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

REGIONAL BENCH – COURT NO.2

Service Tax Appeal No. 76722 of 2018

(Arising out of Order-in-Appeal No. 26/ST/BBSR-GST/2018 dated 20.02.2018 passed by Commissioner (Appeals), CGST, CX & Customs, Bhubaneswar)

M/s. Kiran Agarwal
(Plot No.-361/2323, Jayadev Vihar, Bhubaneswar-751013)

Appellant

VERSUS

Commr. of CGST & CX, Bhubaneswar
(C. R. Building, Rajaswa Vihar, Bhubaneswar-751007

Respondent

With

Service Tax Appeal No. 76723 of 2018

(Arising out of Order-in-Appeal No. 28/ST/BBSR-GST/2018 dated 20.02.2018 passed by Commissioner (Appeals), CGST, CX & Customs, Bhubaneshwar)

M/s. Computer Associates Pvt. Ltd.,
(Plot No.-361/2323, Jayadev Vihar, Bhubaneswar-751013)

Appellant

VERSUS

Commr. of CGST & CX, Bhubaneswar
(C. R. Building, Rajaswa Vihar, Bhubaneswar-751007)

Respondent

APPEARANCE :
Mr. Rajeev Agarwal, Advocate for the Appellant
Mr. P. K. Ghosh, Authorized Representative for the Respondent

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

FINAL ORDER NO.75815-75816/2024

Date of Hearing : 24 April 2024
Date of Decision: 24 April 2024

PER R. MURALIDHAR:

In respect of similar set of facts, this Bench has already passed Final Order No. 75386-75389/2024 dated 27/02/2024 holding that the refund claims have been correctly rejected by the lower Authorities. Accordingly, the Appeals were dismissed. In the present case, the facts are identical emanating from the same Lease Agreement entered into with the Rajarhat IT Park Ltd. (lessor) and the present Appellant (lessee). 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. However, both the lower authorities have rejected the refund claims. Being aggrieved, the Appellant is before the Tribunal.

3. The learned AR draws my attention to the relevant paragraphs in the OIO. He points out to Para 2.4 to 2.6 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.

4. He also takes me through the detailed finding of the Commissioner (Appeals). At Paragraph 5.2 to 5.3 of the OIA wherein, 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.

5. I had gone through the Agreement of Lease of Rajarhat IT Park Ltd. when deciding the earlier Appeal on identical issue wherein the present Lease Deed was involved. 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.

6. 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"*. In that case, 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 agitating 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.

7. However, I see that this issue was not the part of Show Cause Notice issued by the Department as is being rightly pointed out by the Learned Counsel. However, 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.

8. 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. The relevant point of OIO is extracted below:-

> *"1.4 The claimant submitted his reply to the said show cause notice wherein the claimant stated that the Builder M/s RITP at Kolkata collected S. Tax on the full value of the property from them, without any abatement as per the relevant Notification, which is without authority. Therefore, Builder M/s RITP has committed an error by collecting higher amount of S. Tax and the claimant has now filed for the refund of the excess paid S. Tax, as a Customer. However, they did not enclose any documents in support of their claim alongwith their reply to the Show Cause Notice.*
>
> *1.6 On 16.02.2015 Sri C.R. Das, Advocate appeared for Personal hearing on behalf of the clamant and stated that they booked the flat with a builder M/s Rajarhat IT Park Ltd. (M/s RITP), at Kolkata against which the builder charged S. Tax @12.36% from them on the entire value of the flat, which was protested by the claimant; <u>but the builder did not accept their argument and collected S. Tax from them on the entire value of the Flat, even though S.T. is payable on the 30% of the value as per the Notification No. 26/2012-ST dated 20.06.2012, as amended by the Notification No. 02/2013-ST dated 01.03.2013.</u> He stated that since they have paid the S. Tax to the builder at*

a higher rate, they requested this office to refund the excess amount of S. Tax paid by them. Regarding assessment of taxable value of the builder M/s Rajarhat IT Park, Kolkata and payment of the S. Tax amount to the Govt. Account, the claimant stated that they have no documents to show.

He also stated that they have produced the copies the demand-cum-service Invoice of the builder as proof of payment of S. Tax to the builder at higher rate as raised, which shows collection of S. Tax at 12.36% by the Builder (M/s RITP) from the claimant. They requested for 7 (seven) days' time to make a written submission in this regard and requested to sanction the refund. But so far no further written submission has been made by the claimant in this regard.

2.4 I find that the claimant has not submitted any document relating to the taxable value, Service Tax liability, assessment details/documents showing taxable value and Service Tax payable along with the copies of all ST-3 returns filed during the period and proof of payment of Service Tax made to the government account in proper head (challan copies) etc, in support of their refund claim for verification of any payment/excess payment of Service Tax to the government account by the claimant. The claimant also mentioned that they are a non-assessee and claimed refund of excess paid S. Tax by them as a Customer. They admitted that they do not have any documents to show that the S. Tax amount collected from them, has been paid by the builder M/s R1TP to the Govt. Account.

