M/S GUJARAT STATE FERTILIZERS & CHEMICALS LTD. & ANR.

v.

COMMISSIONER OF CENTRAL EXCISE

(Civil Appeal Nos. 4066-4067 of 2015)

NOVEMBER 22, 2016

[A. K. SIKRI AND ABHAY MANOHAR SAPRE, JJ.]

Finance Act, 1994: ss.65(105)(zza), 65(102) – Two PSUs – GSFC and GACL – Both the companies receiving Hydro Cynic Acid (HCN) from RIL through common pipeline and utilising the same in their respective factories and sharing the incineration charges – Allegation that GSFC was collecting 'incineration charges' from GACL and the said amount charged by GSFC from GACL amounted to providing 'storage and warehousing services' falling under s.65(105)(zza) – Held: To enable GACL to receive this HCN through common pipeline, arrangement/agreement was entered into between these two companies – For this purpose, handling facilities were installed in the premises of GSFC – However, for installation of these facilities both the parties had contributed towards the investment – Since the said handling facilities were in the premises of GSFC, incineration is also taking place at the said premises – Handling facilities expenditure thereof is shared equally by both the parties – Once these facts are accepted, handling portion and maintenance including incineration facilities is in the nature of joint venture between two of them and the parties have simply agreed to share the expenditure – The payment which is made by GACL to GSFC is the share of GACL which is payable to GSFC – Thus, it cannot be treated as common 'service' provided by GSFC to GACL for which it is charging GACL – Since there is no element of service provided by GSFC, the question of service tax would not arise – Demand of 'service tax' made by the respondent is unwarranted.

Allowing the appeals, the Court

HELD: In order to levy service tax pertaining to 'Storage

A and Warehousing' of goods, two conditions are required to be satisfied: The goods in question have to come within four corners of the definition of 'Storage and Warehousing' contained in Sub-Section 102 of Section 65 of the Finance Act, 1994; and there has to be an element of service provided by one person to the other
B for which charges for providing such services are collected. There is no dispute about the manner in which HCN is received through pipeline from M/s. Reliance Industries Ltd. by GSFC and GACL and then shared in the ratio of 60:40 respectively. GSFC and GACL are public sector undertakings. Since HCN is to be received
C through pipeline, it is abundantly clear that in order to save the expenditure, both the parties agreed that there should be a common pipeline. Once HCN is received through the said common pipeline, it comes first to GSFC's premises and from there it is diverted in the ratio of 60:40, meaning thereby that
D GSFC receives 60% of the HCN whereas GACL receives 40% of the supply in accordance with their respective requirement. To enable GACL to receive this HCN through common pipeline, arrangement/agreement was entered into between these two parties. For this purpose, handling facilities were installed in the premises of GSFC. However, fact remains, for which there is no
E dispute, that for installation of these facilities both the parties had contributed towards the investment. Since the said handling facilities are in the premises of GSFC, incineration also takes place at the said premises. Handling facilities expenditure thereof is shared equally by both the parties. That is clearly provided in
F the agreement/arrangement that was agreed to between the parties and is reflected in the Minutes dated 06.07.1980. Once these facts are accepted, handling portion and maintenance including incineration facilities is in the nature of joint venture between two of them and the parties have simply agreed to share
G the expenditure. The payment which is made by GACL to GSFC is the share of GACL which is payable to GSFC. By no stretch of imagination, it can be treated as common 'service' provided by GSFC to GACL for which it is charging GACL. The second ingredient has not been established in the present case and the

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question of service tax does not arise. In view thereof, it is not necessary to go into the question as to whether receiving of HCN through the said common pipeline in the tank which is setup by the GFSC and GACL amounts to 'storage' or not and is left open. The demand of 'service tax' made by the respondent is unwarranted and is hereby set aside. [Paras 8, 15, 16 and 17] [760-F-G; 762-G-H; 763-A-G]

Bijaya Kumar Agarwala v. State of Orrisa **(1996) 5 SCC 1 : (1996) 4 Suppl. SCR 249;** *Indian Oil Corporation v. AP Industrial Infrastructure Corporation Ltd.* **(2015) SCC 1290 – referred to.**

Case Law Reference

(1996) 4 Suppl. SCR 249	**referred to**	**Para 11**
(2015) SCC 1290	**referred to**	**Para 11**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 4066-4067 of 2015.

