

CESTAT, BANGALORE BENCH

Pooja Marketing Agencies

v.

Commissioner of Customs & Central Excise, Hyderabad*

P.G. CHACKO, JUDICIAL MEMBER
AND M. VEERAIYAN, TECHNICAL MEMBER
STAY ORDER NO. 1404 OF 2012
APPLICATION NO. ST/STAY/456 OF 2009
APPEAL NO. ST/609 OF 2009
JULY 3, 2012

ORDER

P.G. CHACKO, JUDICIAL MEMBER - THIS APPLICATION FILED BY THE APPELLANT SEEKS WAIVER OF PRE-DEPOSIT AND STAY OF RECOVERY IN RESPECT OF THE ADJUDGED DUES WHICH INCLUDE AN AMOUNT OF RS. 52,82,725/- DEMANDED FROM THEM TOWARDS SERVICE TAX AND EDUCATION CESS FOR THE PERIOD 2003-05 UNDER THE HEAD 'BUSINESS AUXILIARY SERVICE' (BAS). ON A PERUSAL OF THE RECORDS, WE FIND THAT THE IMPUGNED DEMAND IS ON THE AMOUNTS COLLECTED BY THE APPELLANT FROM M/S. SHAW WALLACE DISTILLERIES LTD. (SWDL) DURING THE MATERIAL PERIOD AS CONSIDERATION FOR THE SERVICES RENDERED BY THE FORMER TO THE LATTER UNDER "AGREEMENT FOR SALES PROMOTION" DATED 20-8-2003. UNDER THE SAID AGREEMENT, THE APPELLANT WAS APPOINTED AS "PROMOTER" BY M/S. SWDL AND ACCORDINGLY THE APPELLANT HAD TO DISCHARGE CERTAIN RESPONSIBILITIES CLEARLY DEFINED UNDER THE AGREEMENT. THESE RESPONSIBILITIES INCLUDED PROCUREMENT OF SUFFICIENT QUANTITY OF PURCHASE ORDERS EVERY MONTH FOR VARIOUS PRODUCTS OF SWDL, MAINTENANCE OF EFFECTIVE FOLLOW-UP TO ENSURE SPEEDY CLEARANCE OF ANY CHANGES REQUIRED BY SWDL WITH REGARD TO PROCESSING, PACKING, SUPPLY SOURCE ETC., PLACING OF EXCISE DUTY-PAID INDENTS WITH SWDL'S MANUFACTURING UNITS FOR EFFECTING SUPPLIES, UNDERTAKING OF ANY PROMOTIONAL/MARKETING ACTIVITIES IN RESPECT OF SWDL'S BRANDS. THE AGREEMENT ALSO OBLIGATED THE APPELLANT TO SUBMIT PROPOSALS TO MAKE SECONDARY SALES OF SWDL BRANDS AND ENTITLED THEM TO REIMBURSEMENT OF ALL SALES/PROMOTIONAL EXPENSES. REFERRING TO THESE AND OTHER TERMS OF THE AGREEMENT, THE LEARNED COUNSEL FOR THE APPELLANT SUBMITS THAT

THE ACTIVITIES UNDERTAKEN BY THEM WERE PROPERLY CLASSIFIABLE AS 'BUSINESS SUPPORT SERVICES' (BSS) RATHER THAN AS 'BAS'. IT IS SUBMITTED THAT 'BSS' WAS NOT A TAXABLE SERVICE DURING THE PERIOD OF DISPUTE AND HENCE THE APPELLANT DID NOT HAVE ANY SERVICE TAX LIABILITY. IN THIS CONNECTION, THE LEARNED COUNSEL SUBMITS THAT THE REAL NATURE OF THEIR SERVICE WAS EXPLAINED WITH REFERENCE TO THE PROVISIONS OF THE ABOVE AGREEMENT, IN THEIR REPLY TO THE SHOW-CAUSE NOTICE, BUT THE SAME WAS NOT ACCEPTED BY THE ADJUDICATING AUTHORITY. THE LEARNED COUNSEL HAS ALSO CHALLENGED THE DEMAND ON THE GROUND OF LIMITATION. FURTHER, HE SUBMITS THAT THE APPELLANT WOUND UP THEIR BUSINESS IN 2005 ITSELF AND IS NOT FINANCIALLY CAPABLE OF MAKING ANY PRE-DEPOSIT.

