

**GIB/GUJ/Linde Engineering/16-01-2020/HC-125**

**High Court Category :** Export of Services

**State :** Gujarat

**Order No.:** GIB/GUJ/Linde Engineering/16-01-2020/HC-125

**Name of Entry :**

Linde Engineering India Pvt. Ltd.

**Date :** 16-01-2020

**Breif Issue :**

**Facts & Issue of The Case:**

The petitioner LINDE ENGINEERING INDIA PVT. LTD. is a Private Limited Company incorporated under the provisions of the Companies Act, 1956 and is engaged in the business of providing taxable output services under the category of consulting engineer services, erection, commissioning and installation service, construction services other than residential complex, including commercial/industrial buildings or civil structures and works contract services etc. to various entities located in and outside India. The Petitioner is subsidiary of Linde AG, Germany.

The petitioners received a communication dated 25-02-2016 from the Superintendent (R-II), Service Tax Division-II, Vadodara on the basis of the letter of Assistant Audit Officer/CERA-(iv), directing the petitioner to submit various documents.

The audit objections were on the following issues:

- The Petitioner which was a 100% subsidiary of Linde AG, Germany, and which was rendering consulting engineering services outside India and claiming the benefit of export of service, without the payment of Service tax;
- That during the scrutiny of records of the Petitioner for the period 2012-13 to 2014-15, it was found that the Petitioner was rendering services to other establishments of the Linde Group, more particularly Linde Engineering GmbH and was raising an invoice in foreign currency
- That the Linde Group Companies, including Linde AG, Germany would be establishments of the Petitioner, and therefore the provision of service by the Petitioner would not fall within the ambit of 'Export of Service' under Rule 6A

of STR and would therefore be and 'exempted service' in terms of the provisions of Rule 2(e) of the Cenvat Rules.”

The petitioner submitted its reply dated 13-05-2016 as under:

- The transaction of provision of service by the Petitioner to the recipient outside India would clearly fall within the ambit of Rule 3 of the Place of Provision of Service Rules, 2012 (hereinafter referred to as “the PPSR”)
  - The petitioner would not be covered by any of the exceptions, namely Rule 4 to rule 12 of the PPSR
  - The provision of the service by the Petitioner would qualify as 'Export of Service' in terms of the provisions of Rule 6A of the STR, and all conditions mandatorily required to be satisfied under the said Rule, stand satisfied by the Petitioner
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- The place of provision of the service, admittedly, was outside India, and the payment in relation to the same was also received in convertible foreign exchange
  - The Petitioner and the recipient of service, i.e. Linde AG, Germany are independent legal entities and that the latter are not an establishment of the Petitioner

The petitioner again received communication dated 18.08.2017, which was replied by the petitioner vide its reply dated 28.08.2017.

Thereafter, the petitioner was served with the show cause Notice dated 10.11.2017 based upon the observations of the Audit Officer and the petitioner was directed to show cause as to why an amount of Rs. 62,51,39,050/-, inter alia, should not be recovered for the period from 2012-13 to 2016-17.

Allegations as per SCN are:

1. Whether in terms of Explanation 3 to Section 65B (44) of the Act, a holding company of the Petitioner being Linde AG, incorporated in Germany, or any other subsidiary of Linde AG, can be construed as 'establishments of the Petitioner?

2. Whether in the facts and circumstances of the present case and on a reading of the provisions of Rule 6A of the Service Tax Rules, 1994 (hereinafter referred to as "STR") read with the provisions of Section 65B(44) of the Act, the constituting engineering services rendered outside India by the Petitioner to any other subsidiary of Linde AG or holding company would qualify as 'Export of Services' as contended by the Petitioner, or Exempted Service under Rule 2(e) of the Cenvat Rules, thereby requiring proportionate reversal of Credit under Rule 6A of the STR as is contended by the Department?"

