

M/S Municipal Corporation Jalandhar Vs. Cce, Ludhiana

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Dec-07-2011

Judge : THE HONOURABLE MRS. JUSTICE ARCHANA WADHWA, MEMBER (JUDICIAL) & THE HONOURABLE MR JUSTICE RAKESH KUMAR, TECHNICAL MEMBER

Appeal No. : Stay Application No.468 of 2011, Service Tax Appeal No.250 of 2011

Appellant : M/S Municipal Corporation Jalandhar

Respondent : Cce, Ludhiana

Advocate for Pet/Ap. : For the Appellant: A.R. Madhav Rao, Advocate. For the Respondent: Dr. Amresh Jain, Advocate.

Judgement :

PER MS. ARCHANA WADHWA, J.

1. The Commissioner vide his impugned order confirmed service tax of Rs.1,25,23,555/- against the appellants along with imposition of penalties u/s 78, 76 and 77 of the Finance Act, 1994.

2. After hearing both the sides, we find that the impugned order confirms two Show Cause Notices as detailed below issued to the noticee:-

(i) Show Cause Notice dtd. 27.11.08 proposing the demand of Rs.92,30,754/- for the period 1.05.06 to 31.03.08.

(ii) Show Cause Notice dtd. 20.10.09 proposing duty demand of Rs.48,18,165/- for the period 1.04.08 to 31.03.09.

3. The appellants entered into a contract with one M/s Shri Durga Publicity Service and certain other parties for investing into the construction of certain Built, Operate, Own and Transfer (BOOT) projects.

4. In return, the said parties were granted permission to put up specified number of sky-signs, unipoles, kiosks, lollipops etc. at different parts of Jalandhar-Kaparthala railway over bridge and also rent certain shops under the said railway over bridge constructed during the period 1.04.06 to 31.03.09. Such places given to the parties under the contract were being used by them for putting advertisements or further allotting the same to the advertisers.

5. The lower authority has confirmed service tax demand against the appellant on the ground that the above activities resulted in providing services falling under the category of "Sale of Space and Time for advertisement services". By referring to the definition of Sale of Space or Time for advertisement services' as appearing u/s 65(105)(zzzm) of the Finance Act, 1994, Commissioner has held that the agreement entered into by the appellants with companies for display of advertisements in the jurisdiction of Municipal Corporation, Jalandhar amounts to rendering of the said services, which are liable to be taxed.

6. Ld. Advocate appearing for the appellants draws our attention to the agreement between the appellants and M/s Durga Publicity Service and submits that the agency was to spend a sum of Rs.18 crores on the Jalandhar-Kapurthala railway line and in lieu of that obtained sole rights to display 199 nos. of illuminated/non-illuminated unipoles along with fixed number of sky signs with add-space. He submits that the amount collected by the Municipal Corporation is on account of advertisement tax, which is a statutory tax under the Punjab Municipal Corporation Act, 1976. He also submits that the applicants granted spaces to the agencies to put up structures and not space to advertise any products or services. He submits that the activity of granting of space for advertisements happens thereafter as and when the said parties who have received permission erect the structure, and grant the advertisement space on the structures for displaying products and services of various third parties. The said parties are registered with the service tax department under the impugned service category and are discharging service tax. He also assails the SCN on the point of limitation.

7. Ld. DR appearing for the revenue by drawing our attention to the definition of "Sale of Time or Space for Advertisement" submits that the definition of the service is the services provided by any person in relation to sale of space for advertisement, in any manner. As such he submits that unless the space is granted by the Municipal Corporation, the erection of sky signs etc. is not allowed. Further the expression 'in relation to' make the definition very wide. He also submits that the sides of the bridge have to be used for putting various advertisement signs. As such it can be safely concluded that the appellants have rendered service for "sale of space" and have collected money for the same, though as the cost of the construction of the bridge.

8. After appreciating the submissions made by both sides, we find that M/s Shri Durga Publicity Service have financed the project by Municipal Corporation. In lieu of that they have got the space for placing various advertisements on the unipoles, sky-signs, street light poles etc. for a number of 11 years from the date of payment of finances to Municipal Corporation.

