Vikram Cement Vs. Cce

Vikram Cement Vs. Cce

SooperKanoon Citation : sooperkanoon.com/44955

Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Feb-26-2007

Reported in : (2007)10STJ32CESTATNew(Delhi)

Judge : S Kang, Vice, N T C.N.B.

Appellant : Vikram Cement

Respondent : Cce

Judgement :

1. The appellant is a manufacturer of cement. In connection with that, it engaged engineering and management consultants from abroad. During the period December 2002 to October 2004, certain payments were also made to those consultants. During the relevant period, these services were liable to Service Tax. Accordingly, on the value of the services, Service Tax was also paid, under protest.

2. Subsequently, on 15.2.05, the appellant filed refund applications claiming return of the Service Tax (over Rs. Two lakhs) paid on the ground that the appellant was not liable to pay the Tax. The contention was that the Tax was payable by the provider of the service, viz.

foreign consultants. The refund application was rejected by the original authority and the first appellate authority. Hence the present appeal.

3. The contention of the ld. Counsel for the appellant is that in terms of Section 68(2) of Finance Act, during the relevant period, the tax was payable by the provider of the service. It is being pointed out that only with effect from 1.1.05, the service recipient became liable for payment of the tax, in the light of Notification No. 36/2004 dated 31.12.04. It is being pointed out that since the tax was not payable by the appellant during the period when the tax was paid, the amount is refundable. Reliance is being placed in this connection, on the Single Bench decision of the Tribunal in the case of Aditya Cement v. CCE 2007-TIOL-236-CESTAT-DEL. It is also being pointed out that it is well settled (Govind Saran Ganga Saran v. Commissioner of Sales Tax and Ors.

1985 (Supp)-205 that unless it is clear as to the person on whom the levy is imposed and is obligated to pay the tax, payment of tax cannot arise.

4. The ld. SDR would contend that, the instant payments of tax took place in terms of agreement between the foreign consultants and the present appellant and the tax was deposited by the appellant as the agreement provided that local taxes are in addition to the cost of the consultancy. It is his contention that refund of the tax rightly paid would not be justified at all. It is also being pointed out that an identical issue came up before a division bench of this Tribunal in the case of Jindal Steel 2006 (3) STR 481 (Tri.-Del.) and this Tribunal had rejected the refund application.

5. Upon the perusal of the record and hearing both sides, it is clear that there is no dispute at all that the tax was attracted during the relevant period on the services received by the appellant. There is also no dispute about the amount of tax paid. We find from the agreements between the foreign consultants and the appellant that local taxes were to be over and above the consultation fees. The agreement clearly stated that "above fees is net and free of all local taxes".

The agreements provided that the foreign consultants would raise their invoices excluding taxes. Thus, under the scheme of the agreements, the appellant was to bear the cost of consultancy as well as the cost of all local taxes. In this scheme of the agreements, the tax amounts could either be remitted by the appellant to the foreign consultants and they paid it to the government or the same could be deposited by the appellant directly to the government. In the present case, latter

course was adopted and the appellant deposited the tax amounts. Such payment can only be treated as payments made on behalf of the foreign, consultants who are liable to deposit the amount. In this view of the matter, we are not able to find merit in the present claims for refund.

A refund at this belated stage would not be in the interests of justice. A refund at this stage would only lead to the appellant receiving an undue advantage, while revenue would not be able to recover the tax due from the foreign consultants. In the facts of the present case, we do not think such a course is adviceable or necessary.

6. The appellant's case is very similar to that of Jindal Steels and Power. In that case also, the recipient of the consultancy service paid the tax first and claimed its refund later. That claim was (sic) was rejected by this Tribunal with the following observation: The service tax was chargeable on the service provider even as stipulated in the agreement, but the appellant instead of remitting it to the foreign party-service provider NKK Corporation, Japan as required by Article 5.3. credited it to the Central Government by filing the return to discharge the statutory liability of the service provider in respect of the value of the taxable service. The service provider instead of collecting service tax from the appellant as per the invoice dated 2.10.2002 had imposed an obligation on the appellant to pay that amount in the treasury, as contemplated in Article 5.1 which provided that in the case of taxes payable by NKK Corporation, i.e. the foreign service provider, they would be borne by JCPL, i.e. the appellant and that the JCPL agreed to bear such amount of service tax specified in para 5.3. The appellant by paying the amount of service tax as per the invoice had in fact discharged the liability of the service provider pursuant to the obligation to do so, which was undertaken by the appellant under Clauses 5.1 read with Clause 5.3 of the agreement. If the appellant had not done so, it would have become liable to the service provider under Article 5.4 of the agreement. It cannot, therefore, be said that the service tax was erroneously paid or that it was not payable in respect of the services provided to the appellant, though it was earmarked for deposit, as stated in the said invoice dated 2.10.2002 which was issued by the foreign services provider on the appellant.

The attempt to shift the focus of the case from Section 68(1) to Section 68(2) is, therefore, wholly misconceived. The service tax payable in respect of taxable service cannot become refundable merely because instead of the service provider collecting and crediting it to the Central Government, it was so credited by the recipient of service under their mutual arrangement. Any other view, will amount to putting a premium on dishonest claim of refund of service tax due and paid in respect of the taxable service in question at the instance of the service provider by the recipient under their contractual arrangement.

We are not concerned with any hypothetical question, which was sought to be raised during the arguments as to what would have happened had the tax not been paid despite the contractual obligation undertaken by the appellant to pay it directly instead of sending it to the provider. When the service tax was admittedly due and payable by the provider of service and was validly paid pursuant to the mutual payment arrangement between the parties, no such irrelevant aspect can make the amount which was validly paid as service tax to be refundable. It has not been disputed before us during the arguments that the benefit of the notification dated 16.12.2002 was not admissible to the appellant, since the service tax had become payable on 2.10.2002. The reasoning of both the authorities below is sound and acceptable on the question of the non-applicability of the exemption notification to the petitioner's case. We find ourselves in complete agreement with the reasoning adopted and findings reached by both the authorities below and find no warrant for interference with the impugned order on any of the contentions raised on behalf of the appellant.