(2024) 11 J&K CK 0002

In the Jammu And Kashmir High Court

Case No : OWP No.145 of 2010

M/S Khair-ud-Din & Sons Co. APPELLANT

Vs

Union of India and Another RESPONDENT

Date of Decision : 20-11-2024

Acts Referred:

Border Security Force Act, 1968 — Section 6
Border Security Force Rules 1969 — Rule 13

Citation : (2024) 11 J&K CK 0002

Hon'ble Judges : M.A. Chowdhary, J, Tashi Rabstan, CJ

Bench : Division Bench

Advocate : Sunil Sethi, Mohsin Bhat, L.K. Moza, Rozina Afzal, Ajay?Abrol, M.K. Bhardwaj

Final Decision : Allowed

Judgement

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M.A. Chowdhary, J

1. In OWP No.145/2010 the petitioner-firm has challenged Communication No.T 1000 dated 13.11.2009, in OWP Nos.963/2009, 966/2009 and 1400/2009 the petitioners-firms have challenged Communication No.KH/6519/GEN/V/102 dated 30.06.2009, whereas in OWP No.955/2010 the petitioner-firm has challenged Communication No.T 1000 dated 27.07.2010, issued by respondent No.2 in these petitions, whereby the Service Tax is sought to be imposed upon the Shot Gun Manufacturers including the petitioners-firms herein at the rate of 12.36%.

2. Since the controversy involved in all these petitions is common in nature, as such we deem it proper to decide all these petitions by this common order and judgment.

3. The facts leading to the filing of these petitions are that the petitioners-firms are dealing with manufacturing of arms and ammunition pursuant to the license granted to them by the competent authority. As per the policy in vogue of the

Government of India, all the shot guns, which are manufactured by such manufacturers, are sent for proof testing at various laboratories and only after the guns are passed through such tests, the same can be sold in the market. The said laboratories are controlled by the Central Government which were charging quality assurance/proof testing charges from the gun manufacturers at the rate of Rs.1100/- for Double Barrel Gun and Rs.550/- for Single Barrel Gun.

4. Now the grievance of the petitioners-firms is that respondent No.2 has issued communication dated 13.11.2009 in OWP No.145/2010, communication dated 30.06.2009 in OWP Nos.145/2010, 963/2009, 966/2009 and communication dated 27.07.2010 in OWP No.955/2010, whereby all the shot gun manufacturers related to SQAE (A) and LPR including the petitioners herein were required to pay the service tax at the rate of 12.36% under the category "Technical Testing and Analysis Service" and the same has been made applicable with effect from 01.07.2003. Hence, the present petitions on behalf of petitioners-firms.

5. The stand of petitioners-firms is that actually the liability to pay the service tax was imposed upon respondent No.2 but, instead of paying the same, respondent No.2 has shifted the burden on the gun manufacturers including the petitioners herein. The further stand of petitioners-firms is that as per the Central Excise Law Manual, service tax is not applicable to the State of J&K. Since the taxable services are being consumed in the State of J&K, the same are not liable to service tax in terms of the Finance Act, 1994, as the said Act has not been extended to the State of J&K.

6. Objections have been filed on behalf of respondents averring therein that the service tax is an indirect tax and is to be paid on all the services notified by the Government of India. Further, the service tax is to be charged from the petitioners-firms for the proof testing analysis and certification facilities which are being provided by the respondents from outside the geographical boundaries of the State of J&K, therefore, the petitioners-firms are liable to pay the service tax as per the Finance Act, 1994. The impugned communications issued by the respondents are, thus, strictly in conformity with the service tax rules. It is further averred that the Central Board of Excise and Customs, Ministry of Finance, Department of Revenue has given the clarification that the service tax is destination based consumption tax and the principle of consumption of services would determine the liability of the service tax. Thus, it is averred that the services are being provided outside the geographical boundaries of the State of J&K which falls within the four corners of consumption of services at a particular place which ultimately would determine the liability of service tax. Therefore, due weightage has to be given with regard to the destination and consumption of services at a particular place for levying service tax on the services of technical testing analysis provided by respondent No.2.

7. Heard learned counsel appearing for the parties, considered their rival contentions and perused the writ files.

8. The stand of the respondents is that the petitioners-firms are required to pay the service tax at the rate of 12.36% under the category "Technical Testing and Analysis Service" and the same has been made applicable with effect from 01.07.2003. However, the stand of the petitioners is that they are licensed manufacturers of guns, their units are located in Jammu and the promoters of the petitioners are also permanent residents of J&K. Therefore, they are not liable to pay the service tax as Section 64 (Chapter V) of the Finance Act, 1994 excludes the applicability of the service tax to the State of J&K.

