CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL BANGALORE

REGIONAL BENCH, COURT NO. 2

Service Tax Appeal No. 60 of 2011

(Arising out of Order-in-Original No. 68/2010 dated 30.09.2010 passed by the Commissioner of Service Tax, Bangalore.)

M/s. Golf links Embassy Business Parks Management Services Pvt. Ltd.,
'ST. Andrews', Embassy Golf links Business Park,
Off Intermediate Ring Road,
Bangalore – 560 071. ……….**Appellant**

VERSUS

The Commissioner of Service Tax,
5th Floor, 16/1,
S.P. Complex, Lalbagh Road,
Bangalore – 560 027. ………..**Respondent**

Appearance:
Mr. N. Anand, Advocate for the Appellant.
Mr. P. Saravana Perumal, Authorized Representative for Respondent.

Coram:

Hon'ble Mr. P.A. Augustian, Member (Judicial)
Hon'ble Mr. Pullela Nageswara Rao, Member (Technical)

Final Order No. 21729 /2024

Date of Hearing: 08.10.2024
Date of Decision:08.10.2024

Per: Pullela Nageswara Rao

The issues in the present appeal are;

(a) Whether amounts collected from tenants towards BESCOM electricity charges on actual basis and paid to BESCOM and;

(b) whether the amounts collected from tenants as reimbursements on actual basis towards back-up power generated through DG Sets are includible in the value of taxable service under the category of "management, maintenance or repair service"

2. The facts in brief are the Appellant is a private limited company engaged in the activity of maintenance of immovable property viz., Embassy Golf Links Business Park situated in Bangalore and is a 'Maintenance Agency' for M/s. Golf links Software Park Private Limited, the owner of the above Business Park. The Appellant is duly registered with effect from 10.02.2006 as provider of taxable service under "management, maintenance or repair" service falling under section 65(64) read with 65(105)(zzg) of the Finance Act, 1994. The Appellant is also registered as "dealer" under the Karnataka Value Added Tax Act, 2003 (KVAT Act).

3. The Appellant entered into Maintenance Agreement with tenants of M/s. Golf links Software Park Private Limited for maintenance of leased premises and also the common areas. In terms of the said Maintenance Agreement, the Appellant maintains the property and collects maintenance charges from the tenants as per agreed terms and the Appellant has duly discharged service tax on the said consideration. However, the scope of services as per the Maintenance Agreement includes host of management and maintenance services including "power for common areas". However, it specifically excludes-"the actual running cost including cost of communications, power consumed, back-up power consumed, maintenance of dedicated equipment such as UPS and air-conditioners". It is stated that the power actually consumed by the tenant as per separate meters installed through BESCOM are to be borne by the tenant and the Appellant would collect the actual power charges billed by BESCOM and in-turn pays to BESCOM. Further, whenever there is failure of supply of power from BESCOM, the Appellant provides back-up power by generating power through Diesel Generating (DG) sets and the actual cost for back-up power consumed by the Appellant is received as reimbursements. Both the above amounts billed and received on actual power consumption (by units) by the tenants is accounted as "Back-up Supply Charges" and no service tax was paid or collected from the tenants. The appellant was filing the periodical returns in form ST-3 from time to time and assessing their service tax liability. On verification of the documents, it was found by the Department that the Appellant paid service tax only on receipt of

maintenance charges and not paid service tax on the BESCOM charges collected from the tenants, on the 'backup power charges' from their tenants. Thus, the service tax for the period from 16.06.2005 to 31.03.2009 were demanded by issuing a show cause notice and thereafter the Adjudication Authority as per the impugned order confirmed the demand along with interest and also imposed penalties under various provisions of Finance Act, 1994. Aggrieved by said order, present appeal is filed before the Tribunal.

