In the High Court of Judicature at Madras

Dated : 24.10.2018

Coram :

The Honourable Mr.Justice T.S.SIVAGNANAM
and
The Honourable Mrs.Justice V.BHAVANI SUBBAROYAN

Civil Miscellaneous Appeal Nos.2206 to 2238 of 2018
and all connected pending CMPs

M/s.Tamilnadu State Marketing
Corporation Ltd., Chennai-8
CMDA Power II ...Appellant(in all C.M.As)

Vs

The Principal Commissioner of GST
& Central Excise, Chennai North
Commissionerate, Chennai-34. ...Respondent(in all C.M.As)

APPEALS are filed under Section 35G of the Central Excise Act, 1944 against common final order Nos.41015 to 41047 of 2018 dated 03.4.2018 respectively in Appeal Nos.ST/41645-41677/2015 respectively on the file of the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai.

For Appellant : Mr.Vikram Vijayaraghavan
for M/s. Subbaroya Aiyar Padmanabhan

For Respondent :Mrs.Hema Muralikrishnan, SPC
in all C.M.A

COMMON JUDGMENT
(Judgment was delivered by T.S.SIVAGNANAM,J)

Mrs.Hema Muralikrishnan, learned Senior Panel Counsel accepts notice for the respondent in all the appeals. We have heard the learned counsel on either side.

2. These appeals, by the Tamilnadu State Marketing Corporation Limited (TASMAC), are directed against the common final order passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai (for short, the Tribunal) in ST/41645-41677/2015 dated 03.4.2018 raising the following substantial questions of law :

> "i. Whether, on the facts and in the circumstances of the case, the Tribunal erred in not appreciating that impugned payments by bar contractors were made in accordance with the provisions of Statute, representing devolution of sovereign rights of the State through the appellant and hence, is not exigible to service tax ?
>
> ii. Whether, on the facts and in the circumstances of the case, the Tribunal erred in upholding service tax payment for period from 01.7.2012 to 31.3.2013 without appreciating that character of impugned payments are not modified by the introduction of Negative List and these payments were as per Statute and in effect made only to the State of Tamil Nadu and is not exigible to service tax ? And
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> iii. Whether on the facts and in the circumstances of the case, the Tribunal erred in not adjudicating the alternate prayer of the appellant, without prejudice to other claims, that from 01.7.2012, only 1% of the payments made by the contractors can be subject to service tax, as has been done from 01.4.2013 onwards ?"

3. Before we proceed to consider the submissions made on either side, we would like to point out that the issue involved in the instant case is as to whether the activity done by the assessee would be exigible to service tax. However, the period of such exigibility can be divided into three parts. The first period being from October 2008 to June 2012. The second period is from July 2012 to March 2013 and the third part is from April 2013 to till date.

4. So far as the first period is concerned, the Tribunal, by the impugned order, held that no service tax is liable to be paid on the ground that the nature of activity done by the assessee can be brought within the ambit of 'Business Support Services' as defined under Section 65(104c) of the Finance Act, 1994. Therefore, the assessee cannot be said to be aggrieved by that portion of the order passed by the Tribunal, the operative portion of which is contained in paragraph 6.6 of the impugned order.

5. However, Mr.Vikram Vijayaraghavan, learned counsel for the assessee/appellant submits that the appellant has challenged the common order in its entirety because one of the arguments advanced before the Tribunal was that the nature of activity

being a statutory right and such a right having been devolved on licencees, it still continues to remain as a statutory right and is not exigible to service tax. Therefore, to that extent, the learned counsel for the appellant would submit that the reason assigned by the Tribunal has to be tested for its correctness.

6. So far as the second period is concerned i.e., from July 2012 to March 2013, the Tribunal held against the appellant and made them liable to pay service tax on the ground that after introduction of Negative List with effect from 01.7.2012, Section 65B(44) of the Finance Act, 1994 was given a broader scope by defining the expression 'service' to mean 'any activity carried out by a person for another for consideration'. Therefore, the appellant has challenged the levy of service tax for the said period from July 2012 to March 2013.

