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

REGIONAL BENCH – COURT NO.1

Service Tax Appeal No.75796 of 2016

(Arising out of Order-in-Original No.33-34/Commr/ST-I/Kol/2015-16 dated 22.01.2016 passed by Commissioner (Appeals) of CGST & Central Excise, Kolkata)

Commissioner of CGST & Central Excise, Kolkata
(180, Shantipally, Rajdanga Main Road, Kolkata-700107)

Appellant

VERSUS

M/s DLF Infocity Developers (Kolkata) Limited
(DLF IT Park,Plot No.08,Block-AF,Major, Arterial Road,PO-New Town,Rajarhat,Kolkata-700156)

Respondent

APPERANCE :

Ms.K.Kalpana, Authorized Representative for the Appellant
Ms.Ekta Jhunjhunwala, Advocate for the Respondent

CORAM:
HON'BLE MR.ASHOK JINDAL, MEMBER (JUDICIAL)
HON'BLE MR.SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO.77354/2025

DATE OF HEARING : 28 AUGUST 2025
DATE OF DECISION : 28 AUGUST 2025

Per Ashok Jindal :

The Revenue is in appeal against the impugned order wherein the adjudicating authority dropped the proceedings against the respondent on the ground that it is the case of supply of electricity against recovery of amount from the recipient which is not taxable service, but the procurement of goods on behalf of the tenants. Therefore, the payment is excludable from the taxable service.

2. The facts of the case are that on scrutiny of Balance Sheet, Profit & Loss Accounts, bills, ledgers etc., of the respondent for the period from 2008-09 to 2012-13, it was found that the respondent has provided transmission or distribution of electricity services to their tenants and realised service charges to the tune of Rs.63,66,04,427/-

under the category of "Management, Maintenance or Repair Services" during the above mentioned period, but has not paid Service Tax to the tune of Rs.6,31,29,127/. It was alleged in the Show Cause Notice that the respondent is not a electricity transmission or distribution utility as defined in Section 65B(23) of the Finance Act, 1994 and as such the service provided by the respondent, would be taxable in terms of Section 65(105)(zzg) of Finance Act. 1994. Therefore, a Show Cause Notice was issued to the respondent for the period from 2008-09 to 2012-13, by invoking extended period of limitation.

2.1 Another show-cause notice was also issued to the respondent for the period 01.10.2013 to 31.03.2014 demanding service tax from the respondent. The ld.Adjudicating Authority has taken both the show-cause notices as mentioned in the adjudication order and the Adjudicating Authority has examined sample agreement in the form of a lease deed executed between the respondent and their tenants which revealed that electricity/power was provided by the assessee to their tenants in three forms,

(a) when grid power was available, charges would have to be paid by the tenants at applicable grid rates,

(b) when power was supplied from back up sources, charges would have to be paid at cost plus 20% and

(c) when power taken from utility companies, charges would have to be paid at cost plus 20%.

2.2 The Adjudicating Authority has observed that the charges collected as per agreement showed extra amount over and above the actual cost of electricity. The Adjudicating Authority also observed that the assessee had submitted a certificate from a Chartered Accountant certifying that the assessee had made payment to West Bengal State Electricity Distribution Company Limited for electricity charges and recovered the expenses incurred for electricity from their tenants towards consumption of electricity bases on meter reading record.

2.3 Therefore, the Adjudicating Authority relied on the decision in the case of Commissioner of Sales Tax Vs Madhya Pradesh Electricity Board, Jabalpur [1969 (1) SCC 200] and in the case of State of A.P. Vs National Thermal Power Corporation Ltd.[2002 (5) SCC 203] wherein the Hon'ble Apex Court held that electricity is goods.

2.4 The Adjudicating Authority has also observed that the realisation of value of goods, i.e. electricity from the service recipient was less than what they have paid to the electric supply company and finally held that supply of electricity against recovery of amounts from the recipients is not a taxable service, but procurement of goods on behalf of the tenant. Therefore, the Adjudicating Authority has dropped the demand.

