IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT No. I

APPEAL No. ST/86736/2015

(Arising out of Order-in-Original No. 09/ST/Commr./2015 dated 16.3.2015 passed by Commissioner of Central Excise, Customs & Service Tax, Aurangabad)

Commissioner of Central Excise, Aurangabad **Appellant**

Vs.

Narsinha Engineering Works **Respondent**

Appearance:

Shri Dilip Shinde, Assistant Commissioner (AR), for appellant
None for respondent

CORAM:

Hon'ble Dr. D.M. Misra, Member (Judicial)
Hon'ble Mr. Sanjiv Srivastava, Member (Technical)

Date of Hearing: 16.7.2018
Date of Decision: 16.7.2018

ORDER No. **A/87075/2018**

Per: Sanjiv Srivastava

The appeal filed by the revenue is directed against the order in original dated 16.03.2015 of Commissioner of Central Excise Customs and Service Tax Aurangabad.

2.0 Respondents are providing "Erection Installation & Commissioning" services, covered under Section 65 (105)(zzd) of the Finance Act, 1994. Scrutiny of their balance sheets/ ledgers for the period 2007-08 to 2012 revealed that they paid Service Tax on value of 15% of gross receipts. They had not charged the service tax on the bills issued to M/s MSEDCL nor have recovered the same from them. In some cases said services were provided with material and at other times without material. In terms of notification 1/2006-ST dated 01.03.2006, Respondents were required to pay service tax on 33% of gross receipts in case where services were provided with material and on 100% of the gross receipt where the services were provided purely on labour charge basis. Accordingly a show cause notice demanding differential service tax of Rs 61,60,288/- (Rupees Sixty One Lakhs Sixty Thousand Two Hundred and Eighty Eight only) for the period 2007-08 to 2012-13 was issued to them. Matter has been adjudicated by the Commissioner after considering the submissions of the party. In his order Commissioner held as follows:

i. *"The demand of Rs 59,53,475/- of service tax for period 1.10.2007 to 30.06.2012 is dropped due to retrospective exemption notifications issued by Govt. of India*

ii. *I confirm demand of Rs 2,06,813/- of Service Tax payable for the period from 1.7.2012 to 30.09.2012, under Section 73(1) [existing Section 73(4)] of the Finance Act, 1994 and the entire liability of Rs 2,06,813/- is appropriated from the* *amount of Rs 25,38,793/- paid by the assessee during January 2013 to February 2013 during investigation.*

iii. I confirm recovery of interest of Rs 16,283/- from the assessee, on the aforesaid amount of Rs 2,06,813/-, under section 75 of the Finance Act, 1994.

iv. I impose penalty @ 1% of the amount of Service Tax per month or Rs 100 per day whichever is higher, on the assessee under section 76 of the Finance Act, 1994.

v. I impose Penalty of Rs 20,000/- on the assessee under section 77 of the Finance Act, 1994 for contravening the provisions of Section 69 of the Finance Act, 1994 read with Rules 4,6 & 7 of the Service Tax Rules, 1994 for not taking service tax registration in time.

vi. I order recovery of late fee amounting to Rs 16,000/- from the assessee @ Rs 2000/- per ST-3 return for the period from October, 2007 to March 2011 under section 70 of the Finance Act, 1994 read with Rule 7C of the Service Tax Rules, 1994."

3.0 Aggrieved by the order of Commissioner revenue is in appeal on various grounds enumerated below:

i. The services related to distribution of electricity were exempted vide Notification No 32/2010-ST dated 22.6.2010 and the Commissioner has erroneously allowed the benefit of said exemption notification. The said notification exempted the taxable service provided by a person authorized to distribute power under Electricity Act, 2003 (36 of 2003), and the respondents was neither a distribution licensee nor a distribution franchisee, nor an authorized person to distribute power under the Electricity Act, 2003 (36 of 2003).

ii. The reliance placed by the Commissioner on the decision in case of M/s Shri Ganesh Enterprises [2014 (35) STR 348 (T)] is incorrect as the said decision was in respect of the Notification No 45/2010-ST and not in respect of the Notification No 32/2010-ST.

iii. The reliance placed on the decision in case of M/s Kedar Constructions is also not correct, as in that case the issue was not in relation to the taxability of service provided by a distribution licensee, a distribution franchisee, or any other person by whatever name called, authorized person to distribute power under the Electricity Act, 2003 (36 of 2003) for distribution of electricity. The said decision was limited to transmission of electricity.

