Indian Subsidiary Company providing Services to Foreign Parent Company is Export of Services

INTRODUCTION:

The Gujarat High Court has given laudable Judgment in the case of ***Linde Engineering India Pvt. Ltd. & Ors. V Union of India*** holding that Indian Subsidiary Company providing Consulting Engineer Services to Foreign Parent Company is Export of Services and the Show Cause Notice (SCN) issued beyond jurisdiction as it was mis-interpreted by the proper officer that Indian Subsidiary Company and Parent Company outside India are merely establishment of distinct persons.

BACKGROUND AND FACTS:

Linde Engineering India Pvt. Ltd. **("the Petitioner No. 1")** is a Private Limited Company incorporated under the provisions of the Companies Act, 1956 and is a subsidiary of LINDE AG, Germany engaged in 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 Company was filing its returns regularly and was paying appropriate service tax in accordance with law.

Linde Engineering India Pvt. Ltd 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 company to submit various document for substantiating that the services provided by the Petitioner No. 1 to the Parent Company outside India is export of services and for which, the further reply was submitted by the Petitioner No. 1 on 28.08.2017.

ISSUES INVOLVED:

1. *Whether according to Section 65B(44) of the Finance Act, 1994 ("the Finance Act") a holding company of the Petition No.1 being Linde AG, incorporated in Germany, or any other subsidiary of Linde AG, can be construed as 'establishments of the Petition No.1'?*

   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 ("the Service Tax Rules") read with the provisions of Section 65B(44) of the Finance Act, the consulting engineering services rendered outside India by the Petition No.1 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, 2004 thereby requiring proportionate reversal of Credit under Rule 6A of the Suspicious transaction reports as is contended by the Department?

REVENUE'S CONTENTION:

1. Linde AG, Germany which are legal entities, were mere establishments of the Petitioner No.1, as contemplated under Rule 6A of the Suspicious transaction reports read with Explanation 3 of the Section 65B (44) of the Finance Act;

2. The services rendered by the Linde Engineering India Pvt. Ltd to Linde AG, Germany would not fall within the ambit of "Export of Services" and would therefore fall within the definition of the term 'exempted service' as defined in Rule 2(e) of the Cenvat Rules;

3. The Rule 6(3) of the Cenvat Rules becomes applicable and it is therefore alleged that the Petitioner No.1 is in wilful violation of the aforesaid Rule.

4. The Linde Engineering India Pvt. Ltd. was then, directed by way of show cause notice as to why an amount of Rs. 62, 51, 9,050/-, inter alia, should not be recovered for the period from 2012-13 to 2016-17.

Further, the Revenue Contended that the petition is not maintainable under Article 226 of the Constitution of India as it is challenging issuance of the show cause notice which is yet to be adjudicated by the competent authority and does not result into any adverse order, which affects rights of the assesse.

OBSERVATION AND FINDING

It was observed by the Court that:

- The respondents have assumed the jurisdiction on mere misinterpretation of the provisions of explanation 3 (b) to Section 65B (44) of the Finance Act read with Rule 6A of the Service Tax Rules.
- It can be said that the rendering of services by the Petitioner No.1 to its parent Company located in Germany was service rendered to its 100% holding Company, which is the r company separately registered in non-taxable territory (Germany) cannot be considered as merely establishments of distinct persons..
- Therefore, the services rendered by the Petitioner No.1- to the to its parent Company would have to be considered **"export of service"** as per Rule 6A of the Service Tax Rules and Clause (f) of Rule 6A of the Service Tax Rules would not be applicable in the facts of the case as the Petitioner No.1, 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 Finance Act.

In the view of above circumstances, the respondents would not have any jurisdiction to invoke the provisions of the Finance Act, 1994 read with Service Tax Rules to bring the services rendered by the Petitioner No.1 to its parent Company outside India within the purview of levy of service tax under the provisions of the Finance Act.

Moreover, the impugned show cause notice is also not tenable in law as the same is issued invoking Section 73 of The Finance Act, 1994 for extended period for the issuing the Notice on the ground of alleged willful mis-statement or suppression of the facts on the part of the Petitioner No.1 cannot be made liable for levy of service tax by wrongly treating the Petitioner No.1 and its parent Company as establishment of the same Company.

HELD:

In view of the above facts and circumstances of the case and the discussion, the impugned show cause notice issued by the respondent No.1 is without jurisdiction and as such the petition

is maintainable under Article 226 of the Constitution of India as held by the Gujarat High Court.

In the light of the discussion, the reliance placed by the respondents on the various Supreme Court decisions, which are based on the facts of specific cases, would not be applicable as the impugned show cause notice is held to be issued without jurisdiction as the respondents could not have issued the same by invoking the provisions of Section 73 read with Section 65B (44) of the Finance Act and Rule 6A of the Service Tax Rules.

Further, the Petitioner Writ is maintainable under Article 226, relying the Supreme Court decision on the case of *Whirlpool Corporation v. Registrar of Trademarks [1998] 8 SCC]* the alternative remedy not to operate as a bar in at least three contingencies, namely, 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.

The petition filed by Linde Engineering India Pvt Ltd succeeds and is therefore allowed. The impugned show cause notice dated 10.11.2017 is hereby quashed and set aside.

A video has been recorded to summaries the key aspects of the pronouncement made by Hon'ble Gujarat High Court: https://youtu.be/_0VQjE-HMjk.

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