4. The Learned Counsel for the Appellant during the hearing draws our attention to copy of the Maintenance Agreement dated 06.12.2006 entered with M/s. BEA Systems Customs Support and Research Centre Pvt., Ltd., and copies of Form ST-3 returns. The learned counsel reiterated the scope of services as per the Maintenance Agreement. As per the conditions in the agreement, Appellant shall raise an invoice for the services provided in any calendar month on or before the 15th of a month on a cost plus 15% management fee basis per month inclusive of all applicable taxes and the service shall include the operation and maintenance of common electrical system, maintenance of lift, maintenance of fire protection system and generator for the common area. The Learned Counsel further submits that the Appellant provided back up power by generating through Diesel Generating (DG) sets and the actual cost for the back-up power consumed by the Appellant is received as reimbursement. Both the amounts billed by BESCOM and reimbursements received for backup power are on actual power consumed by the tenants, and no service tax was paid or collected from the tenants.

5. The Ld. Counsel further draws our attention to VAT-100 returns filed by the Appellant and submits that as per the law, electrical energy is treated as goods both as per Central Excise Tariff Act, 1985 also under KVAT Act, 2005 and the same is exempted. The Ld. Counsel further submits that as per Section 2(7) of the Sale of Goods Act, 1930, electricity/power is construed as goods within the meaning of expression specified in Sl. No. 22 of first Schedule to the Karnataka Value Added Tax Act, 2005, being goods exempted from tax under Section 5((1), no service tax is payable. The Learned Counsel further

submits that the issue is no more *res integra* and the Hon'ble Supreme Court in the matter of **State of Andhra Pradesh Vs. M/s. National Thermal Power Corporation (2002 (127) STC 280 (SC)** held that electricity is goods. Even as per the provisions of Section 2(f) of Central Excise Act, 1944, the activity of electricity generation is considered as manufacturing within the meaning of Central Excise Act as held in the matter of **M/s. CMS One Operation & Maintenance Company Pvt., Ltd. Vs. CC (2007 (7) STR 369 (Tri. – Che.).** The Ld. Counsel further submits that the impugned order is also contrary to the Notification No. 12/2003-ST dated 20.06.2003, where all such taxable services exempt the value of goods and materials sold by the service provider to the recipient of the service from the service tax liability under Section 66 of the Finance Act, 1994 subject to condition that there must be documentary proof which specifically indicate the value of said goods and materials. However, Adjudication authority has not considered the issue even after producing the tax invoices on the customer towards sale of electricity both for the BESCOM purchased electricity and also the electricity generated through DG sets and VAT was shown as charged @ 0% since it is exempted from payment of VAT.

6. The Learned Counsel also relied on the judgment of the Hon'ble Supreme Court in the matter of **M/s. Bharat Sanchar Nigam Ltd Vs. Union of India (2006 (2) STR 161 (SC) and M/s. I Magic Creative Pvt. Ltd Vs. CCT (2008 (9) STR 337 (SC).** Thus, the impugned order is unsustainable. The Ld. Counsel further submits that even as per Notification No. 45/2010 dated 20.07.2010, no service tax is payable on any taxable services relating to transmission and distribution of electricity provided by the service provider to the service receiver during the period up to 26.02.2010 and for the period up to 21.06.2010 for all taxable services relating to distribution of electricity.

7. The Learned Counsel further submits that as per the agreement, the tenant is liable to bear the entire expenses, and Appellant is entitled only for collection of charges on actual basis and in-turn remit the amount so collected to BESCOM. As regards backup power generated and supplied from operating DG sets, it is only the cost of generation

shared and collected from the clients. The appellant is only collecting and remitting the amounts, and the Appellant has not done any value-addition in this regard. Therefore, the amounts so collected and paid cannot form part of the value of service in the hands of the Appellant.

8. The Learned Counsel further submits that that the collection of power charges (both towards BESCOM and also back-up DG power) are in the nature of "reimbursable expenses" and such reimbursable expenses cannot be included in the "value of taxable service" in section 67 for the period up to 14.5.2015 in the light of the judgment of the Honorable Supreme Court in the case of **UOI Vs. Intercontinental Consultants and Technocrats Pvt., Ltd.-2018 (10) GSTL 401 (SC)** affirming the judgment of the Delhi High Court in the case of Intercontinental Consultants and Technocrats Pvt Ltd Vs. UOI,-2013 (29) STR 9 (Del.). Hence the impugned order is not tenable.

9. The Learned Counsel further submitted that this issue is no longer res integra and is settled by the following judicial decisions,-

(a) Kiran Gems Pvt Ltd Vs. CCE&ST Surat, 2019 (25) GSTL 62 (Tri-Ahmd).

