(2024) 03 CESTAT CK 0021

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Service Tax Appeal No. 11422 Of 2014

C.C.E. & S.T.-Rajkot APPELLANT

Vs

PSL Ltd RESPONDENT

Date of Decision : 18-03-2024

Acts Referred:
Finance Act, 1994 — Section 65(25b)

Citation : (2024) 03 CESTAT CK 0021

Hon'ble Judges : Ramesh Nair, Member (J);Raju Member, (T)

Bench : Division Bench

Advocate : Ajay Kumar Samota, Amber Kumrawar

Final Decision : Dismissed

Judgement

Ramesh Nair, Member (J)

1. The issue involved in the present case is that whether the appellant is liable to pay service tax on the services of laying Pipes were provided to Government of Gujarat under ?Sujalam Sufalam Yojana? and the same was not provided for commercial purpose or otherwise.

2. Shri Ajay Kumar Samota, learned Superintendent (AR) appearing on behalf of the Revenue/Appellant reiterates the ground of the appeal. He submits that for the purpose of laying of pipe line, erection Commissioning and Installation services do not exclude any non commercial activity. Therefore, the learned Counsel relying on the board circular, wrongly dropped the demand.

3. On the other hand, Shri Amber Kumrawat Learned Counsel appearing on behalf of the Respondent/Assessee at the outset submits that the Revenue filed the present appeal only on ground that the judgment whereby the issue is covered in the case of Larsen & Toubro Ltd Vs. CST, 2011 (22) STR 459 (1) has been appealed against by the Revenue before the Hon?ble Gujarat High Court. He submits that merely by filing the appeal the binding effect of the Tribunal order cannot be ignored, particularly when there is no stay by the Hon?ble High

Court. Therefore, Larsen & Toubro Ltd decision of this Tribunal prevails and the learned Commissioner could have followed the binding president. He further submits that the issue is covered by various following judgments:-

? CCE VS PSL Ltd, 2013 (31) STR 570 9T

? Larsen & Toubro Ltd Vs CST, 2011 (22) STR 459 (1)

? Commissioner Vs Larsen & Toubro, Tax Appeal No. 1199 of 2011 Order dated 18.04.2012 issued on admission of department appeal preferred against the Order of CESTAT Ahmedabad in L&T (Supra)

? Indian Hume Pipe Co. Ltd Vs CCE, 2008 (12) STR 363 (T)

? A.Sekar Vs CCE, 2010 (19) STR 82 (T)

? Shree Hindustan Fabricators Vs CCE, 2020 92) TMI 110- CESTAT-Ahmedabad

? CGST VS BMS Projects Pvt. Ltd, 2018 (8) GSTL 13 (Guj.)

? Indian National Shipowners Association Vs UOI, 2009 (13) STR 235 (Bom) Affirmed by the Supreme Court of India in 2010 (17) STR J57 (S.C)

? Hindustan Zinc Ltd Vs CCE, 2008 (11) STR 338 (Tri-LB) Affirmed by the Supreme Court of India in 2009 (14) STR J125 (S.C)

? Nizam Sugar Factory Vs CCE, 2006 (197) ELT 465 (SC)

? NRC Ltd Vs CCE, 2007 (5) STR 308 (T)

4. We have carefully considered the submission made by both the sides and perused the records. We find that the learned commissioner has dropped the proceeding relying on the following judgments :-

? Sekar Vs. CCE Trichy [2010 (19) STTR 82 (Tri.- Chennai)]

? Indian Hume Pipe Co. Ltd. Vs CCE [2008 (12) STR 363 (Tri.- Chennai)]

? Dinesh Chandra Agrawal Infracon P. Ltd. Vs. CCE Trichy [2011 (21) STR 41 (Tri.- Ahmd)]

? Larsen & Toubro Ltd. Vs. CST Ahmedabad [2011-TIOL-218- CESTAT-AHD]

4.1 The Revenue filed the present appeal only on the ground that the judgment whereby the issue is covered in the case of Larsen & Toubro Ltd., the Revenue has challenged the same and the revenue appeal is pending before the Hon?ble Gujarat High Court. We do not agree with this contention of the Revenue because unless until there is a stay, the Tribunal decision is binding on the department, as held by the Hon?ble Supreme Court in the case of Union of India V. Kamlakshi Finance Corporation Ltd.- AIR 1992 SC 711 according to which the Tribunal decision is binding on the departmental officer. Therefore, the impugned order passed relying on the Larsen & Toubro Ltd judgment as well as Indian Hume Pipe Co. Ltd ? 2008 (12) STR 363 (Tri-Chennai) decision, the same does not suffer from any infirmity. The judgment of Larsen & Toubro Ltd is reproduced below:-

