

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 26.02.2015

CORAM

THE HONOURABLE MR. JUSTICE R.SUDHAKAR
and
THE HONOURABLE MR.JUSTICE R.KARUPPIAH

CIVIL MISCELLANEOUS APPEAL No.215 OF 2015
& M.P.No.1 of 2015

M/s. Kaashyap Technologies Limited
2nd Floor, B.R. Complex,
C.P.Ramaswamy Road, Alwarpet
Chennai - 600 018.
rep. by its Authorized Signatory
Mr.Ganesan Annaswamy

.. Appellant / Applicant

- Vs -

1. The Customs, Excise and Service Tax
Appellate Tribunal,
Haddows Road, Shastri Bhawan
Annexe 1st Floor, Chennai - 600 006.
by its Assistant Registrar ...Respondent/Appellate Authority
2. The Commissioner of Service Tax
Newry Towers, Anna Nagar,
Chennai - 600 040. ... Respondents/ Respondent

APPEAL under Section 35G of the Central Excise Act, 1944
against the order dated 11.11.2014 made in Modify Order No.41909 of
2014 in Misc. Stay Order No.41423 of 2014 dated 21.8.2014 in
ST/Stay/40138/2013 in ST/40145/2013-DB on the file of the Customs,
Excise and Service Tax Appellate Tribunal, Chennai.

For Appellant : Mr.N.Viswanathan

For Respondents : Mr.V.Sundaresswaran-R2
R1 : Court

J U D G M E N T

(Judgment of the Court was delivered by R.SUDHAKAR,J.)

This Civil Miscellaneous Appeal is filed by the assessee
against the order passed by the Tribunal ordering pre-deposit,
raising the following substantial questions of law:

"1. Whether the Tribunal was right in ordering the

pre-deposit for entertaining the appeal of the appellant even after admitting that the whole demand was made by the Revenue based only on the Profit and Loss Account without discharging the onus case on the Revenue that the appellant had rendered the taxable service and obtained the value thereof and that too by overlooking the very same financial statement showing the value on which the tax was demanded as a Sundry Debt, meaning amounts yet to be realized?

2. Whether the Tribunal was correct in recording the finding that the appellant had not placed any evidence that they have not rendered any service or received payment by failing to understand that calling for such evidence of non-existence fact is contrary to law?

3. Whether the Tribunal was correct in not considering the provisions of Section 68 of the Finance Act read with Section 6 of the Service Tax Rules mandating the liability to pay service tax by the service provider only upon realization of the value during the material time?

4. Whether the Tribunal was correct in considering the Auditor's Certificate only for the purpose of accepting the prima facie view of they being not liable to pay tax under the taxable Commercial Training or Coaching Service, while ignoring the other part of the certificate certifying to the amounts shown as Sundry Debtors on which tax was demanded under the Management Consultancy Service?

5. Whether the Tribunal was correct in distinguishing the judgment of the Hon'ble Supreme Court in the case of Benara Valves Ltd. Vs. CEX reported in 2006 (204) E.L.T. 513 (SC) and by recording that the direction to pre-deposit a sum of Rs.20 lakhs out of the total demand of Rs.1.41 Crores cannot be full or substantive part of the demand, while not disputing the claim of the appellant that the demand raised on the face of it has no legs to stand?"

2. The brief facts of the case are as follows:

The appellant company is a listed public limited company engaged in the business of software education and consultancy. It is also engaged in the business of various modes of information technology enabled services, design, develop buy and sell software products and tools. It is stated that the company mainly concentrates its business activities on overseas market, particularly in USA and the major portion of income in the annual accounts was out of income earned from the services rendered in USA. In the course of the investigation, statements were recorded from A.Ganesan, director of the Company on 15.2.2010. The accounts of

the company were verified in the course of investigation. The Department, inter alia referred to the profit and loss account, annual report etc. and found that the assessee had earned income through taxable services, management or business consultant, as defined under Section 65(105) (r) of the Finance Act, 1994 read with Section 65(65) of the said Act. They also earned income by way of recruitment consultancy charges. Based on this material, a show cause notice was issued demanding duty in respect of the services rendered for the period April 2006 to March 2009 under Section 73(1) of the Finance Act, 1994 and service tax payable under the head "commercial training coaching services" for the period April 2006 to March 2009 under Section 73(1) of the Finance Act, 1994. Besides the above-said demand, in respect of the wrong availment of cenvat credit, a show cause notice was issued proposing to demand interest and penalty.

