IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 18.06.2015

CORAM

THE HONOURABLE MR. JUSTICE R.SUDHAKAR
AND
THE HONOURABLE MS. JUSTICE K.B.K.VASUKI

C.M.A. NO. 1259 OF 2010
AND
M.P. NO. 1 OF 2010

The Commissioner of Central Excise
6/7, A.T.D. Street
Race Course Road
Coimbatore 641 018. ... Appellant

- Vs -

M/s.Aqua Flow
2/189-C, Karayampalayam
Mylampatti Post
Coimbatore 641 014. ... Respondent

Appeal filed under Section 35-G of the Central Excise Act against the order dated 07.10.2009 passed by the Customs, Excise & Service Tax Appellate Tribunal, South Zonal Bench, Chennai, made in Final Order No.1395/2009.

Against the Order of the Commissioner of Customs, Central Excise of Service Tax(Appeals), Coimbatore made in Appeal No.76 of 2007 (C.Ex) dated 19.12.2007.

Against the Order of Deputy Commissioner of Central Excise, Coimbatore IV Division, Coimbatore made in Original Order No.10 of 2007 dated 30.04.2007.

Against the Order of the Deputy Commissioner of Central Excise, Coimbatore IV Division, Coimbatore made in (Show Cause Notice) C.No.V/84/30/16/2006 adj dated 06.11.2006.

For Appellant : Mr. A.P.Srinivas

For Respondent : Mr. S.Jaikumar

JUDGMENT
(DELIVERED BY R.SUDHAKAR, J.)

Aggrieved by the order of the Tribunal in allowing the appeal filed by the assessee, the appellant/Revenue is before this Court by filing the present appeal. This Court, vide order dated 9.7.2010, while admitting the appeal, framed the following substantial questions of law for consideration :-

> "i) Whether the Goods Transport Agency service received by a manufacturer of final products as a consignor/consignee for which he is made the person liable for paying service tax under Section 68 (2) of the Finance Act, 1994, can be deemed in terms of the Explanation to Rule 2 (p) of Cenvat Credit Rules, 2004, as an 'output service' provided by him when the said Explanation specifically excludes from its scope a person liable for paying service tax if he manufactures final products?
>
> ii) Whether the credit taken by such manufacturer on the input service used in the final products could be utilised for discharging service tax liability as a person liable for paying service tax in relation to the said Goods Transport Agency service received by them on claiming the GTA service as an output service in terms of the above Explanation to Rule 2 (p) of Cenvat Credit Rules, 2004?"

2. The facts, in a nutshell, are as hereunder :-

The respondent/assessee is a manufacturer of monobloc pumps falling under Tariff Item No.8413.7010 of the schedule to the Central Excise Tariff Act, 1985. The assessee is registered with the Central Excise Department. As a manufacturer of excisable goods, the respondent/assessee availed credit of duty paid on inputs, capital goods and service tax on input services under the Cenvat Credit Rules, 2004. On scrutiny of the documents by the Department, it came to light that the assessee had wrongly availed credit of service tax paid on outward transportation during the period from 1.4.05 to 30.9.06 amounting to Rs.3,03,634/=, thereby contravening the provisions of Rules 2 and 3 of the Cenvat Credit Rules as the service tax paid on outward freight beyond the place of removal would not qualify as input service under Rule 2 (l) of the Cenvat Credit Rules and the said service tax component would not be eligible for input service credit as per the provisions of Rule 3 of the Cenvat Credit Rules, 2004. Therefore, a show cause notice was issued to the respondent demanding the wrongful availment of service tax credit to the tune of Rs.3,03,634/= under Rule 14 of the Rules along with interest and penalty. After adjudication, the adjudicating authority confirmed the demand along with interest and penalty of Rs.10,000/- vide order dated 30.04.07.

3. Aggrieved by the said order, the assessee preferred appeal to the Commissioner (Appeals), who, while upholding the order of the adjudicating authority by confirming the demand along with applicable interest, however, set aside the penalty imposed on the assessee vide order dated 19.12.07.

