

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.268 OF 2015
& M.P.No.1 of 2015

M/s. Coxswain Technologies Limited
29A, ARK Colony, Eldams Road,
Chennai - 600 018.
rep. by its President
B.D.Ramesh Babu

.... Appellant

- Vs -

1. The Customs, Excise and Service Tax
Appellate Tribunal,
Haddows Road, Shastri Bhawan
Annexe 1st Floor, Chennai - 600 006.
by its Assistant Registrar

2. The Commissioner of Service Tax
Newry Towers, Anna Nagar,
Chennai - 600 040.

... Respondents

APPEAL under Section 35G of the Central Excise Act, 1944 against
the order dated 29.10.2014 made in Misc. Modify Order No.41842 of
2014 in Misc. Stay Order No.40851 of 2014 in ST/S/41251 in
ST/41567/2013 on the file of the Customs, Excise and Service Tax
Appellate Tribunal, Chennai.

For Appellant

: Mr.N.Viswanathan

For Respondents

: Mr.Vikram Ramakrishnan-R2

R1

: Tribunal

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 when the order passed by the original authority/2nd respondent had not discharged the onus cast on her to establish that the appellant had actually rendered the taxable broadcasting service during the material period for the sole reason of which alone the order passed by her is not sustainable in law having no legs to stand on its own, more particularly when the appellant had shown before the 1st respondent/tribunal that the two television companies involved in the dispute are owned by separate corporate entities with whom the appellant had entered into contracts/agreements for providing only the up-linking services for them?

2. Whether the tribunal was right in relying upon the permission letter dated 08.10.2004 issued by Ministry of Information and Broadcasting to the appellant for telecasting the programmes of the two television channels for holding the appellant liable for the payment of tax under the broadcasting service so as to order the huge pre-deposit for entertaining their appeal?

3. Whether the Tribunal was right in omitting the plea taken on behalf of the appellant that the two channels owned by the two different companies are duly registered with the authorities under the taxable broadcasting service and are accordingly discharging the service tax liability during the disputed period?

4. Whether the Tribunal was right in accepting the finding of the 2nd respondent/Commissioner, insofar as it related to the confirmation of demand on the payments received from the sundry debtors of the appellant pertaining to the period prior to 01.05.06 as shown in their profit and loss account overlooking the explanations offered by them in terms of the provisions of law as was existing at the material time?

5. Whether the order of the Tribunal directing the payment of pre-deposit without considering that the order of the original authority on the face of record clearly showed that it has no legs to stand on its own warranting the application of the ratio of 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)?

6. Whether the Tribunal was right in rejecting the

claim of the appellant that the demand notice issued to them was hopelessly barred by limitation as the service of the notice was contrary to the provisions contained in Section 37 of the Central Excise Act, mandating the service by invoking resorting to Section 37(1)(a) or 37(1)(b) before invoking 37(1)(c) of the Act and that too by resorting to affixing of the notice outside their office premises on the last that too being a holiday viz., Sunday?"

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

The appellant company, in the month of September, 2002 obtained registration from service tax department for payment of tax under the category "Broadcasting Service". Thereafter, by letter dated 29.10.2004, the assessee approached the Deputy Commissioner of Service Tax and sought for cancellation of the registration certificate on the ground that they are undertaking only up-linking service, for which service tax is not leviable. Thereafter, it appears that the appellant obtained registration under the category of "Business Support Service" with effect from 1.5.2006. In respect of up-linking facility provided by them, they were filing returns from September, 2006. Be that as it may. In the year 2010, the Audit party visited the premises of the appellant and on scrutiny of the records, they found that the appellant accounted the income under the head "allotment of airtime and uplink income" covered under the category of "broadcasting service, came into effect from 16.7.2001. Therefore, show cause notice was issued on 22.10.2010 demanding a sum of Rs.1,03,34,893/- for the period 2005-06 to 2009-10 along with interest and penalty under the category of "Broadcasting Service". The Adjudicating Authority taking note of the service tax already paid by them confirmed the demand of Rs.78,38,768/- along with interest and penalty.

3. 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.

4. According to the assessee, up-linking agencies are not broadcasting agencies and not liable to pay service tax. As per Accounting Standards in their profit and loss account they have mentioned it as broadcasting income, which is actually up-linking charges. On this premise, they pleaded that the demand of service tax by the Department is not justified because they are under misconception that up-linking services is equivalent to broadcasting services.

