(2015) 03 AHC CK 0191

In the Allahabad High Court

Case No : Central Excise Appeal No. 41 of 2015

Commr. of S.T. APPELLANT

Vs

Greater Noida Development Authority RESPONDENT

Date of Decision : 30-03-2015

Acts Referred:
Finance Act, 1994 — Section 65(105), 65(105)(zzzz), 65(90a), 73(1), 75

Citation : (2016) 36 GSTR 110 : (2015) 40 STR 46 : (2016) 87 VST 507

Hon'ble Judges : Arun Tandon and Dr. Satish Chandra, JJ.

Bench : Division Bench

Judgement

1. The Commissioner of Service Tax, Noida has filed this appeal against the order of the Customs, Excise & Service Tax Appellate Tribunal Principal Bench, New Delhi, dated 28-8-2014 passed in Appeal No. ST/59067/2013 and Appeal No. ST/3256/2012 [2015 (38) S.T.R. 1062 (Tri.-Del.)]. The department is aggrieved by the part of the judgment, wherein it has been held that the letting out of vacant land by way of lease/license, for construction of buildings or temporary structure for use at a later stage in furtherance of business and commerce, is a taxable service only from 1-7-2010 and not from any date prior to it. The facts in short leading to this appeal are as follows:

"The assessee is a statutory body constituted under the U.P. Industrial Development Act, 1976. It has been discharging statutory functions while monitoring and carrying on the development of the areas within their territorial jurisdiction. The assessee was registered for the purpose of the payment of Service tax on renting of immovable properties, services and sale of space for advertisement since 1-6-2007. It has been making payment of Service tax on the rent received from constructed immovable properties rented out by it for business or commerce. However, the assessee did not made payment of Service tax on the rent which it had received in the matter of allotment of plots of vacant land to various persons on lease for industrial and commercial purposes."

2. With effect from 1st June, 2007, Section 65(105)(zzzz) was introduced in

Finance Act, 1994. The section provides for Service tax to be levied on service provided to a person by any other person of renting of immovable property or any other service in relation of such renting for use in course of, or for furtherance of business or commerce. Explanation-I to Section 65(105)(zzzz) defines immovable property and it provides,-

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(zzzz) to any person, by any other person in relation to renting of immovable property for use in the course or furtherance of business or commerce.

Explanation 1.--For the purposes of this sub-clause, "immovable property" includes -

(i) building and part of a building, and the land appurtenant thereto;

(ii) land incidental to the use of such building or part of a building;

(iii) the common or shared areas and facilities relating thereto; and

(iv) in case of a building located in a complex or an industrial estate,

all common areas and facilities relating thereto, within such complex or estate, but does not include -

"(a) Vacant land solely used for agriculture, aquaculture, farming, forestry, animal husbandry, mining purposes;

(b) Vacant land whether or not having facilities clearly incidental to the use of such vacant land;

(c) Land used for educational, sports, circus, entertainment and parking purposes; and

(d) Land used solely for residential purposes and buildings used for the purposes of accommodation, including hotels, hostels, boarding houses, holiday accommodation, tents, camping facilities."

3. However, w.e.f. 1-7-2010, clause (v) was added to the definition of immovable property and it now covers vacant land given on lease or license for construction of a building or temporary structure at a later stage, to be used for furtherance of business or commerce. A notification was issued by the Research Unit of Central Board of Excise & Customs (Department of Revenue) dated 26-2-2010 whereunder it was clarified that suitable amendment in the definition of taxable service relating to renting of immovable property is being made so as to provide that tax would be charged on rent of a vacant land if there is an agreement or contract between the lessor and the lessee that construction on such land is to be undertaken for furtherance of business or commerce during the tenure of the lease.

4. The expression renting of immovable property is defined under Section

65(90a) which reads as follows:

"Renting, letting, licensing or other similar arrangements of immovable property for use in the course or furtherance of business or commerce but does not include:--

(i) renting of immovable property by a religious body or to a religious body; or

(ii) renting of immovable property to an educational body, imparting skill or knowledge or lessons on any subject or field, other than a commercial training or coaching centre.

Explanation-I to Section-65(90a) clarified that - for the purpose of this clause," for use in the course or furtherance of business or commerce" include use of immovable property as factories, office buildings, warehouse, theaters, exhibition halls and multiple use building.

Explanation-II to this Section clarifies that for the removal of doubts, it is hereby declared that for the purpose of this clause, renting of immovable property" include allowing of permitting the use of space in an immovable property, Irrespective of the transfer of possession or control of the said immovable property."

