

(2023) 07 CESTAT CK 0004

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Service Tax Appeal No. 11851 Of 2016

Anjani Excavation Operation

APPELLANT

Vs

Commissioner Of Central Excise & ST, Bharuch

RESPONDENT

Date of Decision : 05-07-2023

Acts Referred:

Special Economic Zones Rules, 2006 — Rule 31

Finance Act, 1994 — Section 78

Special Economic Zones Act, 2005 — Section 26, 26(1)(e), 51

Citation : (2023) 07 CESTAT CK 0004

Hon'ble Judges : Ramesh Nair, Member (J); C.L. Mahar, Member (T)

Bench : Division Bench

Advocate : Nimish S Desai, Kalpesh P Shah

Final Decision : Allowed

Judgement

Ramesh Nair, Member (J)

1. The brief facts of the case are that the appellant is registered with the Service Department for taxable services viz. "Site formation and clearances, excavation and earthmoving and demolition" Service. During the course of audit of record of the appellant by the internal audit team of Vadodara Audit -II, Commissionerate, Surat, it was noticed that M/s ONGC Petro Additions Ltd. (M/s OPAL), a SEZ unit situated at plot No. Z-1 & Z-83, Dahej Special Economic Zone, Dahej, had appointed M/s. IVRCL Infrastructure and Project Ltd. (M/s IVRCL) as contractor for carrying out work and providing services as per their contract. In turn, M/s IVRCL have entered into a sub-contract with Appellant for performing various works such as Excavation Services, Soil Filling Services etc. falling under the category of "Site Formation and clearance, excavation and earthmoving and demolition" Services, to be carried out at site of M/s OPAL, Dahej. In terms of contract appellant has provided service to M/s IVRCL and they did not pay the service tax, as service were provided to SEZ units i.e. M/s OPAL and thus are exempt from service tax under Notification No. 09/2009-ST dated 03.03.2009 as

amended by Notification No. 15/2009-ST dated 20.05.2009 and subsequent exemption Notification No. 17/2011-ST dated 01.03.2011 and 40/2012-ST dated 20.06.2012. As per revenue the service tax exemption is available to services received by a Developer or units of SEZ with approval from the approval committee. In the instant case, the Appellant does not have approval from the competent authority to provide the services to Developer or SEZ units i.e. M/s OPAL. Further the Appellant has provided services to M/s IVRCL, who is the "Contractor" appointment by M/s OPAL. Thus, appellant has not satisfied the conditions specified in the Notification No. 09/2009-ST dated 03.03.2009 as amended by Notification No. 15/2009-ST dated 20.05.2009. Revenue also observed that appellant had provided services to M/s Fernas Constructions Pvt. Ltd., another contractor appointment by M/s OPAL and had also provide services to M/s Gannon Drunkenly & Co. Ltd., a contractor appointed by M/s. Torrent Energy Ltd., Dahej SEZ. The revenue alleged that the Appellant had wrongly availed the benefit of exemption Notification No. 9/2009-ST dated 03.03.2009 as amended by Notification No. 15/2009-ST dated 20.05.2009 as well subsequent exemption Notification No. 17/2011-ST dated 01.03.2011, No. 40/2012-ST dated 20.06.2012 and Notification No. 12/2013-ST dated 01.07.2013 relating to services provided to SEZ units or Developer, which resulted in non-payment of Services tax to the tune of Rs. 1,95,31,310/-.

2. Accordingly, a show cause notice was issued to the Appellant, it proposed to demand of Service tax along with interest and penalty. The show cause notice was adjudicated vide impugned Order-in-Original No. BHR-EXCUS-000-COM-032-16-17 dated 13-07-2016, whereby the proposed demand was confirmed with interest and equal amount of penalty was imposed under Section 78 of the Finance Act, 1994. Being aggrieved, the appellant is before this Tribunal.

