

Service Tax- Runways are not roads - Repair of Roads, Airports was Taxable High Court:

Based on the scrutiny of the records of the services rendered:

- (i) Repair and maintenance of roads;
- (ii) Repair and maintenance of airport runways;
- (iii) Site formation activity undertaken at roads

During the financial years 2005-06 to 2009-10, a SCN dated 14th October, 2010 was issued to the petitioner/appellant, calling upon it to show cause as to why service rendered by it should not be classified under the categories of:

- (a) Management, Maintenance or Repair;
- (b) Commercial and Industrial Construction Service and
- (c) Site formation and excavation clearance service why service tax amounting to Rs.10,25,72,125/- should not be demanded from them.

The CCE, Nagpur confirmed the demand with penalties and interest.

In appeal before the CESTAT, the appellant pointed out that no service tax is payable in respect of repairs of roads as the same were exempted with retrospective effect from 16/6/2005 to 26/7/2009 by virtue of Section 97 of the Finance Act, 2012. It was also submitted that vide notification 24/2009-ST, dated 27/7/2009 the Central Government had exempted service tax leviable in relation to maintenance and repairs of roads.

The CESTAT vide order dated 30/7/2012 while partly dispensing with pre-deposit held that repairs and maintenance of roads are exempted from service tax and, therefore, demand made by the revenue to that extent is not tenable. However, the Tribunal took a view that the repairs and maintenance of runways at airports are chargeable to service tax.

A pre-deposit of Rs.3 crores was ordered.

In appeal, the High Court observed -

"6. ...We find that the issue for consideration before the Tribunal on merits would be whether the word "roads" would include within it "runways" at airports. Prima facie, it appears to us that runways at the airports are species of the genus "road". Therefore, the runways should also normally receive the same treatment as roads for service tax purpose. We find prima facie that the case of the appellant is a very arguable case."

Accordingly, the High Court set aside the order and directed the Tribunal to hear the appeal on merits without insisting for any pre-deposit of duty, interest or penalty. See order dated 29.11.2012 2012-TIOL-1030-HC-MUM-ST.

The High Court, however, clarified that the observations made are only a prima facie view and the Tribunal should not be influenced by the same while disposing of the appellant's appeal on merits.

On the question of extending the benefit of exemption notification 24/2009-ST dated 27/07/2009 in respect of services in relation to management, maintenance and repair of roads and the retrospective effect given by the Finance Act, 2012, the CESTAT agreed that the matter has to go back to the adjudicating authority to consider the grant of exemption since at the time of adjudication, the provision of the law had not come into existence.

The Bench also negated the contentions raised by the appellant that maintenance or repair of road would include maintenance or repair of runways and, therefore, in the absence of a specific exemption in respect maintenance or repair of runways, the benefit of service tax exemption available in respect of roads cannot be extended to runways, the Bench added.

As regards the claim of the appellant that in respect of runways constructed in defence airports, the benefit of retrospective exemption provided by the Finance Act, 2012 would be available, the CESTAT observed that this aspect needed consideration by the adjudicating authority as this issue had not been raised or considered by the said authority.

The matter was remanded to the adjudicating authority. See Order dated 29.05.2013 2013-TIOL-1029-CESTAT-MUM.

The appellant filed an appeal before the Bombay High Court and the same was admitted on the following substantial questions of law:-

- (a) Whether in the facts and circumstances of the present case, the impugned order passed by the appellate tribunal holding that the activities pertaining to "runway" will not be entitled for exemption in terms of section 97 and 98 of the Finance Act is sustainable in law?
- (b) Whether in the facts and circumstances of the case, the activity of repair and maintenance of runway undertaken by the petitioners will be taxable under "management, maintenance or repair service, even when it is specifically excluded from the scope of "commercial or industrial construction service"?

Without awaiting the decision of the High Court, the adjudicating authority passed an order dated 28.11.2014 upholding the demand for Rs.5, 34, 70,601/-. However, the following reliefs were granted to the petitioner -

- (a) Benefit of section 97 on grounds that retrospective exemption is expressly granted to management, maintenance and repair of roads from 16th June 2005. Therefore, to that extent the demand was dropped.
- (b) Further, cum-duty tax benefit was allowed.

Against this order the Writ Petition was filed and which was also admitted and heard along with the appeal.

In a marathon submission sprinkled with case laws, the petitioner submitted that -

- Works contract pertaining to roads and airport are excluded from the ambit of Works contract service. The same cannot be covered under the category of repair and maintenance service as the said taxable head will cover only service simpliciter and not works contract.
- "Road" is a genus of which runway is the species. The repair services rendered qua runway will also be exempt in terms of section 97 of the Finance Act, 1994. ++ Runway is part of airport only & therefore the benefit of section 98, which provides retrospective exemption to repair/maintenance services provided to non-commercial Government buildings, has to be extended to runways of airports as well.
- The demand is barred by limitation; issue involves interpretation of law; petitioner was of the bonafide view that they are not liable to pay service tax; customers are also Government; penalties deserve to be waived.

