IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA

REGIONAL BENCH – COURT NO.2

Service Tax Appeal No. 77226 of 2018

(Arising out of Order-in-Appeal No.131/S.Tax-I/Kol/2018 dated 15.02.2018 passed by the Commissioner of CGST & CX, Kolkata South Commissionerate)

M/s. Renu Singhania
(Block-A, 4th Floor, 24, Hemanta Basu Sarani, GPO
Kolkata-700001)

Appellant

VERSUS

Commr. of CGST & CX, Kolkata North
(180, Shantipally, Rajdanga Main Road, Kolkata-700107)

Respondent

With

(i) Service Tax Appeal No. 77227 of 2018 (Durga Agarwal Vs. Commissioner of CGST & CX, Kolkata North) (ii) Service Tax Appeal No. 79110 of 2018 (Viewmore Vincom LLP Vs. Commr. of CGST & CX, Kolkata North (iii) Service Tax Appeal No. 76462 of 2019 (Uma Rungta Vs. Commr. of CGST & CX, Kolkata North)

(i) (Arising out of Order-in-Appeal No.137/S. Tax-I/Kol/2018 dated 28.02.2018 passed by the Commissioner of CGST & CX, Kolkata South Commissionerate)

(ii) (Arising out of Order-in-Appeal No.470/S. Tax-I/Kol/2018 dated 31.07.2018 passed by the Commissioner of CGST & CX (Appeal-I), Kolkata)

(iii) (Arising out of Order-in-Appeal No. 90/KOL-NORTH/KOL/19 dated 26.03.2019 passed by the Commissioner of CGST & CX (Appeal-I), Kolkata)

APPEARANCE :
Mr. Sushil Kumar Goyel, CA for the Appellant
Mr. S. S. Chattopadhyay, Authorized Representative for the Respondent

CORAM:
HON'BLE MR. R. MURALIDHAR, MEMBER (JUDICIAL)

FINAL ORDER NO.75386-75389/2024

Date of Hearing : 27 February 2024
Date of Decision: 27 February 2024

PER R. MURALIDHAR:

Service Tax Appeal Nos. 77226-77227/2018, ST/79110/2018 & ST/76462/2019

Since the issue is common, all the four Appeals have been taken up together with the consent of both the parties. The Appellants have entered into an agreement to take on lease with Rajarhat IT Park Ltd. The lessors have leased out the property for 99 years and for the consideration received on this count, they have charged the Service Tax. The Appellants have taken the view that the service provided by the service provider is not that of renting of immovable property, but it is that of construction services.

2. As per the Appellant, the service provider would be eligible to get the benefit of exemption Notification No. 26/2012, dated 20th June 2012, wherein it is provided that for the construction of complex, 70% abatement is granted. As per the appellant, since the Service Tax was paid by them to the service provider on the entire 100% and not on the 30%, they are eligible to get the refund of the Service Tax paid on the balance 70% portion. On this belief, they have filed their refund claims.

3. The Adjudicating Authority issued a deficiency memo on the ground that proper documents have not been filed towards their refund claim. He has sought the documentary evidence to the effect that the service provider has not claimed a Cenvat credit, which is the condition specified under Notification No. 26/2012. After due process, Show Cause Notice was issued and the refund claim was rejected by the Adjudicating Authority. Being aggrieved, the Appellants have filed their Appeals before the Commissioner (Appeals). The Commissioner (Appeals) has held that even at the time of their appeal before the Commissioner (Appeals), the Appellants have failed to prove the fact that the service provider has not claimed the Cenvat Credit and he has remitted all the Service Tax due to the Government and they have not proved as to whether the cost of land was included in the value of the commercial property purchased/Leased by the Appellant. Noting that these details were not properly provided by

the Appellant, he has dismissed their Appeal. Being aggrieved, the Appellant is before the Tribunal.

4. The learned Chartered Accountant appearing on behalf of the Appellants submits that this is not a case of leasing of immovable property, but it is a case of providing construction service towards the commercial property sold to the appellants. During the last Hearing, he was directed to submit a copy of the Lease Agreement. Today he has produced the same. He draws my attention to Paragraph 6 of the OIO and submits that the Adjudicating Authority has misinterpreted the whole issue and has rejected the refund claim on the ground that the Appellant was neither the service provider nor recipient duly registered with the Central Excise Department. He submits that the Commissioner (Appeals) has not appreciated the factual details and has dismissed their appeal without proper consideration. Therefore, he prays that the present Appeals may be allowed with consequential relief.

