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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Jun-18-2004

Reported in : (2006)3STR297

Judge : J Balasundaram, A M Moheb

Appellant : Bajaj Auto Ltd.

Respondent : Commissioner of Customs and

Judgement :

1. This stay application for waiver of pre-deposit and stay of operation of the impugned order arose out of the order of the Commissioner (Appeals) who in the impugned order confirmed the order of the lower authority demanding service tax of Rs. 3,74,01,709/- computed at the rate of 5% of the total value of taxable service of Rs. 74,80,34,172/- paid by the applicant to M/s. Kawasaki Heavy Industries, Kobe, Japan (M/s. KHI), ordered recovery of interest of the amount of service tax as per Section 75 of the Finance Act, 1994 and imposed a penalty of Rs. 3,84,500/- upon the applicant.

2. Briefly the facts are that the applicant is engaged in the manufacture of two/three wheeled motor vehicles. The applicant made payments on account of technical know-how and royalty to the foreign company, M/s. KHI. These charges were paid by the applicant to the above said foreign company as per the terms and conditions laid down in the agreements dated 9.5.1998, 2.2.2000 and 7.11.2000. As per article 5.02 of the agreement dated 9.3.1998 for technical

information, the applicant acquired the technical know-how from M/s. KHI for developing and manufacturing and assembly of motor cycles. As per Section 65 of the Finance Act, 1994 the taxable service in respect of consulting engineer means "Any service provided to a client by a 'Consulting Engineer' in relation to advice, consultancy or technical assistance in any manner in one or more discipline of Engineering." The lower appellant authority ruled that M/s. KHI provided taxable services, i.e.

services of technical assistance, supply of technical know-how etc. to the applicants and such services are covered within the ambit of the definition of Consulting Engineer.

3. In terms of Rule 6 of the Service Tax Rules, 1994 in case a person is non-resident or is operating from outside India and does not have any office in India and is liable to pay service tax on the taxable services provided in India, the service tax thereon shall be paid by such person or on his behalf by any other person authorised by him. In the instant case, M/s. KHI were operating from abroad and did not have any of their establishment/office in India. The service tax was accordingly required to be paid by the applicant on behalf of M/s. KHI.4. The applicant argued that in accordance with the decision by the Supreme Court in *Laghu Udyog Bharati v. UOI* (1999 (112) ELT 365), service tax is a levy on the person rendering services who alone can be regarded as an assessee and not the customer. In the present case, the service provider is a company situated abroad and the applicant is only a service receiver. As the receiver of service, he is not liable to service tax under the provisions of the Finance Act, 1994. Further, it is argued that the services provided by the foreign company in the form of technical know-how do not constitute service provided by a consulting engineer. The department cannot collect service tax from the receiver simply because that the agreement between the applicant and the foreign company provides for discharge of all taxes to be paid in India by the Indian party. It is also argued that an agreement and its provisions cannot override the statutory provisions in respect of levy of tax. Thus, whatever the agreement says the fact remains that the present applicant is only a receiver of service and therefore is not liable to pay any tax on services rendered by a foreign company. A question also arose about levy on the

running royalty which the applicant pays to the foreign company and whether it could be called as a taxable service.

5. The applicant prayed for waiver of pre-deposit of the amounts demanded in the impugned order and stay recovery thereof during the pendency of the appeal as several questions of law arise out of the demand.

7. We observe that the issues raised in the application for stay are debatable. The main issue whether a service receiver is obliged to discharge service tax in view of an agreement with the supplier of service that he (through Indian party) should discharge all taxes payable by the foreign company. It is a fact that the applicant is not an agent or an authorised person of the foreign company in India. At best, he can be called a client. Rule 6 of Service Tax Rules provides that an authorised person or an agent of the foreign company is obliged to discharge tax liability insofar as service tax is concerned, on behalf of a foreign service provider. From the facts of the case, it is debatable whether the applicant can be called an authorised person or an agent of the service provider operating from a foreign land. We observe that the applicant made a strong prima facie case in his favour. We are therefore of the opinion that this is a fit case for waiver of pre-deposit of the tax demanded in the impugned order.

However, taking into consideration the stakes involved and the debatable issues, we consider that this is also a fit case for hearing this appeal out of turn. We accordingly fix the hearing of the appeal on 9.8.2004.

8. In view of what has been stated above, we waive pre-deposit of service tax demanded and stay recovery thereof pending disposal of the appeal.

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