

The Additional Commissioner, Central Excise, Madurai Vs. M/s. Strategic Engineering Private Ltd.

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Court : Chennai Madurai

Decided On : Dec-18-2015

Judge : V. Ramasubramanian & N. Kirubakaran

Appeal No. : Writ Appeal (MD) No. 1223 of 2011

Appellant : The Additional Commissioner, Central Excise, Madurai

Respondent : M/s. Strategic Engineering Private Ltd.

Judgement :

(Prayer: Writ Appeal filed under Clause 15 of Letters Patent, against the order, dated 08.08.2011, made in W.P. (MD)No.11427 of 2006.)

V. Ramasubramanian, J.

1. This appeal by the Revenue arises out of an order passed by the learned Judge, setting aside a demand for payment of Service Tax.

2. Heard Mr.B.Vijay Karthikeyan, learned Standing Counsel for the appellant Department and Mr.Joseph Prabakar, learned counsel for the respondent/assessee.

3. The respondent/assessee is a manufacturer of GRP pipes. Upon perusal of the accounts of the respondent/assessee, the Department noticed that the assessee received an amount of Rs.5,19,45,145/- towards labour charges for installation and commissioning of GRP Pipes for various customers during the period from 01.07.2003 to 31.10.2004. Therefore, a show cause notice, dated 30.05.2005, was issued on the ground that they are liable to pay service tax on the value of the service rendered by them under the category of "Erection, Commissioning or Installation Services" during the period from 01.07.2003 to 31.10.2003, under the proviso to Section 73(1) of the Finance Act, 1994. The assessee gave a reply.

4. Thereafter, an order-in-original, bearing No.15/2006 was passed by the Additional Commissioner of Central Excise on 20.11.2006, confirming the demand. Instead of filing a regular appeal, the respondent/assessee filed a writ petition in W.P.(MD)No.11427 of 2006. Though the Department raised the question of maintainability on the ground of availability of an alternative remedy, the learned Judge rejected the same and held on merits that the demand was unsustainable. Aggrieved by the order of the learned Judge, allowing the writ petition, the Revenue is on appeal before us.

5. The first and the foremost contention of Mr.B.Vijay Karthikeyan, learned Standing Counsel for the Revenue, is that when the assessee has an effective alternative remedy of appeal provided by the statute, the writ petition ought not to have been entertained by the learned Judge.

6. The learned Standing Counsel for the Department is justified in raising such a contention. It is not in every case that this Court can entertain a writ petition challenging orders such as orders-inoriginal. It is only in the

rarest of rare cases that this Court would entertain a writ petition allowing the assessee to bypass the alternative remedy of appeal.

7. But, in the case on hand, the order-in-original is dated 20.11.2006. The writ petition was filed way-back in December, 2006 and it was eventually allowed by a learned Judge on 08.08.2011. The appeal filed by the Department was admitted on 21.11.2011. Thus, a total period of 9 years has passed from the date of the order-in-original. A period of five years has passed from the date of the order of the learned Judge, allowing the writ petition. Therefore, it is futile to set aside the order of the learned Judge and to dismiss the writ petition on the ground of availability of alternative remedy, at this distance of time. Hence, we reject the first contention.

8. On merits, the stand taken by the respondent/assessee before the Additional Commissioner was that they were engaged only in the business of laying down pipelines and that therefore the same would not come within the purview of the expression "plant, machinery or equipment" so as to attract the provisions of Section 65(29) of the Finance Act, 2003. In order to understand the reach of the said contention, it is necessary to look into the developments that took place from 2003.

9. Section 65(105)(zzd) of the Finance Act, 1994 defined "taxable services" to mean "any service provided to a customer, by a commissioning and installation agency in relation to commissioning or installation". The provisions of the Finance Act, 1994 were intended to levy and collect taxes on untapped service sector.

10. Therefore, the services of "commissioning or installation" were brought under the service tax net in the Finance Act, 2003. Section 65(28) defined "commissioning or installation" to mean "any service provided by a commissioning and installation agency in relation to commissioning or installation of plant, machinery or equipment". This came into effect on 01.07.2003.