3. Shri Nimesh S. Desai, Ld. Advocate appearing on behalf of the Appellant submits that undisputedly appellant provided the disputed services in terms of contract by the main contractors at the site of SEZ units (M/s OPAL and M/s Torrent Power). That usually, for the services transaction take place between two parties, i.e. Service provider and Service receiver but in the present case there are three parties to the transaction. If sub-contractor are providing services to the main contractor for completion of main contract, then service tax obviously not leviable on the services provided by such sub-contractor. Unequivocally, appellant qua sub-contractor had provided services exclusively to SEZ units and also wholly consumed by the SEZ units, hence not liable to service tax. He placed reliance on the Board Circular No. 147/16/2011-ST dated 21.10.2011 and following decisions.

(i) L& T vs. State of Andhra Pradesh – (2006) 148 STC 616(AP)

(ii) State of Andhra Pradesh Vs. Larsen & Toubro (2008) 16STT 501 =17VST 1(SC)

4. Further by relying the provisions of SEZ Act and Rules he submits that services rendered by the Appellant are fully exempted from service tax in terms of the provisions of the SEZ Act, the condition of exemption by way of refund imposed under the Notification issued under the Finance Act would be inconsistent with the provisions of the SEZ Act. It also needs to be noted that the SEZ Act was enacted in 2005, much after the enactment of the Finance Act in 1994. The Notification has been issued only to operationalize the exemption/immunity available to SEZ units under Section 26(1)(e) of the SEZ Act, 2005. Service tax exempted by the Section 26 of SEZ Act, 2005. Thus, exemption Notification itself not necessary. Hence, the appellant has rightly availed the exemption.

5. He also submits that the conjoint reading of Section 26(1)(e) of SEZ Act with Rule 31 of SEZ Rules would show that the only condition required for availing exemption from payment of service tax by developer/entrepreneur/ unit is that the taxable services should be used for the carrying on the authorized operations by the Developer/Entrepreneurs/Unit. The location of the service provider or the place of service is entirely irrelevant for this exemption. It is worthy to mention that, the relevant Rule 31 of SEZ Rules, 2006 was in operation during the disputed period 2010-11 to 2013-14.

6. He further submits that the provisions of an Act which provide for an exemption from a tax have to be interpreted strictly. It is well settled legal principle that in a taxing statute, the provision has to be read in it's as is form. There is no room for any intendment or import external terms. In view of the plain language to include a condition that, the exemption would be available only if the services are rendered within SEZ. Ipso facto, services were rendered within SEZ and that too to the SEZ unit for authorized operation in the present case. Therefore, subsequent notification inserted purports to add a new condition without proper application of mind and in colourable and mechanical exercise of powers. The impugned notifications have no nexus with the object and purpose of SEZ Act and SEZ Rules which was to provide impetus to exports. The impugned Notification has virtually attempted to defeat the object with which the SEZ Act/ SEZ Rules were formed.

7. He also submits that SEZ Act & Rules are benedict and tailored specifically for the purpose to attain robust growth in the export. SEZ Act and Rules made thereunder suggests that, specified services received by the SEZ unit are exclusively used for the authorized operations in the given facts, the person liable to pay service tax has option not to pay service tax ab-initio. It is settled law that, subsequent notification not to undo benefit conferred under earlier notification. Thus, impugned notification sought to introduce new conditions which are not prescribed by the SEZ statutory provision and therefore interpretation of the Notification is contrary to the SEZ Act and SEZ Rules. Therefore, a reading of Section 51 would clear that the provisions of SEZ Act are paramount and anything contrary to the said provision will be overridden,

meaning SEZ Act/ Rules are still holding the field and boils down to procedural lapses.

8. In support of above view he placed reliance on the following decisions.

(i) M/s DIC Fine Chemicals Pvt. Limited vs. CCE, Final Order No. A/12278-12279/2022 dated 23.12.2022

(ii) Intas Pharma Limited vs. CST 2013(32) STR 543 (Tri. Ahmd.)

(iii) Reliance Ports and Terminals Limited vs. CCE- 2015(40)STR 200 (Tri. Ahmd.)