4.0 Have heard Shri Dilip Shinde Authorized Representative (AR) for the Appellants. Respondents were not present during the hearing. Arguing for the revenue learned AR submitted that the order of the commissioner was erroneous as it allowed the benefit of exemption notification no 32/2010-ST which was not applicable in the present case. The respondents were providing the services of “Erection Installation & Commissioning” to M/s MSDECL and were in no way concerned with the services of distribution of electricity. Since the commissioner has extended the benefit of the said notification which was not applicable in the facts of present case the order of commissioner needs to be set aside and demand dropped confirmed.

5.1 Undisputedly in present case the respondents were providing the services under the category of “Erection Installation & Commissioning” service to Maharashtra State Electricity Distribution Company Limited (MSEDCL), which is a company engaged in distribution of electricity. Vide exemption Notification 11/2010-ST dated 27.02.2010, all services provided by any person to any other person for transmission of electricity were exempted. The text of the Notification is reproduced below:

> ***"NTF. NO. 11/2010-ST, DT. 27/02/2010***
> ***Regarding exemption to the taxable service provided for distribution of electricity***
> *G..S.R. (E) In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994) (hereinafter referred to as "the said Finance Act"), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts the taxable service provided to any person, by any other person for transmission of electricity, from whole of the service taxes leviable thereon under section 66 of the said Finance Act."*

5.2 Thus by the said exemption all the taxable services which were being provided by any person to any other person (who may be an Electricity Distribution Company or not) were exempt from payment of service tax, provided that the said services were meant for distribution of electricity. However from the reading of the notification it is quite evident that the services provided by the such electricity distribution company were not covered by the exemption notification No 11/2010-ST. Accordingly another exemption notification No 32/2010-ST has been issued exempting the services by a distribution licensee, a distribution franchisee, or any other person by whatever name called, authorized to distribute power under the Electricity Act, 2003(36 of 2003), for distribution of electricity. The text of the said notification is reproduced below:

> ***"NTF. NO. 32/2010-ST, DT. 22/06/2010***
>
> ***Regarding exemption to the taxable service provided for distribution of electricity***
>
> *G..S.R. (E) In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994) (hereinafter referred to as "the said Finance Act"), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts the taxable service provided to any person, by a distribution licencee, a distribution franchisee, or any other person by whatever name called, authorized to distribute power under the Electricity Act, 2003(36 of 2003), for distribution of electricity, from the whole of service tax leviable thereon under section 66 of the said Finance Act.*
>
> *2. This notification shall come into force on the date of its publication in the Official Gazette.*
>
> ***[F.No. 356/13/2010 – TRU]***
>
> *(K.S.V.V. Prasad)*
>
> *Under Secretary to the Government of India"*

5.3 Vide notification 45/2010-ST dated 20/07/2010, the services in respect of which exemption has been given by the Notifications 11/2010-ST and 32/2010-ST were given the benefit of Section 11C of Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994. Thus even for the period prior to the date of issuance of the said two notifications no tax was required to be paid in respect of these services.

NTF. NO. 45/2010-ST, DT. 20/07/2010

> ***Regarding levy of service tax on all taxable services relating to transmission and distribution of electricity***
>
> *G.S.R. (E).- Whereas, the Central Government is satisfied that a practice was generally prevalent regarding levy of service tax (including non-levy thereof), under section 66 of the Finance Act, 1994 (32 of 1994) (hereinafter referred to as 'the Finance Act'), on all taxable services relating to transmission and distribution of electricity provided by a person (hereinafter called 'the service provider') to any other person (hereinafter called 'the service receiver'), and that all such services were liable to service tax under the said Finance Act, which were not being levied according to the said practice during the period up to 26th day of February, 2010 for all taxable services relating to transmission of electricity, and the period up to 21st day of June, 2010 for all taxable services relating to distribution of electricity;*
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> *Now, therefore, in exercise of the powers conferred by section 11C of the Central Excise Act, 1944 (1 of 1944), read with section 83 of the said Finance Act, the Central Government hereby directs that the service tax payable on said taxable services relating to transmission and distribution of electricity provided by the service provider to the service receiver, which was not being levied in accordance with the said practice, shall not be required to be paid in respect of the said taxable*

services relating to transmission and distribution of electricity during the aforesaid period.
[F. No. 356/13/2010 – TRU]