From the Judgment and Order dated 04.02.2015 of the Customs, Excise & Service Tax Appellate Tribunal, West Zone Bench, Ahmedabad in Appeal No. ST/13303/2013 and No. ST/10589/2013.

Prag P. Tripathi Sr. Adv., Preetesh Kapoor, Ms. Hemantika Wahi, Kabir Hathi, Advs. for the Appellants.

P. K. Mullick, Subhash Acharya, B. Krishna Prasad, Advs. for the Respondent.

The following Judgment of the Court was delivered

JUDGMENT

1. Heard learned counsel appearing for the parties.

2. These appeals are filed by the appellants which are two Public Sector Undertakings of the State of Gujarat. They were served with show cause notice dated 04.05.2011 alleging therein that the appellant no. 1 (hereinafter referred to as 'GSFC') was collecting 'incineration charges' from M/s. Gujarat Alkalies & Chemical Ltd. (hereinafter referred to as 'GACL') and the said amount charged by GSFC from GACL

A amounted to providing 'Storage and Warehousing Services' falling under clause (zza) of Sub-Section (105) of Section 65 of the Finance Act, 1994. The GSFC submitted its reply questioning the very basis of the said show cause notice and submitted that the process which was undertaken did not amount to 'Storage Facilities' and, in any case, GSFC was not B providing any service to GACL for which the aforesaid 'incineration charges' were collected. It was explained that though the GSFC and GACL were receiving Hydro Cynic Acid (HCN) from M/s. Reliance Industries Limited through common pipeline, which was partially utilized in their factory for manufacturing of their final product and was shared C between them in the ratio of 60:40, since incineration process was also required to be undertaken, the charges, which were incurred on the said process, were also shared in the ratio of 50:50. It was also mentioned that an agreement was arrived at between GSFC and GACL on the aforesaid basis and, therefore, there was no question of providing any services by one party to the other. This contention of the appellants was D not accepted by the Adjudicating Authority which confirmed the demand of 'service tax' along with interest and also imposed penalties under various sections including Section 78 of the Finance Act, 1994. The appellants preferred appeal there-against before the Commissioner (Appeals) which was dismissed by the Appellate Authority upholding the E order of the Adjudicating Authority. Further appeal to the Customs Excise & Service Tax Appellate Tribunal(CESTAT) has met the same fate inasmuch as vide impugned judgment dated 04.02.2015, the CESTAT has affirmed the order passed by the Adjudicating Authority as well as the Appellate Authority. The present appeals challenge the order of the F CESTAT.

3. In order to appreciate and understand the matter it requires to first state the process of receiving the HCN through pineline and the manner in which it is shared between GSFC and GACL and also the manner in which 'incineration charges' are divided between them. The G appellants had explained the same in their reply to the show cause notice. The relevant portion thereof reads as under:

> "G. In the existing procedure of ACH production in GSFC-PU, HCN is one of the main raw material HCN is received from M/ s. RIL, Vadodara through pipeline directly by gravity from their

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plant. It is taken in an intermittent hold tank which is situated in GSFC-PU premises. As per agreement, the quantity of HCN as soon as it is received is being consumed at 60:40 ratio by GSFC-PU and GACL - Sodium Cyanide Unit. The hold tank is there to sustain continuous process of both the plants and to facilitate smooth operation of the suction pumps and to avoid starvation of the pumps. Starvation of pump is not allowed as it causes damage to the pump and disturb the process. In case of any problem at consumers end, HCN supply from M/s. RIL is stopped, remaining quantity in tank is immediately consumed by either of the plants. The question of storing HCN does not arise because it is not permissible to store HCN on safety ground. The hold tank is duly washed and kept empty for further use."