9. Viewed it from other angle, we note that if the Municipal Corporation have themselves constructed the railway line or bridges etc. with their own finances and by selling the sides of the bridge, would have collected that amount from the other parties, the said activity would have 'prima-facie' amounted to providing sale of space or time for advertisements. In the present case, M/s Shri Durga Publicity Service has given the entire finances before hand to the Municipal Corporation for construction of the bridge and in turn has earned their right to space to be provided by the Municipal Corporation for putting up various advertisements etc. The appellants plea that the said money was realized as advertisement tax which is a sovereignty/State function, cannot be appreciated at this stage as rightly observed by the Commissioner that an amount of Rs. 11 crores cannot be said to be advertisement tax. Further, he has also referred to the agreement specifically stating that the noticee will not charge any advertisement tax, Tehbazari or any tax for the whole contract period. He has accordingly observed that this reflects that advertisement tax has to be over and above the amount charged by the noticee from its client. He has also observed that for collecting advertisement tax, there is no need to enter into an agreement with the assessee in as much as collecting tax is sovereign function which has to be unilaterally performed by the State or its entities. As such he has concluded that the amount paid to Shri Durga Publicity Service is actually rent for land or pole being rented to them for advertisements.

10. At this prima-facie stage, we agree with the findings of the adjudicating authority as we have already observed the Municipal Corporation has admittedly rented the space to Durga Publicity Service for placing the advertisements. The fact that Shri Durga Publicity Service paid service tax on the advertisements being placed by them on such sky-signs or poles etc., will not dilute the applicant's liability to pay service tax on "renting the space" for placing such advertisements. As such at this prima-facie stage, we find that applicants need to be put to some terms of deposit for the purpose of Section 35F of Central Excise Act.

11. However, we agree with the Ld. Advocate that in as much as in earlier SCN dtd. 27.11.08 stands issued to the appellants for the period 1.05.06 to 31.03.08, with subsequent SCN 28.10.09 for the period 1.04.08 to 31.03.09 would be prima-facie, partially barred by limitation. As such by taking into account the overall facts

and circumstances of the case, we direct the appellants to deposit an amount of Rs. 50 lakhs out of the total confirmed demand of Rs.1,25,23,555/-. The said deposit is required to be made within a period of 12 weeks from the date of pronouncement of the order. Subject to deposit of the above amount, the pre-deposit of balance amount of duty and entire amount of penalty shall stand waived and its recovery stayed during pendency of the appeal. Matter to come up for ascertaining compliance on _____.

Per: Sh. Rakesh Kumar:

12. I have gone through the order prepared by my learned sister. Since I am not in agreement with the same, I am recording a separate order.

13. The appellant Municipal Corporation, Jalandhar, entered into an agreement dated 17.7.2006 with M/s Shri Durga Publicity Service, Amritsar under which the latter were to invest Rs. 18 crores for construction of flyover on Jalandhar Kapurthala Railway line and in lieu of this, M/s Shri Durga Publicity were given sole right at 199 spots within the jurisdiction of Municipal Corporation of Jalandhar, including spots on the flyover, for putting up unipoles, kiosks, skysigns, lollipops etc for advertisement. There were similar agreement with other parties. The unipoles, kiosks, skysigns, lollipops etc erected by M/s Shri Durga Publicity and others at the spots permitted by the Appellant were used for advertisement or for sale of advertising space on them to others. The Appellant in terms of their resolutions approved by the Government of Punjab, Department of Local Government, charged advertisement tax on the revenue earned by various parties including M/s Shri Durga Publicity from the advertising space on the unipoles, kiosks, skysigns, lollipops etc. erected by them. The department is of the view that the Appellant by permitting the use of various spots by various parties for putting up unipoles, kiosks, skysigns, lollipops etc for advertisement have provided the service in relation to sale of advertising space or time taxable under Section 65(105(zzzm)) of the Finance Act, 1994 and treating the advertisement tax charged by the Appellant from various parties including M/s Shri Durga Publicity as the consideration for the service provided, seek to charge service tax on the same. On this basis, two show cause notices, dated 27.11.2008 and 20.10.2009 were issued to the Appellant for recovery of service tax amounting to Rs.92,30,754/- and Rs. 48,18,165/- respectively alongwith interest under Section 75 of Finance Act, 1994 read with Section 73 of Finance Act, 1994 and Section 75 ibid and also for imposition of penalty on them under Section 76, 77 and 78 ibid. The show cause notices were adjudicated by the Commissioner by a common order dated 16.11.2010 by which the service tax demands, as made in the show cause notices were confirmed alongwith interest and penalties were imposed on the Appellant under Section 76, 77 as well as 78 of the Finance Act, 1994. In this order the Commissioner has given a specific finding that the amount charged by the Appellant - Municipal Corporation, Jalandhar from M/s Shri Durga Publicity and others is not advertisement tax, but is actually rent for land or poles being rented to them for advertisement. The imposition of penalty under Section 78 on the Municipal Corporation has been justified by the Commissioner on the ground that the Municipal Corporation suppressed the fact regarding receipt of amounts from various parties for providing service in relation to sale of space for advertisement. Against this order of the Commissioner, this appeal alongwith stay application has been filed.

