IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 30.04.2013

Coram :

THE HONOURABLE MRS.JUSTICE R.BANUMATHI

and

THE HONOURABLE MR.JUSTICE K.RAVICHANDRABAABU

Civil Miscellaneous Appeal No.961 of 2013

M/s.Leaap International Pvt. Ltd.,

Old No.46, Rajaji Salai,

Chennai-1. .. Appellant

Vs.

The Commissioner of Service Tax

Newry Towers, 2054-1, IInd Avenue,

Anna Nagar, Chennai-40. .. Respondent

Appeal is filed under Section 35G of Central Excise Act, 1944 against the Miscellaneous Order of Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai in Misc. Order No.403892013 dated 04.02.2013.

For Appellant : Mr.Arvind P.Datar

Senior Counsel

for

Mr.K.Vaitheeswaran

For Respondent : Mr.V.Sundareswaran

JUDGMENT

R.BANUMATHI,J

The above appeal is filed by the Assessee against the order passed by Customs, Excise and Service Tax Appellate Tribunal, Chennai (CESTAT) in Miscellaneous Order No.403892013 dated 04.02.2013, directing the Assessee to make pre-deposit of Rs.30 lakhs as against the service tax of Rs.1,38,23,529/- and penalty of Rs.1,38,23,529/-.

2. Assessee M/s.Leaap International Private Limited, Chennai, a Proprietorship firm is engaged in providing Custom House Agent Service, Business Auxiliary Service and Business Support Service. Assessee is registered with Service Tax Commissionerate, Chennai and their Service Tax Registration Number is AAACL1251FST001. Assessee provide cargo space already booked by them in Airlines/Ship for their clients use for export of goods. Assessee pays charges for space bookings to the respective Airlines/Steamer Agents. Whenever consignment of their customers are sent using the space booked, Assessee charge their customers freight charges for the transportation of the goods by the respective Airlines/Steamer Agents. While charging their customers towards freight charges for the cargo booked, the Assessee is said to be collecting extra charges and collect the same from their clients. The services of the Assessee are classifiable under 'Business Auxiliary Service' under the category of procurement of goods or services which are inputs for clients introduced with effect from 10.09.2004. Consequently, the Assessee is liable to pay service tax on the extra charges collected on the Airlines/Steamer Agents, which according to the Revenue is the consideration received for rendering the above services and will form part of the value of taxable service and liable for service tax under Business Auxiliary Service.

3. A Show Cause Notice No.11/2010 dated 12.01.2010 was issued by the Commissioner of Service Tax proposing to assess taxable services relating to the charges which are collected in excess of ocean freightof Rs.11,95,65,220/- for the period from October 2004 to December 2008 and the service tax payable is Rs.1,38,23,529/- under Business Auxiliary Service under Section 65(19((iv) read with Section 65(105)(zzb) of Finance Act. Assessee sent a detailed reply (03.01.2011) to the Show Cause Notice (12.01.2010). Objection of the Assessee was rejected and by the order dated 13.04.2011, the Commissioner of Central Excise confirmed the demand of service tax of Rs.1,38,23,529/- being the service tax on the Business Auxiliary Service rendered during the period October 2004 to December 2008 and also imposed penalty of Rs.1,38,23,529/- under Section 78 of Finance Act.

4. Being aggrieved by the order of the Commissioner, Central Excise (13.4.2011), Assessee filed appeal before CESTAT in ST/475/2011 on the ground that there is no question of any service tax and once the dispute is on legal interpretation, penalty cannot be imposed. Pending appeal, Assessee filed application for waiver of pre-deposit of tax of Rs.1,38,23,529/- imposed under Section 73(1) and also penalty of Rs.1,38,23,529/- under Section 78 of Finance Act raising the plea that they had not rendered any service which is an input for their clients and demand of tax under Business Auxiliary Service is not

sustainable and that the alleged extra amount is in the nature of profit while charging their customers towards freight charges.

5. Observing that Assessee booked space for cargo for transporting their clients goods which has been utilised by the exporter/importer and prima facie case is made out that extra amount collected by the Assesse is in relation to the procurement of that service, by the order dated 04.02.2013 in Miscellaneous Order No.403892013, CESTAT directed the Assessee to pre-deposit a sum of Rs.30 lakhs within a period of six weeks and report compliance on 26.03.2013. Being aggrieved by the order of CESTAT directing the Assessee to make pre-deposit of Rs.30 lakhs, the Assessee has preferred this appeal.