9. Though the learned counsel for respondents have not disputed the provisions of Section 64 (Chapter V) of the Finance Act, 1994 excluding the applicability of the service tax to the State of J&K, yet their argument is that in terms of Rule 4 of the Place of Provisions of Services Rules, 2012, the place where the services are actually performed, the service tax is leviable to justify the demand of service tax, as proof testing analysis and certification facilities are being provided by the respondents from outside the geographical boundaries of the State of J&K. Further, the Central Board of Excise and Customs, Ministry of Finance, Department of Revenue has given the clarification that the service tax is destination based consumption tax and the principle of consumption of services would determine the liability of the service tax.

10. However, we need not to go into the said ground, as the very same issue regarding the Service Tax liability on the charges has already been examined in detail by a Coordinate Bench of this Court in OWP No.1391/2010 along with OWP No.1563/2014 decided on 22.11.2016 in which one of us (Tashi Rabstan–J, now CJ) was also a member. The relevant portion of the judgment is reproduced below:

"On facts the 5th respondent is a Government of India establishment assigned with the job of proof tasting of fire arms. The proof testing is required as per the statute to manufacture of fire arms for public safety. Under Rule 22 of the Arms Rule, 1962 testing fee alone is collected. The said clarification issued by the Revenue will bind the subordinate assessing authorities and one cannot expect a different order from respondents 6 and 7. A similar issue was already considered by Commissioner of Central Excise Bhopal against CESTAT final order No.ST/26/2010 (PB) in Appeal No.ST/346/2007 dated 26.04.2010 by holding that periodical testing of gas cylinder is a statutory requirement under Indian Explosives Act 1884 and therefore, it is not an activity covered for service tax either under maintenance and repair services or technical inspection and certification services and having aggrieved about the said order, Civil appeal filed before Hon'ble Supreme Court was dismissed on 05.01.2011.

10. Based on the said order, the office of Commissioner of Customs, Central Excise and Service Tax, Bhopal issued circulation 21.02.2012 by providing as under:-

".............. Activities assigned to and performed by the sovereign/public authorities under the provisions of any law are statutory duties. The fee or amount collected as per the provisions of the relevant statute for performing such functions is in the nature of a compulsory levy and are deposited into the Government account. The testing of shot guns is similar to testing of gas cylinders, boilers, and certificate given is similar to those given by RTO and electrical inspectorate. Hence on the same lines. I hold that the activity carried out by the notice pertaining to safety and health of the public which is mandated by the statutory requirement under the Indian Law.

"Therefore, such activities are purely in public interest and are undertaken as mandatory and statutory functions. These are not to be treated as services provided for a consideration. As it involves the safety of the public and it is bounden duty of the State to protect its citizens. Therefore, such activities assigned to and performed by a sovereign/ public authority under the provisions of any law, do not constitute taxable services. Any amount/fee collected in such cases is not to be treated as consideration for the purpose of levy of service tax….."

11. From the above order of CESTAT, affirmed by Hon'ble the Supreme Court, and Circular No.96 issued by Government of India, Ministry of Finance, Department of Revenue, Tax Resource Unit, New Delhi in Circular No.96/7/2007-ST dated 23.08.2007 as well as the clarification issued by Commissioner of Customs, Central Excise & Service Tax, Bhopal dated 21.02.2012, the operative portions of which are extracted above, and having regard to the fact that the Senior Quality Assurance Officer, being authorised office for testing, and the petitioners having paid only testing fee for fire arms, which is a statutory requirement under Rule 22 of the Arms Rules, 1962, no service tax can be levied on the petitioners who are granted license under Section 5 of the Arms Act, 1950 even if the service provider i.e. the Senior Quality Assurance Officer is in Kanpur where Section 64 of the Finance Act, 1994 is applicable."

11. In view of the ratio already laid down by this Court and considering the nature of work attended to by the petitioners-firms, we find that there can be no service tax liability on the charges to be paid by the petitioners herein. Hence, there is no question of interest payable by them.

12. Viewed thus, the petitions are allowed and the impugned Communication No.T 1000 dated 13.11.2009 in OWP No.145/2010; impugned Communication No.KH/6519/GEN/V/102 dated 30.06.2009 in OWP Nos.963/2009, 966/2009 and 1400/2009 as well as impugned Communication No.T 1000 dated 27.07.2010 in OWP No.955/2010 issued by respondent No.2 in these petitions are hereby quashed thereby directing the respondents not to levy/charge or recover service tax from the petitioners-firms towards testing fee paid to respondent No.2 in these petitions.