The Counsel for the Revenue supported the impugned order and submitted that as the petition is devoid of merits the same be dismissed.

The High Court after a careful analysis of the submissions, inter alia, made the following observations -

Whether, because repair of road and airports is excluded from the definition of industrial construction, the same cannot be taxed under another general category?

- Merely because repair of road and airports is specifically excluded from the definition of commercial or industrial construction does not mean that it cannot form part of other taxable service.
- It is the management of properties as also their maintenance or repairs, irrespective of whether they are immovable or not, which is a management, maintenance or repair service. Once it is taxable, then, whether it is in relation to road or airport is hardly relevant and material for us. It is not for us to sit in judgment over the wisdom of the legislature.
- In matters of taxing provisions, the legislature enjoys a very wide latitude and discretion. It need not tax everything to tax something. It is not for the court to probe this part of the legislative action even if it finds that some other way or measure could have been thought of. We do not think that the definitions as carved out would make any provision of the Act redundant.
- It is clear that in matter of taxation, when the language of the section or provision is clear and unambiguous, then, the court must give effect to it. There is no question of then interpreting the provision and by finding out the supposed intention of the legislature. It is only when the language is not clear but ambiguous or obscure, then, there is scope for interpretation.
- Eventually, in inserting and incorporating definitions so as to understand taxable service if management, maintenance or repair is taken to be a distinct service and that aspect is excluded from the definition of the term "commercial or industrial construction service", then, it is not a case of redundancy or rendering any provision nugatory, but being specific and clear.
- This is not a case of the legislature granting exemption from tax as and by way of abundant caution. The legislature has clearly held that the service falling within the purview of section 97 can be brought to tax. It is, therefore, clear that exemption of those services from tax has been granted by exercising a distinct power vesting in the Central Government. It is that distinct power which has been conferred and envisaged in the Central Government by the enactment.
- What could be brought to tax alone can be exempted from it or the levy. If that was not taxable at all or from inception, then, there is no question of grant of any exemption therefrom.

"Road", whether is a genus of which runways is the species - claim of s.97 benefit

- There is a difference even in commercial parlance between these two words and terms. These terms being not defined in the Finance Act, 1994, it is conceded that they must take their colour from their common parlance meaning. They must be understood and interpreted as known to the commercial world. Even the plain dictionary meaning does not support the above contention. Concise Oxford Dictionary, 1990 Edition says that "runway" is a specially prepared surface along which an aircraft takes off and land. Thus, it is a path for aircraft to take off from. Whereas, "road" may be a path or way with a specially prepared surface, but it is used by vehicles/pedestrians etc.
- Runway is made or specifically prepared along which an aircraft takes off and lands. Eventually, it is not how it is made and surfaced, but what it is utilized for which is relevant. We do not think, therefore, that the premise or foundation that road is a genus of which runway is species is correct and proper.
- Merely because on some portions and adjacent to a runway, motor vehicles ply or to tow or bring back stranded aircraft specialized recovery vehicles are brought on runway does not mean that runways are roads.

Run-way, whether a part of Airport - claim of s.98 benefit

- We do not think that we are required to find out whether definition of "airport" itself includes runways and even if they are so included, whether those are contemplated by section 98. Section 98 refers to building services relating to management etc. of non-commercial Government buildings. We are not construing the ambit and scope of such services. We are concerned with the excision from the definition of this service the maintenance of road, repair to runway etc. That exclusion is clear.

The High Court also held that the Tribunal was not in error in upholding the denial of exemption notification 17/2005-ST.

Limitation:

- There was never any doubt about the provisions and the nature of the services. We do not think, therefore, that appellant can assail or challenge the findings on the point of limitation and imposition of penalty.

Holding that there is no merit in the appeal, the High Court concluded thus -

"Once the order impugned in the writ petition is a consequential one and follows the tribunal's order under appeal and is delivered and pronounced on remand, then, for the very reasons, which we have assigned for upholding the conclusion of the tribunal would cover the outcome of the writ petition. If the tribunal's order dated 29th May 2013 is upheld, then, this order also must prevail. Consequently, the writ petition must also fail."

Quick Reference:

Section 97- Special provision for exemption in certain cases relating to management, etc. of roads.

(1) Notwithstanding anything contained in section 66, no service tax shall be levied or collected in respect of management, maintenance or repair of roads, during the period on and from the 16th day of June, 2005 to the 26th day of July, 2009 (both days inclusive) ..."

"Section 98- Special provision for exemption in certain cases relating to management, etc, of Non-commercial Government buildings.

(1) Notwithstanding anything contained in section 66, no service tax shall be levied or collected in respect of management, maintenance or repair of non-commercial Government buildings, during the period on and from the 16th day of June, 2005 till the date on which section 66B comes into force ..."