CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, WEST ZONAL BENCH : AHMEDABAD

REGIONAL BENCH - COURT NO. 3

SERVICE TAX Appeal No. 11552 of 2016-DB

[Arising out of Order-in-Original/Appeal No VAD-EXCUS-001-COM-001-16-17 dated 16.05.2016 passed by Commissioner of Central Excise, Customs and Service Tax-VADODARA-I]

Randhawa Construction .... **Appellant**
203,shivag Apartments, Behind Malhar Point,
Old Padra Road, Akota, VADODARA, GUJARAT-390005

VERSUS

Commissioner of Central Excise & ST, Vadodara-i .... **Respondent**
1st Floor, Central Excise Building,
Race Course Circle, Vadodara,
Gujarat -390007

APPEARANCE :

Shri Saurabh Dixit, Advocate for the Appellant
Shri SS Vikal, Assistant Commissioner AR for the Respondent

CORAM: HON'BLE MR. SOMESH ARORA, MEMBER (JUDICIAL)
HON'BLE MR. C.L. MAHAR, MEMBER (TECHNICAL)

DATE OF HEARING : 04.04.2024
DATE OF DECISION: 08.04.2024

FINAL ORDER NO. 10778/2024

C.L. MAHAR :

The facts in brief are that the appellant is engaged in providing Erection, Commissioning and Installation Service and other construction activities and for the same they are registered with service tax authorities. The appellant has entered into a contract as a subcontractor for the period 2009-10 to 2013-14 with M/s. Samsung Engineering Company Limited. M/s. Samsung Engineering Company Limited was appointed as a contractor by M/s. ONGC Petro Additions Limited, a SEZ unit situated at SEZ Dahej for carrying out construction work and providing goods and other services as per the contract. The appellant in the capacity of subcontractor of M/s. Samsung Engineering Company Limited had provided PC Pipe Rack Erection work to M/s. ONGC Petro Additions Limited and consequently availed exemption from service tax as per Notification No.9/2009-ST dated 03.03.2009 as amended by Notification No. 15/2009-ST dated 20.05.2009 and other amendments. The department has undertaken audit of the financial records of the appellant and it was pointed out that appellant had failed to furnish authorization in terms of Form A-1 and A-3 and therefore, they are not entitled to exemption as per Notification No. 09/2009-ST dated 03.03.2009 as amended. A show cause notice came to be issued which was adjudicated by the impugned order-in-original dated 16.05.2016 by which service tax amounting to Rs. 3,85,72,267/- has been confirmed against the appellant. Penalty under Section 78(1) of the Finance Act, 1994 has also been imposed on the appellant with confirmation of recovery of interest. The appellant are before us against the impugned order-in-original.

2. Shri Saurabh Dixit, learned advocate appearing for the appellant submits that the service provided by a subcontractor to a unit located in SEZ is eligible for exemption benefit in terms of Notification No. 9/2009-ST dated 03.03.2009 as amended. It was wrong on the part of the Adjudicating Authority to hold that exemption is available only to services provided by main contractor and received by a developer or units of SEZ because the approval from Approval Committee has been provided for the contractor to whom the contract for services have been entered into by a developer or SEZ Unit and not to the subcontractor.

2.1 Learned advocate has also contended that the requirement of furnishing a declaration in Form A-1 was introduced only by an amendment in Notification No. 9/2009-ST vide amendment No. 17/2011 dated 01.03.2011 hence it is effective only after this date that the requirement of submitting a declaration in Form A-1 became the imperative, therefore, the demand which pertains to period prior to March 2011 is otherwise not sustainable because there was no such requirement of making any declaration in Form A-1 by the appellant prior to that. It has further been submitted by the learned advocate that a substantive benefit provided by a notification or by an Act cannot be denied merely for some infringement of procedural requirement. The learned advocate emphasized that Section 26 of SEZ Act provides that all activities and services rendered in SEZ area for SEZ developer or SEZ unit are exempted from service tax. The learned advocate relied upon various case laws in support of his arguments:-

(a) Shyam Engineers Final Order No.12201/2023 dated. 07.08.2023

(b) Rishabh Construction Company – 2023 (10) TMI 596-CESTAT Ahm

(c) Fedco Paints and Contracts 2017(3) GSTL 364-(Tri- Mum)