#### **Decision of Advance Ruling Authority :**

##### **Decision**

It was held that the SCN is not tenable in law, as it is issued by invoking section 73 of the Finance Act, for extending the time limit for issuance of SCN on the ground of alleged wilful mis-statement or suppression of facts, when the petitioner cannot be said to have made any wilful misstatement or suppressed any facts

On perusal of the provisions of the Act, 1994 and the Rule, 1994 read with Rules, 2004, it emerges that Rule 6A of the Rules, 1994 provides that:

services rendered would be treated as "Export of services" when clause (a) to clause (d) refers to provider of service is located in the taxable territory and recipient of service is located outside India and the service is not a service specified in Section 66D of the Act and the place of the provision of the service is outside India and as per clause (e) the payment for such service has been received by the provider of service in convertible Foreign Exchange.

It emerges that the petitioner is fulfilling all the conditions, however, **so far as the clause (f) of Rule 6A of Rules, 1994 is concerned, it provides that the provider of service and recipient of service are not merely establishments of a distinct person in accordance with Item (b) of explanation 3 of clause (44) of Section 65B of the Act.**

As per clause (44) of Section 65B of the Act, 1994 "service" means any activity carried out by a **person for another for consideration and includes a declared service but shall not include:**

##### **Definition of Establishment of distinct person:**

Explanation 3. — For the purposes of this Chapter, —

(a) an unincorporated association or a body of persons, as the case may be, and a member thereof shall be treated as distinct persons.

(b) an establishment of a person in the taxable territory and any of his other establishment in a non-taxable territory shall be treated as establishments of distinct persons.

On analysis of the aforesaid provisions, it appears that the respondents have assumed the jurisdiction on mere misinterpretation of the provisions of explanation 3 (b) to Section 65B(44) of the Act, 1994 read with Rule 6A of the Rules, 1994 as by no stress of imagination, it can be said that the rendering of services by the petitioner to its parent Company located outside India was service rendered to its other establishment so as to deem it as a distinct person as per Item (b), explanation 3 of clause (44) of Section 65B of the Act, 1994, the petitioner which is an establishment in India, which is a taxable territory and its 100% holding Company, which is the other company in non taxable territory cannot be considered as establishments so as to treat as distinct persons for the purpose of rendering service.

Therefore, the services rendered by the petitioner Company outside the territory of India to its parent Company would have to be considered “export of service” as per Rule 6A of the Rules, 1994 and Clause (f) of Rule 6A of the Rules, 1994 would not be applicable in the facts of the case as the petitioner who is the provider of service and its parent Company, who is the recipient of services cannot be said to be merely establishment so as to be distinct persons in accordance with Item (b) explanation 3 of Clause (44) of Section 65B of the Act, 1994.

The petitioner Company, which is incorporated under the provisions of the Companies Act, 1956 and its holding Company incorporated at Germany are both distinct persons and therefore, both cannot be treated to be establishments of the same Company distinct artificial jurisdiction person.

For the foregoing reasons, the petition succeeds and is accordingly allowed. The impugned show cause notice dated 10.11.2017 is hereby quashed and set aside. Rule is made absolute to the aforesaid extent with not order as to costs.

## CASES REFERRED

1. *Special Director versus Mohd. Ghulam Ghouse reported in 2004 (164) E.L.T.141 (S.C.)*
2. *In Assistant Collector of Central Excise, Chandan Nagar, West Bengal versus Dunlop India Ltd and Ors – (1985(19)E.L.T. 22 (S.C.),*
3. *Union of India and another versus Kunisetty Satyanarayana {Appeal (civil) 5145 of 2006}*

4. *Executive Engineer, Bihar State Housing Board vs. Ramdesh Kumar Singh and others JT 1995 (8) SC 331*
5. *Special Director and another vs. Mohd. Ghulam Ghouse and another AIR 2004 SC 1467*
6. *Ulagappa and others vs. Divisional Commissioner, Mysore and others 2001(10) SCC 639*
7. *State of U.P. vs. Brahm Datt Sharma and another AIR 1987 SC 943*
8. *Binani Cement versus Union of India 2014 (313) E.L.T. 27 (Guj.)*
9. *Rashid Ahmed v. Municipal Board, Kairana*
10. *K.S. Rashid & Son v. Income Tax Investigation Commission*
11. *State of U.P. v. Mohd. Nooh*
12. *A.V. Venkateswaran, Collector of Customs v. Ramchand Sobhraj Wadhwani*
13. *Calcutta Discount Co. Ltd. v. ITO, Companies Distt.*