**Commissioner of Central Excise Vs. Linde-kca-dresden Gbh**

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**SooperKanoon Citation** : sooperkanoon.com/44531

**Court** : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

**Decided On :** Jan-05-2007

**Reported in** : (2007)9STJ112CESTAT(Mum.)bai

**Judge** : K Kumar

**Appellant** : Commissioner of Central Excise

**Respondent** : Linde-kca-dresden Gbh

**Judgement** :

1. Heard both sides. The issue relates to payment of service tax, penalty and interest. This appeal is filed by the Revenue. The Revenue has taken the following grounds in their Memorandum of Appeal: (I) In this case, the main issue is related to the question -whether the notice had provided any service - which was coming into preview of service tax or not. Commissioner (Appeals) relied on the noticee's submission that since the agreement was terminated without providing any service, the appellants not liable to pay service tax However, a close look of termination agreement reveals that noticee's claim is factually not correct. It is clear from para 1.b of Preamble of termination agreement that "LKCA" has completed draft conceptual design, though there are different viewpoint on the scope of its completion between WRBPL and LKCA". Thus, it is quite clear that before agreement of termination the service of "Draft Conceptual Design" was provided by M/s. LKCA. Thus Commissioner (Appeals)'s observation that "agreement was terminated without providing any service" is not factually correct. In fact, whole order of Commissioner (Appeals) is based on this presumption only -

so order is not sustainable on this ground only.

(II) The termination agreement talks about payment of f12,275=DEM. The notice submitted that it is merely a "compensation" and not "consideration". However, a close look of the said payment clause of termination agreement clearly reveals that this payment is not any "compensation" but a "consideration" related to the service of draft conceptual design. Para 2.2 (Terms and Conditions of termination) read as under: Irrespective of the status of the conceptual design, it is agreed that LKCA will raise a fresh invoice as a full and final settlement for a value of 12,275=DEM (in words: Twelve thousand two hundred and seventy five only DM) exclusive of any duties of taxes payable to Indian Institutions or Authorities. WRBPL upon receipt of the invoice will make the necessary payments to LKCA in full and final settlement of all their claims under this agreement.

It is clear from this para that payment is related to "conceptual design" only. And if any payment is made to the service provided by the assessee the assessee is liable to pay service tax. Thus Commissioner (Appeals) order is not legal and proper.

(III) It is clear from the above before termination agreement some service was rendered and payment was made. Now the question arises whether this payment was inclusive of service tax or not. And if this payment was not inclusive to tax whether the assessee is liable to pay service tax or not. In this regard Para 2.2. of said agreement reveals that the "payment made was exclusive of any duties or taxes payable to Indian institution or Authorities." Thus it appears that service tax was not added in the payment. However regarding charging of "service tax" the statutory provisions of Finance Act 1994, as amended, made it clear that even though service tax may not be added in payment made: the assessee has to pay service tax.

In this regard it is important to mention that Section 68 of Chapter V of Finance Act 1994 deals with payment of service tax. Prior to Finance Act 1998 this section read as under: (1) Every person providing taxable services to any person shall collect the Service Tax at the rate specified in Section 66.

(1A) Notwithstanding anything contained in Sub-section (1) of Section 68. In respect of the taxable service referred to in items (g) to (r) or Sub-clause (41) of Section 65, the Service Tax for such service shall be collected from such person and in such manner as may be prescribed at the rate specified in Section 66 and all the provisions of this Chapter shall apply to such person as if he is the person responsible for collecting the service tax in relation to such service.

(2) The service tax collected during any calendar month in accordance with the provisions of Sub-section (1) or Sub-section (1A), as the case may be, shall be paid to the credit of Central Government by the 15th of the month immediately following the said calendar month.

(3) Any person, responsible for collecting the Service Tax, who fails to collect the tax in accordance with the provisions of Sub-section (1) or Sub-section (1A) as the case may be, shall, notwithstanding such failure, be liable to pay the tax to the credit of the Central Government within seventy five days from the end of the month in which the service was rendered.

However, Section 68 had been amended significantly by Finance Act 1998. Section 68 as substituted by Finance (No. 2) Act 1998 (w.e.f.

16.10.98) read as under: (1) Every person providing taxable service to any person shall pay service tax at the rate specified in Section 66 in such manner and within such period as may be prescribed.

(2) Notwithstanding anything contained in Sub-section (1), in respect of any taxable service notified by the Central Government in tne Official Gazette, the Service Tax thereon shall be paid by such person and in such manner as may be prescribed at the rate specified in Section 66 and all the provisions of this chapter shall apply to such person as if he is the person liable for paying the Service Tax in relation to such service.

It is clear that from 1998 there has been a paradigm shift in Section 68, in such a way that collection of tax has been replaced by payment of tax. It means that even if the assessee is not able to collect the tax, he shall be liable to make the payment of Service Tax and he will be liable for Service Tax in relation to such Service. Since in this case termination was made of 5^th Nov. 1998 - after the enactment - and payment was made thereafter, provisions of amended Section 68 is applicable in this case and the noticeeis liable to pay service tax.

2. After perusal of the grounds taken in the Memorandum of Appeal by the Revenue, I consider it necessary to remand the matter to the Commissioner (Appeals) for de novo adjudication for passing a speaking order after giving a reasonable opportunity of nearing. The appeal is allowed by way of remand in the above terms.