(iv) Sudhir Chand Jain vs. CCE – 2018(8)GSTL 302 (Tri. All)

(v) CST Vs. Fedco Paints and Contracts – 2017 (3) GSTL 364 (Tri.-Mumbai)

(vi) SRF Limited vs. CCE &ST -2022 (64)GSTL 489 (Tri. Del.)

(vii) Wabco India Limited vs. CGST &CE (Tri. Chennai) -2021 (54) GSTL 37 (Tri. Chennai)

(viii) Torrent Energy Limited vs. State of Gujarat [SCA No. 14856 of 2010 and SCA 711 of 2014]

9. He also argued that in the present matter demand is time barred, since time to time appellant had filed statutory return so department cannot take stand that it is only during the audit it can examine the factual position. Thus it cannot be urged by the department that if the officers of the team would not have conducted the audit, non-payment of service tax would not have unearthed. He also placed reliance on the following judgment.

(i) Gannon Dunkerly & Co. Limited vs. Commr. (Adj)- 2021 (47) GSTL 35 (Tri. Del.)

(ii) Sahitya Mudranalaya Pvt. Limited vs. ADG – 2021(46)GSTL 245 (Guj)

(iii) SEM Construction vs. CCE & ST 2021 (44) GSTL 385 (Tri. Ahmd)

(iv) Tata Steel Limited vs. CCE & ST – 2020 (38)GSTL 62 (Tri. Kolkata)

(v) Sujana Metal Products Limited vs. CCE – 2011 (273)ELT 112 (Tri. Bang.)

10. On other hand Shri. K.P. Shah, Ld. Assistant Commissioner (AR) appearing for the revenue reiterates the finding of impugned order.

11. We have carefully considered the submissions made by both sides and perused the records. After going through the appeal records, we find that the main ground of Revenue in the present matter is that Notifications and SEZ Act and Rules provides exemption from payment of Service tax on taxable services provided to a Developer or SEZ unit for carrying out the authorized operation in a Special Economic Zone, but there is no provision for exemption for services provided by sub-contractor to contractors appointed by a Developer or Unit in the SEZ Act. In the present matter SEZ units appointed main contractors for

carrying out work and main contractor appointed to Appellant as sub-contractor for carrying out works of SEZ units. Further in term of Notification No. 9/2009-ST dated 03.03.2009 service tax exemption is available to services received by the Developer of units of SEZ with approval from the approval committee. In the instant case appellant does not have any approval form the competent authority to provide the services to Developer or SEZ units. In terms of said Notification No. 9/2009 -ST, as service provider who provides services to SEZ units or developers of SEZ, has to pay Service tax on services so provided on which service receiver i.e. SEZ units or developer of SEZ may claim refund.

12. We find that even though the sub-contractor provided the service as sub-contractor to the main contractor but it is not under dispute that the service was provided in the SEZ which prima-facie show that services were provided by the appellant as sub-contractor which was ultimately received by the SEZ developer or unit in SEZ. As per the decisions cited by the learned Counsel, in some of the case laws, identical issue has been considered where the service was provided by sub-contractor even then the exemption notification was extended under Notification No. 9/2009-ST and/ or 15/2009-ST.

13. It is also the contention of the Revenue that the services provided by sub-contractor are not approved. In this regard we find that it is not the service provider specific if the services are approved in relation to the main contractor, there should not be any need of separate approval of list of services with the sub-contractor. Moreover, in the judgments cited by the appellant, it was also held that the approved list of services is only a procedural requirement which should not come in the way of granting substantial benefit of notification. It is also submission of the appellant that there are judgments on the issue that in the SEZ Act the exemption from duty and service tax is provided which prevails over the other Acts therefore, in this position, only on the basis of the subordinate legislation and procedural lapse thereof, the exemption provided in the parent Act i.e. SEZ Act, cannot be denied. All these aspects need to be reconsidered by the Adjudicating Authority.

14. Accordingly, we set-aside the impugned order and allow the appeal by way of remand to the Adjudicating Authority to pass a fresh order considering our above observations and also the judgments on all the issues involved herein. The appeal is allowed by way of remand to the Adjudicating Authority.