CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

SERVICE TAX APPEAL NO: 86312 OF 2018

[Arising out of Order-in-Original No: 11/CGST-NM/Commr/SKV/2017-18dated 15th November 2017 passed by the Commissioner of Central tax (GST &Central Excise), Navi Mumbai.]

eClerx Services Limited
Building No.14, 4th Floor, K Raheja Mindspace
Plot No.3, TTC Industrial Area, Thane-Belapur Road
Airoli, Navi Mumbai - 400708 …***Appellant***

versus

Commissioner of CGST &Central Excise
16th Floor, Satra Plaza, Sector 19D,
Palm Beach Road, Vashi, Navi Mumbai - 400705 ***…Respondent***

APPEARANCE:

Shri Mihir Deshmukh and Ranjan Mishra, Advocates for the appellant

Shri Dilip Shinde, Assistant Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: A / 85824 /2022

DATE OF HEARING: 21/03/2022
DATE OF DECISION: 01/09/2022

PER: C J MATHEW

M/s eClerx Services Ltd, aggrieved by order-in-original no. 11/CGST-NM/Commr/SKV/2017-18 dated 15th March 2017 of

Commissioner of CGST & CX, Navi Mumbai ordering recovery of ₹ 11,89,13,942 as tax payable under section 73 of Finance Act, 1994 for the period from 2008-09 to 2012-13 along with applicable interest under section 75 of Finance Act, 1994 besides being imposed penalty of like amount under section 78 of Finance Act, 1994, is in appeal before us with the plea that the adjudication order had failed to appreciate that the services rendered by them to M/s Credit Suisse Services (India) Pvt Ltd was not taxable owing to the privileges conferred upon the recipient by Special Economic Zones Act, 2005.

2. It was alleged that between June 2009 and February 2011, the appellant herein had rendered ‘taxable service' valued at ₹ 80,16,46,587 on which the liability of ₹ 8,25,69,598 should have been discharged and, in accordance with notification no. 9/2009-ST dated 3rd March 2009 and as amended by notification no. 15/2009-ST dated 20th May 2009, claimed as a refund thereafter upon compliance with the conditions specified therein. Likewise, it was alleged that for the period from 1st March 2011 to 14th June 2011, the appellant herein had rendered taxable service valued at ₹ 16,86,45,901 on which tax liability of ₹ 1,73,70,528 should have been discharged and, in accordance with notification no. 17/2011-ST dated 1st March 2011, should have been backed by form A-1 which, upon scrutiny, was found to have been verified only on 14th June 2011. It is further alleged that the appellant herein, for the period from 1st July 2012 to

31st March 2013 had availed of exemption against form A-I which, having been dated only on 29thAugust 2012, precluded the privilege between 1st July 2012 and 28th August 2012 during which taxable service valued at ₹ 12,92,07,189 was renderedwithout discharging liability of ₹ 1,59,70,009. In sum, the recovery of ₹ 11,59,10,135 was ordered on account of breach of condition in the respective notifications embodying the procedure by which the appellant could have availed exemption from service tax on supply of services to units in special economic zones (SEZ).

3. Further allegation against the appellant is that proportionate contribution of expenditure had been charged from their several subsidiary enterprises which was held to be consideration for rendering of 'business auxiliary service' within India valued at ₹ 2,72,68,835 on which liability of ₹ 30,03,807 had not been discharged.

4. We have heard Learned Counsel for appellant and Learned Authorized Representative at length. The primary contention of Learned Counsel is that the issue of taxability of services rendered to units in special economic zones (SEZ) stands settled by the decision of the Hon'ble High Court of Telengana and Andhra Pradesh in *GMR Aerospace Engineering Limited v. Union of India & others [2019-VIL-489-TEL]* holding that

'24. Therefore, the terms and conditions subject to which the exemptions are to be granted under sub-section (1) of Section 26 should be prescribed by the Rules made by the Central Government under the SEZ Act, 2005. Being conscious of this fact, the executive has incorporated Rule 22 in the SEZ Rules, 2006 issued in exercise of the power conferred by Section 55 of the SEZ Act. It is not necessary to extract Rule 22, since there is no dispute about the fact (1) that the petitioners have complied with the prescriptions contained in Rule 22 of the SEZ Rules, 2006 and (2) that Rule 22 of the SEZ Rules, 2006 does not stipulate the filing of forms A1 and A2 as prescribed in the three notifications issued under Section 93 of the Finance Act, 1994.

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27. A look at Section 93 of the Finance Act, 1994 would show that it has nothing to do with the units located in a SEZ. Section 93 is a general power of exemption available for the benefit of all and sundry. In fact, Section 93 was substituted in its present form by Finance (No. 2) Act, 1998 with effect from 16-10-1998. The notifications issued under Section 93 may cover taxable services of any description. Even the units located outside a SEZ are entitled to the benefit of the notifications issued under Section 93 of the Finance Act, 1994, if the conditions stipulated in those notifications are fulfilled.