4. Aggrieved by the said order, the assessee preferred further appeal to the Tribunal. The Tribunal, following its Larger Bench decision in the case of M/s. ABB Ltd. & Ors. - Vs - CCE & Ors. (2009-TIOL-830 :: 2009 (15) STR 23 (Tri. - LB), allowed the appeal in favour of the assessee against which the Department is before this Court by filing the present appeal.

5. Heard the learned standing counsel appearing for the appellant/Revenue and the learned counsel appearing for the respondent/assessee and perused the materials available on record.

6. When the matter was taken up, it is brought to the notice of this Court by the learned counsel on either side that the issue raised in this appeal is covered by the decision of this Court in Commissioner of Central Excise, Chennai - Vs - M/s.Borg Warner Morse TEC Murugappa Pvt. Ltd. (2015-TIOL-831-HC-MAD-CX).

7. This Court, in Borg Warner's case (supra), on the issue of outward freight charges, had occasion to consider the decision of the Karnataka High Court in the case of CCE - Vs - ABB Ltd., Bangalore (2011 (44) VST 1 :: 2011-TIOL-395-HC-KAR-ST) on an identical issue, and answered the issue in favour of the assessee. For better clarity, the relevant portion of the order is quoted hereinbelow :-

> "11. With regard to the outward freight charges, the Karnataka High Court in the case of CCE V. ABB Ltd., Bangalore reported in [2011] 44 VST 1, which was rendered on the appeal filed by the Department as against the decision of the full Bench of the Tribunal, while answering the issue whether the services availed by a manufacturer for outward transportation of final products from the place of removal should be treated as an input service in terms of Rule 2 (1) (ii) of the CENVAT Credit Rules, 2004 and thereby enabling the manufacturer to take credit of the service tax on the value of such services, held as follows:
>
> "30. The definition of 'input service' contains

both the word 'means' and 'includes', but not 'means and includes'. The portion of the definition to which the word means applies has to be construed restrictively as it is exhaustive. However, the portion of the definition to which the word includes applies has to be construed liberally as it is extensive. The exhaustive portion of the definition of 'input service' deals with service used by the manufacturer. Whether directly or indirectly, in or in relation to the manufacture of final products. It also includes clearance of final products from the place of removal. Therefore, services received or rendered by the manufacturer from the place of removal till it reached its destination falls within the definition of input service. What are the services that normally a manufacturer would render to a customer from the place of removal? They may be packing, loading, unloading, transportation, delivery etc,. Though the word transportation is not specifically used in the said section in the context in which the phrase 'clearance of final products from the place of removal' is used. It includes the transportation charges. Because, after the final products has reached the place of removal, to clear the final products nothing more needs to be done, except transporting the said final products to the ultimate destination i.e. the customer's/buyer of the said product, apart from attending to certain ancillary services as mentioned above which ensures proper delivery of the finished product upto the customer. Therefore, all such services rendered by the manufacturer and included in the definition of 'input service'. However, as the legislature has chosen to use the word 'means' in this portion of the definition, it has to be construed strictly and in a restrictive manner. After defining the 'input service' used by the manufacturer in are restrictive manner, in the later portion of the definition, the legislature has used the word 'includes'. Therefore, the later portion of the definition has to be construed liberally. Specifically what are the services which fall within the definition of 'input service' has been clearly set out in that portion of the definition. Thereafter, the words 'activities relating to business' - an omni-bus phrase is used to expand the meaning of the word 'input service'. However, after using the omni-bus phrase, examples are given. It also includes transportation. The words used are (a) inward transportation of inputs or capital goods (b) outward transportation upto the place of removal. While dealing with inward transportation, they have specifically used the words 'inputs' or 'capital goods'. But, while dealing with outward transportation those two words are conspicuously missing. The reason being, after inward transportation of inputs or capital goods into the factory premises, if a final product emerges, the final product has to be transported from the factory premises toll the godown before it is removed for being delivered to the customer. Therefore, 'input service' includes not only the inward transportation of inputs or capital goods but also includes outward transportation of the final product upto the place of removal. Therefore, in the later portion of the definition, an outer limit is prescribed for outward transportation, ie… up to the place of removal.

