(2014) 05 CESTAT CK 0017

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Appeal No. 862 Of 2008

?M/s. Flex Industries Ltd — APPELLANT

Vs

CCE, Indore — RESPONDENT

Date of Decision : 23-05-2014

Acts Referred:

Finance Act, 1994 — Section 65(105)(zzm), 65(105)(zm), 65(zm), 65(12), 65(12)(a)(i), 75, 76, 77, 78

Citation : (2014) 05 CESTAT CK 0017

Hon'ble Judges : G. Raghuram, J;Rakesh Kumar, Technical Member

Bench : Division Bench

Advocate : K.K. Anand, Udit Jain, Surabhi Sinha, Pramod Kumar

Final Decision : Allowed

Judgement

1. The facts leading to filing of this appeal, in brief, areas under :-

1.1 The appellant are manufacturers of flexible laminates falling under Chapter 39 of the Central Excise Tariff and for this, they have a factory at

Malanpur, Distt. Bhind, M.P. The appellant gave the factory premises along with entire plant and machinery on lease to M/s. Montage Enterprises

Pvt. Ltd., Malanpur in terms of an agreement with them. During the period from 2004-05 to May, 2007, they received total lease rent of

Rs.44,65,00,000/-. The department was of the view that this activity of the appellant is taxable as â??Banking and other Financial Servicesâ? under

Section 65(105)(zzm) read with Section 65(12) of the Finance Act, 1994. According to the department, this activity is covered by Clause (a)(i) of

Section 65(12), which covers â??Financial Leasing Services including Equipment Leasing and Hire Purchase by a Body Corporateâ?. On this basis, a

show cause notice dated 14-9-2007 was issued to the appellant for demand of service tax along with education cess amounting to Rs. 5,10,09,000/-

from them for the period from April, 2004 to May, 2007 along with interest thereon under Section 75 of the Finance Act, 1994 and also for imposition

of penalty on them under Sections 76, 77 and 78 ibid. This show cause notice was adjudicated by the Commissioner vide order-in-original dated 29-9-

2008 by which the above mentioned service tax demand was confirmed against the appellant along with interest on it under Section 75 and besides

this, penalties were imposed on them under Sections 76, 77 and 78 ibid. Against this order of the

Commissioner, this appeal has been filed.

2. Heard both the sides.

3. Shri K.K. Anand, Advocate, ld. Counsel for the appellant, pleaded that the appellant on account of excess capacity had leased out their factory

premises at Malanpur to M/s. Montage Enterprises Pvt. Ltd.; that this transaction of the appellant with M/s. Montage Pvt. Ltd. is not covered by the

definition of â??Banking and Financial Serviceâ?, as given in Section 65(105)(zm) read with Section 65(12) as what is covered by the definition of

â??Banking and Financial Serviceâ? under Section 65(12), is financial leasing service including equipment leasing, hire purchase by a body corporate,

wherein an element of financing is involved, while the agreement of the appellant with M/s. Montage Enterprises Pvt. Ltd. is purely an agreement for

leasing of the premises on rent basis and there is no element of finance involved in it, and that activity of the appellant is, in fact, renting of immovable

property which became taxable w.e.f. 1-6-2007 under Section 65(zm) and hence, during the period prior to 1-6-2007, the same would not be taxable.

He also cited the judgment of the Tribunal in the case of Banswara Syntex v. CCE, Jaipur reported in (Tribunal) wherein it was held that leasing of

land, building and plant and machinery under a lease agreement is not financial leasing and is not taxable under Section 65(105)(zm) read with Section

65(12) as â??Banking and Financial Serviceâ?. He also cited the judgment of the Tribunal in the case of CCE, Vadodara-I v. G.E. India Industries

Pvt. Ltd. reported in (Tribunal-Ahmd.), wherein it was held that though during the period prior to 1-6-2007, there was no definition of â??financial

leaseâ? in Section 65(12), it has to be interpreted in the sense in which it is understood in the common parlance or trade parlance and that lease agreements, which, do not satisfy the criteria for financial leasing in Accounting Standards published by ICAI for financial leases, cannot be treated as

financial lease agreements. Shri Anand emphasized that lease agreement, in question, is not a financial lease agreement as there is no option to the

lessee to acquire the asset at the end of the lease period. He, therefore, pleaded that the impugned order is not correct.