?3. At the end of hearing, the learned SDR had requested for permission to make written submission, which was granted by the Bench. Accordingly, written submissions were made by the learned SDR and submitted on 11-10-10, which in turn, were forwarded to the learned Advocate appearing for the appellant, by this Tribunal on 9-11-

10. The learned Advocate has taken serious objection to this process. He has submitted that because of the complexity involved in the proceedings, oral hearing is prescribed, whereby through dialogue issues can be debated and clarified. He submitted that the issues raised by the department were argued and replied by the appellant?s counsel and therefore the department should not have be given another opportunity to make written submissions in writing. However, he has not cited any specific provisions of statute or precedent decisions to support this view. We do not understand how the appellant has been prejudiced by allowing the department to make written submissions especially when the Tribunal has taken care to ensure that copy of the written submissions was sent to the learned advocate so that he also can make written submissions in response.

In the absence of citation of any specific statutory provision or judicial precedent, this objection deserves to be overruled and rejected.

4. The definition of commercial or industrial construction service as defined under Section 65(25b) of Finance Act, 1994 is as under :

? ?Commercial or Industrial Construction Service? means -

(a) construction of a new building or a civil structure or a part thereof; or

(b) construction of pipeline or conduit; or

(c) completion and finishing services such as glazing, plastering, painting, floor and wall tiling, wall covering and wall papering, wood and metal joinery and carpentry, fencing and railing, construction of swimming pools, acoustic applications or fittings and other similar services, in relation to building or civil structure; or

(d) repair, alteration, renovation or restoration of, or similar services in relation to, building or civil structure, pipeline or conduit, which is -

(i) used, or to be used, primarily for; or

(ii) occupied, or to be occupied, primarily with; or

(iii) engaged, or to be engaged, primarily in,

commercial or industry, or work intended for commerce or industry, but does not include such services provided in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams;?

5. The issues to be considered by us are whether by purchasing water at one rate and selling at higher rates, the pipeline constructed can be said to be used or to be used primarily for commerce or industry so that the activity undertaken by L&T for GWSSB becomes liable to Service Tax. Whether the extended period can be invoked on the ground that the appellant did not declare the information regarding the service rendered by them, thereby suppressing the fact with intent to evade tax and under these circumstances whether the penalty is imposable or not.

6. The learned Advocate on behalf of the appellant relied upon the decision of the Tribunal in the case of M/s. Nagarjuna Construction Co. Ltd. v. CCE - 2010 (19) S.T.R. 259 (Tri.), wherein the Tribunal had considered the very same issue. In that case also, the pipeline was laid for GWSSB. The Tribunal took a view that laying of pipeline for GWSSB for supply of water is not taxable because the pipeline was laid under the contract was not for commerce or industry. The Tribunal, in that case, categorically rejected the argument that GWSSB was engaged in commercial activity because it was purchasing water at one price and selling at higher price to others.

7. The learned SDR, on the other hand, submitted that the decision of the Tribunal in the case of M/s. Nagarjuna Construction Co. Ltd. was rendered, relying upon the Tribunal?s decision in the case of M/s. Indian Hume Pipe Co. Ltd., reported in 2008 (12) S.T.R. 363 (Tri.-Chennai). It was submitted that the observation of the Tribunal that water supply project being infrastructure facility and civic amenity provided by State in public interest, not an activity of commerce or industry was only obiter dicta. In that case, the Tribunal was dealing with the scope of levy on ?erection, commissioning or installation? service and the Tribunal had clearly come to the conclusion that the service provided in that case was not covered by any of the three expressions used in the service and therefore the observation about water supply project had no relevance to the issue to be decided. Learned SDR cited the judgments in the case of M/s. Ulhas Oil & Chemical Indus. P. Ltd. v. H.M. Singh as reported in 1988 (36) E.L.T. 462 (Bom.) and in the case of M/s. Spie Capag S.A. v. CCE, Mumbai as reported in 2009 (243) E.L.T. 50 (Tri-Mumbai), to submit that the opinion of Court on any issue not necessary for deciding the dispute, cannot be considered as a ratio of that case.

