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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Sep-11-2007

Reported in : (2008)12STT89

Judge : J Balasundaram, Vice-, S T A.K.

Appellant : thermax Limited

Respondent : Commissioner of Central Excise

Judgement :

1. The appellants are the manufacturers of industrial boilers, heaters, pollution control equipment, heat pumps, chillers, etc., for industrial use falling under Chapter 84 of the Central Excise Tariff Act, 1985.

The appellants are also registered under service tax for providing services under the five categories, viz., consulting engineering, installation and commissioning, repairs and maintenance, technical testing and analysis, franchise service.

2. During the scrutiny of their records, the CERA auditors observed that the appellants are also engaged in the business of leasing and hire purchase of some equipment from July 16, 2001 onwards and have received lease receipts/financial charges for providing these services.

This service appeared to be covered as taxable service under the category of "banking and other financial services" as per Section 65(12) of Chapter V of the Finance Act, 1994 (as amended) with effect from July 16, 2001. Further, Ministry

of Finance vide its circular No.BII/1/2001 TRU dated July 9, 2001 has clarified that in the case of hire-purchase agreement, interest or finance charges together with processing charges/documentation charges is the consideration for the services rendered which will constitute the value of the taxable services and service tax is payable on this. The original adjudicating authority, i.e., the Assistant Commissioner, Central Excise (STC), Pune-I observed that as per Section 65(105)(zm) of the Act "any service provided to a customer by any other body corporate in relation to 'banking and other financial services' namely, 'financial leasing services including equipment leasing and hire-purchase by a body corporate' is a taxable service with effect from August 16, 2002".

Accordingly, he confirmed the demand of service tax of Rs. 1,35,189 under Section 73(1) of the Finance Act, 1994 for the period from August 16, 2002 till March 31, 2004 as against the demand of Rs. 3,45,553 raised in the show cause notice dated October 12, 2004 for the period from July 16, 2001 to March 31, 2004. The Assistant Commissioner also levied interest under Section 75 of the said Act and also imposed penalties under Sections 76, 77 and 78 of the said Act. On appeal, the Commissioner (Appeals) confirmed the order passed by the Assistant Commissioner. Hence this appeal.

4. The appellants contended that they are primarily engaged in the activity of manufacturing of industrial boilers, etc. However, in stray cases, they had occasion to supply their own boilers on lease contract.

In these cases, they have not charged any amounts on account of management fee, processing fees or documentation charges, etc., the way professional finance institutes charge, but interest was charged on unpaid amount of credit. Their contention is that this interest cannot be equated with the interest that is generally charged from the buyers by the professional financial institutes. Therefore, such interest amount is not in terms of the services rendered by them. They refer to Clause (viii) of Explanation 1 to Section 67 as inserted by Finance (No. 2) Act, 2004 with effect from September 10, 2004, according to which the amount of interest collected is outside the ambit of the service tax. They pointed out that the Explanation has removed the lacuna that existed in the earlier provisions and

hence it is clarificatory in nature, i.e., with effect from August 16, 2002 and, therefore, the amount of interest charged from the customers cannot be held liable to service tax under "banking and other financial services". They also stated that they have paid the sales tax on the boilers in question, which have been supplied on lease basis and filed some copies of the invoices for the relevant period in support of their claim. They also cited judgment of the Constitution Bench of the honourable Supreme Court in the case of Bharat Sanchar Nigam Ltd. v.Union of India 5. The learned SDR reiterated the findings of the Commissioner (Appeals) and prayed for the rejection of the appeal filed by the appellants.

6. We find that there are cases wherein the customers would like to take the machinery or boilers manufactured by the appellants on lease basis due to their financial constraints. In such cases, the appellants have charged and collected interest on the amount, which is loaned/blocked with customers. This activity was limited to their own products, i.e., boilers, etc. The appellants are not professional in leasing business for any other products, which are manufactured by other companies. The appellants' prime business activity is of manufacturing hi-tech boilers, pollution control equipment, etc., which are high value capital goods for industrial uses.

7. The lower authorities confirmed the service tax demand of Rs. 1,35,189 for the period from August 16, 2002 to March 31, 2004 on the ground that as per Section 65(105)(zm) of the Finance Act, 1994 "any service provided to customer by any other body corporate" in relation to "banking and other financial services" is a taxable service with effect from August 16, 2002. "Banking and other financial services" are defined in Section 65(12) of the Act. "Financial leasing services including equipment leasing and hire-purchase" provided by a body corporate is covered under the category of "banking and other financial services". The lower authorities have relied on the Ministry of Finance Circular No. BII/1/2001 TRU dated July 9, 2001 wherein it has been clarified that in case of hire-purchase agreement, interest or finance charges together with processing charges/documentation charges constitute value of taxable service. In the instant case, it is not disputed that the appellants have not charged any amounts on account of lease management fee, processing fees or documentation charges,

etc., but interest was charged on unpaid amount of credit. The dispute relates to levy of service tax on interest amount received on leasing of machinery/ equipment by the appellants, who are a body corporate in terms of Clause (7) of Section 2 of the Companies Act, 1956. The period involved is from August 16, 2002 to March 31, 2004. We are of the view that the inclusion of "interest" element in the value of taxable services vide the Ministry of Finance Circular No. BII/1/2001 TRU dated July 9, 2001 is open to question, since the element of rendering any "service" for recovering interest is absent. A bank collects interest merely because its money has been used by the customer and one of the primary functions of a bank is to lend money on interest. Interest is compensation fixed by an agreement or allowed by law for use or detention of money or for loss of money by one who is entitled its use.

Interest cannot be considered as consideration for rendering any service. In any case, Clause (viii) of Explanation 1 to Section 67 inserted by Finance (No. 2) Act, 2004 now specifically provides that "interest on loan" will not form part of the value of taxable service.

In this context, it has been clarified by the Ministry vide Circular No. 80/10/2004 ST dated September 17, 2004 that "all such interests which are in the nature of interests on loans would thus remain excluded from the taxable value." In our view, the insertion of the Explanation has removed the anomaly that existed earlier and it should be treated as clarificatory in nature, i.e., effective from August 16, 2002. In that view of the matter, the service tax demand confirmed for the period from August 16, 2002 to March 31, 2004 is not sustainable.

8. There is another angle to the case. The appellants have furnished sample copies of the invoices relevant to the period in question to show that the sales tax is paid by them on the equipment leased to the various customers as there is transfer of right to use goods from the appellants to the customers. It would appear from the Supreme Court's ruling in Bharat Sanchar Nigam Ltd. v. Union of India that anything on which sales tax is paid is goods and, therefore, service tax cannot be levied thereon, though Central excise duty may be leviable, if the goods are found to be excisable and dutiable. The ratio laid down by the Supreme Court

ruling in the BSNL case has been followed by the Tribunal in the case of BPL Mobile Communication Ltd. v. CCE [2007] 10 VST 313 (CESTAT-Mum) : [2007] TIOL 435 (CESTAT-Mum) wherein the Tribunal has held that service tax cannot be levied on the value of SIM cards, once sales tax has been paid on the same. Viewed from this angle also, service tax is not leviable in the instant case.

9. Since the service tax demand itself has been held to be not sustainable on merits, the question of demanding interest and imposition of penalties does not arise. The same is set aside. The impugned order passed by the Commissioner (Appeals) is set aside. The appeal is allowed with consequential relief.

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