5. The Director General of Central Excise on the material evidence collected found that the assessee has shown income from leasing of vacant land for the purpose of construction of commercial buildings, but it had not paid any Service tax thereon. Accordingly, a show cause notice dated 19-3-2012 was issued to the assessee for the period 1-7-2010 to 31-5-2011, whereunder it was disclosed that the appellant received a total amount of Rs. 40,14,15,820/- as lease charges from the allotment of various plots of land for commercial purposes on which Service tax was payable. The assessee was, therefore, called upon to pay service tax including education cess to the tune of Rs. 4,13,45830/- along with interest. They were also called upon to explain as to why penalty under Section 77(1)(C) and Section 78 of the Finance Act, 1994 be not imposed.

6. The show cause notice was adjudicated upon by the Commissioner, Central Excise and Service Tax, Noida vide order-in-original dated 19-7-2012, the demand was confirmed along with interest thereon under Section 75. Penalty of equal amount was imposed on the assessee under Section 78 of the Finance Act, 1994. Another penalty of Rs. 200/- per day starting from the first day after the due date was imposed under Section 77(1)(c) upon the assessee, for failure to furnish the required information and to produce the documents.

7. Against the above order of the Commissioner, Appeal No. ST/3256/12 was filed before the Tribunal by the assessee.

8. A second show cause notice was issued to the assessee on the basis of the enquiry conducted by the Additional Director of General, DGCEI, New Delhi dated 17-10-2012, it was reported that the assessee for the period between 1-6-2007

to 31-3-2012 had received a sum of Rs. 14,60,25,26,232/- under various heads from their customers/allottees on which Service tax was payable and had not been paid. The quantum of Service tax was calculated as Rs. 1,40,74,64,342/- along with interest.

9. A second show cause notice dated 17-10-2012 was issued to the assessee for recovery of above mentioned amount. The assessee was also called upon to show-cause as to why penalty under Sections 76, 77 & 78 of the Finance Act, 1994 be not imposed.

10. This show cause notice was adjudicated by the Commissioner, Central Excise and Service Tax, Noida vide order-in-original dated 30-4-2013. He confirmed the demand of Service tax of Rs. 140,74,64,342/- against the assessee under proviso to Section 73(1) of the Finance Act along with interest. Penalty of equal amount under Section 78 and penalty of Rs. 200/- per day starting from the first day after the due date for failure was also imposed under Section 77. Against the said order of the Commissioner, Appeal No. ST/59067/2013 was filed before the Tribunal buy the assessee.

11. The Tribunal under the order impugned dated 28th August, 2014 has confirmed the demand of the Service tax under the order-in-original dated 19th July, 2012 only for the normal period of limitation commencing from 1-7-2010 the amount whereof has been directed to be quantified by the Commissioner on remand. Penalty upon the assessee under Sections 77 and 78 has been set aside. The order-in-original dated 30th April, 2013 has been set aside and the matter has been remanded to the Commissioner for de novo adjudication in light of the order of Tribunal. The department being aggrieved has filed the present Central Excise appeal.

12. Clause (v) to the Explanation 1 added under Finance Act, 2010 to Section 65(105)(zzzz) reads as follows:--

"(v) vacant land, given on lease or license for construction of building or temporary structure at a later stage to be used for furtherance of business or commerce;"

13. The Excise appeal was admitted by the Court on following grounds:

"(I) Whether the Tribunal has committed an error of law in holding that the renting of vacant land by way of lease or license (irrespective of the duration of tenure), for construction of building or a temporary structure for use at a later stage in furtherance of business or commerce is a taxable service only from 1-7-2010, and not so, earlier to this date?

(II) Whether the CESTAT has committed an error of law in interpreting the leviability of Service tax on vacant land, for construction of a building or a temporary structure for use at a later stage in furtherance of business or commerce is taxable service only from 1-7-2010, whereas exclusion of vacant land as per (a) and (b) only signifies that renting of vacant land was already covered under definition and there was legislative intent to exclude certain category of vacant land and since there has been no change in exclusion after insertion of clause (v) only signifies that clause (v) was already part of main definition?"

14. Before adverting to the merits of this appeal it may be recorded that the appeal filed by the assessee before this Court, being Central Excise Appeal 54 of 2015, against the same order of the Tribunal dated 28-8-2014 has been dismissed by us under the judgment and order dated 30-3-2015 and the findings of the Tribunal under challenge in the said appeal, insofar as it was against the assessee, has since been affirmed.