2.5 Against the said order, the Revenue is in appeal.

3. The ld.A.R. for the Revenue-Appellant, submits that it has been alleged in the Show Cause Notice that the respondent has provided Transmission or Distribution of Electricity Services and have raised bills under the category of "Management, Maintenance or Repair Services to their tenants and realised service charges on the basis of individual consumption. The respondent cannot be described as a transmission and distribution utility in terms of Section 65B(23) of Finance Act, 1994.

The Adjudicating Authority has observed that electricity is 'goods' and the respondent has procured 'goods' on behalf of their tenants. Therefore, in terms of Section 65B(23) of the Finance Act, 1994, 'Electricity Transmission or Distribution Utility' means the Central Electricity Authority; a State Electricity Board; The Central Transmission Utility or a State Transmission Utility notified under the Electricity Act, 2003(36 of 2003); or a Distribution or Transmission Licencee under the said Act, or any other entity entrusted with such functions by the Central Government or, as the case may be, the State Government.

3.1 She further submits that in the instant case, the respondent could not provide any documentary evidence indicating that they have qualified to be a transmission or distribution utility in terms of Section 65B (23) of Finance Act, 1994. But The Adjudicating Authority observed that with effect from 01.07.2012, Transmission or Distribution of Electricity by an electricity transmission or distribution utility are in negative list in terms of Section 66D(K) of Finance Act, 1994; but he has not considered the fact that the respondent were not qualified to be a electricity transmission or distribution utility and as such the services provided by the respondent would be chargeable to Service Tax. Further, the Adjudicating Authority, held that supply of electricity against recovery of amounts from recipients is not a taxable service but procurement of goods on behalf of the tenant and the value is excludible from the taxable service. But in the instant case, the respondent have clearly distributed electricity to his tenants and have realised amounts from the tenants depending on the individual consumption of electricity by the tenants. It is also a matter of fact that the respondent has collected extra amounts over and above the cost of electricity in actual and the incident was not wholly on cost to cost basis where applicable charges were more than the cost of the electricity. The respondent has thus kept a mark up over and above the cost of electricity distributed by them, which is not considered by the Adjudicating Authority.

3.2 She further submits that in terms of Notification No.32/2010-ST dated 22.06.2010, distribution of electricity by a distribution licencee, a distribution franchisee or any other person authorised to distribute power under the Electricity Act, 2003, is exempted from payment of Service Tax. Again in terms of Notification No.11/2010-St dated 27.02.2010, transmission of electricity to any person by any other person is also exempted from payment of Service Tax. But in the instant case, the respondent was not specified person to be the transmission or distribution utility or a distribution licencee or a distribution franchisee or an authorised distributor of electricity. In that circumstances, the impugned order is required to be set aside.

4. The ld.Counsel for the respondent submits that no service tax is chargeable on amounts booked under internal lighting/electricity income as the same are towards sale of electricity. To support her contention, she relies on the following judgments :

(i) Kumbakonam Electric Supply Corporation Ltd. Versus Joint Commercial Tax Officer, Esplanade Division Madras - 1963 (9) TMI 43 - Madras High Court, affirmed by Hon'ble Supreme Court in the case of Commissioner of Sales Tax, Madhya Pradesh, Indore Vs. Madhya Pradesh Electricity Board, Jabalpur[1968 (11) TMI 85 - Supreme Court], wherein electricity has been held as goods.Similar proposition has been upheld in the case of State of AP & Others versus National Thermal Power Corporation Ltd. And Others [2002 (4) TMI 694 - Supreme Court], which has inter alia relied upon the Hon'ble Apex Court judgment pronounced in the case of Madhya Pradesh Electricity Board *(supra),* to hold electricity as goods.

(ii) ICC Reality (India) Pvt. Ltd. Vs. Commr. of Central Excise, Pune-III, 2013 (32) S.T.R. 427 (Tri. - Mumbai).

(iii) Radius Water Ltd. Vs. Commissioner of Central Excise & Service Tax, Raipur 2017 (9) TMI 83 – CESTAT, New Delhi affirmed in Commissioner of Central Excise and Service Tax Vs. Radius Water Limited,2018 (7) TMI 1657 – SC ORDER, wherein it has been held that a transaction involving pure sale of water would not be susceptible to service tax.