7. With regard to the period from April 2013 to till date, the appellant is not aggrieved in the sense that the Tribunal, taking note of the amendment to the Tamil Nadu Liquor Retail Vending (in Shops and Bars) Rules, 2003 (for brevity, the Retail Vending Rules) by insertion of Rule 9A, held that the appellant is liable to pay service tax only on 1% of the revenue generated, as the remaining 99% of the revenue is passed on to the State of Tamil Nadu. There is also a subsidiary submission contending that in the event this Court does not agree with the appellant's contention with regard to their liability from July 2012 to March 2013, then this Court may consider the effect of insertion of Rule 9A of the Retail Vending Rules and that the relief granted by the Tribunal for the period from April 2013 to till date may be extended by directing payment of service tax on 1% of the revenue generated by the appellant.

8. The learned counsel for the appellant has elaborated his submissions and taken us through the nature of activity done by the appellant. The relevant provisions of the Tamil Nadu Prohibition Act, 1937 and the Rules framed thereunder and in particular, the Retail Vending Rules, 2003, as it stood amended with effect from 29.3.2013. In support of his submission that the nature of activity, being devolution of a statutory right in favour of the licencees, always remains a statutory right and that no service tax is leviable, he has placed reliance on the decision of the Bombay High Court in the case of CCE, Nashik Vs. Maharashtra Industrial Development Corporation [reported in 2017-TIOL-HC-MUM-ST].

9. Per contra, Mrs.Hema Muralikrishnan, learned Senior Panel Counsel appearing for the respondent has sought to sustain that portion of the order, which has made the appellant liable to pay service tax for the period from July 2012 to March 2013. She has submitted that the Department is in the process of filing an appeal as against the finding rendered by the Tribunal

in respect of the period from October 2008 to June 2012 contending that the activity done by the assessee cannot be brought under the ambit of 'Business Support Services' as well as against that portion of the order of the Tribunal for the period from April 2013 to till date wherein the Tribunal held that the appellant will be liable to pay tax on 1% of the revenue generated, as the remaining 99% has been passed on to the State Government.

10. It is to be noted that till date, no appeal has been filed by the Department. Nevertheless, since the period of limitation is stated to have not expired, we make it clear that in this order, we shall test the correctness of the order passed by the Tribunal for the period from July 2012 to March 2013. While doing so, we will also consider as to whether the appellant is justified in contending that the activity done by the assessee is a devolution of statutory right and therefore, the assessee is not exigible to service tax. Incidentally, we are also called upon to decide the issue as to whether the benefit granted to the appellant by the Tribunal from April 2013 to till date making them liable only to the extent of 1% of the revenue generated can be extended for the period from July 2012 onwards.

11. Firstly, we take up for consideration the contention of the learned counsel for the appellant/assessee that the right, which has been granted by virtue of the licence issued to private parties for running the bar, is a devolution of a statutory right and that therefore, the assessee is not exigible to service tax. We have examined the relevant Rules and in particular, Rule 9A, which was inserted to the Retail Vending Rules in March 2013. The insertion of Rule 9A of the Retail Vending Rules was pursuant to a proposal sent by the Commissioner of Prohibition and Excise dated 22.3.2013 wherein he had proposed that a rule may be inserted to grant privilege to private parties for selling eatables and collecting empty bottles in the bar owned by the appellant, collect tender amount from the successful tenderers and remit the same to the Government after retaining 1% of the collected amount as agency commission.

12. The proposal made by the Commissioner of Prohibition and Excise was accepted by the Government and after Rule 9, Rule 9A was added to the Retail Vending Rules, which reads thus :

> "Rule 9A : Grant of Privilege to Run the Bar: The privilege of running bars may be granted to private parties by tender. The Board of the Corporation may decide the upset price and other terms and conditions of tender, from time to time, with the prior approval of the Commissioner of Prohibition

and Excise. The Corporation, as agency, shall collect the tender amount from the successful tenderers and remit the same to the Government on or before the 25th of the following month and the Corporation may retain 1% of the amount so collected as agency commission."

13. The learned counsel for the appellant would interpret the said Rule by contending that the privilege of running bars is vested with the appellant as a statutory right and when this privilege is granted to a private party, it amounts to devolution of a statutory right and it continues to remain as a statutory right.

14. Rule 9A of the Retail Vending Rules deals with grant of privilege to run the bar. It states that the privilege of running bar may be granted to private parties by tender, that the Board of the appellant may decide the upset price and other terms and conditions from time to time with the prior approval of the Commissioner of Prohibition and Excise, that the appellant, as agency, shall collect the tender amount from the successful tenderers and remit the same to the Government on or before 25th of the following month and that the appellant may retain 1% of the amount so collected as agency commission.

