Reportable

* IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ WP (C) No. 11460/2009 & CM No. 11182/2009

% *Reserved on: October 06, 2009*
Pronounced on: October 30, 2009

Microsoft Corporation (India) Private Ltd. . . . Petitioner

through : Mr. M. Venkatraman, Sr. Adv.
with Mr. Achin Goel, Advocate

VERSUS

Commissioner of Service Tax & Anr. . . . Respondent

through : Mr. Biswajit Bhattacharya, Sr.Adv.
with Mr. Mukesh Anand,
Mr. Shailesh Tiwari and
Mr. Sumit Kumar, Advocates

CORAM :-
THE HON'BLE MR. JUSTICE A.K. SIKRI
THE HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J.

1. The petitioner herein, namely, Microsoft Corporation (India) Private Ltd., entered into market development agreement dated 1.7.2005 with Microsoft Operations, Singapore (hereinafter referred to as the 'MS'). Both the MS and the petitioner are the wholly owned subsidiaries of Microsoft Corporation, Washington (hereinafter

referred to as the 'Holding Company'). As per the agreement dated 1.7.2005, the petitioner was appointed to provide various technical support services, including marketing of Microsoft products in Bhutan, India, Maldives, Nepal and British Indian Ocean territory. For the services provided by the petitioner to the MS under the aforesaid agreement, the petitioner is receiving commission. The respondent herein has taken the view that the commission received on these services is amenable to service tax. After issuing show-cause notice, the first respondent passed the order-in-original dated 23.9.2008 raising demand of more than Rs.255 crores, which included service tax amounting to Rs.124.99 crores and penalty of Rs.128.03 crores. After adding interest thereupon, the total demand is in the neighborhood of Rs.400 crores.

2. The petitioner has filed appeal against this order before the Customs, Excise and Service Tax Appellate Tribunal (hereinafter referred to as the 'Tribunal'). This appeal is pending consideration. Along with this appeal, the petitioner also moved an application for stay under Section 35F of the Act, which is made applicable also to service tax vide Section 83 of the Finance Act, 1994. The case of the petitioner is that commission received by the petitioner under the agreement is not liable to service tax on the ground that the same is export of service, which is exempt from payment of cess tax. On this stay application, the Tribunal has passed impugned order dated 31.7.2009 directing the petitioner to make pre-deposit of Rs.70 crores and realization of balance demand is settled till the disposal of

the appeal. The petitioner is not satisfied with this conditional stay as it wants complete waiver of the condition of pre-deposit. Therefore, challenging that order the present petition is filed.

3. We may point out at this stage that under the agreement dated 1.7.2005, four types of services are agreed to be provided by the petitioner to the MS, which are as under :-

> "2. PRODUCT SUPPORT SERVICES & CONSULTING SERVICES
>
> 2.1 Product Support Services and Consulting Services. Subsidiary shall have a non-exclusive right to provide product support services and consulting services for Microsoft Products in the Territory.
>
> 2.2 Subsidiary's Duties
> 2.2.1 Subsidiary will use its best efforts to further the interests of M.O. and to maximize the markets for product support services and consulting services in the Territory.
>
> 2.2.2 Subsidiary shall not solicit orders of agreements from outside the Territory.
>
> 2.2.3 Subsidiary may provide product support services which may include standard Microsoft product support services for products which are generally made available to end users and may include requests for support originating from the Territory.
>
> 2.3 MO's Duties. MO will use its best efforts to assist Subsidiary with technical matters in connection with the marketing of Microsoft Products and Services.
>
> 3. MARKETING OF MICROSOFT PRODUCTS
>
> 3.1 Marketing. Subsidiary shall have a non-exclusive right to market Microsoft Products in the Territory.
>
> 3.2 Subsidiary's Duties.
> Subsidiary will use its best efforts to further the interests of MO and to maximize the markets for Microsoft Products in the Territory.
>
> 3.2.1 Subsidiary shall not solicit orders or agreements from outside the Territory. In soliciting orders, Subsidiary shall only be authorized to inform customers of price, payment, delivery and other terms offered by MO in accordance with

information received from MO or its affiliates, as appropriate. Unless otherwise authorized herein or otherwise agreed by the parties, Subsidiary shall not enter into any agreements with customers regarding Microsoft Products, but shall instead promptly submit written customer orders to MO or its affiliates, as appropriate, for its acceptance or rejection.

3.2.2 Subsidiary shall assist MO as requested in collection past due accounts and performing other activities reasonably related to MO's business.

3.3 MO's Duties.

3.3.1 MO will use its best efforts to fill, or procure the fulfillment of, orders as scheduled and assist Subsidiary with technical matters in connection with the marketing of Microsoft Products and Services.

3.3.2 MO shall permit Subsidiary to operate a service on MO's or its affiliate's web sides for the support of MO's or its affiliate's customers in the Territory, without charge by MO.

4. RGE SERVICES

MO shall reimburse Subsidiary for expenses arising from Resident Guest Employee Services ("RGE Services"). RGE Services include but are not limited to human resource expenses, legal expenses and internal information technology expenses.

