

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD**

REGIONAL BENCH - COURT No. I

Service Tax Appeal No.70600 of 2017

(Arising out of Order-in-Original No.KNP-EXCUS-000-COM-001-17-18 dated 15.05.2017 passed by Commissioner of Customs, Central Excise & Service Tax, Kanpur)

**Commissioner of Central Excise &
CGST, Kanpur**

(117/7, Sarvodaya Nagar, Kanpur-208005)

.....Appellant

VERSUS

M/s Z Square Shopping Mall (P) Ltd.,

(16/113, M.G. Marg, Kanpur)

....Respondent

APPEARANCE:

Ms. Chitra Srivastava, Authorized Representative for the Revenue
Shri Atul Gupta, Advocate for the Respondent

**CORAM: HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)**

FINAL ORDER NO.- 70641/2024

DATE OF HEARING : 30.09.2024
DATE OF DECISION : 30.09.2024

P. K. CHOUDHARY:

The present appeal has been filed by the Appellant – Revenue assailing the Order-in-Original No.KNP-EXCUS-000-COM-001-17-18 dated 15.05.2017 passed by the Commissioner of Customs, Central Excise & Service Tax, Kanpur.

2. The facts of the case in brief are that the Respondent leased out the immovable property by entering into the lease agreement with the tenants. The Respondents paid service tax on the above mentioned service. Under the lease agreement, the Respondent was also providing various services as specified in clause 8.5 of the lease deed. Lessees were paying for the additional facilities like supply of electricity in addition to the lease rent charges. DG Sets were also installed on the premises of the Respondents to provide uninterrupted supply of electricity

to the tenants. As per the lease deed, the Respondent has installed meters on its premises at its own cost and was providing 40% of the electricity consumption from the State Electricity Board at State Electricity Board rates and the balance power was being provided through DG Sets at actuals. Respondent was collecting the amount for the electricity provided on actual basis from the tenants. Therefore, Respondent, apart from providing the renting of immovable property services, was also trading electricity. It is the case of the Respondent that the amount recovered on account of electricity charges have been in the nature of reimbursement of expenses on the actual basis and since electricity is goods covered by entry 54 of List II of Schedule VII of the Constitution of India, service is not leviable upon it. An audit was conducted for the period from May, 2010 to March, 2011 on 26.07.2012 and it was observed by the Department that the Respondent was providing renting of immovable property alongwith maintaining DG Sets for the uninterrupted supply of electricity for use during smooth operation of their business. The Department objected in the report that the services provided by the party to their tenants, should be treated as 'Bundled Services', which included the "renting of immovable property (shops)" and "production, transmission and distribution of electricity through DG sets installed for continuous and uninterrupted power back-up, as explained under Explanation to Section 66F of the Finance Act, 1994, as amended. It has been considered by the Department that the activities of providing uninterrupted power back-up to the lessees were in the nature of incidental or ancillary services, which helped in better enjoyment of the main service i.e., renting of immovable property. Thus, it has been alleged that the activities undertaken by the party by way of production, transmission and distribution of electricity to their tenant were 'taxable services' under 'Renting of Immovable Property' prior to and on or after 01.07.2012. The Respondent gave a detailed reply to this audit objection and explained why the supply of electricity is not a supply of service but rather trading of goods.

Show Cause Notice was issued under F. No. DGCEI/LZU/INV/Gr.F/130/2015/Pt.1/4714-4722 dated 20.09.2016 to the party for inclusion of Rs.18,41,74,227/- received by the Respondent against supply of uninterrupted power back up of electricity during the course of providing 'immovable property service and demanding service tax thereon amounting to Rs.2,15,22,205/- (including Cesses) under Section 73(1) of the Finance Act, 1994. Demand of interest was proposed under Section 75 of the Act. Penalties under Section 77(2) and 78 of the Act were proposed. Further, penalty under Section 78A of the Act was proposed upon Shri Rajesh Shukla, General Manager (Finance) of M/s Z Square Shopping Mall (P) Ltd., Kanpur. The SCN was adjudicated by the Commissioner, Central Excise & Service Tax, Kanpur vide Order-in-Original dated 15.05.2017 whereby the proceedings initiated against the Respondent in the SCN were dropped. Hence the present appeal filed by the Department before the Tribunal. The learned Commissioner while passing the impugned Order-in-Original observed as under:-