(d) Anjani Excavation Operation 2023(7) TMI 205-CESTAT Ahm

(e) Sanghvi Movers Ltd 2018(10) TMI 90- CESTAT Mum

(f) Neo Structo Construction 2023(2) TMI 289-CESTAT Ahm

2.2 It has further been stressed by the learned advocate that this Tribunal in the case of Reliance Ports and Terminals Limited reported in 2015 (40) STR 200 (Tri. Ahmd.) as well as in the case of DHL Lemiur Logistics Pvt. Limited reported in 2016-CESTAT-1455-CESTAT-MUM has held that any service provided in SEZ area never attract service tax at all, irrespective of following or otherwise the procedural requirement since as per Section 26 of SEZ Act, 2005 no service tax is payable on service provided in SEZ area at all. The learned advocate has further stressed that there is no denying of the fact that services were in fact provided by the appellant to a unit located in SEZ Area which is an admitted fact by the department also and therefore a substantive benefit provided by the legislature cannot be withheld only for some procedural infringements.

3. We have heard Shri SS Vikal, learned Assistant Commissioner (AR) who has reiterated the findings as given in the impugned order-in-original.

4. Having heard both the sides, we find that only question which needs to be answered by us is whether the appellant being a subcontractor to the main contractor M/s. Samsung Engineering Company Limited which was appointed for rendering certain services to M/s. ONGC, located at SEZ Dahej, is entitled for the benefit of Notification No. 9/2009-ST dated 03.03.2009 as amended by various notifications being a subcontractor. Before proceeding further in the matter it will be relevant to reproduce here the arguments on which the demand has been confirmed by the learned Adjudicating Authority in order-in-original :-

> **"22.6.** I therefore find that from the overall facts of the case seen in the light of the existing provisions, in-admissibility of the exemption on the taxable services provided by a sub contractor to the Contractor of a SEZ Unit is expressly clear. Nowhere in the SEZ Act, 2005 and the Rules framed there-under or under any Notification issued in relation thereto as well as under any statutory provisions of the Finance Act, 1994 (as amended) there is any such provisions of exemption from levy of Service Tax on the taxable services when provided by a sub-contractor to the Contractor of a SEZ Unit. Further, levy of service tax is by virtue of the Finance Act, 1994 and no levy can be imposed by way of instructions/circular by the Board. In this regard, the recent decision of Hon. Tribunal in the case of M/s. Sew Construction Ltd. Vs. CCE, Raipur- 2011 (22) STR 666 (Tri.-Del) is most relevant. It was held by the CESTAT that -
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> > *"5. We do not find any provision in the Finance Act, 1994 to grant immunity to the sub contractor from levy of service tax when undisputedly taxable services were provided by them. No evidence was before us to notice whether the service provided by the sub- contractor to the contractor was ever been taxed. We noticed that para 9 of the Larger Bench decision in the case of M/s. Vijay Sharma & Co. cited by the learned AR clearly speaks that a sub-contractor shall not be immune from service tax under Finance Act, 1994. The said para 9 is reproduced below for appreciation.*
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> In view of the foregoing discussion, it is clear that even when service is provided in the category of sub-contractor, he is liable to pay service tax. This view is also supported by Board's circular No. 96/7/2007-ST dated 23.08.2007 and 138/7/2011-ST dated 06.05.2011 as elucidated above. Under the circumstances I find M/s Randhawa not eligible for the exemption on the taxable services provided by them as sub-contractor to M/s Samsung.**"**

It can be seen that there is no denying of the fact that services were provided by the appellant in the capacity of a subcontractor to a unit located in SEZ area and only argument on the basis of which the learned Adjudicating Authority has confirmed the demand of service tax only on the ground that when the service has been provided by a subcontractor to the contractor of the SEZ Unit, the subcontractor will not be entitled to benefit of notification even though services have been provided to a SEZ unit.

