CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL REGIONAL BENCH AT HYDERABAD

Division Bench
Court – I

Service Tax Appeal No. 20883 of 2014

(Arising out of OIO No. 100/2013 Adjn. (Commr.) ST dt.25.11.2013 passed by Commissioner of Customs, Central Excise & Service Tax, Hyderabad-IV)

GMR Hyderabad International Airport Ltd **……Appellant**
3rd Floor, Aero Towers, Shamshabad,
Hyderabad, AP – 500 409

VERSUS

Commissioner of Central Excise & Service Tax, Hyderabad - IV **……Respondent**
Posnett Bhawan, Tilak Road, Ramkoti,
Hyderabad, Telangana – 500 001

Appearance
Shri Anil Kathuria, Advocate for the Appellant.
Shri Chittaranjan W. Prakash, AR for the Respondent.

Coram:
HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. A.K. JYOTISHI, MEMBER (TECHNICAL)

FINAL ORDER No. A/30321/2023

Date of Hearing: 25.08.2023
Date of Decision: 11.10.2023

[Order per: ANIL CHOUDHARY]

The issues involved in this Appeal is whether the demand of service tax have rightly been raised on the amount of electricity charges and water charges collected by the Appellant from its tenants/concessionaires and also the availability of Cenvat credit on Outdoor Catering services and Club Membership.

2. The Appellants are registered with Service Tax Department vide Registration No. AABCH3448MST001 for providing various services viz., Airport Service, Renting of Immovable Property service, Management Consultancy service, Consulting Engineer service, Business Support and Business Auxiliary services and others.

3. The Appellant entered into an agreement with various concessionaires. The agreement is for the grant of right to use the various locations, which are primarily for use in the course of their business in the Airport. As per the agreement, the concessionaires should utilize the locations for the sole purpose

for which it is specified. In this connection, the Appellants had also recovered the specified amounts towards supply of electricity and water for the period October, 2008 to June, 2010 from the said concessionaires in addition to consideration for providing such space as per the terms of the agreement with them against the right to use the space in the Airport.

4. The Government had issued Notification No.31/2010-ST dt.22.06.2010 in exercise of powers under Sec 93(1) of the Finance Act providing exemption of various services provided within the Port or an Airport, *inter alia*, including supply of water and supply of electricity.

5. Thereafter, in the course of audit of the accounts of the Appellant, it appeared to Revenue that Appellant have recovered towards reimbursement of electricity and water charges, with an addition of 10% to actual expenses, incurred, from the tenants/licensees, located within the premises of the Airport. It appeared to Revenue that the amount recovered under these two heads fall under taxable category of "Management, Maintenance & Repair service" under Sec 65(64) of the Finance Act prior to 01.07.2010. Further, as the exemption was granted w.e.f. the said date vide aforementioned Notification No.31/2010-ST, it appeared that Appellant was liable to pay service tax on these two receipts for the period 01.10.2008 up to 30.06.2010. Accordingly, the SCN was issued dated 06.03.2013, invoking extended period of limitation demanding a total amount of Rs.1,47,74,774/- including cess. Further, the SCN also proposed to disallow Cenvat credit availed on input services being Membership of Clubs and Outdoor Catering totaling Rs.18,88,042/-. The SCN also proposed to demand interest and proposed imposition of penalty under Sec 76, 78 and Rule 15 of CCR.

6. The SCN was adjudicated on contest by the Commissioner vide OIO dated 25.11.2013 confirming the proposed demands with interest and further equal penalty was imposed under Rule 15 of CCR read with Sec 78 of the Act. Being aggrieved, the Appellant is before this Tribunal.

7. Assailing the Impugned Order, learned Counsel for the Appellant submits that both electricity and water are "goods" and thus demand of service tax under these two heads is erroneous and fit to be set aside. It is further urged that the Appellants are managing and running Airport including navigation and non-navigation services. The said Airport is neither the property of the Appellant nor of the concessionaries/tenants. The charges for water and

electricity have been collected from the tenants/concessionaires on actual basis, after adding 10% towards development charges under the Agreement between the parties. By no stretch of imagination, such amount collected can be chargeable to service tax under the head "Management, Maintenance & Repair service" (MMRS). It is evident from the sample bills annexed to the Appeal paper book that Appellant is charging the tenants on the basis of actual consumption (shown as per meter). Admittedly, Appellants have collected these amounts and paid to the service providers, who are supplying electricity and water services to the Airport. Admittedly, Appellants have also paid service tax on all other receipts, which are chargeable to service tax, there being no other dispute. Further, extended period of limitation is not invokable as the issue is wholly of interpretation, there being no case of suppression or misstatement or fraud on the part of the Appellant.

8. They have further stated that it is evident from the facts on record that, it was only after issue of Notification No. 31/2010-ST dated 22.06.2010, wherein, the Central Government, in its wisdom, provided for exemption from the levy of service tax on various services provided in the Port or Airport, *inter alia*, including supply of water and supply of electricity. The Revenue prior to the issue of this notification believed that amount collected by the Appellants for these two activities, which are in the nature of sale of goods, was not liable to service tax. Thus, the Impugned Order is fit to be set aside for invocation of extended period of limitation, itself.