5. OTHER INTERCOMPANY SERVICES

5.1 Services between MO and MSFT and Affiliates. Subsidiary acknowledges that MO provides services to MSFT and its other affiliates from time to time. Subsidiary acknowledges that Mo may from time to time provide as a service the physical payment to Subsidiary of amounts owed by MSFT or its other affiliates to Subsidiary. MO shall clearly identify for Subsidiary which portion of funds are paid on its own behalf and which are paid on behalf of MSFT. Subsidiary shall not hold MO liable for any disputed amounts owed by MSFT to Subsidiary that are not provided by MSFT to MO for payment to Subsidiary.

5.2 Services between MO and Subsidiary. Mo and Subsidiary acknowledge that MO and/or its affiliates may from time to time provide services to Subsidiary and Subsidiary may from time to time provide services to MO and/or its affiliates.

4. Payment terms for aforesaid 4 types of services were provided in para 6.1, 6.2, 6.3 and 6.4 of agreement which reads as under :-

"6.1 Product Support Services and Consulting Services. For product support services and consulting services rendered pursuant to Article 2, Mo shall pay Subsidiary an amount equal to one hundred and ten percent (110%) of Subsidiary's actual expenses, less revenue, incurred in connection with its duties, provided such expenses comply with Subsidiary's budget, as adjusted from time to time, and provided, further, such expenses are not already covered by another section of this Agreement or covered in another agreement between Subsidiary and MO or any MO affiliate. The reimbursement and additional compensation shall be exclusive of any applicable consumption tax such as a Value Added Tax or a Goods and Services Tax, which consumption tax shall be the responsibility of MO.

6.2 Marketing of Microsoft Products. For assistance in the marketing of Microsoft Products under Article 3, MO shall pay Subsidiary one hundred and fifteen percent (115%) of Subsidiary's actual expenses, less revenues, incurred in connection with its duties as defined in Article 3, provided such expenses comply with Subsidiary's budget, as adjusted from time to time, and provided, further, such expenses are not already covered by another section of this Agreement or covered in another agreement between Subsidiary and MSFT or any MSFT affiliate. Taxes, insurance, duties, freight and other charges not attributable to the Microsoft Product itself paid by the customer shall not be considered in calculating the amount of commission. The commission payments shall be exclusive of any applicable consumption tax such as a Goods and Services Tax or a Value Added Tax which consumption tax shall be the responsibility of MO.

6.3 RGE Services. For RGE Services rendered pursuant to Article 4, MO shall pay subsidiary an amount equal to one hundred and ten percent (110%) of Subsidiary's actual expenses, less revenues, incurred in connection with its duties, provided such expenses comply with Subsidiary's budget, as adjusted from time to time, and provided, further, such expenses are not already covered by another section of the Agreement or covered in another agreement between Subsidiary and MO or any other MSFT affiliate. The reimbursement and additional compensation shall be exclusive of any applicable consumption tax such as a Value Added Tax or a Goods and Services Tax, which consumption tax shall be the responsibility of MO.

6.4 Other Intercompany Services. For other services and/or sales provided pursuant to Article 5, MO or Subsidiary shall invoice the recipient of the sales and/or services for such sales and/or services at a price as

> may be agreed between the parties from time to time, provided however, that any amount so invoiced shall be consistent with the arm's length standard (as defined in the OECD transfer pricing guidelines and relevant national legislation). The invoice shall contain a general description of the sales or services and the cost of the sales and/or services to be paid."

4. The adjudicating authority, in its order-in-original, has held that the petitioner is providing business support to the MS. The aforesaid services were provided in India and were never provided outside India, for which there was no export of services within the meaning of Rule 3(1)(iii) of the Export of Service Rules, 2005 (hereinafter referred to as the 'Rules') for the period in question, i.e. 19.4.2006 to 31.5.2007. Further, for the period 1.6.2007 onwards the criterion of providing of service outside India being omitted from the law, the condition of service provided from India and used outside India will remain in force. This does not grant immunity for the petitioner from taxation in respect of business auxiliary services provided by the petitioner.

5. The Tribunal has referred to the said order and extracted the relevant portions therefrom *in extenso* in its impugned order. It recorded that the adjudicating authority had formulated four issues in para 214 of the order of adjudication. Thereafter, the answer to those issues given by the adjudicating authority is also extracted. The adjudicating authority discarded the plea of export of service made by the petitioner holding that there was no export of services for which the petitioner was liable to pay tax under the Finance Act, 1994, under the category of business auxiliary services providing

during the year in question. The Tribunal, thereafter, recorded the submissions of the counsel for the petitioner, on the basis of which order of the adjudicating authority is challenged and dealt with the same, taking *prima facie* view of the matter.

6. Perusal of the order would also indicate that the Tribunal has heavily relied upon the judgment of the Supreme Court in ***All India Federation of Tax Practitioners & Ors.*** v. ***Union of India & Ors.,*** 2007 (7) STR 625, wherein it has been held that services fall in two categories, namely, property based services and performance based services and the service performed in India would be covered by the service tax under the Finance Act, 1994. As per the *prima facie* view taken by the Tribunal, place of performance of service is decisive for determining event of taxability as well as incidence of tax.