5. The learned AR draws my attention to the relevant paragraphs in the OIO. He points out to Para 1 of the OIO wherein the Adjudicating Authority has clearly given a finding that the Appellant was not in a position to prove by way of any documentary evidence that the service provider M/s Rajarhat IT Park have not availed the Cenvat Credit for the inputs received by them, which is a necessary and requisite statutory condition under Notification No. 26/2012, dated 20th June 2012.

6. Secondly, he has also held that whether the value of the land has been charged in the total consideration received by Rajarhat or not, was not proved by the Appellants. Further, he has gone through the Lease agreement and has held that it is only a Lease agreement and is not a Sale Agreement. He has also gone through the money receipts issued by the third party Rajarhat IT Park Ltd. and he has noted that from these money

receipts, it is seen that they do not have any proof that Service Tax has been collected by Rajarhat from them. There is no Service Tax registration number given in those receipts nor the Service Tax percentage nor the Service Tax charged have been provided in these receipts. Therefore, the Learned AR submits that the Adjudicating Authority has rejected the refund claim on all these grounds put together and not only on account of Section 11B provisions alone. He also takes me through the detailed finding of the Commissioner (Appeals). At Paragraph 5.2 of the OIA, the Commissioner (Appeals) has clearly held that even at the time of hearing before the Commissioner (Appeals), the Appellant was not in a position to prove that the service provider has deposited all the Service Tax collected from the Appellant. Secondly, he has not been able to prove that the service provider has not taken the Cenvat Credit for the inputs received by them. The Appellant is also not in a position to prove that the cost of land has been included in the total consideration received by Rajarhat. Finally, he has held that unless these three points are proved, the Appellant cannot claim that the service provider should have paid the Service Tax only on the balance 30% of the consideration so as to claim the present refund and after this he has dismissed their Appeal. The Learned AR supports the dismissal of Appeal by the Commissioner (Appeals) and prays that the present Appeals may also be dismissed.

7. Heard both sides, perused the Appeal papers and the documentary evidence placed before me.

8. On going through the Agreement of Lease between the Appellant and Rajarhat IT Park Ltd, I find that it is a pure Lease Agreement. Nowhere, is it specified that it is a part of any Sale Agreement or Sale Deed. On going through the receipts issued by Rajarhat, it is seen that they have simply mentioned the amount collected by them without mention of any Service Tax component or Service Tax registration taken by the service provider.

09. In this case, I find that the Appellant has been charged Service Tax by the service provider under the heading of "renting of immovable property" for the Lease Agreement entered with them. However, the Appellant has taken a different stand stating that the service provided by the service provider is that of construction of commercial complex and accordingly in that case the, the service provider should have been granted the abatement of 70% in terms of Sl. No. 12 of Notification 26/2012-ST dated 20/6/2012. The Appellant being the service recipient, I take the view that the Appellant is not allowed to question the classification adopted by the service provider. The service provider in this case has treated the service as "renting of immovable property" and has collected the Service Tax @ 12.36% (as per the Appellant himself) and has also filed the ST-3 Returns accordingly with their jurisdictional office. The service provider has, at no point of time claimed that this has been done by him by way of mistake and actually they are providing only the "service of construction of commercial property". In such a case, the Appellant as a recipient of service is precluded from changing the classification adopted by the service provider to claim the present refund. As a matter of fact, the refund cannot be claimed by him and the Appeal basically fails on this count itself.

10. However, I see that this issue was not the part of Show Cause Notice issued by the Department. The Department has given enough chance to the Appellant to prove that the service provider has not availed the Cenvat Credit and has paid the Service Tax received from the Appellant and also to show that the cost of land has been included in the total lease value charged by them.

11. Both the lower authorities have clearly held that no evidence in a proper form has been provided by the Appellant to satisfy these queries and the Adjudicating Authority has rejected their refund claim on this ground and

even the lower Appellate Authority has dismissed their Appeal only on this ground.

12. I do not see any reason to interfere with the detailed findings given by the Adjudicating Authority as well as by the Commissioner (Appeals), since the Appellant is not in a position to prove anything contrary even at this stage. Therefore, I dismiss all the appeals.

(Dictated and pronounced in the open court.)

Sd/-
(R. Muralidhar)
Member (Judicial)

Pooja