8. The second submission made by the learned SDR in this regard was that the decision in the case of M/s. Nagarjuna Construction Co. Ltd. cannot be applied so that the Tribunal had not considered the meaning of ?commerce? in detail. It was submitted that for deciding the issue, the meaning of the word ?commerce? was sine-qua-non. He relied upon the decision in the case of Chairman, Madhya Pradesh Electricity Board and Others v. Shiv Narayan & Another in Civil Appeal No. 1065/2000 as reported in 2005 (7) Supreme Court 283 and the decision of Hon?ble High Court of Orissa in the case of M/s. National Press v. State of Orissa as reported in 1973 (32) STC 341 (Orissa), to submit that the word ?commerce?

has nothing to do with sale for profit. It would only mean buying and selling and in terms of above two decisions, the activity in this case is ?commerce? and result of the activity which may be profit, loss or even no profit or loss, is not relevant. He also argued that the meaning of the term ?commerce? or ?industry? used in the definition have to be understood as they are commonly used. The words have been used to identify a category of activity. The definition does not talk about the status or the definition of the receiver. From the plain reading of the definition of the service, it is apparent that any service receiver irrespective of its status or definition or composition, if utilizing the pipeline for ?commerce? or ?industry? will render the service provider liable for Service Tax.

9. First of all, we find the claim of the learned SDR that the Tribunal did not consider the meaning of ?commerce? while rendering the decision in the case of M/s. Nagarjuna Construction Co. Ltd. case, is not correct. The relevant Paragraph 9 of the decision is reproduced below.

?9. We find that GWSSB discharges an important duty and responsibility of the Government to provide drinking water to the people residing in its jurisdiction. As per the Gujarat Act, GWSSB is constituted mainly to ensure supply of drinking water and maintenance of sewerage system in the jurisdiction of the said Board. In the coming days water could be a precious commodity traded for profit and supply of water entailing that business would constitute ?industry?. However, production of drinking water to the community in Gram Panchayat?s and Nagar Panchayats in the State on recovery of user charges at a highly subsidized rate, we find, does not come within the expression ?industry? used in the definition of the taxable entry in question. From the figures of revenue of the Board for the year 2005-06, we find that above 90% of its revenue came from sale of water to local bodies rural population. The revenue was less than l/3rd of the cost incurred to maintain water supply by the Board. The Board is run by substantial amounts released by the State Government as grant every year. These facts show that the pipeline in question were not laid to facilitate any commercial or industrial activity. We find that in the decision of the Tribunal in Indian Hume Pipe Co. Ltd. v. CCE, Trichy reported at 2008 (12) S.T.R. 363 (Tri.-Chennai) which dealt with taxability of long distance pipeline laid by the appellant therein under the entry ?erection, commissioning or installation? of the Act held as follows :

?We also find that a water supply project is an infrastructure facility and a civic amenity the State provides in public interest and not an activity of commerce or industry. The impugned order also did not hold it to come under a service of commercial or industrial nature as submitted by the ld. Consultant for the Revenue. Therefore, the impugned order demanding duty on the activity of laying of pipeline interpreting it to be erection, commissioning and installation of a plant is totally misconceived and unacceptable.??

The portion of above paragraph starting from ?from the figures of revenue ??.any commercial or industrial activity?, shows that the Tribunal did consider whether the activity was ?commerce? or not. The Tribunal took a view that since the

Revenue was less than 1/3rd of the cost incurred, the pipeline was not laid to facilitate any commercial activity. In Paragraph 8.1, it was held that laying of pipeline was not industrial activity.

10. Since the Tribunal had considered and held that the pipeline was not used or to be used primarily for commerce or industry, and the Tribunal had also considered the meaning of ?commerce? or ?industry?, we would be bound by Co-ordinate Bench decision and judicial discipline requires that we follow the same. In this connection, it is worthwhile to cite the decision of Hon?ble High Court of Mumbai as reported in 2010- TIOL-195-HC-MUM-CX. = 2010 (252) E.L.T. 168 (Bom.). In that case, the Tribunal had not followed the Coordinate Bench decision on the ground that the decision did not address the grievance of the Revenue and had not laid down a clear ratio. The Hon?ble High Court observed as follows.