6. Learned Senior Counsel for Assessee Mr.Arvind P.Datar submitted that Assessee is multi-modal transport operators and are engaged in making arrangements for transporting the goods and that Assessee is not procuring any goods or services which are inputs for clients and the contract between the clients and the Assessee is specifically one of providing transportation by various modes of transport to the clients and the same is not liable to be taxed. It was further submitted that the difference between the selling price and the purchase price is nothing but profit or loss, as the case may be, which cannot be subjected to service tax and when ocean freight is not liable to tax, the profit made on the ocean freight cannot be taxed. In support of his contention, the learned Senior Counsel placed reliance upon (2010) 18 STR 348 [M/S.GUDWIN LOGISTICS V. COMMISSIONER OF CENTRAL EXCISE, VADODARA]; (2010) 17 STR 266 [DHL LEMUIR LOGISTICS PVT. LTD. V. COMMISSIONER OF SERVICE TAX, BANGALORE] and (2012) TIOL 1558 CESTAT-MAD [M/S.FREIGHT SYSTEMS PVT. LTD. V. COMMISSIONER OF SERVICE TAX, CHENNAI].

7. Per contra, Mr.V.Sundareswaran, learned counsel for Revenue submitted that though ocean freight as such is not chargeable to service tax under Chapter V of the Finance Act, 1994 and while charging the customers towards freight charges for the cargo booked, the Assessee collects extra charges from their clients i.e. in excess of what is paid to the Airlines/Steamer Agents. Learned counsel submitted that CESTAT after analysing the facts and circumstances of the case, directed the Assessee to pre-deposit a sum of Rs.30 lakhs which is only 21.7% of the total amount of service tax portion of Rs.1,38,23,529/- and granted waiver for the balance amount of Rs.2,46,47,529/- (tax Rs.1,08,23,529/- and penalty Rs.1,38,23,529/-) and the same cannot be assailed by the Assessee.

8. We have considered the submissions made by the learned Senior Counsel for Assessee and the learned counsel for Revenue and also perused the materials on record.

9. As pointed out earlier, Assessee is registered as multi-modal transport operators and are engaged in making arrangements for export of goods and as a registered service tax Assessee. Whether services of the Assessee are classifiable under Business Auxiliary Service under the category of procurement of goods or services which are inputs for clientsand whether the same is taxable under Section 65(19) of Finance Act have to be gone into and adjudicated upon by the CESTAT. What is now urged before us is only against the pre-deposit order passed by the CESTAT.

10. Before considering the correctness or otherwise of the order passed by the CESTAT, let us consider the scope of Section 35F of the Central Excise Act. Section 35F of Central Excise Act reads as follows:-

35F. Deposit, pending appeal, of duty demanded or penalty levied. - Where in any appeal under this Chapter, the decision or order appealed agianst 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.

11. Two important expressions used in Section 35F of Central Excise Act are undue hardship to such person and safeguard the interests of Revenue. While dealing with the application twin requirements of considerations i.e. consideration of undue hardship aspect and imposition of conditions to safeguard the interest of the Revenue have to be kept in view. The same view was expressed by the Hon'ble Supreme Court in the case of MONOTOSH SAHA V. SPECIAL DIRECTOR, ENFORCEMENT DIRECTORATE AND ANOTHER 2008 AIR SCW 6004].

12. The Hon'ble Supreme Court in the case of S.VASUDEVA V. STATE OF KARNATAKA [AIR 1994 SC 923] observed that under Indian conditions the expression undue hardship is normally related to economic hardship. Unduemeans something which is not merited by the conduct of the claimant, or is very much disproportionate to it. Undue hardship is caused when the hardship is not warranted by the circumstances.

13. There are two important expressions in Section 35F of Central Excise Act. One is Undue hardship. "Undue hardship" is a matter within the special knowledge of the applicant for waiver and has to be established by him. Mere assertion about undue hardship would not be sufficient. For a hardship to be undue it must be shown that the particular burden to have to observe or perform the requirement is out of proportion to the nature of the requirement itself, and the benefit which the applicant would derive from compliance with it. The other aspect relates to imposition of conditions to safeguard the interest of the Revenue. It is for the Tribunal to impose such conditions as are deemed proper to safeguard the interest of the Revenue.

14. In (2007) 13 SCC 207 [UNION OF INDIA AND ANOTHER V. ADANI EXPORTS LTD. AND ANOTHER], the Hon'ble Supreme Court considered the question relating to pre-deposit under Section 129-E of Customs Act. The Hon'ble Supreme Court held that three aspects has to be focussed while dealing with such applications are (a) prima facie case (b) balance of convenience and (c) irreparable loss.

