(2021) 09 CESTAT CK 0052

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Service Tax Appeal No. 86858 Of 2017

Goa Friends Engineering And Electricals Pvt Ltd APPELLANT

Vs

Commissioner Of Customs And Central Excise RESPONDENT

Date of Decision : 09-09-2021

Acts Referred:

Finance Act, 1994 — Section 65B, 66B, 73, 102
Central Excise Act, 1944 — Section 11B
Service Tax (Determination of Value) Rules, 2006 — Rule 2A

Citation : (2021) 09 CESTAT CK 0052

Hon'ble Judges : Ajay Sharma, J;C.J. Mathew, Technical Member

Bench : Division Bench

Final Decision : Allowed

Judgement

1. In this appeal, M/s Goa Friends Engineering & Electricals Pvt Ltd seeks approval of their claim for refund of tax discharged by them under section 66B of Finance Act, 1994 on rendering of 'works contract' and 'maintenance of sub-stations' services between 1st April 2015 and 29th February 2016 which, upon challenge after rejection by the original authority, was also similarly discarded by Commissioner of Central Excise & Customs (Appeals), Pune - II (Goa) in order-in-appeal no. GOA-EXCUS-000-APP-016-2017-18 dated 2nd June 2017; the nullifying of the levy, discharged by them after rescinding of exemption available till then on specific activities, was accorded retrospective effect by section 102 of Finance Act, 1994 which also contained special provisions for refund of tax paid in the inter regnum. For such self-assessed payment of tax liability, the 'relevant date' for determining limitation under section 11B of Central Excise Act, 1944 (as made applicable to service tax) was to be computed from the date on which the restoring statutory enactment of 2016 received Presidential assent; that, not being a controversy in the present dispute, is merely taken note of for context.

2. Learned Counsel for the appellant informed that, during 2015-16, tax was paid as provider of 'works contract service' at the appropriate rate on the

consideration agreed upon for 'installation, testing and commissioning' of electrical circuitry for structures erected by Goa State Infrastructure Development Corporation (GSIDC) and on the consideration for 'maintenance service' undertaken on the electrical sub-stations of Goa Medical College which, prior to 31st March 2015, were exempt in terms of serial no. 12 in notification no. 25/2012-ST dated 20th June 2012. He further informed that, vide notification no. 6/2015-ST dated 1st March 2015, which excluded activities enumerated in (a), (c) and (f) in the said entry, this exemption ceased to be available but was restored, vide notification no. 9/2016-ST dated 1st March 2016 by inserting these at serial no. 12A in the original mega-exemption notification, to enable availment towards consideration in contracts that subsisted prior to 1st April 2015. He points out the legislative intent to withdraw the exemption had had the effect of disturbing the certainty of tax (or, as in the present issue, exemption from tax) attending upon 'continuous supply of service' contracted prior to withdrawal of the exemption which the retrospective exemption and the special refund provision sought to rectify.

3. According to him, it was in this context of facts and circumstances that the claim for refund was scrutinized before being rejected solely on the finding that the activity of the appellant could not be construed as 'civil work' or 'any other original works' as intended by rule 2A of Service Tax (Determination of Value) Rules, 2006. He further submitted that the several contentions to the contrary were discarded by the original, and appellate, authority with the bald finding that 'electrical works' could not be placed within the ambit of

'12A. Services provided to the Government, a local authority or a governmental authority by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of -

(a) a civil structure or any other original works meant predominantly for use other than for commerce, industry, or any other business or profession;

(b) a structure meant predominantly for use as (i) an educational, (ii) a clinical, or (iii) an art or cultural establishment; or

(c) a residential complex predominantly meant for self-use or the use of their employees or other persons specified in the Explanation 1 to clause (44) of section 65B of the said Act;

under a contract which had been entered into prior to the 1st March, 2015 and on which appropriate stamp duty, where applicable, had been paid prior to such date ......'

in notification no. 25/2012-ST dated 20th June 2012. Learned Counsel also emphasized that the compliance with conditions of eligibility in section 102 of Finance Act, 1994, other than conformity with the description above, were not contested in the orders of the original, and appellate, authority. The entitlement to exemption from tax before 1st April 2015 is, according to Learned Counsel, incontrovertible as no demand has been raised under section 73 of Finance Act, 1994 at any stage.

4. Learned Authorised Representative contends that the appellant had failed to make out a case for eligibility for exemption that would stand the test of the principles laid down the Hon'ble Supreme Court in Commission of Central Excise, New Delhi v. Hari Chand Shri Gopal [2010-TIOL-95-SC-CX-CB]. It was also pointed out by him that the pre-requisite of

'47. When we consider the overall effect of the provisions prior to amendment and post-amendment under Finance Act, 2011, we are of the opinion that the claim for refund cannot be entertained unless the order of assessment or self-assessment is modified in accordance with law by taking recourse to the appropriate proceedings and it would not be within the ken of Section 27 to set aside the order of self-assessment and reassess the duty for making refund; and in case any person is aggrieved by any order which would include self-assessment, he has to get the order modified under Section 128 or under other relevant provisions of the Act.'

enunciated by the Hon'ble Supreme Court in ITC Ltd v. Commissioner of Central Excise, Kolkata - IV [2019-TIOL-418-SC-CUS-LB] precluded any claim for refund.

5. It is further contended that the Tribunal had, in Karanja Terminal and Logistics Pvt Ltd v. Assistant Commissioner - Mumbai South [2021-TIOL-76-CESTAT-MUM], applied the ratio of the said decision to uphold the rejection of the refund claim by the assessee. It is submitted by him that the contract involved shifting of high tension lines which could hardly be described as 'civil construction' to which the exemption was restricted.