4. Shri Pramod Kumar, ld. Joint CDR defended the impugned order by reiterating the findings of the Commissioner and pleaded that the leasing by the

appellant of their plant and machinery to M/s. Montage Enterprises Pvt. Ltd., Malanpur is covered by the definition of Banking and Financial Service.

5. We have considered the submissions from both the sides and perused the records.

6. On going through the records, we find that the appellant had entered into a lease agreement with M/s. Montage Enterprises Pvt. Ltd. on 13-4-2002

for lease of their plant at Malanpur on a lease rent of Rs.40 lakhs per month for the first year, Rs.50 lakhs per month for second year and Rs.60 lakhs

per month for third year. However, w.e.f. 14-5-2003, this agreement had been converted into a licence agreement for renting of their plant and

machinery to M/s. Montage Enterprises Pvt. Ltd. for a period of 11 months on a licence fee of Rs.40 lakhs per month. Thereafter, this licence

agreement was renewed on expiry of the licence period. The department is of the view that this activity of the appellant is Financial Lease covered by

the definition of â??Banking and Financial Serviceâ? as given in Section 65(12) of the Finance Act, 1994 and hence, the lease amount/licence fee

received by the appellant would attract service tax under Section 65(105)(zm) read with Section 65(12) of the Finance Act, 1994.

7. Section 65(105)(zm) covers the services provided to any person by a banking company including a non-banking financial company or any other

body corporate in relation to banking and other financial services. The expression â??Banking and Other Financial Servicesâ? is defined in Section

65(12), the clause (a)(i) of which covers â??financial leasing services including equipment leasing and higher purchase.â? During the period of

dispute, there was no definition of financial lease given in this Section. However, w.e.f. 1-6-2007, an explanation was added to clause (a)(i) of Section

65(12) explaining the scope of the financial leasing as under :-

â??Explanation - For the purposes of this item, â??financial leasingâ?? is a lease transaction where :-

(i) Contract for lease is entered into between two parties for leasing of a specific asset;

(ii) Such contract is for use and occupation of the asset by the lessee;

(iii) The lease payment is calculated so as to cover the full cost of the asset together with the interest charges; and

(iv) The lessee is entitled to own, or has the option to own, the asset at the end of the lease period after making the lease payment.â??

8. The above features of the financial lease given in the explanation, which was added w.e.f. 1-6-2007, are in accordance with the Accounting

Standards for Financial Lease Agreement published by the ICAI. According to the Accounting Standards for Financial Lease published by ICAI, a

lease is classified as a financial lease, if there is an option for transfer of asset to the lessee at the end of the lease period. Besides this, in a financial

lease, lease period is almost the entire economic life of the asset. Though during the period of dispute, the term, â??Financial Leaseâ? was not

defined in Section 65(12) of the Finance Act, as held by the Tribunal in the case of Commissioner of S.T. v. Lufthansa Technik Service India Pvt.

Ltd. reported in (Tribunal-Delhi) in absence of the definition of this term, the same must be interpreted in the sense it is understood in the common

parlance or trade parlance and accordingly, this term is to be understood according to its meaning in the ICAI Accounting Standard or International

Accounting Standards. Looked at from this criteria, the lease agreement/rent agreements in question, do not satisfy any of the criteria for a financial

lease and the same are basically the rent agreements, which are renewed on expiry of 11 months. There is absolutely no element of financing and the

agreements, in question, are purely the agreements of renting of immovable property (plant & machinery) which became taxable under Section

65(105)(zzzz) of the Finance Act, 1994 w.e.f. 1-6-2007. Therefore, during the period of dispute, the renting of plant & machinery by the appellant

under lease agreement/licence agreement was not taxable as Banking and Financial Services under Section 65(105)(zzm) read with Section 65(12)

and as such, the impugned order is not sustainable. The same is set aside. The appeal is allowed.

(Operative portion already pronounced in open Court)