11. By Section 90 of the Finance (No.2) Act, 2004, Section 65(28) was omitted and a new section 65(39a) was inserted with effect from 10.09.2004. This Section 65(39a) read as follows:

"(39a) 'erection, commissioning or installation' means any service provided by a commissioning and installation agency in relation to erection, commissioning or installation of plant, machinery or equipment."

12. By Section 88 of the Finance Act, 2005, Section 65(39a) was amended. The amended Section 65(39a) reads as follows:

"(39a) 'erection, commissioning or installation' means any service provided by a commissioning and installation agency', in relation to, -

(i) erection, commissioning or installation of plant, machinery or equipment; or

(ii) installation of --

(a) electrical and electronic devices, including wirings or fittings therefore; or

(b) plumbing drain laying or other installations for transport of fluids; or

(c) heating, ventilation or air-conditioning including related pipe work, duct work and sheet metal work; or

(d) thermal insulation, sound insulation, fire proofing or water proofing; or

(e) lift and escalator, fire escape staircases or travelators; or

(f) such other similar services."

13. A careful look at the development that had taken place from 01.07.2003 would show (i) that the focus of Section 65(28) with effect from 01.07.2003 was on the commissioning or installation of plant, machinery or

equipment, (ii) that the focus of Section 65(39a) with effect from 10.09.2004 was also on commissioning or installation of plant, machinery or equipment, with the addition of the service of erection, and (iii) that the focus of Section 65(39a) with effect from 2005 was on several things, apart from plant, machinery or equipment.

14. It could be seen from the amendment to Section 65(39a), introduced under Finance Act, 2005, that the definition of "erection, commissioning or installation" was extended so widely as to include (i) electrical and electronics devices, (ii)plumbing, (iii)heating, ventilation or air-conditioning, (iv) thermal insulation, (v) lift and escalator, and (vi) such other similar services.

15. Therefore, it is clear that before the amendment to Section 65(39a) under Finance Act, 2005, installation of plumbing, drain laying or other installations for transport of fluids was not included within the definition of "erection, commissioning or installation". This is why the learned Judge came to the conclusion that the contract that the respondent/assessee had with its customers for the purpose of laying pipelines did not come within the definition of the expression "commissioning or installation" as it prevailed under Section 65(28) as on 01.07.2003. We find nothing wrong in the conclusion reached by the learned Judge.

16. As a matter of fact, CESTAT held in M/s.Indian Hume Pipes Co. Ltd vs. Commissioner - {2008 (12) S.T.R. 363} that pipes or pipelines would not come under the category of "plant, machinery or equipment". This decision of the Tribunal in Indian Hume Pipes Co. Ltd. was affirmed by a Division Bench of this Court, to which one of us (VRSJ) was a party, in the Commissioner of Central Excise v. Indian Hume Pipes Co. Ltd. - {2015-TIOL-2049}. Therefore, the learned Judge was right in holding that the services rendered by the respondent/assessee to its customers did not form part of taxable services as on 01.07.2003.

17. Mr.B.Vijay Karthikeyan, learned Standing Counsel for the Department, attempted to distinguish the decision in Indian Hume Pipes Co. Ltd. on the ground that this Court was concerned in that case with the laying of pipelines for the Tamil Nadu Water Supply and Drainage Board, which was a public utility service.

18. We do not think that such a distinction is called for insofar as the levy of service tax is concerned. All that we are called upon to see is whether the laying of pipelines was included in the definition of the expression "commissioning or installation" under Section 65(28) with effect from 01.07.2003. The pipes that the respondent/assessee had to lay were not plant, machinery or equipment. Therefore, the learned Judge was right in allowing the writ petition.

19. It is contended by Mr.B.Vijay Karthikeyan, learned Standing Counsel for the appellant department, that the contract that the respondent had was for fabrication, erection, alignment and hydrotesting of GRP piping at the LNG Terminal of a company by name M/s.Petron Engineering Constructions Ltd. Therefore, he contended that these pipes form part of plant and machinery.

20. But, we do not think so. GRP pipes are fundamentally used for carrying Liquefied Natural Gas. The Finance Act, 2005 specifically included plumbing, drain laying or other installations for transport of fluids. Therefore, we are of the view that the learned Judge was right in allowing the writ petition. Hence, there are no merits in the writ appeal. Accordingly, it is dismissed. No order as to costs.