3. After considering the reply submitted by the assessee in response to the show cause notice issued, the case was adjudicated by the jurisdiction Commissioner, who came to hold that the profit and loss account of the appellant showed income from operations - software development and consultancy and that was relatable to one M/s.Digipolis, a company registered in India with its registered office at Mumbai to whom development of competitive software similar to SAP was agreed upon for a consideration of Rs.2.12 crores. The appellant/assessee denied this statement stating that the period of contract did not take place. Similarly there was another project for a sum of Rs.6.74 crores in respect of M/s.Rainstek Systems Private Limited, which was also reflected in the annual accounts. The assessee pleaded that this project also did not materialise and they did not receive any money. The specific case of the assessee before the Adjudicating Authority was that there was no service rendered and consequently, there was no receipt of money.

4. Before the Adjudicating Authority the Department alleged that these were actual receipt of money in respect of taxable service and therefore accounted for in the books of accounts. The assessee claimed that they have shown the amount said to have been received on the services provided as sundry debtors in their balance sheet. The assessee also stated that the Department has only gone on the plea that this amount was reflected in the profit and loss account as receipts, but failed to take note of the fact that the said amount was shown as sundry debtors, as the assessee has not rendered any service.

5. The Adjudicating Authority did not accept such a plea of the assessee, but on the basis of the statement made by the non-executive Director dated 15.2.2010, who stated that they have been providing taxable services, the Adjudicating Authority held that when there was no corresponding document to show that such transaction did not take place, the contention of the Department that taxable service was rendered has to be accepted. The mere

statement of the assessee that the proposal did not take place was rejected by the Adjudicating Authority. The Adjudicating Authority on the basis of the financial statement, which is a statutory document, came to hold that there is a clear case of receipt of amount for which service tax is payable is proved. The Adjudicating Authority also came to the conclusion that the assessee did not let in any evidence to substantiate their claim either from the service receiver that no service has been rendered or that they have not paid the value of service. In the absence of any specific material to show that the transaction did not take place, the Adjudicating Authority was of the view that the records showing receipt of amount should be accepted as a primary evidence to mulct the service tax liability on the assessee. For better clarity, the findings of the Adjudicating Authority are as follows:

"However, it was claimed that they recorded a transaction which did not take place. There were only two service receivers viz., M/s.Digipolis, company registered in India with its registered office at Mumbai and M/s.Rainstek Systems Pvt. Ltd. I find from the submissions of the noticee that there is a mere statement that the proposals in both cases did not take off. The department had discharged the onus by producing evidence in the form of universally acceptable financial statements and accounts of the noticee and therefore the onus got shifted to the noticee. The noticee did not let in any evidence to substantiate their claim either from the service receivers alleged to have paid the value of the services or any contra or reverse accounting entries or explained the circumstances as to how the business transactions collapsed in both the cases. Therefore, the inescapable inference evidenced by the circumstances and the audited Annual Reports is that the noticee had provided the taxable service and realized the value."

6. With the result, the Adjudicating Authority confirmed the demand as follows:

"27. I hereby confirm the amount of Rs.99,56,405/- (Rupees ninety nine Lakhs fifty six thousand four hundred and five only) on M/s.Kaashyap Technologies Limited, Chennai, being the service tax payable under 'Management or Business Consultancy Service' for the period from April 2006 to March 2009 under Section 73 of the Finance Act, 1994.

28. I also confirm the amount of Rs.40,19,870/- (Rupees forty lakh nineteen thousand eight hundred and seventy only) on M/s.Kaashyap Technologies Limited, Chennai, being the service tax payable under 'Commercial Training or Coaching Service' for the period from April 2006 to March 2009 under Section 73 of the Finance Act, 1994.

29. I further confirm the amount of Rs.1,45,224/-

(Rupees one lakh forty five thousand two hundred and twenty four only) on M/s.Kaashyap Technologies Limited, Chennai, being the irregular availment of Cenvat credit under Rule 14 of the Cenvat Credit Rules, 2004 read with Section 73 of the Finance Act, 1994.