- a. *The OIO relied upon the findings of the Supreme Court in Commissioner of Sales Tax, Madhya Pradesh, Indore v. Madhya Pradesh Electricity Board, Jabalpur [1969 (2) SCR 939], wherein the specific issue under consideration, as to whether the electricity is 'goods' or not, was considered. While considering the definition of 'goods', as provided under Article 366 (12) of the Constitution, the Apex Court held that electricity is also goods.*
- b. *The OIO also relied upon the judgment of the Supreme Court in State of A.P. v. National Thermal Power Corporation Ltd. & others [2002 TIOL-107-SC-CT] wherein the decision given in the case of Madhya Pradesh Electricity Board was affirmed with slight modification that 'electric energy' cannot be stored. Thus, the OIO aptly concluded that electricity is goods.*
- c. *The OIO further observed that in respect of electricity, the processes of generation/transmission/distribution/supply/consumption/sale are simultaneous and inseparable in respect of the establishments, who are engaged in*

generation of electricity and thus, the activities of transmission and distribution should not be ascertained or determined in isolation in case of such establishments. The sale of electricity completes only after the generated electricity transmitted/distributed to the consumers and is consumed by them.

- d. The OIO further observed that it is a settled law that electricity is not only 'goods' but is also 'excisable goods', which finds a mention in the Central Excise Tariff Act, 1985. Thus, sale, supply and distribution of electricity and money realized from simultaneous sale, supply and distribution shall be towards 'sale of goods' and it would be tantamount to "trading in goods".*
- e. On the question of taxability under the negative list, the adjudicating authority relied upon the Education Guide dated 20.06.2012 published by TAX RESEARCH UNIT, Central Board of Excise & Customs, Department of Revenue, Ministry of Finance, Government of India, New Delhi in respect of taxation of services. In the guide, the answer to question no. 4.6.2 categorically stated that "if central excise duty is leviable on a particular process, as the same amounts to manufacture, then such process would be covered in the negative list even if there is a central excise duty exemption for such process".*
- f. The OIO further observed that though the party is not an "electricity transmission or distribution utility" however, the negative list is completely silent for those establishments who are engaged in generating/manufacturing electricity and selling it to consumers. The learned adjudicating authority noted that there is a prevalent practice in the power sector/industry to produce electricity and then hand it over to other setups, who are exclusively engaged in providing transmission and distribution services. Further, the manufacturers of the electricity have been kept out of purview of services, because the law makers knew that the electricity is 'goods' capable of being manufactured, bought and sold. The processes of production/ transmission/ distribution/supply/consumption/purchase/sale in respect of electricity are simultaneous and inseparable and thus, the service elements of transmission and distribution cannot be ascertained or determined in isolation for levying service tax*

upon the establishment or undertaking, who has completed all the processes right from the manufacture to sale, as the sale of electricity completes only after it is transmitted, distributed and consumed in single action or one go.

g. Lastly, the OIO stated that to constitute bundling of services, the presence of two different services is mandatory. However, in the present case, one activity of the Respondent constitutes the service of renting immovable property, and the other activity constitutes the trading of electricity. Therefore, there cannot be any bundling of services.

3. We find that the issue is no more *res integra* and has been decided by the Tribunal in the case of Principal Commissioner, CGST & Central Excise, Lucknow vs. M/s India Housing in Service Tax Appeal No.70033 of 2020, vide Final Order No.70501/2024 dated 31.07.2024. We find that the trading of goods had been in negative list under provisions of section 66D(e), as amended. Further, generation of Electricity by Installed DG sets was a process amounting to manufacture or production of goods defined under the section 65B(40) of the Act *ibid*, as the electricity is goods covered by entry 54 of the List II of Schedule VII of the Constitution of the India. Also, electricity is in Excise Tariff under 27160000, hence, it is not liable to service tax.

4. We further find that keeping in view the correct legal position and by relying upon the relevant case laws, the adjudicating authority in the OIO concluded that electric energy, though an intangible object, is 'goods' covered by Entry 54 of List II of Schedule VII to the Constitution of India, capable of being sold and purchased, held that electricity is 'goods' capable of being purchased and sold, as like any other commodity. The adjudicating authority relied upon the judgment of the Hon'ble Supreme Court in State of A.P. vs. National Thermal Power Corporation Ltd. & others (2002 TIOL-107-SC-CT), wherein it has been held that electricity is goods and electricity charges collected from the tenants could not form part of the assessable value for the purpose of service tax as provider of renting of immovable properties. Apart from this, the adjudicating authority also relied upon the following judgments:-

- Commissioner of Sales Tax, Madhya Pradesh, Indore vs. Madhya Pradesh Electricity Board, Jabalpur, 1969 (2) SCR 939.
- Orient Paper & Industries Ltd. vs. Orissa State Electricity Board, 1989 (42) E.L.T. 552 (Ori).