5. The Tribunal taking note of the submissions made by the assessee has come to the conclusion as follows:

"4. It is noted that P&L Account for the year ending 31.3.2005 showed fees for allotment of airtime

and up-linking charges separately. Thus it is clear that applicant had been collecting fees for allotment of air time. So, prima facie, we are unable to accept the contention of learned advocate that they were not rendering any service of broadcasting. It is seen from the impugned order that in the P&L Account for the year ended 31.3.2006 in the Schedule X relating to administration and other expenses, the expenses in respect of cassettes, tapes and carriage fees were shown separately. The contention of the learned advocate is that they have collected up-linking charges from the other two parties as per the agreement would be examined at the time of appeal hearing. We have also considered that audit party during their visit in 2010 detected collection of broadcasting charges after examining the records. Hence prima facie we are not satisfied with the submission of learned advocate on limitation."

6. However, taking note of the deposit made by the assessee at Rs.4,90,003/- after the issuance of show cause notice, the Tribunal ordered pre-deposit of Rs.20 lakhs as against the demand of Rs.78 lakhs. Not satisfied with the order of the Tribunal, the assessee filed another miscellaneous petition seeking modification of the order.

7. The Tribunal, by order dated 29.10.2014 disposed of the miscellaneous application in Misc. Order No.41842 of 2014, where again the submission made by the appellant based on the balance sheet was rejected by the Tribunal holding that prima facie they are in agreement with the findings of the Adjudicating Authority. The Tribunal reserved the right to go into the factual issue at the time of hearing the appeal and therefore, in respect of pre-deposit, they did not find any good reason to modify the earlier order stating that the deposit already made has been considered and therefore while dismissing the application, granted a further period of six weeks to make the pre-deposit.

8. Aggrieved by the said order of the Tribunal, the assessee is before this Court.

9. Learned counsel appearing for the appellant submitted that the appellant has no financial liquidity to pay the demand and, therefore, the plea of undue hardship has not been properly considered by the Tribunal. In any event, the primary issue that has to be considered is whether the up-linking charges should come under taxable service should be interpreted in favour of the appellant by granting waiver of pre-deposit. He further submitted that the assessee had already made deposit of Rs.4,90,003/- after the issuance of show cause notice, but the Adjudicating Authority has not recorded the same in the order.

10. Heard the rival contentions of both sides and perused the materials placed before this Court.

11. The Tribunal in similar case in respect of such disputed issues has ordered pre-deposit at 15%, however, we do not want to make a hard and fast rule that in each and every case it should be restricted to 15%. There can be no rule of universal application in such matters and the order has to be passed keeping in view the factual scenario involved. In the facts of the present case, we find that there has been certain payments made after the issuance of show cause notice as against the demand and the Adjudicating Authority has given certain benefits. After taking note of the plea of no service tax liability, we find that the Original Authority has revised the cum tax value. We find that the Adjudicating Authority revised the cum tax value in paragraph 11 of the order, which reads as follows:

"11.0 I have carefully gone through the records of the case, reply of the noticee and the submissions made by them at the time of personal hearing. The noticee's main contentions can be summarized as follows

The value has to be taken as cum-tax as it has been taken from debtors account.

The noticee's activities do not come under the "Broadcasting Service".

An amount of Rs.10,09,814/- is to be deducted towards reimbursement of expenses.

The demand is hit by limitation.

11.1 The first contention by the noticee is that the value in the notice is based on debtors ledger and hence, has to be taken as cum-tax value. I accept the noticee's contention and the demand after taking the value as cum-tax works out to Rs.78,38,768/- as below.

Value adopted in SCN treated as Cum-tax value (Rs.)	Transaction Value (Rs.)	Service Tax Payable (Rs.)	Service Tax paid (Rs.)	Differential Tax (Rs.)
21,69,97,410	19,50,03,427	2,19,70,983	1,41,32,215	78,38,768

12. From the above findings of the Adjudicating Authority, there appears to be an element of justification in the assessee's plea that the demand of tax liability has to be considered by the Tribunal on merits. Taking note of this plea, we are inclined to modify the order of the Tribunal.