2. WE HAVE HEARD THE LEARNED ADDITIONAL COMMISSIONER (AR) ALSO WHO OPPOSES THE PLEA FOR WAIVER AND STAY, ON THE STRENGTH OF THE FINDINGS RECORDED IN THE IMPUGNED ORDER. HE HAS ALSO EXTENSIVELY REFERRED TO THE RELEVANT PROVISIONS OF THE AFORESAID AGREEMENT. IT IS HIS SUBMISSION THAT THE ACTIVITIES UNDERTAKEN BY THE APPELLANT UNDER THOSE PROVISIONS WERE CLEARLY CLASSIFIABLE UNDER 'BAS'. AS THE APPELLANT NEVER TOOK ANY STEPS FOR GETTING THEMSELVES REGISTERED WITH THE DEPARTMENT OR TO FILE SERVICE TAX RETURNS OR TO PAY SERVICE TAX, WHILE RENDERING THE TAXABLE SERVICE TO SWDL WITHOUT DISCLOSING THIS FACT TO THE DEPARTMENT, THE EXTENDED PERIOD OF LIMITATION WAS RIGHTLY INVOKED AGAINST THEM.

3.1 AFTER GIVING CAREFUL CONSIDERATION TO THE SUBMISSIONS, WE ARE CONVINCED THAT THE APPELLANT HAS NO PRIMA FACIE CASE ON MERITS AGAINST THE IMPUGNED DEMAND. WE HAVE PERUSED THE RELEVANT PROVISIONS OF THE AGREEMENT. THOSE PROVISIONS BRING THE APPELLANT'S ACTIVITIES SQUARELY WITHIN THE AMBIT OF THE DEFINITION OF 'BAS'. ONE OF THE LIMBS OF THIS DEFINITION READS THUS:

"PROMOTION OR MARKETING OR SALE OF GOODS PRODUCED OR PROVIDED BY OR BELONGING TO THE CLIENT."

3.2 THE LEARNED COUNSEL HAS ENDEAVOURED TO BRING THIS ACTIVITY WITHIN THE AMBIT OF THE DEFINITION OF 'BSS', BUT WE ARE NOT IMPRESSED. THE PLEA OF LIMITATION ALSO IS FAR FROM CONVINCING. IT IS NOT IN DISPUTE THAT THE APPELLANT DID NOT DISCLOSE TO THE DEPARTMENT THE FACTUM OF HAVING BEEN RENDERING 'BAS' TO SWDL UNDER THE AFORESAID AGREEMENT DURING THE PERIOD OF DISPUTE. THEY DID NOT ATTEMPT TO OBTAIN THE REQUISITE REGISTRATION WITH THE DEPARTMENT, NOR DID THEY FILE THE STATUTORY RETURNS, NOR OF COURSE DID THEY PAY SERVICE TAX. UNDER THESE CIRCUMSTANCES, THE ALLEGATION OF SUPPRESSION OF FACTS WITH INTENT TO EVADE PAYMENT OF SERVICE TAX, RAISED IN THE SHOW-CAUSE NOTICE, CANNOT BE FAULTED. PRIMA FACIE, THEREFORE, THE IMPUGNED DEMAND CANNOT BE SUCCESSFULLY CHALLENGED ON THE GROUND OF LIMITATION. IN THE PRESENT STAY APPLICATION, THERE IS NO ACCEPTABLE PLEA OF FINANCIAL HARDSHIPS. NEVERTHELESS, WE ARE NOT INCLINED TO INSIST ON FULL PRE-DEPOSIT IN THE CIRCUMSTANCES OF THIS CASE. WE DIRECT THE APPELLANT TO PRE-DEPOSIT AN AMOUNT OF RS. 20 LAKHS (RUPEES TWENTY LAKHS ONLY) WITHIN 6 WEEKS AND REPORT COMPLIANCE TO THE ASSISTANT REGISTRAR ON 10-9-2012. ASSISTANT REGISTRAR TO REPORT TO THE BENCH ON 17-9-2012. SUBJECT TO DUE COMPLIANCE, THERE WILL BE WAIVER OF PRE-DEPOSIT AND STAY OF RECOVERY IN RESPECT OF THE PENALTIES IMPOSED ON THE APPELLANT AND THE BALANCE AMOUNT OF SERVICE TAX AND EDUCATION CESS AND INTEREST THEREON.