14. In course of hearing of the stay application, Shri A.R. Madhav Rao, Advocate the learned Counsel for the Appellant, emphasized that the agreements of the Appellant with various parties including M/s Shri Durga Publicity are licensing agreements under which M/s Shri Durga Publicity and other parties have been granted permission to put up unipoles, kiosks, skysigns, lollipops etc. at different places within the jurisdiction of Municipal Corporation for the purpose of advertisement, that the Appellant have not sold any advertising space and it is M/s Shri Durga Publicity and others who have sold the space for advertisement; that the amount received by the Appellant from M/s Shri Durga Publicity and other is advertisement tax levied by them in accordance with their resolutions duly approved by the Government of Punjab; that this advertisement tax, collected in exercise of sovereign and statutory function, cannot be treated as amount received for service in relation to sale of advertising space; that no taxable service has been provided by the Appellant; that the actual providers of taxable service of sale of advertising space are M/s Shri Durga Publicity and others who have put up unipoles, kiosks, skysigns, lollipops etc. and had sold the advertising

space on them, that granting of permission by the Appellant to various parties for putting up unipoles, kiosks, skysigns, lollipops etc. for advertisement cannot be treated as service in relation to sale of space for advertisement; that the unipoles, kiosks, skysigns, lollipops etc. erected by M/s Shri Durga Publicity and other to whom the permission in this regard has been granted by the Appellant, are owned by them not by the Appellant and, hence, there is no question of the Appellant having sold the advertising space on such unipoles, kiosks, skysigns, lollipops etc; that the department's case against the Appellant is without any basis; that the Appellant have a strong prima-facie case and, hence, the requirement of pre-deposit of service tax demands, interest and penalty may be waived for hearing of the appeal and recovery thereof may be stayed till the disposal of the appeal.

15. Shri Amresh Jain, Id. DR opposed the stay application by reiterating the findings of the Commissioner and emphasized that the Appellants agreements with M/s Shri Durga Publicity and others are nothing but the agreements for sale of advertising space and the amount charged by the Appellant as advertisement tax is nothing but the consideration for the service in relation to sale of advertisement space.