(iv) Logix Soft Tel Private Limited and Ors. Vs. Commissioner of Central Excise, Noida and Ors., 2018 (4) TMI 1503-CESTAT Allahabad.

4.1 She further submits that even if the supply of electricity forms part of taxable services provided by the respondent, the exemption under Notification No.12/2003-ST dated 20.06.2003 excludes value of goods sold while rendering any taxable service available for the period upto 30.06.2012. Thereafter, sale of goods is anyways excluded from the definition of service.

4.2 It is further submitted that without prejudice to the above, no demand can be fastened against the respondent inasmuch as the activity of recovery of electricity charges from the tenants is in the nature of pure agent which is specifically excluded from the valuation for the purposes of charging service tax.

4.3 She further submitted that the demand on internal lighting income stands dropped in cases of group companies of the respondent, and such orders have been accepted by the department. Thus, a different view cannot be adopted in the instant case.

4.4 Therefore, she prays that the impugned order is to be upheld.

5. Heard both the parties and considered the submissions.

6. The sole issue emerges here that the respondents are supplying electricity to their tenants, so whether the supply of electricity is "goods" or not ?

7. The said issue has been examined by the by the Hon'ble Madras High Court in the case of Kumbakonam Electric Supply Corporation Ltd. Versus Joint Commercial Tax Officer, Esplanade Division Madras - 1963 (9) TMI 43 - Madras High Court, which has been affirmed by the Hon'ble Apex Court in the case of Commissioner of Sales Tax, Madhya Pradesh, Indore Vs. Madhya Pradesh Electricity Board, Jabalpur (supra), wherein electricity has been held as goods. Same view has been taken again by the Hon'ble Apex Court in the case of State of AP & Others versus National Thermal Power Corporation Ltd. And Others (supra), wherein after relying on the decision in the case of Madhya Pradesh Electricity Board (supra), it was held electricity as goods.

8. This Tribunal also in the case of ICC Reality (India) Pvt.Ltd. Vs. Commissioner of Central Excise, Pune III (supra), held that once electricity has been held to be goods and the entire transaction of sale

of goods and the question of charging service tax on the same, treating it as provision of service, is incorrect and unwarranted.

9. Further, this Tribunal in the case of Radius Water Ltd. Vs. Commissioner of Central Excise & Service Tax, Raipur (supra), which has been affirmed by the Hon'ble Apex Court, wherein it has been held that the transaction involving pure sale of water would not be susceptible to service tax.

10. Further, we find that in the case of Logix Soft Tel Private Limited and Others Vs. Commissioner of Central Excise, Noida (supra), this Tribunal has held as under :

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> *"4. After hearing both sides, we find that admittedly on electricity VAT is charged on the sale of electricity by the Sales Tax Department. Further, distribution of electricity is not a taxable activity under Service Tax, as clarified by Notification No.45/2010–ST. Further, we find that as per the facts noticed in the show cause notice, it is revenue's case that the appellant have sold electricity and not given the service tax of electricity. Accordingly, we find that the show cause notice with respect to sale of electricity as a distributor under the fact that the Electricity Department provided them with one common meter for the whole building, intrusting upon the appellant to give connection through sub meters to its tenant (s) and thereafter, they collected the amount and paid to the Electricity Department. Thus, the activity is also in the nature of pure agent, being done by the appellant. Accordingly, we hold that the appellant is not liable to pay service tax on the sale of electricity either received from the Electricity Department or supplied from its D.G. Sets and also regarding sale of other consumer goods to the tenants."*

11. Admittedly, in this case, the respondent has supplied electricityto their tenants against payment. Therefore, the same will be termed as sale of goods on which VAT has also been discharged. Therefore, no service tax is payable by the respondent. The same view has been taken by the adjudicating authority in the impugned order. Therefore, we do not find any infirmity with the impugned order and the same is upheld.

12. The appeal filed by the Revenue is dismissed.

(Operative part of the order was pronounced in the open court)

(Ashok Jindal)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

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