2.5 I find that the claimant stated that S. Tax should have been collected from the by the Builder at lesser value after availing abatement as per the Notification No. 26/2012-ST dated 20.06.2012, as amended by the Notification No. 02/2013-ST dated 01.03.2013, which has not been done by the builder. I find that the exemption given in the said Notification is conditional and is subject to fulfilment of the conditions given therein.

2.6. I also find that the claimant failed to provide the supporting documents such as documents of assessment of taxable value and S. Tax, proof of payment of S. Tax to the Govt. Account in proper head for verification without which the tax liability and any payment or any excess payment cannot be verified in respect of the assessment for the said period, which can be done by the respective assessing officer of the concerned jurisdiction only.

2.7. I find that the claimant is registered under S. Tax under this Division as a non-assessee; as such no assessment documents and Returns or payment of S. Tax details etc. are available in the Range office or in ACES for verification in this regard by the Range officer here.

2.8. I find that the claimant could not furnish the supporting documents in relation to the claim filed by them, without which the claim cannot be allowed and therefore, liable for rejection and the case laws cited by the claimant in this regard do not give any support to the claimant in this case."

[Emphasis supplied]

9. The relevant portion of the OIA is extracted below:-

"5.2. From records it reveals that the appellant has not submitted any document relating to the taxable value of Service Tax liability, assessment details/documents showing taxable value and Service Tax payable along with the copies of all 5T-3 returns filed during the period and proof of payment of Service Tax made to the government account in proper head (challan copies) etc, in support of their refund claim for verification of any payment /excess payment of Service Tax to the government account by the claimant. The appellant also mentioned that they are a non-assessee and claimed refund excess paid S. Tax by them as a Customer. They admitted that they do not have any documents to show that the S. Tax amount collected from them, has been paid by the builder M/s. RITP to Govt. Account. The appellant has stated that S. Tax should have been collected from them by the Builder at lesser value after availing abatement as per the Notification No. 26/2012-ST dated: 20.06.2012, amended by the Notification No. 02/2013-5T dated 01.03.2013, which has not been done by the builder. It appears from the Notification that the exemption given in the said Notification is conditional and is subject to fulfillment of the conditions given therein. In terms of 51. No. 12 of the amended Notification No. 02/ 2013-ST dated 1.3.2013 w.e.f .1.3.2013 the entries thereto reads as:

In the instant case, the service provider (in case builder) has eligible to claim refund in terms of Section 11B of Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994. The service provider (in case builder) should have issued credit note in favour of service receiver i.e. the appellant and *then filed refund application before department, if excess tax has been deposited in Government Account instead of actual tax. But in the instant case, it has not done so.*

5.3. Further, I find that the appellant failed to provide the supporting documents such as documents of assessment of taxable value and S. Tax, proof of payment of S. Tax to the Govt. Account in proper head for verification without which the tax liability and any payment or any excess payment cannot be verified in respect of the assessment for the said period, which can be done by the respective assessing officer of the concerned jurisdiction only."

[Emphasis supplied]

10. The Learned Counsel vehemently persisted that the matter may be remanded to the Jurisdictional officials of the Builder RITP since both the Adjudicating and lower Appellate authority have held that this verification can be done at that jurisdiction only. This request of the Learned Counsel cannot be accepted for the following reasons:-

(i) There is nothing to show from the Appeal record that the service provider had paid the Service Tax under any other Heading since the Lease Agreement is towards the "renting of immovable property" only.

(ii) The Appellants are receiver of the service. As per the Lease Agreement and the invoices issued by the service provider, the service is that of renting of immovable property. On the other hand, the Appellants were service recipients are claiming that the service is classifiable under "construction service", which would require re-classification of the service which cannot be taken up at the instance of the receiver of the service.

(iii) There is nothing brought on record by the present Appellant that the RITP had questioned the classification adopted by their jurisdictional Revenue Authorities.

(iv) I do not see any statutory provisions allowing the service recipient to dispute the classification of the service provider and take up the issue with the jurisdictional authorities of the service provider to re-classify the service or verify the already finalized ST-3 Returns. No third party can make such a request except for the concerned assessee himself.

11. In view of the above details reasons, I reject the request for remanding the matter to the Adjudicating Authority.

12. Therefore, I do not find any reason to deviate from the ratio of the decision in respect of the same set of facts vide Final Order No. 75386-75389/2024 dated 27/02/2024. Accordingly, I dismiss the present Appeals.

(Dictated and pronounced in the open court.)

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

Pooja