15. In our considered view, though the said Rule states that it has a privilege of running bars, the appellant has not authorized private parties to vend liquor in the shops, which are annexed to the retail vending shops. It is no doubt true that the Retail Vending Rules empower the appellant to vend liquor not only in the shops established by them, but also in the bars. But, the factual scenario in the State of Tamil Nadu is that in the retail vending shops, vending alone is permissible and in the bars attached to the retail vending shops, a facility is provided for consumption of liquor thereby the liquor purchased in the retail vending shops is taken by the customer to be consumed inside the premises and this is with a view to prevent the customer to consume liquor in the open area causing nuisance to the general public.

16. Therefore, the use of the expression 'running bars' in Rule 9A of the Retail Vending Rules, in our considered view, is a misnomer. This is so because the Retail Vending Rules also permit the licences to be used by certain categories of establishments where they are permitted to vend liquor and allow the persons to consume the liquor within the same premises. Some examples are certain categories of hotels, resorts, etc. Therefore, the grant of privilege in the instant case, which we are presently dealing, is for the purpose of selling eatables and collecting empty bottles and cartons in the bars, which are

adjacent or annexed to the retail vending shops.

17. Thus, the question would be as to whether such a right or privilege to sell eatables and collect empty bottles can be treated as a statutory right or a devolution of a statutory right. The answer to the question should be in the negative. We support such a conclusion with the following reasons :

The statutory right conferred on the appellant under the provisions of the Tamil Nadu Prohibition Act, 1937 read with the Retail Vending Rules is on account of a policy decision taken by the Government whereby the State of Tamil Nadu enacted the Tamil Nadu Prohibition Act, 1937 and framed various Rules. Therefore, there is no vested right granted to any private individual to trade in alcohol in the State of Tamil Nadu and already, the privilege has been vested with the appellant, which is a State Owned Corporation. Therefore, if the appellant is to part away with such a statutory right, there should be a statutory authorization permitting the appellant to part away with that statutory right. Rule 9A of the Retail Vending Rules, though states that it is a grant of privilege to run the bars, private parties are not allowed to vend liquor in the premises, but are only entitled to sell eatables and collect empty bottles and cartons. Therefore, to state that the right to sell eatables and collect empty bottles is a statutory right is an absurd proposition, which cannot be accepted.

18. We agree with the reasons assigned by the Tribunal, more particularly in paragraph 6.11 of the impugned order wherein the Tribunal took note of the fact that the decision to give permission to award contracts was a decision by the Board of Directors of the appellant and it cannot be stated to be a statutory function exercised by the State. The Tribunal examined the audited balance sheets of the appellant and found that the balance sheets have been prepared and audited only in terms of Section 227(4A) of the Companies Act, 1956 and in terms of the Accounting Standards referred to in Section 211(3C) of the Companies Act, 1956. It further noted that the supplementary audit conducted by the Comptroller and Auditor General has been carried out only in terms of Section 619(3)(b) of the Companies Act, 1956.

19. Therefore, the Tribunal was right in concluding that the activities assigned and performed for the period in dispute can never be treated as a sovereign function or a statutory right or an activity performed by a Public Authority under the authority of law. The Tribunal also took note of the circulars issued by the Central Board of Excise and Customs dated 23.8.2007 and 18.12.2006, which clarified that if a Sovereign/Public Authority provides a service, which is not in the nature of a statutory activity and if the same is undertaken for a consideration,

which is not a statutory fee, then, in such cases, service tax would be leviable as long as the activity undertaken falls within the scope of taxable service as defined. Even when a Governmental Authority performs a service, which is not in the nature of a statutory activity, the same has to be held leviable to service tax and this view is supported by the decision of the Karnataka High Court in the case of Karnataka Government Insurance Department Vs. ACCE, Bangalore [reported in (2012) 26 STR 521]. This decision has been followed by a learned Single Judge of the High Court of Kerala in the case of Kerala State Insurance Department Vs. Union of India [reported in (2012) 28 STR 337]. The High Court of Allahabad in the case of Greater Noida Industrial Developmental Authority Vs. CCE & CE [reported in 2015-TIOL-1008-HC-ALL-ST] also decided a similar issue.

