IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11.12.2015

CORAM:

THE HONOURABLE MR.JUSTICE M.JAICHANDREN
AND
THE HONOURABLE MRS.JUSTICE S.VIMALA

Civil Miscellaneous Appeal No.2769 of 2015
and Miscellaneous Petition No.1 of 2015

Arafaath Travels Pvt. Ltd.,
No.7 Century Plaza,
No.560-562 Anna Salai,
Chennai - 600 018
Represented by its Managing Director,
Mr. Sherif Dyan .. Appellant

vs.

1. Customs, Excise and Service Tax Appellate Tribunal (Southern Bench), Shastri Bhavan, Annexe Building, 1st Floor, Haddows Road, Chennai - 600 006
2. The Commissioner of Service Tax, No.692 Anna Salai, M.H.U.Complex, Nandanam, Chennai - 600 035 .. Respondents

Civil Miscellaneous Appeal filed under Section 35G of The Central Excise Act, 1944, against the order passed by the first respondent in Miscellaneous Order, dated 15.10.2015, bearing No.41314 of 2015.

For Appellant : Mr. S.Raghunathan
For Respondents : Mr. V.Sundareswaran, Sr. Panel Counsel

J U D G M E N T

(Judgment of the Court was delivered by S.Vimala, J.,)

This Civil Miscellaneous Appeal has been filed by the appellant, as against the Miscellaneous Order No.41314 of 2015, dated 15.10.2015, passed by the first respondent. By this order, the appellant was directed to deposit a sum of Rs.20,00,000/-, as a pre-deposit, for filing the appeal, challenging the demand of Rs.55,11,411/-, as Service Tax payable, on the alleged Overriding Commission (ORC) recieved by the appellant during the period from 01.04.2011 to 31.03.2012.

Brief facts:-

2. The appellant is a Company, incorporated under The Companies Act, 1956, and is, inter-alia carrying on business as a General Sales Agent, in respect of Cargo Sales and Passenger Air Transportation, for Saudi Arabian Airline Corporation, Jeddah, (SSA). The Company is registered under the head 'Air Travel Agent Service'. The Service Tax Registration of the company is 'AAACA4912EST001'.

2.1. The appellant provides services in accordance with the terms and conditions enumerated in the General Sales Agent (GSA) Agreement. The appellant acts as a GSA for passenger air transport services, in the states of Tamil Nadu, Kerala (Cities of Cochin and Trivandrum) and for cargo sales in Tamil Nadu. For the services of GSA, the appellant is entitled to Overriding Commission of 3% on passenger air ticket sales and 2.5% on cargo sales. In respect of passenger air ticket sales, the Saudia issues Agency Credit Memo (ACM) towards the Overriding Commission, due to the appellant, on the sales of each month. The sales are adjusted by the assessee against the money, which has to be remitted to Saudia, towards the direct passenger air ticket sales. The overriding commission is denominated in the Agency Credit Memo, in Saudi Rials, and the net amount is stated in INR, by converting the amount, at the prevailing rate of exchange.

2.2. The Cargo Sales are made by IATA, Cargo Agents. For such sales, Saudia gives the Cargo Agents 5% commission on the freight amount, for the cargo and also incentive, as decided by Saudia from time to time. The appellant is entitled to ORC of 2.5% on cargo freight amount, which the appellant deducts from the net frieght received from it from the Cargo Agents and remits the balance to Saudia.

3. The Revenue / second respondent had issued show cause notices demanding service tax, for the period pertaining to 2003-2011, claiming that the overriding commission, on passenger air ticket sales and cargo sales, is liable to service tax.

3.1. The contention of the assessee / appellant was that the overriding commission, on passenger air ticket sales and cargo sales, does not come under the category of “service tax”, and it is covered under the expression “export of services” (Rule 3 (1) (iii) and 3 (2) of The Export Rules, 2005), and hence, the appellant is not liable to pay service tax. The further contention of the assessee was that, as there was no liability, the Revenue cannot demand any interest and penalty, as per Sections 75 to 77 of The Finance Act, 1994.

3.2. Rejecting the contention of the assessee, the Commissioner of Central Excise, directed the assessee to pay the service tax of Rs.55,11,411/-.

3.3. The assessee preferred an appeal before the CESTAT / the first respondent herein, under sub-section (1) of Section 86 of The Finance Act, 1994. The first respondent, before taking the appeal on file and as a pre-condition to take the appeal on file, passed an order in Miscellaneous Order No.41314 of 2015, dated 15.10.2015, directing the assessee to deposit a sum of Rs.20,00,000/-, within a period of eight weeks from the date of that order and also directed reporting of compliance by 29.12.2015. This order is under challenge, in this Civil Miscellaneous Appeal.

