GIB/GJ/LINDE ENGINEERING/16-01-2020/HC-146

High Court Category : Export

State : Gujarat

Order No.: GIB/GJ/LINDE ENGINEERING/16-01-2020/HC-146

Name of Entry :
LINDE ENGINEERING INDIA PVT. LTD. & 1 other(s) Versus UNION OF INDIA

Date : 16-01-2020

Breif Issue :

Issue & Fact Of The Case-

The export of service requires fulfilment of certain conditions and if any one of the conditions is not satisfied, the transaction is not considered as export of service. The provisions in the erstwhile service tax regime and the GST regime regarding export of service are same and so in the present update, we wish to discuss the landmark decision delivered by hon'ble Gujarat High Court in the case of LINDE ENGINEERING INDIA PVT. LTD. & OTHERS VERSUS UNION OF INDIA [CIVIL APPLICATION NO. 12626 OF 2018] wherein the question raised was regarding provision of consulting engineering service by Indian company to its holding company situated in Germany was to be considered as export of service or not.

Before proceeding further, it is pertinent to refer to the relevant provisions in the erstwhile service tax regime in this regard as follows:-

Rule 6A of Service Tax Rules, 1994defined export of service as follows:-

6A. Export of services.-(1) The provision of any service provided or agreed to be provided shall be treated as export of service when,-

(a) the provider of service is located in the taxable territory,

(b) the recipient of service is located outside India,

(c) the service is not a service specified in the section 66D of the Act,

(d) the place of provision of the service is outside India,

(e) the payment for such service has been received by the provider of service in convertible foreign exchange, and

(f) 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

Furthermore, explanation 3(b) of Section 65B(44) of the Act, 1994 reads as :

“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”.

The petitioner was issued show cause notice alleging that the consulting engineering services provided by them to their holding company situated in Germany is not export of service and is to be considered as exempted service attracting provisions of credit reversal as per Rule 6(3) of Cenvat Credit Rules, 2004. Consequently, the petitioner filed writ petition challenging the show cause notice as contrary to the provisions contained in Rule 6A of Service Tax Rules, 1994 read with explanation 3(b) of section 65B(44) of the Act, 1994.

The revenue authorities contested the writ petition on the grounds of alternate remedy available to the petitioner after adjudication of show cause notice. However, the Hon’ble Court relied upon the decision of Apex Court in the case of Whirlpool Corpn. V. Registrar of Trade Marksreported in (1998)8 SCC page 1 and held that the writ petition is maintainable even in case of availability of alternate remedy in the following circumstances:-

where the writ petition has been filed for the enforcement of any of the Fundamental Rights or

where there has been a violation of the principle of natural justice or

where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged.

Decision of Advance Ruling Authority :

Decision-

The hon’ble High Court held that the present writ petition is maintainable as the show cause notice has been issued without jurisdiction. It was held that according to the Explanation 4 to Section 65B(44) of the Act, 1994, a person carrying on a business through a branch or agency or representational office in any territory shall be treated as having an establishment in that territory. It was submitted that in the facts of the case, the Linde AG Germany is neither a branch nor an agency nor a representational office of the petitioner. 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”.

It is trite law that the petitioner, 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.

Consequently, the impugned show cause notice issued by the respondent is without jurisdiction and the petition is maintainable under Article 226 of the Constitution of India.

The above decision can be used as binding precedent in the GST law also as the definition of export of service given in section 2(6) of IGST Act, 2017 is exactly same read with explanation 1 to section 8 of the IGST Act, 2017. Therefore, this landmark decision can be of use to the assessees in GST era, particularly where the services have been provided by company situated in India to its parent/holding company situated abroad. Another question which arises is that if holding-subsidiary companies are not covered under the clause (v) of section 2(6) of the IGST Act, 2017, then which entities will be covered by the deeming fiction. It is hope that suitable clarification is issued by the government explaining the coverage of section 2(6)(v) of IGST Act, 2017 read with explanation 1 and 2 to section 8 of the IGST Act, 2017.