5. We are of the view that since the services rendered to a SEZ unit on behalf of a Contractor who has formally been authorised by SEZ Unit for providing certain goods and services to them, irrespective whether the services directly provided by the main contractor or the main contractor has appointed a subcontractor makes no difference since the service has been rendered to SEZ Unit, the benefit of exemption notification is available to the appellant. While holding the above view, we take note of this Tribunal's decision in the case of M/s. Shyam Engineers Final Order No.12201/2023 dated 07.08.2023. The relevant extract of the same is reproduced below:-

> "5. We have carefully considered the submissions made by both the sides and perused the record. We find that Revenue has denied the exemption on payment of service tax under Notification No. 09/2009-ST only for the reason that the appellant being a sub-contractor, have not provided service directly to the SEZ unit or developer of SEZ. On perusal of notification, we find that notification prescribes that the service which are provided in relation to authorised operation in SEZ and received by a developer or unit of SEZ are exempted from whole of service tax. As per this plain reading of the notification, the only criteria is that the service which is provided, should be in relation to the authorised operations in SEZ and received by a developer or unit of SEZ. In the facts of the present case, there is no dispute that appellant have provided service which are approved by the concerned authority in relation to the authorised operations in SEZ therefore, in our considered view, even the appellant is sub-contractor but the condition of providing service to authorised operation has been satisfied. Therefore, exemption cannot be denied to the appellant. This issue has been considered by this Tribunal in the following decisions;
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> (a) Sudhir Chand Jain vs. CCE – 2018 (8) GSTL 302 (Tri. All)
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> (b) CST vs. Fedco Paints and Contracts – 2017(3) GSTL 364 (Tri.-Mumbai)

From the above judgments and the discussion and findings given hereinabove, there is no doubt in our mind that service provided by the appellant in the capacity of sub-contractor but in relation to the authorised operations in SEZ are clearly eligible for exemption Notification No. 9/2009-ST dated 03.03.2009 as amended. Accordingly, the impugned order is set-aside, appeal is allowed."

A similar view has also been taken by this Tribunal in the case of Rishabh Construction Company – 2023 (10) TMI 596-CESTAT Ahmd, the same is reproduced below:-

"4. We have carefully considered the submission made by both sides and perused the records. We find that the Revenue has denied the exemption to the appellant on the ground that the appellant being sub- contractor provided the service not to the SEZ but to the main contractor i.e. M/s. Khurana Construction, therefore, they are liable to pay the service tax. We find that even though the service was provided by the appellant on the behest of the main contractor M/s. Khurana Construction but there is no dispute that the service was provided in relation to various operations of the SEZ and the services was undisputedly consumed in the SEZ therefore, the appellant has provided the service in SEZ. Accordingly, they are eligible for exemption Notification No. 04/2004-ST dated 31.03.2004. This issue is no longer res-integra as the same has been decided in various decision of the Tribunal cited by the learned counsel. Some of the judgments are reproduced below:-

Commissioner of Service Tax, Mumbai –I Vs. M/s. FEDCO Paints and Contracts – 2017 (3) GSTL 364 (Tri. Mumbai)

"5. After hearing both the sides, we find that the main ground of the appeal of the Revenue is that the respondent had never provided services directly to the SEZ unit but was contracted as a sub-contractor to provide services to a unit in SEZ. Hence, the benefit of Notification No. 4/2004-S.T. is not applicable. It is undisputed that during the period 1-4-2005 to 31-3-2009 the respondent had rendered various services to the unit situated in SEZ and being developed by the SEZ developer. It is also undisputed that appellant was a sub-contractor. On this factual matrix, we have to now consider the Notification No. 4/2004-S.T. which reads as under :

"Service tax exemption to services provided to a Developer or units of Special Economic Zone — Notification No. 17/2002-S.T. superseded

In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994) and in supersession of the notification of the Government of India in the erstwhile Ministry of Finance and Company Affairs (Department of Revenue), No. 17/2002-Service Tax, dated 21-11-2002, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) dated 21-11-2002, vide, G.S.R 777(E), dated 21-11-2002, except as respects things done or omitted to be done before such supersession, the Central Government being satisfied that it is necessary in the public interest so to do, hereby exempts taxable service of any description as defined in clause (90) of sub-section (1) of section 65 of the said Act provided to a developer of Special Economic Zone or a unit (including a unit under construction) of Special Economic Zone by any service provider for consumption of the services within such Special Economic Zone, from the whole *of service tax leviable thereon under section 66 of the said Act, subject to the following conditions, namely:-*

(i) the developer has been approved by the Board of Approvals to develop, operate and maintain the Special Economic Zone;

(ii) the unit of the Special Economic Zone has been approved by the Development Commissioner or Board of Approvals, as the case may be, to establish the unit in the Special Economic Zone;

(iii) the developer or unit of a Special Economic Zone shall maintain proper account of receipt and utilisation of the said taxable services.