9. Learned Counsel also relies on the ruling of Hon'ble Delhi High Court in the case of Intercontinental Consultants and Technocrats Pvt Ltd, as the Appellants have acted as a pure agent by collecting the electricity and water charges from their tenants/licensees and have paid the amount to the suppliers of these items. Hence, Appellants cannot be subjected to any service tax and the SCN is wholly misconceived. Reliance is also placed on ruling of Hon'ble Supreme Court in the case of State of AP & Ors vs National Thermal Power Corporation Ltd & Ors [2002 (5) SCC 203 (SC)], wherein, the Constitution Bench held that electricity is goods and is liable to Sales Tax. Water is also a good is not in dispute.

10. For denial of credit on Outdoor Catering services, they have relied on certain judgments in support that they were eligible for same in view of settled law for the period prior to 01.07.2011. For Club Membership, they have pointed

out that it is not individual club membership rather it is company's membership with professional bodies.

11. Opposing the Appeal, learned AR for Revenue relies on the Impugned Order. He further urges that the Appellant have supplied electricity and water by way of service and the tax has been rightly demanded.

12. Heard both sides and perused the records.

13. The period of dispute is from 2008-09 to 30.06.2010 in respect of the amount collected by the Appellant from the clients towards the provision of electricity and water. The Department felt that as per the statutory provisions, especially as per Sec 65(64) of the Finance Act, 1994, as amended which covers MMRS, the service or provision of electricity and water to their tenants/concessionaires would fall under the ambit of service tax and therefore liable for service tax. It is not disputed that the Appellants have collected these charges on reimbursable basis, except for the fact that they have also collected 10% extra amount. The Department felt that since they have collected 10% extra over and above actual amount, the Appellants are not in the nature of pure agent and instead rendered services as an independent service provider.

14. On going through the records and submissions made by the Appellant, it is observed that they have mainly contended that they have entered into agreement with various concessionaires to grant the right to use various locations which are primarily for the use in the course of their business in Airport and that they have been paying service tax under the category of 'Renting of Immovable Property service' and the same has been discharged. However, the same does not include charges for electricity and water since they are charges for supply of goods. These charges have been collected under separate invoice as utility charges. These utility charges have been collected based on the actual consumption. They have also contended that if primary charges are not taxable i.e., supply of water and electricity, the margin on the same cannot be subjected to tax for which they have relied on the judgment of Baroda Electric Meters Ltd vs Collector of Central Excise [1997 (94) ELT 13 (SC)].

15. On going through the concessionaire agreement it appears that this is mainly in relation to renting of space/premises within the Airport to independent concessionaire with whom they have different revenue sharing agreement, etc., in lieu of rent. The actual consumption of electricity and water

by these concessionaires is part of the same agreement but the same cannot be treated as part of MMRS, in view of the fact that it is an independent activity which they have to provide within the Airport premises, as they have no other option to get the water and electricity from somebody else. The Revenue has tried to classify this as MMRS, however, mere supply of water and electricity cannot become in itself MMRS in the facts of the case, when the entire agreement is seen in totality.

16. There is also force in the argument by the Appellant that Department has mainly relied on Notification No. 31/2010-ST dated 22.06.2010, which, inter alia, provided for exemption of services relating to supply of water and electricity, in support that prior to this, the same was liable to service tax. In order to understand why the supply of water and supply of electricity were exempted from service tax when provided within a Port or Airport, under the category of "Airport Services", which is not in dispute in the present case, one has to refer to DO Letter D.O.F. No. 334/1/2010-TRU dated 26.02.2010. This DO Letter clearly indicates that various actions have been taken including issuance of Notification No. 31/2010-ST dated 22.06.2010 to ensure that whatever activities within the Airport, which were not being charged to service tax, would not be charged service tax, even after introduction of a separate category of services viz., 'Airport services'. Therefore, if the Government felt that supply of water and supply of electricity were not chargeable to service tax, either under some exemption or interpretation, they have continued to give that exemption by virtue of Notification No. 31/2010-ST.

17. There is another aspect of Notification No. 12/2003 dated 20.06.2003, which provided for exemption to the extent of value of goods and materials sold by the service provider to the recipients of service subject to certain conditions. Therefore, under this notification also, even if the entire contract is to be treated as MMRS, the value of goods sold would have to be excluded, meaning, there won't be any service tax liability to that extent. As discussed supra, in view of the relied upon case laws, both, electricity and water, are to be treated as goods. Therefore, we find that supply of water and electricity is essentially a sale of goods and therefore not chargeable under provisions of service tax. By virtue of this interpretation also, there was no liability for payment of service tax on supply of water and electricity in view of the Notification No. 12/2003 dated 20.06.2003.

18. Therefore, having considered the rival contentions, admitted facts and case laws cited, we find that they are not required to discharge any service tax on supply of water and electricity to their concessionaires, who were paying for these two utility services on actual basis plus markup of 10%.

19. In so far as the denial of credit on account of Outdoor Catering service is concerned, it is no longer res integra, in view of the case laws cited, as it is service in relation to business and not excluded as such for period prior to 01.07.2011. Similarly, in the case of Club Membership, also admittedly is for membership of the Appellant, with various professional associations/bodies and not for individual club membership, therefore, it is again to be considered as relating to business. Therefore, both these services were eligible for Cenvat credit during the relevant period.

20. In view of the findings and observations, we allow the Appeal and set aside the Impugned Order. Appellant shall be entitled to consequential benefits, in accordance with law. As the Appeal is being allowed on the grounds of merit itself, the issue of limitation has been kept open.

(Pronounced in the Open Court on 11.10.2023)

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

(A.K. JYOTISHI)
MEMBER (TECHNICAL)

Veda