7. We may also, at this stage, point out that the Supreme Court in the aforesaid case had specified two categories of the services in the following manner :-

> "7. In the light of what is stated above, it is clear that Service Tax is a VAT which in turn is destination based consumption tax in the sense that it is on commercial activities and is not a charge on the business but on the consumer and it would, logically, be leviable only on services provided within the country. Service tax is a value added tax.
>
> 8. As stated above, service tax is VAT. Just as excise duty is a tax on value addition on goods, service tax is on value addition by rendition of services. Therefore, for our understanding, broadly 'services' fall into two categories, namely, property based services and performance based services. Property based services cover service providers such as architects, interior designers, real estate agents, construction services, mandapwalas etc. Performance based services are services provided by service providers like stock-brokers, practising chartered accountants, practising cost accountants,

security agencies, tour operators, event managers, travel agents etc."

8. Contesting the approach of the Tribunal, the submissions of Mr. N. Vekatraman, learned senior counsel appearing for the petitioner, were as under :-

(a) The Tribunal has failed to appreciate that apart from the aforesaid two categories of services enumerated by the Supreme Court, the Government, while framing the Rules, had carved out third category as well under rule 3 thereof, which reads as under :-

> "Export of taxable services
>
> 3 (1) Export of taxable services shall, in relation to taxable services –
>
> (i) Specified in sub-clauses (d), (p), (q), (v), (zzq), (zzza), (zzzb), (zzzc), (zzzh), (zzzr), (zzzy), (zzzz) and (zzzza) of clause (105) of Section 65 of the Act, be provision of such services as are provided in relation to an immovable property situated outside India;
> (ii) Specified in sub-clauses (a), (f), (h), (i), (j), (l), (m), (n), (o), (s), (t), (u), (w), (x), (y), (z), (zb), (zc), (zi), (zj), (zn), (zo), (zq), (zr), (zt), (zu), (zv), (zw), (zza), (zzc), (zzd), (zzf), (zzg), (zzh), (zzi), (zzl), (zzm), (zzn), (zzo), (zzp), (zzs), (zzt), (zzv), (zzw), (zzy), (zzzd), (zzze), (zzzf), (zzzp), (zzzzg), (zzzzh) and (zzzzi) of clause (105) of section 65 of the Act, be provision of such services as are performed outside India:
>
> Provided that where such taxable service is partly performed outside India, it shall be treated as performed outside India:
>
> Provided further that where the taxable services referred to in sub-clauses (zzg), (zzh) and (zzi) of clause (105) of section 65 of the Act, are provided in relation to any goods or material or any immovable property, as the case may be, situated outside India at the time of provision of service, through internet or an electronic network including a computer network or any other means, then such taxable service, whether or not performed outside India, shall be treated as the taxable service performed outside India;

(iii) Specified in clause (105) of section 65 of the Act, but excluding -

(a) sub-clauses (zzzo) and (zzzv);

(b) those specified in clause (i) of this rule except when the provision of taxable services specified in sub-clauses (d), (zzzc) and (zzzr) does not relate to immovable property; and

(c) those specified in clause (ii) of this rule,

when provided in relation to business or commerce, be provision of such services to a recipient located outside India and when provided otherwise, be provision of such services to a recipient located outside India at the time of provision of such service:

Provided that where such recipient has commercial establishment or any office relating thereto, in India, such taxable services provided shall be treated as export of service only when order for provision of such service is made from any of his commercial establishment or office located outside India:

Provided further that where the taxable service referred to in sub-clause (zzzj) of clause (105) of section 65 of the Act is provided to a recipient located outside India, then such taxable service shall be treated as export of taxable service subject to the condition that the tangible goods supplied for use are located outside India during the period of use of such tangible goods by such recipient.

(2) The provision of any taxable service specified in sub-rule (1) shall be treated as export of service when the following conditions are satisfied, namely :-

(a) such service is provided from India and used outside India; and
(b) payment for such service is received by the service provider in convertible foreign exchange.

Explanation – For the purposes of this rule "India" includes the designated areas in the Continental Shelf and Exclusive Economic Zone of India as declared by the notifications of the Government of India in the Ministry of External Affairs numbers S.O. 429(E), dated the 18th July 1986 and S.O. 643(E), dated the 19th September 1996."

He submitted that the Tribunal ignored the provisions of this Rule, which in fact would govern the field and the case of the petitioner squarely falls in category 3, which in no uncertain terms excluded those services provided in relation to business or commerce, the provision of such services to a recipient located outside India and when provided otherwise, the provisions of such services to a recipient located outside India at the time of provision of such services. The second proviso to third category clarifies that where the taxable service referred to any sub-clause (zzzj) of clause (105) of Section 65 of the Act is provided to a recipient located outside India, then such taxable service shall be treated as export of taxable service, subject to the condition that the tangible goods supplied for use are located outside India during the period of use of such tangible goods by such recipient. His submission was that conditions of this category are fulfilled by the petitioner and, therefore, the petitioner was not liable to pay the service tax.

Learned senior counsel also referred to Circular dated 24.2.2009 as per which the applicability of the aforesaid clause was amply clarified in favour of the persons like the petitioner in the instant case.