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30. This is for the reason that Section 26(1) of the SEZ Act made the entitlement to certain exemptions subject to provisions of sub-section (2) of Section 26. Section 26(1) did not make the entitlement of a Developer to certain exemptions, subject to the provisions of something else other

than the provisions of sub-section (2). Therefore, the 5th respondent cannot read Section 26(1) to mean that the exemptions listed therein are (1) subject to the provisions of sub-section (2) of Section 26, and (2) also subject to the terms and conditions prescribed in the Customs Act, 1962, the Customs Tariff Act, 1975, the Central Excise Act, 1944, the Central Tariff Act, 1985 and the Finance Act, 1994. This is especially so, since the authority of the Central Government to prescribe the terms and conditions subject to which exemptions may be granted under Section 26(1), flows only out of sub-section (2) of Section 26. The word "prescribe" is verb. Generally no enactment defines the word "prescribe". But the SEZ Act 2005 defines the word "prescribe" under Section 2(w) to mean the rules framed by the Central Government under the SEZ Act, 2005. The space is also not left unoccupied, as the Central Government has issued a set of Rules known as "the Special Economic Zones Rules, 2006", wherein the Central Government has prescribed the terms and conditions for grant of exemptions under Rule 22. Therefore, there is no question of comparing the terms and conditions prescribed in Rule 22 with the terms and conditions prescribed in the notifications issued under any one of five enactments listed in Section 26(1) to find out whether there was any inconsistency.'

5. Reliance is also placed on the decision of the Tribunal in *Reliance Industries Ltd v. Commissioner of Central Excise [2016 (41) STR 465 (Tri-Mumbai)]* and in *Sanghvi Movers Ltd v. Commissioner of Central Excise, Pune-I [final order no. A/87199/2018 dated 13th July 2018 in appeal no. ST/89404/2014 against order-in-original no. PUN-EXCUS-001-COM-015-14-15 dated 16th July 2014 of*

Commissioner of Central Excise, Pune – I].

6. The issue to be decided on this appeal is plain and simple enough: whether the notifications relied upon by the adjudicating authority can invalidate exemption accorded under

> *'26. (1) Subject to the provisions of sub-section (2), every Developer and the entrepreneur shall be entitled to the following exemptions, drawbacks and concessions, namely: -*
>
> *(a) exemption from any duty of customs, under the Customs Act, 1962 or the Custom Tariff Act, 1975 or any other law for the time being in force, on goods imported into, or service provided in, a Special Economic Zone or a Unit, to carry on the authorised operations by the Developer or entrepreneur;*
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> *(b) exemption from any duty of customs, under the Customs Act, 1962 or the Customs Tariff Act, 1975 or any other law for the time being in force, on goods exported from, or services provided, from a Special Economic Zone or from a Unit, to any place outside India:*
>
> *(c) exemption from any duty of excise, under the Central Excise Act, 1944 or the Central Excise Tariff Act, 1985 or any other law for the time being in force, on goods brought from Domestic Tariff Area to a Special Economic Zone or Unit, to carry on the authorised operations by the Developer or entrepreneur;*
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> *(d) drawback or such other benefits as may be admissible from time to time on goods brought or services provided from the Domestic Tariff Area into a Special*

Economic Zone or Unit or services provided in a Special Economic Zone or Unit by the service providers located outside India to carry on the authorised operations by the Developer or entrepreneur;

(e) exemption from service tax under Chapter-V of the Finance Act, 1994 on taxable services provided to a Developer or Unit to carry on the authorised operations in a Special Economic Zone;

(f) exemption from the securities transaction tax leviable under section 98 of the Finance (No. 2) Act, 2004 in case the taxable securities transactions are entered into by a non-resident through the International Financial Services Centre;

(g) exemption from the levy of taxes on the sale or purchase of goods other than newspapers under the Central Sales Tax Act, 1956 if such goods are meant to carry on the authorised operations by the Developer or entrepreneur.

(2) The Central Government may prescribe the manner in which, and the terms and conditions subject to which, the exemptions, concessions, drawback or other benefits shall be granted to the Developer or entrepreneur under sub-section (1).

of Special Economic Zones Act, 2005. It is unquestionably clear from the

'51. (1) The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in

any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.'

of Special Economic Zones Act, 2005 that no other law can prevail over it.

7. It is on record that the required documentation was not available for the entire period of the dispute but, at the same time, it cannot be denied that at some point, the eligibility did exist. The procedural infirmities, for a shorter or longer time, does not in any way supplant the exemption accorded to the impugned supply of services. Furthermore, the findings of the adjudicating authority do not arrive at a conclusion that, but for the said procedural infirmities, the eligibility of the appellant to render such services without payment of tax was in question. In the light of decision cited *supra*, the overriding nature of the exemption afforded by section 26 of Special Economic Zones Act, 2005 and the breach of conditions being procedural, we have no hesitation in setting aside the demand pertaining to the rendering of services to M/s Credit Suisse Service (India)Pvt Ltd.

8. The next issue concerns the finding that the services had been rendered in India and consumed in India. The definition of

'(m) "export" means –

> *(i) taking goods, or providing services, out of India, from a Special Economic Zone, by land, sea or air or by any other mode, whether physical or otherwise; or*
>
> *(ii) supplying goods, or providing services, from the Domestic Tariff Area to a Unit or Developer; or*
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> *(iii) supplying goods, or providing services, from one Unit to another Unit or Developer, in the same or different Special Economic Zone;'*

in Special Economic Zones Act, 2005 is substantially different from that in the rules which delineate 'exports' from 'domestic supply' in the scheme of service tax law and, in view of section 51 of Special Economic Zones Act, 2005, have to be read in the context of the exemption afforded by section 26 of Special Economic Zones Act, 2005 and not in terms of Finance Act, 1994. Consequently the prism through which the adjudicatory perception has been enunciated does not apply to the facts of the service rendered by the appellant. Accordingly, the demand for allegedly rendering of services within India does not sustain.

9. For the reasons cited *supra*, we set aside the impugned order and allow the appeal.

(Order pronounced in the open court on 01/09/2022)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*