20. In the light of the above reasoning, we are of the considered view that the nature of activity done by the assessee, which is the subject matter of the present litigation, can never be termed as a statutory activity and that therefore, it cannot be considered as a devolution of a statutory right. Thus, we agree with the finding rendered by the Tribunal. Accordingly, substantial question of law 1 and 2 are answered against the assessee.

21. With regard to the third substantial question of law, which is an alternate argument, the learned counsel for the appellant would submit that the Tribunal accepted the contention that Rule 9A of the Retail Vending Rules, having been inserted in the Rules with effect from the year 2013, gives a statutory backing and authority to the appellant to grant the privilege of running bars, selling eatables and collecting empty bottles to private entities by tender and that they are entitled to retain 1% of the collected amount as agency commission and the remaining should be remitted to the Government of Tamil Nadu. The Tribunal, therefore, held that the appellant is liable for service tax on 1% of the revenue retained by them as agency commission.

22. We are informed that the Revenue proposes to file an appeal as against such a finding. However, till date, there is no appeal on record. Nevertheless, as observed earlier, we do not propose to foreclose the rights of the Revenue in the event they challenge the findings of the Tribunal on this issue regarding levy of service tax on 1% of the revenue retained by the assessee/appellant as agency commission.

23. The question would be as to whether this benefit, which was granted by the Tribunal, should be extended in favour of the appellant for the period covering July 2012 to March 2013.

24. The learned counsel for the appellant would vehemently contend that the Tribunal failed to appreciate that Rule 9A of the Retail Vending Rules was clarificatory in nature and ought to have been made retrospectively applicable from October 2008. It is further argued that the Tribunal did not appreciate the fact that Rule 9A of the Retail Vending Rules merely explains the powers explicitly and is consequently retrospective thereby the decision of the Tribunal in holding the appellant not exigible to service tax from April 2013 must apply for the period starting from July 2012, at best, at the rate of 1%.

25. In the preceding paragraphs, we have referred to Rule 9A of the Retail Vending Rules. The said Rule was notified in exercise of the powers conferred under Sections 17C, 17D, 21 and 22D read with Section 54 of the Tamil Nadu Prohibition Act, 1937. By virtue of this Notification, there has been amendment to the Retail Vending Rules by insertion of a new Rule namely Rule 9A. This Notification was pursuant to examination of the proposal given by the Commissioner of Prohibition and Excise. Thus, when a new Rule is inserted, it would take effect from the date, on which, it is notified unless the Notification specifically fixes an anterior date. In the relevant Notification, there is no indication that it is retrospective. Therefore, we cannot read anything into the Notification, which is not contained therein. The Notification is, therefore, held to be prospective. Secondly, the Notification can never be held to be retrospective or clarificatory because if at all a privilege is granted in favour of a private party, it can be only prospective and it is not the case of the assessee that the said Rule was inserted to validate past actions. Therefore, to term that Rule 9A is clarificatory in nature is an argument, which is stated to be rejected and we do not agree with the submission made by the learned counsel for the appellant that the benefit granted by the Tribunal for the period from April 2013 to till date by making the appellant/assessee liable to pay service tax on 1% of the revenue retained by them as agency commission can be extended for the period from July 2012 to March 2013. For the above reasons, the third substantial question of law is answered against the assessee.

26. In the result, the above civil miscellaneous appeals are dismissed. No costs. Consequently, all connected pending CMPs are also dismissed.

s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

To
1. The Member Secretary(Judicial)
   The Customs, Excise and Service Tax Appellate Tribunal,
   South Zonal Bench, Chennai. 26, Sasthri Bhavan, Annexe Building, Haddows Road, Chennai 6.

2. The Commissioner of GST & CCE(Chennai North) Chennai 34.

3. The Commissioner of Service Tax I, Chennai.

+3 Ccs to Mr.Subbaroya Aiyar Padmanabhan, Advocate sr 72703.
+2 Ccs to Mrs.Hema Muralikrishnan, sr 72812.
+30 Ccs to Mr.Subbaroya Aiyar Padmanabhan, Advocate sr 72703.
(02/01/2019)

CMA.Nos.2206 to 2238 of 2018
& all connected pending CMPs

KJI(CO)
SP(12/12/2018)