(b) In all similar appeals which were pending before the different Benches of the Tribunal, the Tribunal had been granted unconditional stay by completely waiving the requirement of pre-deposit. He referred to the following orders passed in this connection :-

(i) *M/s. GAP International Sourcing (India) Pvt. Ltd.* v. *Commissioner of Service, Delhi –*

"5. We have carefully considered the submissions from both sides. We are conscious that we are dealing with export of services which are intangible unlike export of goods. A reading of the agreement shows that the decision relating to the choice of various fabrics, vendor, service providers are to be taken by the parent company which are based outside India. Admittedly, they do not have any office in India. The applicant has undertaken several activities in India but the feed-back or the reports appear to have been submitted by them to the parent company and the same may constitute the actual rendering of services. The fact that the India based company has received payment in foreign exchange, prima facie, supports the claim of the applicant that they have exported the services. The other issues raised by the learned Jt. CDR have to be gone into at the time of final hearing."

(ii) *M/s. Bitachi Home & Life Solution (I) Ltd.* v. *Commissioner of Central Excise, Ahmedabad-III -*

"3. Ld. Advocate submits that prior to 15.3.2005, such services were fully exempted under Notification No. 2/2003 dated 20.11.2003. The benefit stands denied by Original Adjudicating Authority only on the ground that the commission received by the appellants in foreign currency was not repatriated and no evidence stand produced by the appellant to that effect. The appellants have contended that if the amount is not repatriated, the production of positive evidence is not possible. There is no evidence produced by the Revenue to the contrary. The appellants have sworn on affidavit that the amount was not repatriated.

As regards the period after 15.3.2005, Ld. Advocate submits that such services would fall under the category of Export Services and in terms of Export of Services Rules 2005, no tax is liable to be confirmed in respect of the same. Ld. Advocate has placed reliance on Circular No. 111/05/2009-ST dated 24.2.2009, laying down that Indian agents who undertake marketing in India of goods of a foreign seller, would get covered under the said Export of Service Rules. Ld. Advocate also placed reliance on the Tribunal's decision in the case of *Blue Star Ltd.* (2008(11) STR 23 (Tri-Bang) and in the case of *ABS India Ltd.* (2009 (13) STR 65 (Tri.-Bang.), setting aside the confirmation of service tax in respect of identical services.

4. In view of the above, we are of the opinion that the appellant has good prima facie case on merits, so as to allow the stay petition unconditionally. We order accordingly and set aside the impugned order and remand the matter to Commissioner (A) for decision on merits, without insisting on any pre-deposit."

His submission was that the Bangalore Bench of the Tribunal had even taken final view in certain appeals holding that no service tax was payable in the following cases :-

(i) *ABS India Ltd.* v. *CST, Bangalore*
2009 (13) STR 65

(ii) *Blue Star Ltd.* v. *CCE, Bangalore*
2008 (11) STR 23

(iii) *Lenovo (India) Pvt. Ltd.* v. *CCE (Appeals-II) & Ors.*
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On that basis, the submission was that the Tribunal could not have ignored the aforesaid orders passed finally or by way of interim measure while deciding the stay application of the petitioner. According to him, as per the well-settled practice and principle of law laid down by the Supreme Court and the High Courts, the petitioner should have been meted out the same treatment by granting similar stay. In this behalf, he drew our attention to the following observations of the Bombay High Court in *Wardha Coal Transport Pvt. Ltd.* v. *Union of India & Ors.,* 2009-TIOL-79, where it was observed as under :-

> "8. It is not possible for us to agree with Mr. Desai. It is pertinent to note that in similar fact situation in SSV Coal Carriers Pvt. Ltd., the Tribunal has granted the prayer for waiver of pre-deposit. Similarly, in Kartikay Bulk Movers Pvt. Ltd. v. Commissioner of Central Excise, Nagpur delivered on 7-10-2008, where also the facts were somewhat similar, waiver of pre-deposit has been granted. Moreover, the Tribunal in Sainik Mining & Allied Services Ltd.'s case (supra) has come to the conclusion that service tax liability does not arise in such cases. Learned Counsel for the petitioners is right in contending that the petitioners have a prima facie case. We may usefully refer to the observation of the Supreme Court in Indu Nissan Oxo Chemicals Industries Ltd.'s case (supra), wherein the Supreme Court has observed that:

"It is true that on merely establishing a prima facie case, interim order of protection should not be passed. But 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...."

9. Viewed in the light of above observations, we are of the opinion that the impugned order deserves to be set aside and is set aside accordingly. Once the Tribunal has granted full waiver atleast in two similarly situated cases, it would not be proper to take a different view and deny full waiver of pre-deposit. Accordingly, we direct waiver of pre-deposit of the amounts in question and stay recovery thereof pending appeal."

He also referred to the judgment of the Supreme Court in ***Polar Industries Ltd.*** v. ***CCE, Meerut***, 1999 (114) ELT 783, which is a short order and reads as under :-

"1. Leave granted.

2. The short question that arises for consideration is whether the High Court was justified in calling upon the assessee to deposit a sum of Rs. 20,00,000/- while the assessee's appeal is pending before the appellate authority. Be it be stated that the Assistant Commissioner raised a demand of Rs. 48,87,777.70 against which the assessee has preferred an appeal and appeal is pending before the appellate authority. The question for consideration is whether the advertisement expenses could be loaded to the value declared by the assessee to arrive at correct assessable value. The assessee moved the appellate authority for not depositing the amount, but having unsuccessful there he moved the High Court. The High Court by the impugned order directed the assessee to deposit a sum of Rs. 20,00,000/- . Mr. Salve appearing for the appellant brought to our notice that for the previous year CEGAT has accepted the contentions of the assessee and has disposed of in favour of the assessee. Mr. Ganguli, the learned Senior Counsel for the department, on the other hand, contended that the said year was in relation to the peculiar facts of that case and may not be applicable to the case in hand. We are not inclined to delve into that question, since we are not inclined to express any opinion on the merit of the contentions made by the parties as the appeal is pending before the appellate authority. But having considered the facts and circumstances of the case we direct that the assessee may not be called upon to deposit any amount till the appeal of the assessee is disposed of by the appellate authority. The impugned order of the High Court and the appellate authority refusing the prayer for not depositing the amount are set aside. The appellate authority is directed to take up the appeal on merits without insisting upon

any deposit to be made by the assessee. The appeal may be heard expeditiously.