16. After considering the submissions from both the sides and on perusal of the records, I find that in terms of the Appellant's agreements with M/s Shri Durga Publicity and others, they have granted permission to M/s M/s Shri Durga Publicity and others to put up unipoles, kiosks, skysigns, lollipops etc at various places within the jurisdiction of the Municipal Corporation including some spots on the flyover whose construction has been financed by M/s Shri Durga Publicity. The actual space required for putting up unipoles, kiosks, skysigns, lollipops etc is very small. Unipoles and skysigns are illuminated or nonilluminated advertising sign frame structures (usually bill boards) mounted on a single steelpole or column. Kiosks are two sided rectangular bill boards put up on street light poles. Lollipops are illuminated advertisement signs mounted on poles. The poles or steel structures required for mounting these advertisement signs require very small space and as mentioned above, kiosks are put up on existing light poles. It is also clear that the unipoles, kiosks, skysigns, lollipops etc put up by various parties are their property and are not owned by the Appellant. The advertisement are put up on the space on the unipoles, kiosks, skysigns, lollipops etc., not on the land, which is very small or on light poles on which such unipoles, kiosks, skysigns, lollipops etc. have been erected/ mounted. In the expression service in relation to sale of time or space for advertisement, the advertising space whose sale can be taxed under Section 65 (105)(zzzm) of the Finance Act, 1994 is the space on bill boards, public places, buildings, bus shelters, conveyances etc and not the land on which bill boards, unipoles, kiosks, skysigns, lollipops etc. have been allowed to be erected. Permitting erection or fixation of bill boards, unipoles, skysigns etc by a person on his land or a corner of the terrace of his house for the purpose of advertisement cannot be said to be an activity in relation to sale of advertising space, as that person is in no way involved in sale of advertising space. The person who permits the use of his land or other immovable property for fixing poles/ structures for putting up bill boards for advertisement or a municipal corporation permitting fixation of kiosks for advertisement on street light poles are neither selling any space for advertisement nor are providing any service in relation to sale of space for advertisement. They have only permitted the use of their property, and such transactions cannot be treated as of service in relation to sale of time or space for advertisement. It is M/s Shri Durga Publicity and others who have created the advertising space available for their use for advertising or for sale to other advertisers by putting up unipoles, kiosks, skysigns, lollipops etc at spots permitted by the Appellant and, therefore, the Appellant cannot be treated as having sold the advertising space or having provided service in relation to sale of advertising space. The Commissioner has simply given a finding that the appellant are renting space to various entities including M/s Shri Durga Publicity for advertising for monetary consideration, without considering as to how mere giving permission to M/s Shri Durga Publicity and others for erecting unipoles, kiosks, skysigns, lollipops etc at various places, which would be used by them for the purpose of advertisement or selling advertisement space on those unipoles, kiosks, skysigns, lollipops etc, can be treated as sale of advertising space by the Appellant or service in relation to sale of advertising space. Moreover, it is difficult to accept that the advertisement tax charged by the Appellant on the advertisement revenue of M/s Shri Durga Publicity and Others on the basis of their resolutions ratified by the Government of Punjab is the consideration for the

alleged service in relation to sale of advertising space provided by them.

17. In my view, therefore, prima-facie the department has no case against the Appellant. Moreover, it is also prima-facie absurd to make allegation of suppression of facts with intent to evade payment of tax against a statutory body for providing basic civic services like Municipal Corporation, Jalandhar. In my view, therefore, this is a fit case for granting dispensation from the requirement of pre-deposit under Section 35F of the Central Excise Act, 1944 as applicable to service tax matter under Section 83 of the Finance Act, 1994. The requirement of pre-deposit of service tax demand, interest and penalty for the purpose of hearing of this appeal is, therefore, waived and recovery thereof is stayed till the disposal of the appeal. The stay application is allowed.

18. Since there is difference of opinion between Member (Tech) and Member (Judicial), the registry of the Tribunal is directed to place the case papers before Hon'ble President for nominating a third Member for decision on the following points of difference:

i) Is the activity of the Appellant, in the background of the fact of this case, prima-facie covered by Section 65(105) (zzzm) of the Finance Act, 1994 for being subjected to service tax as service in relation to sale of time or space for advertisement?

ii) Can the advertisement tax collected by the Appellant from M/s Shri Durga Publicity and Others on their advertisement revenue, under the Appellant's resolution ratified by Government of Punjab, be prima-facie called consideration for the service in relation to sale of advertising space alleged to have been provided by them?

iii) Is the Department's case against the Appellant without any basis and hence the requirement of pre-deposit under Section 35F of Central Excise Act, 1944, as made applicable to service tax matter by Section 83 of the Finance Act, 1994 must be waived or the Department has a prima-facie case and pre-deposit as proposed by the learned Member (Judicial) must be ordered for hearing of the appeal.

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