(Prashant Kumar)
Under Secretary to the Government of India

6.0 From the said exemption notifications it is quite evident that all the taxable services provided by any person in relation to the distribution of electricity and the taxable services provided by the distribution company for the distribution of electricity have been exempted from the payment of service tax since inception. The notification No 11/2010-ST and 32/2010-ST have been rescinded by the Notification No 34/2012-ST dated 20.06.2012 and hence service tax in respect of these service tax was payable from the said date.

7.0 During the course of argument learned AR had relied upon the decision of the tribunal in case Sudarshan Electricals Engineering Works Vs Commissioner of Central Excise and Service Tax [Order No A/85724-85725/2018 dated 23.03.2018] wherein para 5, it has been observed-

"5.We have carefully considered the submissions made by both the sides, we find that the appellant has provided the service of erection, installation and commissioning undisputedly to M/s

Maharashtra State Electricity Distribution Company Limited that is involved in distribution of electricity, therefore the service provided by the appellant is involved in relation to distribution of electricity. Hence the same is covered by exemption Notification No 45/2010-ST which is effective upto 26.2.2010, therefore the demand upto 26.2.2010 is set aside. As regard the demand for the period 27.2.2010 onwards there was no analogues notification existing for the service in relation to the distribution of electricity…"

8.0 From the above it is quite evident that this tribunal has in similar circumstances extended the benefit of Notification No 45/2010-ST. However beyond 26.2.2010, the Notification No 11/2010-ST dated 26.2.2010 was not brought to the notice of bench or the said notification has not been considered by the said bench, hence the order of bench in this aspect is sub-silento, and for the period beyond 26.2.2010 cannot be taken as binding precedent. In view of the exemption contained in the notification No 11/2010-ST we are of the view that taxable services provided by the respondents to the M/s MSEDCL continue to remain exempted. For availing the benefit of the exemption under notification No 11/2010-ST the service provider need not be a distribution licencee, a distribution franchisee, or any other person by whatever name called, authorized to distribute power under the

Electricity Act, 2003(36 of 2003). The said conditions are necessary only in case if the exemption was being allowed under notification No 32/2010-ST. In the appeal filed by the department, revenue has contested the applicability of notification No 32/2010-ST without mentioning an iota of word in respect of notification No 11/2010-ST. Similar view has been expressed by the tribunal in case of M/s Kedar Constructions [2014-TIOL-2138-CESTAT-MUM]-

> "*6. From the reading of the above notification it is clear that all the services which are provided in relation to transmission of electricity are exempted. The transmission of electricity is carried out by the Maharashtra State Electricity Transmission Board and for transmission of electricity whatever services used, all those services are exempted under Notification No. 45/10 and 11/10. This issue is no longer res integra as in the various judgments of this Tribunal which are cited by the Ld Counsel for the respondent, the issue has been decided. Accordingly, impugned orders are just and legal which do not need any interference. Accordingly, we uphold the impugned orders and dismiss the Revenue's appeals."*

9.0 Similar view has been expressed by the tribunal in following decisions

a. *M.D. Aub Khan vs. CCE [2015 (40) STR 267]*

b. *CCE vs. Sri Rajyalakshmi Cement Products [2017 (52) STR 309]*

c. *JC Electricals vs. CCE [2015 (39) STR 131;]*

d. *Kedar Constructions vs. CCE [2015 (37) STR 631]*

e. *MP Power Transmission Co. Ltd. vs. CCE [2011 (24) STR 67].*

10.0 In view of above we do not find any merits in the appeal filed by revenue. Appeal filed by the revenue is dismissed.

(Pronounced in court)

(Dr. D.M. Misra)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

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