15. Learned Senior Counsel for Assessee contended that the demands raised will not stand the test of appeal and that it would be undesirable to require the Assessee to deposit a sum of Rs.30 lakhs, out of the demand and prays for waiver of pre-deposit. Contending that in similar matters, Tribunal took the view that ocean freight is not liable to service tax and waived pre-deposit on the ground that service tax is leviable on freight forwarding agency and multi-modal transport operators. Learned Senior Counsel further submitted that when the Commissioner of Central Excise having taken the view that ocean freight is not taxable, Tribunal ought to have been consistent in its view in waiving the pre-deposit for the Assessee also and it was not proper for the Tribunal to take a different view for the Assessee alone.

16. To contend that ocean freight is not leviable to service tax, the learned Senior Counsel placed reliance upon (2010) 18 STR 348 [M/S.GUDWIN LOGISTICS V. COMMISSIONER OF CENTRAL EXCISE, VADODARA]. In the said decision, the service provider had taken out the registration under Custom House Agent under Section 65(35) read with Section 65(105)(h) of Finance Act and rendered services such as fumigation, loading and unloading, stuffing goods in containers, labour charges for stuffing, facilitating charges and also collected ocean freight. The department levied service tax under the clearing and forwarding charges under Custom House Agent taxable services. CESTAT held that the substantial portion of the collected amount relates to ocean freight which itself is not liable to service tax under the Custom House Agent. Hence, the issue as to whether the excess collection over and above the ocean freight was liable to service tax under the Business Auxiliary Service under Section 65(19)(iv) or not was not the issue in appeal in that case before the CESTAT. Therefore, such case is distinguishable on facts.

17. Learned Senior Counsel placed reliance upon (2010) 17 STR 266 [DHL LEMUIR LOGISTICS PVT. LTD. V. COMMISSIONER OF SERVICE TAX, BANGALORE] where the Tribunal held that Air/Sea Freight Rebate is a margin derived on principal to principal transaction and it is not for rendering Custom House Agent services. In the said case, the service provider was registered under Custom House Agent services (Section 65(35) read with Section 65(105)(h)) and it collected charges for collecting fees, Break Bulk fees, Profit share form origin, Unallocated income, Currency adjustment factor, Freight rebate, Airline commission and sea freight brokerage, Air freight incentives, Expenses reimbursement billing. The department sought to tax the same under the head of Custom House Agent as forming part of Clearing and Forwarding services. CESTAT held that activity under one category shall not be made liable to service tax under another category and held that activity relating to freight forwarding cannot be brought under Custom House Agent. In the said case also the question as to whether excess collection over and above the ocean freightwas liable to service tax was not the issue.

18. Learned Senior Counsel has also placed reliance upon (2012) TIOL 1558 CESTAT-MAD [M/S.FREIGHT SYSTEMS PVT. LTD. V. COMMISSIONER OF SERVICE TAX, CHENNAI] where the Tribunal granted waiver of pre-deposit on the ground that service tax is not leviable on freight forwarding agency and multi-modal transport operator.

19. Learned counsel for Revenue contended that in the said cases the service provider collected only the actual ocean freight whereas the present case, the service provider collected excess amount which form part of the value of taxable service and hence liable for service tax under Business Auxiliary Services and those decisions are distinguishable on facts. Since the decisions relied upon by the Assessee are stated to be distinguishable on facts, the Assessee is not right in contending that Tribunal was inconsistent in its order.

20. When the question whether Assessee's services are classifiable under Business Auxiliary Service has to be adjudicated upon by the Tribunal, there cannot be a full waiver. In the facts and circumstances of the case, CESTAT directed the Assessee to remit Rs.30 lakhs being 21.7% of the total amount of service tax portion of Rs.1,38,23,529/- and granted waiver for the balance amount of Rs.2,46,47,529/- i.e. Rs.1,08,23,529/- being the tax amount and Rs.1,38,23,529/- being the penalty.

21. Lastly, the learned Senior Counsel urged that in case, the Court is not inclined to accept the contention of the Assessee, prayed for reduction of pre-deposit amount.

22. Having regard to the facts and circumstances of the case and considering the submissions of the learned Senior Counsel for Assessee, we deem it appropriate that Assessee could be directed to deposit Rs.20 lakhs instead of Rs.30 lakhs as ordered by the CESTAT, so that the appeal shall be taken up for hearing on merits without further delay by the CESTAT.

23. Accordingly, the order of CESTAT in Miscellaneous Order No.403892013 dated 04.02.2013 is modified and Assessee is directed to make pre-deposit of Rs.20 lakhs (Rupees Twenty Lakhs) within a period of four weeks from today. The Civil Miscellaneous Appeal is disposed of accordingly.

Consequently, connected Miscellaneous Petition is closed. No costs.

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To

1. The Commissioner of Service Tax,

   MHU Complex, 6th Floor,

   692, Anna Salai, Nandanam, Chennai-35.

2. The Customs, Excise and Service Tax

   Appellate Tribunal, South Zonal Bench, Chennai