3. The appeal is disposed of accordingly."

(c) His next submission was that the learned Tribunal also did not correctly appreciate the principles on which applications for stay are to be considered. According to him, when the petitioner had made out a strong *prima facie* case in its favour and the Tribunal had in other cases taken the view that no pre-deposit is required, merely because the petitioner had capacity to pay the amount would not by itself be a determinative factor. In this behalf, he submitted that this Court in the case of ***Sri Krishna*** v. ***Union of India,*** 1998 (104) ELT 325 had unambiguously observed that if the appellant has such a *prima facie* strong case and as is most likely to exonerate him from payment and the Tribunal still insisted on deposit, the same would amount to undue hardship. The relevant portion is as under :-

"7. In view of the above said submissions in which we find substance, a case for waiver of pre-deposit was made out clearly and the Tribunal could not have insisted on pre-deposit of the amount of the impugned penalty either wholly or in part.

8. Mr. M.L. Bhargava, the learned Counsel for the respondent submitted that the impugned order being a discretionary order is not liable to be interfered with in exercise of writ jurisdiction of this Court. He relied on the decision of the Supreme Court in S.I. Coir Mills v. Addl. Collector, Customs, AIR 1976 SC 1527 and *Oswal Weaving Factory* v. *State of Punjab,* AIR 1966 Punjab 532. Suffice it to observe that while disposing of an application under Section 129 of the Customs Act, 1962 the Tribunal is obliged to adhere to the question of undue hardship. The order of the Tribunal should show if the pleas raised before it, have any merit prima facie or not. If the appellant has such a prima facie strong case as is most likely to exonerate him from payment and still the Tribunal insists on the deposit of the amount it would amount to undue hardship."

He also drew our attention to the principle laid down by the Supreme Court in ***Ravi Gupta*** v. ***Commissioner of Sales Tax, Delhi,*** 2009 (237) ELT 3, wherein the principles governing grant of stay were discussed in the following manner :-

> "8. Principles relating to grant of stay pending disposal of the matters before the concerned forums have been considered in several cases. It is to be noted that in such matters though discretion is available, the same has to be exercised judicially.
>
> 9. The applicable principles have been set out succinctly in *Silliguri Municipality and Ors.* v. *Amalendu Das & Ors.* (AIR 1984 SC 653), *M/s. Samarias Trading Co. Pvt. Ltd.* v. *S. Samuel & Ors.* (AIR 1985 SC 61) and *Assistant Collector of Central Excise* v. *Dunlop India Ltd.* (AIR 1985 SC 330).
>
> 10. It is true that on merely establishing a *prima facie* case, interim order of protection should not be passed. But 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. Petitions for stay should not be disposed of in a routine manner unmindful of the consequences flowing from the order requiring the assessee to deposit full or part of the demand. 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. Merely because this Court has indicated the principles that does not give a license to the forum/authority to pass an order which cannot be sustained on the touchstone of fairness, legality and public interest. Where denial of interim relief may lead to public mischief, grave irreparable private injury or shake a citizens' faith in the impartiality of public administration, interim relief can be given."

This view was reiterated by the Supreme Court in ***Benara Valves Ltd.*** v. ***CCE,*** 2006 (204) EIT 513.

9. Mr. Bhattacharya, learned senior counsel appearing on behalf of the respondents, countered the aforesaid arguments in the following manner :-

(i) His preliminary submission was that the Tribunal had exercised its discretion and granted interim relief directing deposit of only 17%

of the total demand. Section 35F of the Act, which has been made applicable under Section 83 of the Finance Act, 1994 mandates conditional right to appeal having regard to securing interest of revenue and undue hardship. Undue hardship has not even been pleaded. Therefore, the interim order of stay does not warrant interference in exercise of discretionary writ jurisdiction of this Court. He referred to the judgment in the case of ***Vijay Prakash Mehta*** v. ***Collector of Customs,*** (1988) 4 SCC 402. He, thus, pleaded that discretion exercised by the Tribunal in granting conditional reply to appeal be not interfered with, more so when it was based upon proper appreciation of the case.

(ii) His further submission was that the *prima facie* case and undue hardship were held earlier to be mutually inclusive concepts. Gradually, this position has undergone some change, as is clear from the following three cases where the courts have held that *prima case* alone is not sufficient to grant an interim stay :-

(i) ***Benera Valves*** (supra)

(ii) ***Ravi Gupta*** (supra)

(iii) ***Wardha Coal Transport Pvt. Ltd.*** (supra)

Thus, even if a *prima facie* case is assumed to exist, no stay order can be passed without pleading financial hardship.