5. We find that the Adjudicating Authority has correctly deduced the position of the law that electricity is a manufactured excisable goods and can very well fit within the ambit of Section 65B (40). The Adjudicating Authority noted the fact that the word used in Section 65B (40) is 'leviable' and not 'levied'. The reading of Section 3 of the Central Excise Tariff Act, 1944 reveals that even if the goods mentioned therein are subject to 'nil' rate of duty, they will still be excisable goods. Section 3 nowhere mandates the levying of duty for calling the goods as 'excisable goods. Therefore, even if electricity is subject to a nil rate of duty or is exempted from duty, it is still a tariff item leviable to duty under the Act.

6. We further find that the Adjudicating Authority relied upon the following judgments to conclude that electricity is a manufactured item which is brought and sold. Thus, sale, supply and distribution of electricity and money realized from simultaneous sale, supply and distribution shall be towards sale of 'goods' and it would be tantamount to 'trading of goods':-

- Orient Paper & Industries Ltd. v. Orissa State Electricity Board, 1989 (42) E.L.T. 552 (Ori).
- Tata Yodogava v. UOI, 1986 (25) E.L.T. 644 (Patna).
- Odisha Power Generation vs. State of Odisha & Another, W.P.(C) No.17017 of 2014, judgment dated 30-03-2015, Orissa High Court.
- Mettur Thermal Power Station vs. CBEC & CCE, W.P. No.17282 of 2014, judgment dated 15-07-2015, Madras High Court.
- CMS (India) Operations and Maintenance Co (P) Ltd. vs. CCE, 2007 (07) S.T.R. 369 (Tri. Chennai) further affirmed by the Supreme Court in 2017 (4) G.S.T.L. 175 (SC).

- NTPC Sail Power Co P. Ltd. vs. CCE, Bolpur, 2012 (277) E.L.T. 221 (Tri. - Kolkata).
- State of A.P. vs. National Thermal Power Corporation Ltd. & others (2012 TIOL-107-SC-CT).

7. We also find that with regard to the demand of the tax in the pre-negative service tax regime, the Adjudicating Authority, after analyzing the lease deeds and the ledgers of the Respondent, comprehensively and meticulously, concluded that the Respondent was collecting three different charges/amounts from its tenants, namely,

- (a) Rent of the leased portion of the complex
- (b) Common Area Maintenance Charges (CAM Charges)
- (c) Electricity charges: subject to the condition, that the Lessor must ensure that the said complex including the said premises has 100% power back- up and the Lessor was required to provide minimum 40% of total electricity consumption at State Electricity Board rates and the balance power was to be provided through DG sets on actual basis.

The Adjudicating Authority observed that the Respondent was paying service tax on the amounts received towards renting of immovable property and CAM charges, that included the consumption of water and electricity. It is regarding the electricity charges collected from the tenants for the activities of production, transmission, and distribution of electricity through D.G. sets to ensure 100% power back-up, that the Department has raised the demand for the electricity charges that were received on actual basis and as per the lease deed, it was agreed upon, that the Lessor was required to provide minimum 40% of total electricity consumption from State Electricity Board rates and the balance power shall be provided through DG sets on actuals. In view of the above facts, the adjudicating authority correctly concluded that the benefit of the exemption Notification 12/2003-ST must be given to the Respondent as it has submitted ledgers showing that electricity is not recovered on fixed basis.

8. We find that the Adjudicating Authority after comprehensively analyzing and reasoning the case laws and legal provisions concluded that the Respondent is not liable to pay service tax and dropped the demands proposed in the SCN. Thus, the Order-in-Original is a well-reasoned and a speaking order that reflects the correct position of law.

9. In view of above discussion, we do not find any reason to interfere with the impugned order and accordingly the same is sustained and the appeal filed by the Department being devoid of any merits, is dismissed.

(Dictated and pronounced in open court)

(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

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