4. Insofar as 'incineration charges' are concerned, the manner in which GSFC and GACL had agreed to share these charges between themselves was also explained, as can be seen from the following portion of the reply to the show cause notice:

"H. GACL does not pay to GSFC Polymer Unit and GSFC Polymer Unit does not demand or receive from GACL any fee or charges nor does either of them do any work of perform any service to the other. The sole monetary transaction between them, vide the agreements/Minutes of the Meeting, etc., is by way of sharing in the agreed proportion, the expenses for usage of storage tank by both of them combinedly for storage of HCN, for repair and maintenance of plant, shares for spare consumed in plant, charges towards power for incineration/refrigeration steam and other facilities such as salary, wages and employees benefit, overheads, factory and administrative expenses, like telephone expenses, office expenses, postage expenses, printing and stationary expenses, security and maintenance, etc.

I. Thus both GSFC Polymer Unit and GACL perform and are responsible equally for, the job of storing and consuming of HCN for their respective processes and for that purpose they both bear the total expenses in the predetermined proportion; but nobody pays to the other any fee or charges, as nobody does any kind of service or obligation or work for the other."

A 5. On the basis of the above, it was argued that GSFC does not store HCN for GACL and the process cannot be treated as covered by clause (zza) of Sub-Section 105 of Section 65 of the Finance Act.

6. The second submission which was made was that, in any case, no service of 'Storage and Warehousing' was provided by GSFC to GACL
B and, therefore, question of payment of any service tax did not arise. Sub-Section (102) of Section 65 of the Finance Act defines 'Storage and Warehousing' in the following terms:

> "(102) 'Storage and Warehousing' includes storage and warehousing services for goods including liquids and gases but
C does not include any service provided for storage of agricultural produce or any service provided by a cold storage."

7. Sub-Section (105) of Section 65 of the Finance Act enumerates those services which are "taxable services". Various kinds of services
D which are subjected to service tax are enumerated therein. As mentioned above, we are concerned with clause (zza) thereof which deals with service pertaining to 'Storage and Warehousing' of goods. Clause (zza) reads as under:

> "(zza). to any person, by a storage or warehouse keeper in relation
E to storage and warehousing of goods."

8. The cumulative reading of the aforesaid provisions makes it abundantly clear that in order to levy service tax pertaining to 'Storage and Warehousing' of goods, following two conditions are required to be satisfied:

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> 1. The goods in question have to come within four corners of the definition of 'Storage and Warehousing' contained in Sub-Section 102 of Section 65 of the Finance Act, 1994;
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> 2. In order to attract service tax, there has to be an element of
G service provided by one person to the other for which charges for providing such services are collected.

9. The appellants have argued that insofar as the present case is concerned, none of the aforesaid ingredients is satisfied. As far as the first element, namely 'Storage of HCN', is concerned, referring to the
H process mentioned in the reply to the show cause notice, which we have

already extracted above, it is submitted that the HCN is received through pipeline and as soon as it is received, the same is consumed in the ratio of 60:40 between GSFC and GACL. The holding tank which is described as 'storage tank' for convenient purposes is there only to sustain the continuous process of both the plants and to facilitate smooth operation of suction pumps and to avoid any damage thereto. It is, thus, argued that nothing is stored in the said so-called storage tank and, therefore, this process would not qualify the term 'Storage'.

10. Mr. Parag P. Tripathi, learned senior counsel appearing for the appellants, has referred to the definition of 'storage' contained in *Black's Law Dictionary (7th Ed.)* as well as *Webster's Comprehensive Dictionary* which defines the term 'store' or 'storage' in the following manner:

> "a. As per *Black's Law Dictionary (7th Ed.),* the word "store" means to keep goods, etc. in safekeeping for future delivery in an unchanged condition;
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> *b.* As per *Webster's Comprehensive Dictionary,* "store" as a verb means to put away for future use, to accumulate, to furnish or supply to deposit for safekeeping."

11. It is argued that from the plain meaning of the word 'store' appearing in the aforesaid dictionaries, it would be clear that the expression contains an element of continuity of creating a stock and using that stock on a future date. According to the appellants, none of these ingredients are present in the instant case. In support, the learned senior counsel has also relied upon the judgments of this Court in *Bijaya Kumar Agarwala v. State of Orrisa, (1996) 5 SCC 1* as well as *Indian Oil Corporation v. AP Industrial Infrastructure Corporation Ltd.,* (2015) SCC online SC 1290.