(iii) Without prejudice, his contention was that even a *prima facie* case does not exist. The petitioner and MS are both wholly owned subsidiaries of the Holding Company. Both have entered into an

agreement dated 1.7.2005 to further their common interest in a concerted manner to provide service to Indian consumers. Clause 5.2 of the agreement makes it clear that MS provides services to the petitioner and in turn the petitioner provides services to MS. Clause 6 stipulates that MS reimburse expenses incurred to the petitioner. It is these expenses that generate business in India. Consumers are based in India. Destination and consumption are both in India. Indian consumers pay for the services which go out to the owners in the Holding Company and part of it comes back to India in the shape of commission. Economic and commercial activities take place in India. Entire performance is exhausted and becomes extinct in India. Under these circumstances, it becomes clear that *prima facie* case does not exist. According to him, the Tribunal had been indulgent to the petitioner by granting stay in liberal terms.

(iv) Adverting to the Rules, he argued that even as per Rule 3(2) of the Rules, in order to claim export, service ought to be used outside India. These words have remained in this Rule intact, even after a series of amendments to the said rule. Therefore, these Rules which have been framed by the Central Government under Section 9u3 and 94 of the Finance Act, 1994 and notified in the official gazette have to be read as it is.

(v) Countering the argument based on clarificatory circular, he submitted that the following judgments of the Supreme Court amply

demonstrate that the Courts/Tribunals are not bound by that Circular:-

(i) *CCE* v. *Dhiren Chemical Industries,* (2002) 2 SCC 127

(ii) *Kalyani Packaging Industry* v. *UOI,* (2004) 6 SCC 719

(iii) *CCE, Bolpur* v. *Ratan Melting,* 20081) ELT 22 (SC)

He, thus, pleaded that any interpretation of Rule 3(2) as aforesaid given by the CBEC vide Circular dated 24.2.2009 shall not be binding on Tribunals/Courts. In any event, having regard to the facts of the case, the Tribunal has returned a finding that the interpretation of the Circular runs counter to the Supreme Court judgment in the *All India Federation of Tax Practitioners* (supra).

(vi) As regards the judgment of the Supreme Court in *All India Federation of Tax Practitioners* (supra), he argued that two categories of services were carved out by the Hon'ble Supreme Court. This is binding on all Courts and Tribunals. The said judgment carves out property based services ad performance based services. Admittedly, the agreement dated 01.07.2005 (subject matter of litigation) is performance based services. Both these categories can have trans-border implication. Such trans-border implication would be sub set of these board categories and by itself cannot be termed as a third category. Interpretation of Service Tax Rules and arguments cannot be pressed to dilute the binding judgment of Hon'ble Supreme Court in *All India Federation of Tax Practitioners* (supra). Therefore,

destination based consumption of service ends with the performance of service in India and this satisfies performance based service tax concept as held by the Hon'ble Supreme Court in ***All India Federation of Tax Practitioner*** case.

(vii) He further pleaded that this Court should not be influenced by the stay orders granted by the Coordinate Benches of the Tribunal. In ***ABS India and Blue Star*** (supra) were the plain and simple import of goods and radically different from the present case which fastens liability on Microsoft India based on agreement dated 01.07.2005. These import of goods can never be equated with peculiar terms of the agreement dated 01.07.2005 between MI and MS. Other benches of the Tribunal had relied upon these judgments of ***ABS India and Blue Star*** (supra).

He, thus, made a fervent plea that the impugned order is in favour of the petitioner and in any case is most equitable and did not require any interference.

10. In the first blush, one finds that the arguments of learned counsel for the petitioner are quite attractive. Not only he has given precedents of interim orders as well as final orders passed by the Tribunals in the matter involving service tax which may appear to be similar, he has also pointed out the import of Rule 3 of the Rules and the clarification issued by the Board itself. However, at this stage, one is to look into the *prima facie* view of the matter. We find from the impugned order passed by the Tribunal that it has discussed this

aspect in much detail though at this stage only *prima facie* view is taken, which it was supposed to. The Tribunal has extensively quoted from the judgment of the Supreme Court in ***All India Federation of Tax Practitioners*** (supra). As of today, the action of the adjudicating authority is predicated on the said judgment. Whether case of the petitioner falls in third category of Rule 3 of the Rules is yet to be finally determined. The Tribunal was not oblivious to these Rules either, as reference thereto finds place in the impugned order. It would be of use to incorporate the following discussion contained in the order of the Tribunal, analyzing the terms of agreement between the petitioner and MS :-

> "24. It also appears that the services provided by the appellant were only to benefit the consumers of Indian Territory and that was provided for and on behalf of the holding company in USA as well as the subsidiary in Singapore. The end user of service being located in India and need of such consumers being met by the appellant for and on behalf of its foreign principal, such services appear to have been provided in India and there appears no export of service. The foreign principal acted through its appellant Agent. The principal was not the beneficiary. A service provider acting directly or indirectly through its agent is not the beneficiary of service so provided while providing of service is its contractual obligation under terms of contract with clients/customers. Therefore in the present case of the appellant no service has occasioned to move out of India to a place out side India following well tested meaning of the term "export" under Section 2(18) of the Customs Act, 1962. Such a view is also very clear when object of Article 2.1, 2.2.1, 2.2.3, 2.3, 3.1, 3.2.1, 3.2.2, 3.3.1 and 3.3.1 of the sample agreement dated 01.07.2005, which has been extracted hereinbefore, is read. Remuneration for the service provided by the appellant was linked with expenses incurred in terms of Article 6.1 and 6.2 of the sample agreement dated 01.07.2005. It may be appreciated that to provide service, expenses were incurred in India in terms of the sample agreement for which the appellant got reimbursement of such expenses and a percentage thereof is paid to it as its remuneration. Thus expenditure met in India has generated service potentiality in India.
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> 25. Reading of the letters filed by the Appellant as stated in this order hereinbefore and also reading of the sample agreement