?17. We are not happy to observe but constrained to say that one must remember that pursuit of the law, however glamorous it is, has its own limitation on the Bench. In a multi-judge court, the Judges are bound by precedents and procedure. They could use their discretion only when there is no declared principle to be found, no rule and no authority. The judicial decorum and legal propriety demand that where a learned single Judge or a Division Bench does not agree with the decision of a Bench of co-ordinate jurisdiction, the matter should be referred to a larger Bench. It is a subversion of judicial process not to follow this procedure. In our system of judicial review which is a part of our Constitutional scheme, we hold it to be the duty of the judges of the courts and members of the tribunals to make the law more predictable. The question of law directly arising in the case should not be dealt with apologetic approaches. The law must be made more effective as a guide to behavior. It must be determined with reasons which carry convictions within the Courts, profession and public. Otherwise, the lawyers would be in a predicament and would not know how to advise their clients. Subordinate courts would find themselves in an embarrassing position to choose between the conflicting opinions. The general public would be in dilemma to obey or not to obey such law and it, ultimately, falls into disrepute. These are the observations made by the Apex Court in Sundarjas Kanyalal Bhathija v. Collector, Thane, AIR 1990 S.C. 261.?

11. Therefore, the question arises as to whether we should refer this issue to Larger Bench. At this juncture, it would be worthwhile to consider the decision cited by the learned SDR to support his view. In the case of Madhya Pradesh State Electricity Board, Hon?ble Supreme Court was considering whether an office of a lawyer or firm of lawyers is a commercial establishment for the purpose of determination of rate at which electricity is to be supplied. Hon?ble Supreme Court held that expression ?commerce? or ?commercial? necessarily has a concept of a trading activity. It was also observed that comparing legal profession with that of trade and business is far from correct approach and it is totally misplaced. It can be seen that in that case, the Apex Court was not

determining the meaning of ?commerce? or ?commercial? organization, but was only looking as to whether the firm of lawyers can be called as a ?commercial? organization.

12. Similarly, in the case of National Press, the Hon?ble High Court of Orissa was considering whether the National Press could be considered a ?dealer? for the purpose of Orissa Sales Tax Act. Hon?ble High Court took note of the definition of the ?dealer? in the Sales Tax Act, which was defined as ?any person who carries on the business of purchasing or selling or supplying goods in Orissa, whether for commission, remuneration or otherwise and includes a department of Government which carries on such business and any firm or Hindu joint family and any society, club or association which purchases goods from or sells or supplies goods to its members and also includes a casual dealer as therein defined.? Hon?ble High Court observed that two important elements have got to be established before one can be said to be a dealer under the Act :

(i) the person must carry on business; and (ii) the business must be of purchase, sale or supply of goods. The decision would show that Hon?ble High Court was considering the meaning of ?business? and ?dealer? as defined in the Act and was nowhere concerned with ?commerce?. No doubt, a view was taken that whether the sale was for profit or not, was not relevant. In fact, under the Sales Tax Act, the tax is not levied on the profit, but on the sales price. Therefore, the profit would not be relevant. Moreover, mere supply of goods is also covered.

13. Both the decisions cited by learned SDR have emerged from different set of facts. We find that both these decisions are not applicable.

14. Before we proceed to decide whether the pipeline laid in this case can be said to have been used or used primarily for commerce or not, it is necessary to deal with the submissions that GWSSB is a commercial organization and therefore the pipeline laid for them and used for carrying the water meant for sale to Panchayat, local body etc. can be said for ?commerce?.

15. The submissions made to support the view that GWSSB is a commercial organization in the impugned order and the submissions made before us are :

(i) Water was purchased @ Re. 1/- per ltr. and sold from the price @ Rs. 2/-per ltr. to Panchayats to price @ Rs. 15/- per ltr to industrial units. Thus, water was being sold at a much higher rate and therefore just because the charges levied were fixed by Government, it does not take away the essential character of the activity, which is ?commerce?. The examples of the oil companies, power utility companies were cited to show that just because Government fixes the rate and there is a cross-subsidy, the charges cannot be said to be non-commercial.

(ii) It was also said that GWSSB was covered under Industrial Dispute Act, 1947 and therefore is industry.

(iii) GWSSB was authorized to raise money and also to give loans to Government or local bodies. Therefore, it can be seen that GWSSB is functioning like any commercial entity by raising money from banks and financial institutions, advancing loans and recovering interest for the same. The very fact that advancing loans is one of the objective behind setting up of GWSSB, GWSSB is meant for generating services and earning profit on its activities.