Explanation. - For the purposes of this notification, -

(1) "Board of Approvals" means the combined Board of Approvals for export oriented unit and Special Economic Zone units, as notified in the Official Gazette, from time to time by the Government of India in the Ministry of Commerce and Industry;

(2) "developer" means a person engaged in development or operation or maintenance of Special Economic Zone, and also includes any person authorised for such purpose by any such developer;

(3) "Special Economic Zone" means a zone specified as Special Economic Zone by the Central Government in the notification issued under clause (iii) of Explanation 2 to the proviso to sub-section (1) of section 3 of the Central Excise Act, 1944 (1 of 1944)."

6. It can be seen from the above reproduced notification that the said notification exempts any taxable service provided by any service provider for consumption of the service within a Special Economic Zone, subject to following/adhering to the conditions. It is also undisputed that all the conditions mentioned in the notifications are satisfied by the SEZ developer i.e. M/s. Reliance Industries Ltd. On the face of such factual matrix, we find that the adjudicating authority was correct in coming to the conclusion that the proceedings initiated by show cause notice issued needs to be dropped. We also find as regards taxability of the service rendered to the SEZ developer was in dispute before this Tribunal in the case of Sujana Metal Products Ltd. v. Commissioner of Central Excise - 2011 (273) E.L.T. 112 (Tri.-Bang.) and this Tribunal came to a conclusion that where the services are rendered to SEZ or a unit in SEZ, as long as it is rendered for consumption in a Special Economic Zone, the services are exempt. We also note that the provisions of Section 26 of the Special Economic Zone overrides provisions of other law and exempts any services or taxes if the same are consumed in Special Economic Zone.

7. In view of the foregoing and the authoritative judicial pronouncement, we find no merits in the appeal filed by the Revenue and the same stands rejected and hold impugned order is correct and legal and does not require any interference. cross-objection is also disposed of."

Sudhir Chand Jain vs. Commissioner of Central Excise, Ghaziabad – 2018 (8) GSTL 302 (Tri.All)

"6. Having considered the rival contentions I hold that the appellant as sub-contractor have provided service through their contractor M/s. Anurag

Enterprises for construction of SDF, Block L at NSEZ for to the Deputy Commissioner of the SEZ. This proposition has been affirmed by the Hon'ble Supreme Court in the case of Imagic Creative and also by Hon'ble Patna High Court in the case of Hindustan Dorr Oliver Ltd. v. State of Bihar. Further, I find that the approval should be either by the Deputy Commissioner and/or Board of Approvals as the case case may be. Here, admittedly the work order has been issued by Deputy Commissioner, SEZ. Hence it amounts to providing and consuming service to SEZ and/or allotted through NBCC, as the operating agency to the appellant with regard to other demand of Service Tax which already stands paid along with interest before SCN and not being contested by the appellant as regard taxability. Thus, there is ipso facto approval of the Deputy Commissioner of the SEZ. Thus, I hold that no further approval of the Approval Committee is required under the facts and circumstances. Accordingly, the appeal is allowed and the demand of Rs. 17,51,124/- is set aside. I also find that there is no suppression of facts or contumacious conduct on the part of the appellant. Accordingly, the penalty under Section 78 & Section 77 of the Finance Act, 1994 is also set aside. The appellant will be entitled to consequential benefits, if any, in accordance with law."

4.1 In view of the above judgments, it is settled that the service of sub- contractor provided in SEZ shall be eligible for exemption under Notification No. 04/2004-ST and other identical notifications.

5. Accordingly, the impugned order is not sustainable, hence, the same is set aside. Appeal is allowed.**"**

6. Following the above decisions, we are of the view that substantial benefits of exemption notification cannot be denied merely on small infringement of procedural requirement. We therefore, hold that impugned order-in-original is without any merits and therefore we set-aside the same. The appeal is allowed.

(Pronounced in the open court on 08.04.2024*)*

(Somesh Arora)
Member (Judicial)

(C L Mahar)
Member (Technical)

KL