THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 03.05.2013

+ CEAC 27/2013 & CM No. 7071/2013 (stay)

M/S AIR INDIA LTD … Appellant

versus

COMMISSIONER ADJUDICATION, SERVICE TAX... Respondent

Advocates who appeared in this case:
For the Appellant : Mr P.K. Sahu, Adv. with Mr Prashant Shukla, Adv.
For the Respondent : Mr Satish Kumar, Adv.

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

BADAR DURREZ AHMED, J (ORAL)

1. This appeal is directed against the order dated 05.03.2013 passed by the Customs, Excise & Service Tax Appellate Tribunal (CESTAT) in Service Tax Stay No. 513/2012 in ST Appeal No. 243/2012. The Commissioner of Service Tax by virtue of the Order-in-Original dated 14.11.2012 had confirmed a service tax demand of ₹. 65,48,52,240/- against the appellant in respect of the year 2006-07. The said service tax demand had two components. The first component being in respect of alleged repair and maintenance service to the extent of ₹. 49.95 crores

and the other component being in respect of alleged business auxiliary service to the extent of ₹. 15.53 crores.

2. Insofar as the component pertaining to the alleged repair and maintenance service is concerned, the Tribunal was of the *prima facie* view that the service tax demand of ₹. 49.95 crores on this component did not appear to be sustainable. However, with regard to the service tax demand of ₹. 15.53 crores, the Tribunal, *prima facie,* held that the demand was on a strong footing. The Tribunal observed as under:-

> "7. As regards the service tax demand of ₹. 15.53 crores, this demand is in respect of payments made to General Sales Agents (GSAs) appointed by the appellant in various foreign territories for the services received by them. On perusal of the relevant clauses of the appellant's agreements with the GSAs as, reproduced in the impugned order, we are of the prima facie view that the services provided by the GSA to the appellant are covered by the definition of business auxiliary service as given in Section 65(19) of the Finance Act, 1994, as the GSAs appointed by the appellant not only represent the appellant abroad and provide various services on their behalf they also promote the sales of the services being provided by the appellant by undertaking various sales promotion activities. Since this service has been used by the appellant in India in relation to their business located in India, in terms of the provisions of Rule 3(1)(iii) of the Taxation of Services (provided from outside India and received in India) Rules, 2006, this service has to be treated as having been provided from outside India and received in India by the appellant and, therefore, in terms of the provisions of Rule 66 A of the Finance Act, 1994 read with Rule 21(d)(iv) of the Taxation Rules, 1994, the appellant as

> service recipient would be liable to pay service tax on the same. We are, therefore, of the prima facie view that the service tax demand of ₹. 15.53 crores is on strong footing. As regards question of limitation, since the same is a mixed question of fact and law, the same can be examined only at the time of final hearing."

3. It is on this basis that the Tribunal, *prima facie*, held that out of the total service tax demand of ₹. 65,48,52,240/-, the service demand of about ₹. 15.53 crores appeared to be on strong footing. However, taking the financial hardship of the appellant in consideration, the Tribunal directed the appellant to make a pre-deposit of ₹. 8 crores within a period of 8 weeks from the date of the order.

4. The learned counsel for the appellant submitted before us that pre-deposit of the entire amount of tax demanded ought to have been waived by the Tribunal inasmuch as the financial position of the appellant was very precarious. The fact that the appellant was going through a financial crisis has been recognised by the Tribunal itself in its orders dated 29.11.2011 and 12.10.2012, though those orders pertained to different services and different periods. The order dated 29.11.11 was passed by the Tribunal in ST/S431/2010/ in ST Appeal No. 265/2010 in the case of ***National Aviation Co. of India v. CCE.*** In that order, in paragraph 8 it was specifically mentioned as under:-

> "But considering the financial hardship faced by this company, wholly owned by the Government of India we waive the full dues arising from the impugned order for hearing of the Appeal. There shall be stay on collection of such amounts during the pendency of the appeal."

The order dated 12.10.2012 was passed by the Tribunal in ST/Stay Application No. 291/2010 in ST/Appeal No. 187/2010-(DB) in the case of ***Air India Limited v. CCE.***. In that order also the Tribunal recognised the fact that the appellant was undergoing financial difficulties. This would be apparent from the paragraph 17 of the said order which reads as under:-

> "17. Considering the fact that the appellant is a national carrier under the ownership of Government of India presently facing serious financial difficulties and in view of the overall appreciation of the issues involved as analyzed above we consider it proper to waive the requirement of pre-deposit of dues arising from the impugned order for admission of appeal. It is ordered accordingly. There shall be stay on collection of dues arising from the impugned order during the pendency of appeal."

5. In the present case, the learned counsel for the appellant submitted that even in respect of the demand of ₹. 15.53 crores, the Tribunal ought to have taken a *prima facie* view in favour of the appellant. The learned counsel referred to the provisions of section 66A of the Finance Act, 1994 and, in particular, to sub-sections (1) and (2) thereof as also to Explanations 1 and 2 therein. According to the learned counsel for the appellant, the purported "business auxiliary service" which was allegedly rendered was, in any event, entirely rendered and received outside India and therefore there was no question of payment of service tax in India in respect

thereof. The learned counsel for the appellant also submitted that the contract with the GSA (General Sales Agent) was also entered into in Hongkong. Furthermore, the ultimate beneficiaries of the services were customers located abroad. On the other hand, the Tribunal has taken a prima facie view that the demand of Rs. 15.53 crores stands on a strong footing.

6. We have also heard the learned counsel for the respondent on this issue as well.

7. After examining the issue at some length, we feel that the provisions of section 66A would require interpretation and the issue according to us is not so clear-cut and is debatable. In these circumstances, and particularly in view of the fact that the financial hardship of the appellant has already been recognised by the Tribunal in other orders dated 29.11.2011 and 12.10.2012, which we have referred to above, in our opinion, the entire amount of tax, penalty and interest demanded ought to have been waived as a condition for hearing the appeal. Consequently, we modify the order of the Tribunal by directing that there shall be full waiver of the requirement to pre-deposit the tax, penalty and interest. The appeal of the appellant before the Tribunal shall be heard without insisting on any pre-deposit. It is obvious that the respondent shall also not press for recovery of the tax, penalty and interest amount till the disposal of the appeal by the Tribunal.

8. The appeal is allowed to the aforesaid extent. There shall be no orders as to costs.

BADAR DURREZ AHMED, J

VIBHU BAKHRU, J

MAY 03, 2013

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