4. The main contention of the learned counsel for the appellant / assessee is that, the order of the Tribunal, directing pre-deposit, is not justified, when the services rendered by the appellant, both under passenger air transport ticket sales and the cargo sales would come within the purview of 'export of services', under which, no service tax is payable.

4.1. The specific contention of the learned counsel for the appellant is that, under Clause 105 of Section 65 of The Finance Act, 1994, when there is, (a) export of services from India and used outside India, and (b) the payment for services, which is provided under outside India is received by the service provider / assessee, in convertible foreign exchange, it would be exempted from payment of service tax. Pointing out these specific provisions, it is contended by the learned counsel for the appellant that when there is no liability at all, to pay the service tax and when the challenge was mainly on liability itself and not on quantum, the order, directing pre-deposit of Rs.20,00,000/-, by the first respondent herein, is against law and therefore, it is not sustainable.

4.2. The learned counsel for the respondents contended that the order directing pre-deposit of Rs.20,00,000/- is perfectly justified, as it is mandatory under the amended provisions of Section 35F of The Central Excise Act, 1994 (hereinafter will be referred to as "the Act").

4.3. The first question to be considered is, whether the provisions of Section 35F of the Central Excise Act, 1994, is applicable to the case of service tax also.

4.4. Vide Section 83 of the Finance Act, 1994, the amended Section 35F of The Central Excise Act, 1944, is made applicable to the service tax also. Therefore, Section 35F of the Central Excise Act, 1994, is applicable to the case of service tax.

4.5. The next question to be considered is, whether the amended provisions of Section 35F of the Central Excise Act, 1994, would be applicable or the unamended provisions of Section 35F of the Central Excise Act, 1994, would be applicale and what are the requirements to be fulfilled under the required provision.

4.6. The amended Section 35F of the Act prescribes mandatory pre-deposit of 7.5% or 10% for first stage or second stage appeal, of duty demanded, where duty demanded is in dispute or where the duty demanded and penalty leveied are in dispute and where penalty alone is in dispute, the pre-deposit shall be calculated on the penalty imposed. These amendments have become applicable to the appeals filed, after August 6, 2014, and all pending appeals / stay applications filed, prior to August 6, 2014 shall be governed by erstwhile provisions. Therefore, it is necessary to find out the erstwhile provisions governing the filing of the appeal, as the appeal in this case has been filed prior on 21.02.2014 i.e., prior to August 6, 2014.

4.7. It is settled law that, any amendment, particularly, in tax statute, has to be prospective, unless and until, the same has been made retrospective by the express provision in the amendment itself. A perusal of the amended Section, i.e., Section 35F of the Act, only indicates the cut-off date, i.e., 06.08.2014, on or after which pre-deposit is made mandatory to entertain the appeal. But, it is silent with regard to the law applicable to the appeal filed prior to 06.08.2014. The pre-existing right of the appeal cannot be destroyed by the amendment and the right to appeal continues to exist only in terms of unamended provisions of Section 35F of the Act. This issue is well settled by a decision of the Hon 'ble Apex Court, in the case of Hoosen Kasam Data (India) Limited v. State of Madhya Pradesh and Others, (1983) ELT (1277) SC, and the relevant observation reads as under:-

> "There can be no doubt that the new requirement "touches" the substantive right of appeal vested in the appellant. Nor can it be overlooked that such a requirement is calculated to interfere with or fetter, if not to impair or imperil, the substantive right. The right that the amended section gives a certainly less than the right which was available before. A provision which is calculated to deprive the appellant of the unfettered right of appeal cannot be regarded as a mere alteration in procedure. Indeed the new requirement cannot be said merely to regulate the exercise of the appellant's pre-existing right but in truth whittles down the right itself and cannot be regarded as a mere rule of procedure".

4.8. Following the Hon 'ble Apex Court decision, cited supra, the High Court of Kerala, in the cases of Jeevan Telecasting Corporation Ltd., CCE, C & ST., Cochin, reported in 2015 (32) ELT (63) and Muthoot Finance Ltd. v. Union of India reported in 2015 (320) ELT 51, had held that, inasmuch as the lis in question had commenced prior to the introduction of the Finance Act, 1994 (with effect from August, 2014), the assessee's right of appeal, as per the erstwhile provision of law, would not be affected by the provisions introduced by the amendment of 2014.

4.9. As per the decision of the Hon 'ble Supreme Court, in the case of Garkapati Veeraya v. N.Subbaiah Choudhry and others (AIR 1957 SC 540), the right of appeal is to be governed by the law prevailing at the date of institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of filing of the appeal.