15. What has been argued before us by the counsel for the department is that the renting of vacant land was under the ambit of Service tax w.e.f. 1st June, 2007 in view of Section 65(105)(zzzz) of the Finance Act, 1994 and for the purpose reference is made to the said section, which reads as follows:--

"Section 65(105) "taxable service" means any service provided or to be provided,-

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(zzzz) to any person, by any other person in relation to renting of immovable property for use in the curse or furtherance of business or commerce."

16. It is his case that the amendment carried out under the Finance Act of 2010 was only clarificatory in nature and vacant land other than that used for the agriculture, aquaculture, fanning, forestry, animal husbandry, running purpose was clearly defined to be under the purview of the Service tax for the purposes of levy. The insertion of clause (v) under the Finance Act of 2010 w.e.f. 1st July, 2010 did not alter the taxable event of letting of the vacant land on lease or license for business/commerce purpose.

17. The Tribunal has recorded a specific finding that prior to the introduction of new clause on 1st July, 2010 the renting of vacant land within the enumerated taxable service was not embarrassed upon.

18. With reference to its earlier order in the case of assessee itself dated 11-12-2013 it has been recorded as follows:--

"12. Introduction of sub-clause (v) in Explanation I has significantly altered and extended the scope of the taxable service, with effect from 1-7-2010 and consequently vacant land given on lease or licence, for construction of a building or a temporary structure, to be used at a later stage for furtherance of business or commerce, would be ''immovable property'' and renting of this immovable property would be the taxable service, since 1-7-2010.

13. In view of clear exclusion of vacant land from the ambit of immovable property prior to 1-7-2010 it cannot gainfully be contended by Revenue, that clause (v) to Explanation I (introduced in 2010), was a mere clarificatory

endeavour, explicating the implicit and inherent meaning of Section 65 (105) (zzzz). Clause (v) is clearly an amendment which expands the scope of the taxable service; and prospectively.

14. Clause 75 of the Bill (which later came to be enacted as Finance Act, 2010) has proposed insertion of sub-clause (v) in Explanation I in Section 65(105) (zzzz) of the Act. The memorandum explaining the provisions in Finance Bill, 2010 also indicates that the amendments are being made in the definition of ''renting of immovable property'' service inter alia levy of service tax on renting of vacant land where there is an agreement between lessor and lessee for undertaking construction of building or structure on such land for furtherance of business or commerce during the tenure of the lease. The C.B.E.&C. Board Circular No. 334/2010-TRU , dated 26-2-2010 (in paragraph 3) explains the purpose of the amendments to Section 65(105)(zzzz). Accordingly, the Circular explains that amendments are being made in the definition of this taxable service to provide that renting of vacant land where there is an agreement or contract between the lessor and lessee for undertaking construction of buildings or structures on such land for furtherance of business or commerce during the tenure of the lease, shall be subjected to service tax. The statement of objects and reasons accompanying the Finance Bill, 2010 also clarify that clause 75 of the Bill seeks to amend Chapter V of the Finance Act, 1994; to modify the scope of certain taxable services including the taxable service defined and enumerated in Section 65(105)(zzzz), of the Act. These several contemporaneous exposition and administrative constructions and the scope of sub-clause (v) of Explanation I in Section 65(105)(zzzz) fortify the conclusion the scope of sub-clause (v). To modify and expand the scope of the taxable service to cover and include vacant land on lease or licence for construction of a building or a temporary construction at a later stage to be used for furtherance of business or commerce, within the ambit of ''immovable property'' is thus the taxable service. Since the introduction of this sub-clause in Explanation I expands the scope of the taxable service and renders the taxable (a) hitherto non-taxable transaction, and absent of explicit retrospective reach provided to the amendment and insertion of this sub-clause, these transactions covered by this sub-clause of the Explanation have only the prospective operation.

15. On the above analysis, renting of vacant land by way of lease or licence (irrespective of the duration or tenure), for construction of a building or a temporary structure for use at a later stage in furtherance of business or commerce is a taxable service only from 1-7-2010, and not so, earlier to this date."

19. In our opinion the findings recorded by the Tribunal on the aforesaid aspect of the matter are legally justified and we see no good reason to take any different view in the matter.

20. For the aforesaid reasons, the question of law as raised by means of the present Excise appeal is answered against the department. The Excise appeal is

dismissed. Interim order, if any, stands discharged.