30. I hereby confirm the interest at appropriate rates on the demands confirmed in paras 27, 28 and 29 above from the due date till actual date of payment under Section 75 of the Finance Act, 1994 read with Rule 14 of the Cenvat Credit Rules, 2004.

31. I hereby impose the mandatory penalty of Rs.1,39,76,275/- (Rupees One Crore thirty nine Lakhs seventy six thousand two hundred and seventy five only) on M/s.Kaashyap Technologies Limited, Chennai under Section 78 of the Finance Act, 1994. I refrain from imposing any penalty under 76 ibid in as much as I impose penalty under Section 78 of the Finance Act, 1994.

32. I also impose a penalty of Rs.1,45,224/- (Rupees one lakh forty five thousand two hundred and twenty four only) on M/s.Kaashyap Technologies Limited, Chennai, under Rule 15 of the Cenvat Credit Rules, 2004 for irregular availment of Cenvat credit.

33. I further impose a penalty of Rs.5,000/- or Rs.200/- for every day during the failure whichever is higher on M/s.Kaashayap Technologies Limited, Chennai under Section 77 of the Finance Act, 1994 for non filing of ST-3 returns within the stipulated time."

7. Aggrieved by the order of the Adjudicating Authority, the assessee filed an appeal before the Tribunal along with an application for waiver of pre-deposit.

8. Before the Tribunal the assessee produced the Auditor's Certificate wherein it was stated that the assessee had undertaken training in the software being developed by them to their employee on collection of certain amounts and paying them monthly stipend and since the company could not accomplish the project undertaken by them, the programme was cancelled.

9. The Tribunal taking note of the submissions made on both sides, was of the prima facie view that the demand of tax on management consultancy was based on the balance sheet figure. The Tribunal recorded that no material has been placed by the assessee to show that such services were not rendered and therefore there was no case for waiver of pre-deposit. The findings of the Tribunal is as follows:

"4. After hearing both sides and on perusal of the records, we find that the demand of tax on management consultancy is based on the balance sheet figure. It is seen that the adjudicating authority had given detailed finding that the applicant had not placed any evidence in

support of their contention that no amount was collected and no service was rendered by them. It is seen that the applicant had not placed any evidence to substantiate their claim either from the service recipient or any contra or reverse accounting entries or explained the circumstances as to how the business transactions collapsed in both the cases. Hence, we find that the applicant failed to make out a prima facie for waiver of predeposit of entire amount of dues in this issue."

10. However, the Tribunal, taking note of the Auditor's certificate in respect of commercial training and coaching service and taking into account the financial hardship pleaded by the appellant, directed the appellant to make a pre-deposit of Rs.20.00 lakhs.

11. Not satisfied with the order of the Tribunal directing the appellant to make a pre-deposit of Rs.20.00 lakhs, the assessee filed modification petition before the Tribunal relying upon the decision in the case of Benara Valves Ltd. Vs. CCE - 2006 (204) ELT 513 (SC). The Tribunal, by order dated 11.11.2014 in Miscellaneous Order No.41909 of 2014, held that there was a factual dispute of the collection of the amount as well as rendering of the service and the same would be verified at the time of hearing of appeal. With regard to the reliance placed by the assessee on the decision of the Supreme Court, the Tribunal held that the demand of tax of about Rs.1.41 crores along with interest and penalty equal to tax, the direction of pre-deposit of Rs.20 lakhs could not be full or substantive part of the demand and hence, the decision of the Supreme Court would not apply to the present case. Hence, the Tribunal rejected the miscellaneous application to modify the pre-deposit order, but granted extension of time by four weeks to make the pre-deposit. For better clarity, the findings of the Tribunal are as follows:

"3. There is no dispute that the applicant has not produced the evidence in support of their contention that no amount was collected and no service was rendered by them. We find that there is a factual dispute of the collection of the amount as well as rendering of the service. The Tribunal clearly recorded that this would be verified at the time of hearing the appeal at length. Regarding the financial hardship, the Tribunal after considering the financial hardship directed the applicant to make a predeposit of Rs.20 lakhs against the demand of Rs.1,41,21,499/- along with interest and penalty of equal amount of tax. The learned counsel strongly relied upon the decision of the Hon'ble Supreme Court in the case of Benara Valves Ltd. (supra) whereby the Hon'ble Supreme Court observed that if on a cursory glance it appears that the demand raised has no leg to stand, it would be

undesirable to require the assessee to pay full or substantive part of the demand. Taking into account, the demand of tax of about Rs.1.41 crores along with interest and penalty equal to tax, the direction of predeposit of Rs.20 lakhs cannot be full or substantive part of the demand. Hence, the decision of the Hon'ble Supreme Court would not apply in the present case.