13. The issue as to whether the up-linking service rendered by the assessee is taxable under the category broadcasting service, has to be decided by the Tribunal in the appeal on merits.

14. We find much force in the plea of the appellant regarding undue hardship and financial difficulty in pursuing the appeal on payment of the pre-deposit as ordered by the Tribunal. The same, therefore, requires to be modified considering the prima facie case of the appellant.

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

- (i) On the questions of law raised, we are of the view that the Tribunal was not justified in ordering the pre-deposit;
- (ii) Consequently, the order of the Tribunal dated 29.10.2014 is modified to the effect that the appellant shall make a pre-deposit of Rs.10,00,000/- (Rupees Ten Lakhs only) towards pre-deposit on or before 31.03.2015 and subject to such compliance, as stated in the order of the Tribunal dated 28.05.2014, the pre-deposit of balance amount demanded shall remain waived and its collection shall stand stayed during the pendency of the appeal before the Tribunal.

In the result, this appeal is disposed of in the above terms. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Asst. Registrar

/true copy/

सत्यमेव जयते Sub Asst. Registrar.

sl

To

1. The Customs, Excise and Service Tax
Appellate Tribunal,
Haddows Road, Shastri Bhawan
Annexe 1st Floor, Chennai - 600 006.
by its Assistant Registrar

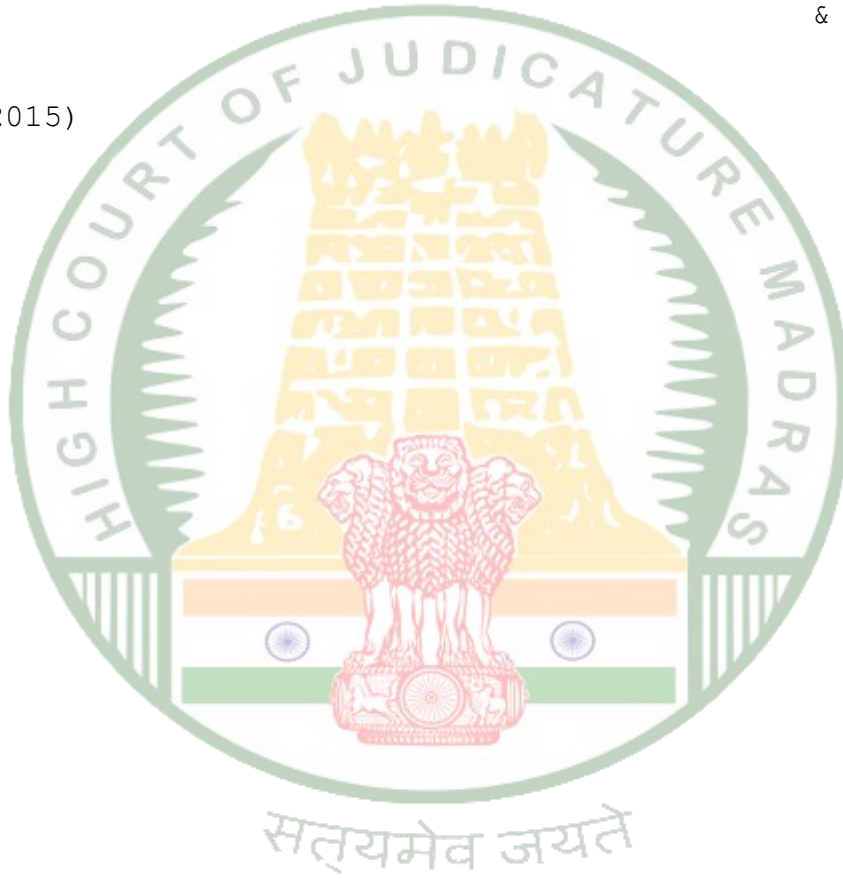
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2. The Commissioner of Service Tax
Newry Towers, Anna Nagar,
Chennai - 600 040.

+1cc to M/s.N.Viswanathan, Advocate, S.R.No.11083
+1cc to M/s.Vikram Ramakrishnan, Advocate, S.R.No.11222

C.M.A.No.268 OF 2015
& M.P.No.1 of 2015

PPA (CO)
CA(06/03/2015)



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