31. The phrase 'activities relating to business' is an omni-bus one and it finds a place in the inclusive definition. The question is, by a judicial interpretation, outward transportation of the final product from the place of removal till it is delivered to the customer, could be construed as falling within the definition of 'input service'. It is a well settled rule of interpretation that, while interpreting a provision, the Court must take note of not only the express words used but also the words which are not used. If the legislature has expressly used the words 'in respect of the transportation' in a particular manner and did not choose to include within the ambit of the word 'transportation'. Certain aspects. Having regard to the scheme of the Section, the way it is worded, it is not open to the Court to include something which the legislature deliberately did not include in the definition. If the Courts indulge in such interpretation, it amounts to rewriting the provision which is impermissible. Yet another reason for coming to such a conclusion is, in the first part of the restrictive

definition 'clearance of final products from the place of removal' is expressly stated. If transportation of final product from the place of removal is included in the phrase 'clearance of final products from the place of removal' again the same cannot be read into the provision under the words 'activities relating to business'. When a particular service was included within the definition, it is not necessary to interpret other provisions of the very same rule to include the said services over again. When a specific provision is made in the first part of the definition portion of the Cenvat Rules which refers to 'clearance of final products from the place of removal' and in the second part (inclusive) of the definition when the phrase used is 'activities relating to business such as', merely because in that portion of the definition either transportation charges is not included or service rendered for clearance of final products is not included, it is impermissible to read those words as in the earlier portion of the definition, it is specifically provided for. It is a well known rule of interpretation that when the statute uses words and phrases in a particular section, meaning has to be given in each of those sections. When the statute provides specifically for a particular contingency, it is to be so interpreted and after so interpreting, it cannot be said in another portion where general words are used, it also includes what is specifically provided. Therefore, the finding recorded by the CESVAT that the phrase and expression 'activities relating to business' admittedly covers transportation upto the customer's place was entirely unnecessary. This interpretation of ours find support from the subsequent conduct on the part of the Central Government, which amended Rule 2 (i)(ii). By notification No.10/2008-C.E.(N.T.) dated 1.3.2008, the words 'clearance of final products upto the place of removal' were substituted in the place of the words 'clearance of final products from the place of removal'. The intention of the legislature is thus manifest. Till such amendment, the words 'clearance from the place of removal' included transportation charges from the place of removal till it reached the destination, namely the customer. Therefore, the said input service was included in the early part of the definition 2 (i)(ii). Consequently, we cannot read what is expressly provided in the early part of the rule as having been included in the later part of the rule while interpreting the words 'activities relating to business', though it has been amplified by saying it is only an inward transportation of inputs or capital goods and outward transportation upto the place of removal. The phrase "outward transportation upto the place of removal" used in the inclusive portion of the definition (the second part), has to be read along with the word inward transportation of input or capital goods. It has no reference to 'clearance of final products'. However, when the claims are put forth on the basis of the said circular of 23.8.2007, for benefit of CENVAT credit, even in the cases where the aforesaid conditions are not satisfied relying on the words clearance of final products from the place of removal, the Central Government it fit to amend the provision from 1.4.2008 by substituting the word 'upto' in place of 'from', in Clause (ii) of Rule 2(i) making the intention clear i.e whether it is an inward transportation of input of capital goods or clearance of final products upto the place of removal, any service rendered and service tax paid would fall within the definition of 'input service'. Therefore, it is clear that till such amendment made effective from 1.4.2008 notwithstanding the clarification issued by the Central Government by way of their circular, transportation charges incurred by the manufacturer for 'clearance of final products from the place of removal' was included in the definition of input service. Therefore, the interpretation placed by the tribunal on the words 'activities relating to business' as including clearance of final products from the place of removal' which occurred already in the first part of Rule 2(i) (ii) prior to 1.4.2008, runs counter to the language employed in the second part of the definition of 'input service' and is to that extent contrary to the legislative intention and therefore, the said finding is unsustainable in law.