4. In view of the above discussion, we do not find any merit in the miscellaneous application filed for modification of the stay order. Accordingly, the application for modification of the stay order is rejected. However, considering the submission of the learned counsel, we extend the period of compliance by further four weeks and direct the applicant to report compliance on 18.12.2014. Miscellaneous application is rejected."

12. Aggrieved by the above-said order of the Tribunal dismissing the petition to modify the order directing pre-deposit, the appellant/assessee has filed the present Civil Miscellaneous Appeal.

13. Learned counsel appearing for the assessee submitted that the assessee company is running in loss. He further submitted that the assessee did not receive any amount, since the project has been cancelled. Hence, the said amount was shown as sundry debtors. He relied on the decision of the Supreme Court in the case of Benara Valves Ltd. Vs. CCE - 2006 (204) ELT 513 (SC) and submitted that when there is an undue hardship, the Tribunal has to take into consideration the financial hardship of the assessee company for the grant of waiver of pre-deposit. Hence, the order of the Tribunal has to be set aside.

14. Heard learned counsel appearing for the assessee and the learned Standing Counsel appearing for the Revenue and perused the materials placed before this Court.

15. It is seen from the order of the Adjudicating Authority that on the basis of the investigation and after scrutinizing the statutory records, the Adjudicating Authority has come to the conclusion that the appellant has rendered taxable service and the profit and loss account showed receipt of amount in respect of such taxable service. The assessee had not produced any material to disprove the same except stating that no money has been received. As to whether such a mere statement that no service was rendered can be an acceptable evidence is a matter for the Tribunal to consider in the appeal. We are, at this point of time, not inclined to consider the plea on merits for the purpose of modifying the pre-deposit on the ground of financial hardship. We find that there is no material including the balance sheet to show that the company is

running in loss and would not be in a position to make any payment. Mere statement that there is a financial hardship is of no avail and there must be some material to substantiate such a plea.

16. The decision of the Supreme Court relied on by the learned counsel appearing for the assessee in the case of Benara Valves Ltd. Vs. CEX reported in 2006 (204) E.L.T. 513 (SC) does not, in any way, help the case of the assessee. If the assessee has produced any material to substantiate the plea of undue hardship, as stated in the decision of the Supreme Court stated supra, we would have certainly considered the plea for modification of the pre-deposit. In the absence of any material, we are unable to modify the order of the Tribunal on mere ipse dixit. We noticed that the Tribunal has kind enough to order only 15% of the demand. We find no reason to modify the order passed by the Tribunal.

17. Learned counsel appearing for the appellant pleaded time to deposit the pre-deposit amount ordered by the Tribunal.

18. For the foregoing reasons, we pass the following order:

(i) The order of the Tribunal stands confirmed and this Civil Miscellaneous Appeal stands dismissed. No costs.

(ii) The appellant is granted time till 31.3.2015 to make the pre-deposit as ordered by the Tribunal.

(iii) Consequently, M.P.No.1 of 2015 is also dismissed.

Sd/-
Asst.Registrar (CO)

/true copy/

Sub Asst. Registrar

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To

1. The Assistant Registrar Customs, Excise and Service Tax
Appellate Tribunal,
Haddows Road, Shastri Bhawan
Annexe 1st Floor, Chennai - 600 006.
2. The Commissioner of Service Tax
Newry Towers, Anna Nagar,
Chennai - 600 040.

1 cc to Mr.N. Viswanathan, Advocate, sr. 11085

1 cc to Mr. Sundareswaran, Advocate, sr. 11026

C.M.A.No.215 OF 2015
& M.P.No.1 of 2015

BR (CO)

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