4.10. Thus, it is clear that the law applicable to the case of the assessee is the unamended provision of Section 35F of the Act, which reads as under:-

> “Section 35-F. Deposit, pending appeal of duty demanded or penalty levied.-
>
> Where in any appeal under this Chapter, the decision or order appealed against relates to any duty demanded in respect of goods which are not under the control of Central Excise authorities or any penalty levied under this Act, the person desirous of appealing against such decision or order shall, pending the appeal, deposit with the adjudicating authority the duty demanded or the penalty levied :
>
> Provided that where in any particular case, the Commissioner (Appeals) or the Appellate Tribunal is of opinion that the deposit of duty demanded or penalty levied would cause undue hardship to such person, the Commissioner (Appeals) or, as the case may be, the Appellate Tribunal, may dispense with such deposit subject to such conditions as he or it may deem fit to impose so as to safeguard the interests of revenue.
>
> Provided further that where an application is filed before the Commissioner (Appeals) for dispensing with the deposit of duty demanded or penalty levied under the first proviso, the Commissioner (Appeals) shall, where it is possible to do so, decide such application within thirty days from the date of its filing.”

5. Coming back to the order passed by the appellate authority, a perusal of the same would go to show that it is a non-speaking order, directing deposit of Rs.20,00,000/-, without considering, (a) the prima facie case, with regard to merits and also (b) with regard to financial difficulties of the assessee. The essential portion of the order reads as under:-

"…. While appellant says that overriding commission shall not be taxable, Revenue holds otherwise.

2. Without expressing any opinion that this stage as to whether the receipt was in relation to the service provided, it is left open to both sides to argue in course of appeal hearing.

3. Appellant is directed to deposit Rs.20,00,000/- (Rupees twenty lakhs only) within a period of eight weeks from today and make compliance on 29th December, 2015. …."

6. The proviso to Section 35F of the Act enables the appellate authority to dispense with the deposit of duty subject to suitable conditions. The appellate authority is expected to strike a balance between the interest of the Revenue and the assessee's right to have its appeal heard on merits. The order passed clearly go to show that neither the appellate authority has considered the prima facie case of the appellant nor has enquired the financial position of the appellant. No doubt, the assessee had neither pleaded nor placed materials to show that there is undue financial hardship for it. The learned counsel for the appellant would submit that, by mistake, the assessee failed to put forth its contention regarding the financial hardship and that the assessee must be permitted to raise this contention, as it is armed with materials to substantite its claim for financial hardship.

6.1. It appears that, as the assessee was of the strong view that, the assessee has a better case on the issue of liability and perhaps carried away by this view, it did not raise the issue regarding the financial hardship. However, the Tribunal is expected to exercise its discretion, vested under the unamended provisions of Section 35F of the Act. In this case, there is a failure to exercise the discretion, as the Tribunal had lost sight of the provision applicable to the case, having regard to the date of filing of the appeal. When the Tribunal had failed to exercise the discretion, this Court is bound to interfere. Further, the order passed by the Tribunal did not indicate that, it has considered the materials to come to a prima facie conclusion. Hence, the order is liable to be set-aside, as the order had been passed, invoking the amended provisions of Section 35F of the Act, whereas the law applicable to the case of the assessee is proviso to unamended Section 35F of the Act.

7. Therefore, for the aforestated reasons, Miscellaneous Order No.41314 of 2015, dated 15.10.2015, passed by the first respondent, is set-aside and the matter is remitted back to the Tribunal / first respondent to pass appropriate orders, afresh based upon the unamended provisions of Section 35F of the Act.

8. As there is an order of remand, the appellant is permitted to file appropriate Application, along with the relevant documents, to the plea regarding the financial hardship. On filing such Application and other relevant documents, (if it is otherwise in order) the Tribunal shall consider the same and pass appropriate orders thereon, within a period of two weeks, thereafter. It is made clear that, till the final order is passed by the Tribunal, including the Application to be filed by the appellant, the respondents shall not initiate any action, based on the earlier orders passed.

9. This Civil Miscellaneous Appeal stands disposed of, accordingly. Consequently, the connected MP is closed.

Sd/-
Assistant Registrar(CO)

True Copy

Sub Assistant Registrar

To

1. Customs, Excise and Service Tax
Appellate Tribunal (Southern Bench),
Shastri Bhavan, Annexe Building,
1st Floor, Haddows Road, Chennai - 600 006

2. The Commissioner of Service Tax,
No.692 Anna Salai,
M.H.U.Complex, Nandanam,
Chennai - 600 035

+1cc to Mr.S.Sundareswaran, Advocate sr.66805

C.M.A.No.2769 of 2015
& M.P.No.1 of 2015

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srg 21/12/2015