32. In Gujarat Ambuja Cements' case, the Principal Bench of CESTAT, New Delhi, had taken the view 'post sale transport of manufactured goods is not an input in manufacture. The two clauses in the definition take care to circumscribe input credit by stating that service used in relation to the clearance from the place of removal and service used for outward transportation up to the place of removal are to be treated as input service. The first clause does not mention transport service in particular. The second clause restricts transport service credit up to the place of removal. When these two clauses are read together, it becomes clear that transport service credit cannot go beyond transport up to the place of removal. The two clauses, one dealing with general provision and another dealing with a specific item, are not be read disjunctively as to bring about conflict and it defeat the laws scheme. The purpose of interpretation is to find harmony and reconciliation among the various provisions'. Giving effect to the said judgment, when the circular was issued by the Board dated 23.8.2007 the circular came up for consideration before the Punjab and Haryana High Court where it was held that when the ownership of the goods and the property remain with the seller of the goods till the delivery of goods in acceptable condition to the purchaser at his door step, the freight charges incurred by the manufacturer for such sale and supply at the door step of the customer are subjected to service tax and therefore, it falls within the definition of 'input service'. However, the Larger Bench of the CESTAT following the aforesaid judgment held the expression 'activities relating to business' covers transportation upto the customers' place and it is an integral part of the manufacturing business and therefore, credit cannot be denied by relying on a specific coverage of outward transportation upto the place of removal in the inclusive clause. However, the interpretation placed by us on the words 'clearance of final products from the place of removal' and the subsequent amendment by notification 10/2008 CE(NT) dated 1.3.2008 substituting the word 'from' in the said phrase in place of 'upto' makes it clear that transportation

charges were included in the phrase 'clearance from the place of removal' upto the date of the said substitution and it cannot be included within the phrase 'activities relating to business'.

33. Therefore, it is not necessary to expand the meaning of the word 'activities relating to business' so as to include the transportation of the final product from the place of removal to its destination. Therefore, though the ultimate order passed by the Larger Bench does not suffer from any infirmity, the aforesaid reason assigned by it in coming to the said conclusion is erroneous.

34. For the reasons, which we have assigned in our order, the final order of the Tribunal is legal and valid. We further make it clear that this interpretation is valid till 01.04.2008. IN that view of the mater, but for the aforesaid modification, we do not see any merit in these appeals. The substantial questions of law raised are answered in favour of the assesses and against the revenue."

8. The above decision is squarely applicable to the facts of the present case. Accordingly, the substantial questions of law are answered in favour of the assessee and against the Revenue.

9. Accordingly, this appeal fails and the same is dismissed confirming the order passed by the Tribunal. Consequently, connected miscellaneous petition is closed. However, in the circumstances of the case there shall be no order as to costs.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

GLN

To

1. The Commissioner of Central Excise
6/7, A.T.D. Street
Race Course Road
Coimbatore 641 018.

2. The Customs, Excise & Service
Tax Appellate Tribunal
South Zonal Bench,
1st Floor, Shastri Bhavan Annexe
26, Haddows Road
Chennai 600 006.

3. The Commissioner of Customs,
Central Excise & Service Tax(Appeals),
6/7, ATD Street, Race Course Road,
Coimbatore 641 018.

4. The Deputy Commissioner of Central Excise,
Coimbatore IV Division,
1237, Elgi Building,
Ist Floor, Trichy Road,
Coimbatore - 18.

+1cc to Mr.S.Jai Kumar, Advocate, S.R.No.29964

C.M.A. NO. 1259 OF 2010

AK(CO)
CA(11/09/2015)