(b) ICC Reality (India) Pvt Ltd Vs. CCE Pune, 2013 (32) STR 427 (Tri-Mum.).

(c) South Eastern Coalfields Ltd Vs. CCE&ST Raipur, 2019 (22) GSTL 393 (Tri-Del.).

(d) Logix Soft Tel Pvt Ltd Vs. CCE Noida, 2019 (20) GSTL 545 (Tri-All.).

(e) Nai Dunia Media Pvt Ltd Vs. CCE, 2023 (71) GSTL 185 (Tri-Del.).

(f) Anandram Developers Pvt Ltd Vs. CST Chennai, 2017 (6) GSTL 75 (Tri-Che.).

(g) In Re: Ticel Bio Park Ltd, 2012 (28) STR 541 (Commr. Appl.) Affirmed in CGST Chennai Vs. Ticel Bio Park Ltd, 2018-TIOL-2195-CESTAT-MAD.

(h) Hotel Lake View Ashok Vs. CGST, 2018-TIOL-2891-CESTAT-DEL

(i) VV Brothers Vs. CCE, 2020-TIOL-146-CESTAT-AHM.

(j) Pragati CNG Vs. CCE, 2021-TIOL-715-CESTAT-AHM.

10. The Learned Authorised Representative (AR) for the Revenue reiterated the finding in the impugned order.

11. Heard both sides and perused the records.

12. We find that the issue is no more *res integra and* settled by the above cited judicial decisions. We find that as per the agreement, amount is specified towards the maintenance charges and Appellant had paid service tax on such amounts received by the Appellant from the tenants. Further the issue is considered in the matter of **M/s ICC Reality India Pvt. Ltd. (supra**), wherein it is held that:-

> *"9. We have gone through the Lease Agreements. As per the terms and conditions of the Lease Agreements, the tenants have to pay electricity charges directly to the MSEB and the appellants are also providing electricity through generator set in case there is a power failure, and the appellants are charging for the same. We find that electricity is specifically covered under Tariff Heading 27 of the Central Excise Tariff Act. We find that as per the provisions of Maharashtra Value Added Tax Act, 2002, electricity is also covered under Schedule A Sr. No. 20 and charged to Nil rate of tax. In view of this, we find the electricity is goods chargeable to duty under Central Excise Tariff as well as under the Maharashtra Value Added Tax Act, 2002. Therefore, the supply of electricity to tenant amounts to sale of goods and not supply of service. Further the Notification No. 12/2003-S.T., dated 20-6-2003 exempt from Service Tax, any value of goods supplied by service provider to service recipient. Further we find that the Commissioner of Central Excise Pune-III vide Order-in-Original dated 28-11-2011 relied upon by the appellants dropped the proceedings which were initiated on the same ground in the case of M/s. Panchshil Tech Park Ltd. The Commissioner of Central Excise in the adjudication order held that electricity is goods and chargeable to Nil excise duty. The decision of the adjudicating authority is accepted by the Revenue as per the communication dated 26-9-2012 by the Commissioner of Central Excise, Pune-III.*

The present appellants are also under the jurisdiction of Pune-III Commissionerate".

13. Therefore, we find that the electricity charges as per the BESCOM bills collected from the tenants and paid to BESCOM by the appellant and the reimbursement charges for the supply of power through DG sets in case of power cut of BESCOM electricity supply collected as backup charges are not includable in the taxable value of Management, maintenance or repair service and not leviable to service tax. Further, electricity is considered as goods, therefore the electricity generated through DG set and supplied by the Appellant to the tenants and the electricity charges for such backup power supply collected from the tenants as reimbursements are not towards any service, hence not includable in the taxable value.

14. In view of the above discussions and considering the decisions on the issue the impugned order is liable to be set aside. Accordingly, the impugned order is set aside, and the appeal is allowed with consequential relief, if any, as per law.

(Operative portion of the order was pronounced in open court on conclusion of hearing.)

(P.A.Augustian)
Member (Judicial)

(Pullela Nageswara Rao)
Member (Technical)

hr/Sasi