

Maveric Systems Ltd. Vs. Commissioner of Service Tax

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Tamil Nadu

Decided On : Jan-21-2008

Reported in : (2008)11STR133

Judge : P Chacko, K T P.

Appellant : Maveric Systems Ltd.

Respondent : Commissioner of Service Tax

Judgement :

1. In the impugned order, learned Commissioner has demanded service tax of over Rs. 1.05 crores from the appellants in respect of two services viz. 'Manpower Recruitment or Supply Agency's Service' and 'Technical Testing and Analysis Services', for the periods 16.06.2005 to 31.03.2006 and 01.07.2003 to 31.03.2006 respectively, in adjudication of a show-cause notice dated 02.02.2007, by invoking the extended period of limitation under the proviso to Section 73(1) of the Finance Act, 1994. He has also appropriated an amount of Rs. 5 lakhs already paid by the assessee, towards the said demand. He has also imposed penalties totalling to over Rs. 1 crore on the assessee. The present application seeks waiver of predeposit and stay of recovery in respect of the balance amount of service tax as also in respect of the penalties.

2. After examining the records and hearing both sides, we note that the appellants were engaged in the activity of software verification & validation and technical writing services during the relevant period.

In some cases, they undertook this activity under bipartite agreements with software developers like Infosys, i-Flex Solutions, Polaris etc.

In some of these cases, the activity was performed at the software developers' sites and, in the remaining cases, it was performed from the assessee's own premises. There were also cases in which the above activity was performed under tripartite agreements between the assessee, software developers and the former's clients like banks and financial service companies like GE Financial Services. In a few cases, standard software was customised. These activities were covered by demand of service tax amounting to over Rs. 95 lakhs. The rest of the demand is on 'Manpower Supply Service'. In this case, the demand is on the amount collected by the assessee from customers under bipartite agreements wherein it was provided that the consideration for the service to the customer be paid in terms of manpower. In this case also, manpower was supplied by the assessee for the above activity. The demand on this count is amounting to over Rs. 10 lakhs.

3. The case of the Revenue in relation to the main service is that software is 'goods' for the purpose of levy of service tax with effect from 01.07.2003 in terms of the apex court's judgment in the case of Tata Consultancy Services v. State of Andhra Pradesh and in terms of Board's Circular No. 81/2/2005-ST Dated 07.10.2005 and, therefore, service tax requires to be paid by the assessee from the said date in respect of the aforesaid activity of 'Technical Testing and Analysis' as defined under Section 65(106) of the Finance Act, 1994. The case of the assessee is that, for the material to be "goods" it should have been made and readied for marketing as per the apex court's ruling, but, in the present case, the entire activity was performed prior to that stage and, therefore, it would not qualify for levy of service tax in the category of 'technical testing and analysis' under Section 65(106) (ibid). We have also examined the definition of the above service, which reads as under: (106) technical testing and analysis" means any service in relation to physical, chemical, biological or any other scientific testing or analysis of goods or material or any immovable property, but does not include any testing or analysis service provided in relation to human beings or animals.

It appears that what was performed by the assessee was, admittedly, a scientific testing or analysis of software. Functionality, performance or usability of software was tested and certified for the benefit of the client. Prima facie, they were working on "material" which term has wider connotation than 'goods' or 'immovable property'. The activity was prima facie covered by definition of 'technical testing and analysis' as found by the Commissioner. Learned senior counsel has argued that, as the demand is based on the Supreme Court's decision dated 05.11.2004 and the Board's Circular dated 07.10.2005, it was not open to them to allege suppression of material facts by the assessee prior to the said dates. It is submitted that the relevant agreements and the connected materials were furnished to the department during 2005 and 2006 and, therefore, there was no suppression during such period also. In respect of the demand in the category of 'Manpower Recruitment or Supply Agency's service', it is submitted that the supply of manpower was incidental to the aforesaid activity and also that the assessee was not a 'Manpower Recruitment or Supply Agency' as defined under Section 65 of the Finance Act, 1994. In respect of the resting and analysis service relating to computer software, learned Counsel has also relied on CBEC's letter No. 334/1/2007-TRU dated 28.02.2007 containing a clarification on "management, maintenance or repair services". In that letter, it was noted that development of computer software continued to be not leviable to service tax being an Information Technology Service. It is argued by learned Counsel that, if that be so, the subject services, which were in the nature of aiding development of computer software, should also be regarded as not leviable to service tax.

4. After giving careful consideration to the submissions, we have found prima facie case against the demand of service tax on "manpower recruitment or supply agency's service" inasmuch as the real activity was software validation and testing the supply of manpower was incidental, thereto. The revenue has also not shown that the assessee was ordinarily engaged in the activity as 'Manpower Recruitment or Supply Agency' as defined under the Finance Act. However, we are not impressed with the arguments advanced by learned Counsel in respect of 'Technical Testing and Analysis Services'. Section 65(107) defines 'Technical Testing and Analysis Agency' as meaning any agency or person engaged in providing services in relation to technical testing and analysis. The definition of

'Technical Testing and Analysis' under Section 65(116) has already been noted earlier in this order and, according to this definition, any service in relation to scientific testing or analysis of "material", excluding any testing or analysis service provided in relation to human beings or animals, is a taxable service. Prima facie, by validating and testing software, the assessee was working on "material" in the manner defined under Section 65(106).

Prima facie, the demand of service tax amounting to over Rs. 95 lakhs is sustainable on merits.

5. At this stage, we turn to the plea or limitation. It is the assessee's case that all the relevant materials were made available to the department in 2005 and 2006. Prima facie, there appears to be suppression of material facts prior to the said period.

6. In an overall view of the matter, we direct the appellants to predeposit an amount of Rs. 20,00,000/- (Rupees Twenty Lakhs only) within five weeks and report compliance on 03.03.2008. In the event of due compliance, there will be waiver of predeposit and stay of recovery in respect of the penalties and the balance amount of service tax.

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