6. The prelude to staking claim for refund was the limited restoration, by notification no. 9/2016-ST dated 1st March 2016, of exemption that stood withdrawn from 1st March 2015 to the extent that it impacted 'continuous supply of service' contracted before such withdrawal and the statutory enablement, by section 102 of Finance Act, 1994, to claim refund of tax already discharged. The appellant sought refund of ☐ 28,82,896/- paid on consideration received in connection with undertaking of 'electrical circuitry' in structures executed by Goa State Industrial Development Corporation (GSIDC) and maintenance of 'sub-stations' that fed energy requirements of Goa Medical College (GMC). That these entities are encompassed within eligible bodies enumerated in the said incorporations to the exemption notification and insertion in Finance Act, 1994 is not in dispute; neither is the bar of limitation nor the commencement of validity of the contract before 1st March 2015. Consequently, attributable to the agreement with the recipients was the mutual understanding that tax was not includible in the consideration owed to the appellant upon whom any subsequent imposition would devolve. The proceedings before the lower authorities were, thus, limited to conformity of the impugned activity to one of the descriptions in the restored exemption.

7. The retrospective exemption, and the entitlement to refund, arises from a special enactment of Parliament. Therefore, the decisions cited by Learned Authorized Representative do not, and cannot, detract from the necessity to restrict the disposal of the claim for refund within the confines of

'102. Special provision for exemption in certain cases relating to construction of Government buildings.

(1) Notwithstanding anything contained in section 66B, no service tax shall be levied or collected during the period commencing from the 1st day of April, 2015 and ending with the 29th day of February, 2016 (both days inclusive), in respect of taxable services provided to the Government, a local authority or a Governmental authority, by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation or alteration of--

(a) a civil structure or any other original works meant predominantly for use other than for commerce,

industry or any other business or profession;

(b) a structure meant predominantly for use as--

(i) an educational establishment;

(ii) a clinical establishment; or

(iii) an art or cultural establishment;

(c) a residential complex predominantly meant for self-use or for the use of their employees or other persons specified in Explanation 1to clause (44) of section 65B of the said Act, under a contract entered into before the 1st day of March, 2015 and on which appropriate stamp duty, where applicable, had been paid before that date.

(2) Refund shall be made of all such service tax which has been collected but which would not have been so collected had sub-section (1) been in force at all material times.

(3) Notwithstanding anything contained in this Chapter, an application for the claim of refund of service tax shall be made within a period of six months from the date on which the Finance Bill, 2016 receives the assent of the President.' of Finance Act, 1994.

8. The restoration, with special enablement of refund, acknowledges the historical existence, and necessity, of exemption of the specified activities from tax that stretch back in time and the claim of the appellant is predicated upon availment of the exemption at the time of contracting with the recipients; and even earlier. There is nothing on record to establish that the denial of refund had been followed up with instituting of proceedings for recovery of tax that had not been paid. The ineligibility of the activity of the appellant for exemption after 1st

March 2015, as held by the lower authorities, implied evasion of tax for the period before that. This inconsistency of approach to tax liability would make it appear that that ineligibility for exemption has been contrived solely for denial of refund. This inference is reinforced by the clarification communicated in circular no. 123/5/2010-TRU dated 24th May 2010 of Central Board of Excise & Customs that

'2. Scope of certain taxable services in brief;

(i) 'Commercial or industrial construction services', in brief, cover construction of and the completion, finishing, repair, alteration, renovation, restoration or similar activities pertaining to buildings, civil structures, pipelines or conduits. Therefore, only such electrical works that arc parts of (or which result in emergence of a fixture of) buildings, civil structures, pipelines or conduits, are covered under the definition of this taxable service. Further, such activities undertaken in respect of roads, railways, transport terminals, bridges, tunnels and dams are outside the scope of levy of service tax under this taxable service.

(ii) Under 'Erection, commissioning or installation services', the activities relevant to the instant issue are (a) the erection, commissioning and installation of plant, machinery, equipment or structures; and (b) the installation of electrical and electronic devices, including wiring or fitting there for. Thus, if an activity does not result in emergence of an erected, installed and commissioned plant, machinery, equipment or structure or does not result in installation of an electrical or electronic device (i.e. a machine or equipment that uses electricity to perform some other function) the same is outside the purview of this taxable service.

(iii) 'Works Contract' incorporates the inclusions and exclusions of the aforementioned two taxable services (amongst others) and it is the nature of the contract (i.e. a contract wherein the transfer of property in goods involved is leviable to a tax as sale of goods) rather than the nature of activities undertaken, that distinguishes it from the previously stated taxable services. Thus, even in the case of 'works contract' if the nature of the activities is such that they are excluded from aforesaid two services then they would generally remain excluded from this taxable service as well.'

to which also runs counter the proposition of the lower authorities that the said activities are ineligible for the exemption. Just as tax liability arises on these ancillary activities of 'civil construction' so would the exemption that attends 'civil construction' either in the definition of the 'taxable service' or by separate notification.

9. The appellant was engaged in 'erection, installation, testing and commissioning' of electrical works and it belies logic to expect electrical works to generally exist independent of civil structure as well as in disregarding the critical indispensability of electrical installation in civil structures. To segregate one component out of the entirety of civil structure does not appear to be the

intendment of law. It would also appear from a perusal of the notification that the exemption is accorded to activities in connection with 'civil structure' or 'original structure' and not restricted to erection of the structure which appears to be the construction placed upon the expression by the lower authorities.

10. In the facts and circumstances narrated supra, the retrospective effect of the exemption is applicable to the electrical works executed, and the maintenance undertaken, by the appellant for Goa State Industrial Development Corporation (GSIDC) and Goa Medical College (GMC). Accordingly, we set aside the impugned order and allow the appeal with consequential relief.

(Order pronounced in the open court on 09/09/2021)