16. Whether GWSSB can be categorized as a industry or not, is not relevant at all. In fact, the learned SDR himself has submitted that the definition of the services does not talk about the status or the definition of the service receiver. Any service receiver irrespective of its status or definition or composition, if utilizing the pipeline for commerce or industry, will render the provider liable to Service Tax. Therefore, strictly speaking, by Revenue?s own submissions, the status of GWSSB is not relevant.

Nevertheless, this issue as to whether the GWSSB can be considered as a commercial organization, was discussed in detail in M/s. Nagarjuna Construction Co. Ltd. case and we agree with the views taken in that case. The Gujarat Act No. 18 of 1979, under which GWSSB was set up has a preamble which reads as ? An Act to provide for the establishment of a Water Supply & Sewerage Board for the rapid development and proper regulation of water supply and sewerage services in the State of Gujarat.? The responsibility of the Board is rapid development and proper regulation of water supply and sewerage services and not commercial or industrial activity. The provision in the act enabling the Board to borrow money or lending money or receiving grant for entering into contract, have been incorporated to serve the purpose for which the Board has been set up. The objective is to execute water supply and sewerage work for the benefit of both rural and urban communities as mentioned by Member Secretary in his letter dt. 14-6-07. A perusal of the Annual Report of the company would show that there is no profit and loss account at all which would be found in any organization, which is classifiable as commercial or industrial establishment. Further, the auditors have clearly observed that the balance sheet and Income-Expenditure account dealt with by this report comply with the accounting standards applicable to non-commercial and non-business entities. Enactment passed by peoples of representatives of Gujarat treats the purpose of the Board as Water Supply and Sewerage; Member Secretary considers the definition of Board as non-commercial one and facilitating supply of water; Annual Report has no profit and loss account; auditors clearly observe that annual report complies with the accounting standards applicable to non-commercial, non-business entities and have raised no objection to the procedure adopted by the Board. The annual report would have been placed before Government of Gujarat. Under these circumstances, we fail to understand how we can consider GWSSB as a commercial organization or the purpose of pipeline laid for them by various contractors as one for commerce i.e. to say to buy and sell water. The name of the scheme for which pipeline was laid was also Mehsana District Water Supply Scheme.

17. The next question that is to be answered is whether the pipeline can be said

to have been used or used primarily for commerce or industry. The only point that has been stressed by the Revenue is that the GWSSB is buying water @ Re. 1/- per ltr. and selling at Rs. 2/- per ltr. to Rs. 15/- per ltr. The definition uses words ?used for commerce? or ?primarily used for commerce?. This would mean that Revenue is required to show that the purpose of construction of pipelines is for ?commerce? or ?primarily for commerce?. ?Commerce? would mean buying and selling not necessarily for profit according to Revenue. But, the question here is the purpose of buying water by GWSSB was for selling or not. Obviously, the purpose of buying water and bringing it from Narmada Dam was not for selling it, but for supplying it to needy people. In this case, buying and selling is incidental. The purpose is supply of water to the needy citizens of the State. The term used ?for commerce? would mean that only purpose would be buying and selling, which is definitely not the case here. The term used ?primarily for commerce? would mean that primary purpose should be buying and selling and the other purposes also may be served incidentally. In this case, purchase and sale of water are incidental and the main purpose is supply of water to needy citizens of the State.

18. In view of the above discussion, we do not find any reason for us to disagree with the views already taken by the Coordinate Bench of this Tribunal in case of M/s. Nagarjuna Construction Co. Ltd. Accordingly, the impugned order cannot be sustained and is set aside.

19. In view of the fact that the appeal is allowed on merit, there is no need to discuss the applicability of extended period and the question of imposition of penalty also does not arise. For the same reason, other grounds canvassed viz. the service is Works Contract and therefore was not liable to Service Tax earlier, is also not required to be considered. In view of the above discussion, we do not consider it necessary to consider other issues raised or decisions cited before us.

20. In the result, appeal is allowed with consequential relief.?

From the above decision, it can be seen that in the above case also the similar activity of laying of pipe line was carried out for the state of Gujarat Board i.e. ? Gujarat Water Supply and Sewerage Board? wherein the demand of service tax was set aside. The facts and issue in the present is the identical to above case. Therefore, the ratio of above decision is directly applicable in the present case.

5. Following the decision of this Tribunal, we are of the view that the demand in the present case is also not sustainable. Hence the impugned order is upheld. Revenue?s appeal is dismissed.