12. The second argument namely no services of 'Storage and Warehousing' are provided by GSFC to GACL, Mr. Tripathi has referred to the agreement/contract which was arrived at between GSFC and GACL relating to the sharing of the expenses between them in respect of HCN handling and incineration facilities installed by GSFC. It is pointed out that HCN handling and incineration facilities, though were installed at the premises of GSFC, the expenses thereof were borne by both the

A parties. From the said agreement it is also pointed out that insofar as handling and incineration facilities are concerned, these are operative expenses for the said system which were agreed to be shared by the parties equally i.e. in the ratio of 50:50.

13. From the aforesaid it was argued that no services were
B provided by the GSFC to GACL and on the contrary, the expenses which were incurred on the maintenance of the said storage/holding tank were simply shared between the parties in equal ratio and, therefore, it could not be said that any service of storage and warehousing was provided by GSFC to GACL.

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14. Learned counsel for the respondent, on the other hand, referred to the discussion contained in the order of Adjudicating Authority as well as Appellate Authority and submitted that even in the statements given by the representatives of the GSFC and GACL it was accepted that the supply of HCN by M/s. Reliance Industries Ltd. was first kept in the
D storage/holding tank and from there it was distributed between GSFC and GACL in the ratio of 60:40 and, therefore, the said storage/holding tank would qualify as "storage facilities". It was further submitted that since GSFC was collecting 'incineration charges' from GACL, it was rightly held that the service was provided by GSFC to GACL and,
E therefore, the provisions of clause (zza) of Sub-Section (105) of Section 65 of the Finance Act, 1994 were clearly attractive. Learned counsel further argued that these were the questions of fact on which all the authorities had arrived at concurrent findings which should not be interfered with by this Court as the scope of the present appeals is only
F to deal with the substantial question of law.

15. We have considered the aforesaid submissions in the light of the material placed on record. We shall advert to the second aspect namely, as to whether the arrangement between GSFC and GACL amounts to providing any services by GSFC to GACL and 50%
G incineration expenses incurred would constitute charges for providing such services. There is no dispute about the manner in which HCN is received through pipeline from M/s. Reliance Industries Ltd. by GSFC and GACL and then shared in the ratio of 60:40 respectively. GSFC and GACL are public sector undertakings, as already mentioned above. Since
H HCN is to be received through pipeline, it is abundantly clear that in

order to save the expenditure, both the parties agreed that there should be a common pipeline. Once HCN is received through the said common pipeline, it comes first to GSFC's premises and from there it is diverted in the ratio of 60:40, meaning thereby that GSFC receives 60% of the HCN whereas GACL receives 40% of the supply in accordance with their respective requirement. To enable GACL to receive this HCN through common pipeline, arrangement/agreement was entered into between these two parties. For this purpose, handling facilities were installed in the premises of GSFC. However, fact remains, for which there is no dispute, that for installation of these facilities both the parties had contributed towards the investment. Since the said handling facilities are in the premises of GSFC, incineration also takes place at the said premises. Handling facilities expenditure thereof is shared equally by both the parties. That is clearly provided in the agreement/arrangement that was agreed to between the parties and is reflected in the Minutes dated 06.07.1980. Once these facts are accepted, we find that handling portion and maintenance including incineration facilities is in the nature of joint venture between two of them and the parties have simply agreed to share the expenditure. The payment which is made by GACL to GSFC is the share of GACL which is payable to GSFC. By no stretch of imagination, it can be treated as common 'service' provided by GSFC to GACL for which it is charging GACL.

16. We are, thus, of the opinion that the second ingredient has not been established in the present case and the question of service tax does not arise. In view thereof, it is not necessary to go into the question as to whether receiving of HCN through the said common pipeline in the tank which is setup by the GFSC and GACL amounts to 'storage' or not and we leave the said question open.

17. For the aforesaid reasons, the demand of 'service tax' made by the respondent is unwarranted and is hereby set aside. We, thus, allow these appeals thereby quashing the Adjudicating Authority's order as well as the order of the CESTAT.

18. There shall be no order as to costs.

Devika Gujral Appeals allowed.