throws light that the appellant was acting on behalf of the foreign principals in India as subsidiary of the foreign holding company. It had acted as agent of the foreign principals to result with provision of services in India out of the endeavour of the appellant with the technical assistance of the holding company and subsidiary company abroad. The service provided in India was consumed without reverting back to foreign principals for consumption abroad. Ultimate outcome of service having been exhausted in India, there appears to be no export of such services since efforts in India generated service recipients in India only. The foreign principals discharged post service contractual obligations. Even the Appellant's plea that Board Circular dated 24.02.2009 clarified that the benefits of the service accrue outside India, does not appear to be of any help to the appellant since benefit of the services has accrued to the consumers in India for the service provided to the consumers thereat to fulfil contractual obligation of the foreign holding company as well as subsidiary company of Singapore. The benefit of service terminated in India only, without travelling abroad. The performance based service provided in India in terms of the sample agreement dated 01.07.2005 appears to have resulted with provision of service to the consumers in India. Therefore it appears that even the circular does not explain the position of law as claimed by the appellant to its advantage.

26. The circulars hold that location of service receiver is relevant factor to decide export of service under Rule 3(1)(iii) of Export of Services Rules, 2005. This does not rule out that when ultimate outcome of service is consumed in India, the service exhausts or extinct thereat without being capable of exported, losing its utility. Performance of service being decisive for taxation and to decide taxable event and incidence of tax, export of service pleaded by the appellant is inconceivable.

27. It may be stated that business auxiliary service provided by a service provider in terms of Section 65(105)(zzb) of Finance Act, 1994 is taxable for the rationale that the principal to whom the marketing support is given by the service provider, ultimately makes available of goods or services to the consumers in India. Similarly marketing support provided to the foreign principal as agent thereof also results with either ultimate supply of goods or provision of services to the consumers of India only and service reaches its destination in India to the intended consumer of the goods or services. Therefore whether service is directly provided by a foreign Principal in India or foreign principal providing service in India through its agents in India makes no difference under service tax law when service tax is a VAT and that too destination based consumption tax as per Apex Court Judgment in All India Fedn. of Tax Practitioners (supra). Had the service been provided to the foreign principal not resulting with ultimate supply of goods or provision of service to the consumer in

India, such services might have assumed the character or nature of export of service following tested principles of customs law in India. But present case is a departure to that principle. The appellant is an intermediary meant to provide well defined services to clients/customers in India with the technical assistance of foreign principal. To provide service in India, the appellant was supported by technical assistance by the foreign principals and the appellant as well as Singapore concern are subsidiaries of the holding company in USA being centrally governed. Service tax law does not appear to have brought any anomalous situation to the concept of service provided in India for its ultimate consumption thereat."

11. The Tribunal also took note of the orders passed by the other Benches, but distinguished the same in the following words :-

> " 28. In the course of hearing, learned Counsel placed reliance on the decisions of Tribunal in case of ABC (India) Ltd v. 2009 131 STR (65) and Blue Star 2001 (11) STR (23). Such reliance was placed to advance argument that when recipient of services is located outside India, it cannot be said that the services were delivered in India or used in India. Services are utilized only outside India and such services shall be eligible to benefit of export of services. Subsequent to hearing of the matter, learned Counsel also submitted a copy of the decision of the Tribunal in the case of Lenovo (India) Pvt. Ltd. 2009 TIOL BANG, wherein it was held that the said case was similar to case of ABC (India) Ltd and Blue Star (supra). But these decisions, prima facie, do not come to rescue of the appellant for the law laid down by Apex Court in All India Fedn. Of Tax Practitioners - 2007 (7) STR 625 (SC).
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> 29. Appellant also relied on the decision of Ahmedabad Bench in 2009 TIOL 602 CESTAT AHMD. A copy of the said decision was submitted subsequent to hearing. That decision related to interim order passed by the Ahmedabad Bench. However, while passing order, Bench had taken note of the decision in Blue Star and ABC (India) Ltd. In addition to these citations, the appellant also relied on decision of Delhi Bench in case of Gap International Sourcing (India) Pvt. Ltd. 2009 TIOL 249 CESTAT DEL. Appellant's submission was that absolute stay was granted in identical issue of existence of recipients of services outside India shall enjoy export service benefit. Therefore, appellant's contention in present case is that when services recipients were outside India, appellant is entitled to similar benefit."

These orders are already reproduced above, which are short orders of single para. As against this, in the present case there is a

detailed discussion by the Tribunal on the various aspects while taking *prima facie* view.

12. It has also discussed the judgment of the Bombay High Court in ***Wardha Coal Transport Pvt. Ltd.*** (supra), as is clear from the following discussion in the impugned order :-

> "31. Learned Adjudicating Authority appears to have thread bare examined the issue by a reasoned and speaking order in different paragraphs depicted aforesaid. There were no materials brought out by the appellant to distinguish its case as export. The Appellant relied on the decision of Hon'ble High Court of Bombay in the case of Wrdha Coal Transprot Pvt. Ltd, Chandrapur v. UOI 2009 TIOL 79 HC Mum ST. to plead for stay of realisation of the demand in view of stay order passed by Ahmedabad Bench. It may be stated that no two cases are equal. It may also be stated that interim orders cannot be precedent decisions following decision of Apex Court in Empire Industries case - 1985 (20) ELT 179 (SC)."

13. After discussing all these aspects, the Tribunal exercised its discretion in directing the petitioner to make pre-deposit of Rs.70 crores and granting stay of the balance demand, which by all means is no less as the amounts covered by the stay order comes to more than Rs.300 crores. While adopting this approach, the Tribunal has taken into consideration various judgments of the Supreme Court laying down the principles which are to be kept in mind for dealing with the application of stay :-

> "32. Prima facie, the appellant has not brought out its case for total waiver of pre-deposit during pendency of appeal since appeal is a conditional right granted by law as held in the case of Vijoy D. Meheta – 1988 (4) SCC 402 : 1989 (39) ELT 178 (SC). Balance of convenience does not tilt in favour of the appellant. There was no case made out to show that irreparable injury or undue hardship shall be caused to the appellant if no full waiver is granted. So also, neither materials were produced nor was financial hardship pleaded in the course of hearing. Rather, Revenue appears to be prejudiced if realization of demand is stayed following decision of Apex

Court in Benera Valve's case 2006 (204) ELT 513 (SC). The applicable principles have also been set out succinctly in *Silliguri Municipality and Ors.* v. *Amalendu Das and Ors.* (AIR 1984 SC 653), *M/s. Samarias Trading Co. Pvt. Ltd.* v. *S. Samuel and Ors.* (AIR 1985 SC 61) and *Assistant Collector of Central Excise* v. *Dunlop India Ltd.* (AIR 1985 SC 330). While arriving at the above conclusion, we were conscious of decision of Apex Court in Ravi Jain's case – 2009 (237) ELT 3 (SC). The Hon'ble Supreme Court in para 10 of the judgment held as under :-

"10. It is true that on merely establishing a prima facie case, interim order of protection should not be passed. But 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. Petitions for stay-should not be disposed of in a routine matter unmindful of the consequences flowing from the order requiring the assessee to deposit full or part of the demand. 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. Merely because this Court has indicated the principles that does not give a license to the forum/authority to pass an order which cannot be sustained on the touchstone of fairness, legality and public interest. Where denial of interim relief may lead to public mischief, grave irreparable private injury or shake a citizen's faith in the impartiality of public administration, interim relief can be given."

33. Having given due considerations to various aspects as aforesaid and to the limitation aspect pleaded by the appellant involving Rs.30.00 crores and refund plea to the extent of Rs.20.00 crores raised on behalf of the appellant in the course of hearing, as an interim measure to work out the modality for protection of interest of revenue, following decision of Apex Court in Dunlop India's case – 1985 (19) ELT 22 (SC), we direct the appellant to make pre deposit of Rs.70.00 crores (Rupees seventy crores only) within 4 (four) weeks of receipt of this order and make compliance on 30.09.2009. Subject to such compliance, realization of balance demand shall be stayed till disposal of appeal."

14. In ***Ravi Gupta*** (supra), referred to by the learned senior counsel for the petitioner, the Apex Court reiterated the principle, firmly approved by series of judgments, that merely on showing a *prima facie* case, interim order of protection should not be passed. Such a

course of action is to be taken only *"if on a cursory glance it appears that the demand raised has no leg to stand"*.

15. We are afraid, the petitioner cannot pitch its case to that level as there are various thronging issues which are settled and cobwebs cleared. As per the respondents, in view of their submissions taken note of above, the case at hand is not that of plain and simple import of goods. The agreement makes it clear that MS provides services to the petitioner and the petitioner provides services to MS. The consumers are based in India, both destination and consumption is in India. Indian consumers pay for services which go out to the owners, namely, the Holding Company and part of it comes back to India in the shape of commission. Economic and commercial activities also take place in India. On the basis of these features, it is the argument of the respondent that entire performance is existed and becomes extinct in India. It is not the province of this Court, in these proceedings, to finally pronounce on these aspects and once we take the view that both sides have arguable case and final determination of these issues is to be done in the first instance by the Tribunal only, it would not be even wise to venture into that exercise. Insofar as the Tribunal is concerned, it has kept in mind all necessary parameters which are required to be gone into for deciding such applications for stay/waiver of pre-deposit and has passed an equitable order.

16. In exercise of our jurisdiction under Article 226 of the Constitution, we feel that it is not a fit case where one should interfere with the said order. This writ petition is, accordingly, dismissed. However, we grant four weeks time to the petitioner to make deposit of the amount as directed by the Tribunal for compliance. The parties shall appear before the Tribunal on 1st December 2009.

No costs.

(A.K. SIKRI)
JUDGE

(SIDDHARTH MRIDUL)
JUDGE

October 30, 2009
nsk