IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 02.07.2015

CORAM

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

C.M.A. NOS. 1558 & 1559 OF 2010

Commissioner of Central
Excise & Service Tax
Large Taxpayer Unit
1775, Jawaharlal Nehru
Inner Ring Road
Anna Nagar Western Extn.
Chennai 600 101. ...Appellant in CMA No.1558 & 1559 of 2010

- Vs -

M/s.MRF Ltd.
Eripakkam
Nettapakkam Commune
Puducherry 606 106. ...Respondent in CMA 1558/2010/Appellant

M/s.MRF Ltd.
Tiruvottiyur
Chennai 600 019. ...Respondent in CMA 1559/2010

C.M.A. No.1558/2010 filed under Section 35-G of the Central Excise Act against the order dated 27.11.2009 passed by the Customs, Excise & Service Tax Appellate Tribunal, South Zonal Bench, Chennai, made in Final Order No.1834/2009.

C.M.A. No.1559/2010 filed under Section 35-G of the Central Excise Act against the order dated 12.11.2009 passed by the Customs, Excise & Service Tax Appellate Tribunal, South Zonal Bench, Chennai, made in Final Order No.1749/2009.

For Appellant : Mr. A.P.Srinivas

For Respondents : Mr. Karthik

COMMON JUDGMENT
(DELIVERED BY R.SUDHAKAR, J.)

Aggrieved by the orders of the Tribunal, which held the issue in favour of the assessee, the Department is before this Court by filing the present appeals. This Court, vide order dated 2.7.10, while admitting the appeals, framed the following substantial questions of law for consideration :-

> "i) Whether the Tribunal was correct in holding that the respondents were entitled to utilise the Cenvat Credit for payment of service tax on Goods Transport Agency services received by them in view of the CBEC Circuler 345/4/2005-TRN dated 3.10.2005, particularly as the circular has not been challenged or set aside?
> ii) Whether the Goods Transport Agency received by the respondents can simultaneously fall within the definition of 'output service' under Rule 2 (p) of the Cenvat Credit Rules, 2004 and within the definition of 'Input Service' under Rule 2 (l) of the Cenvat Credit Rules, 2004?"

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

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The respondent/assessee are manufacturers of tyres under Chapter 40 of the first schedule to the Central Excise Tariff Act. The respondents are availing credit of duty paid on inputs and capital goods and service tax paid on input services. During the period from March, 2005 to January, 2006, the assessee paid service tax of Rs.2,52,476/= on Goods Transport Agency services received by them. The amount so paid was taken as credit as GTA service qualified as an input service. However, the Department was of the view that payment of service tax by utilising the Cenvat Credit was in contravention of Rule 3 (4) of the Cenvat Credit Rules, 2004, as the GTA service was not an output service. Further, as the payment of tax was not in conformity with the rules, the credit availed on unauthorised payment was also in contravention of Rule 9 (1) of the Cenvat Credit Rules. Therefore, a show cause notice dated 22.2.2006 was issued by the Assistant Commissioner of Central Excise, Division-II, Pondicherry, proposing recovery of the unauthorised credit along with interest and penalty. After adjudication, order was passed by the Deputy Commissioner of Central Excise, Division-II, Pondicherry, confirming the demand under Rule 14 of the Cenvat Credit Rules, 2004 and further imposed interest under Section 11AB of the Act and penalty of Rs.15,000/= under Rule 15 of the Cenvat Credit Rules.

3. Aggrieved by the said order, the assessee preferred appeal before the Commissioner (Appeals), who vide order dated 29.8.07, upheld the order of the adjudicating authority. Against the said order, the assessee moved the Tribunal by filing an appeal. The Tribunal, after considering the matter allowed the appeal filed by the assessee following its earlier decisions in the case of India Cements Ltd. (2007 (7) STR 569) and RRD Tex Pvt. Ltd. (2007 (8) STR 186).

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4. The respondent/assessee are manufacturers of tyres under Chapter 40 of the first schedule to the Central Excise Tariff Act. The respondents are availing credit of duty paid on inputs and capital goods and service tax paid on input services. During the period from April, 2005 to September, 2005, the assessee paid service tax of Rs.8,14,327/= on Goods Transport Agency services received by them. The amount so paid was taken as credit as the GTA service qualified as an input service. However, the Department was of the view that payment of service tax by utilising the Cenvat Credit was in contravention of Rule 3 (4) of the Cenvat Credit Rules, 2004, as the GTA service was not an output service. Therefore, a show cause notice dated 10.10.2006 was issued by the Joint Commissioner, Service Tax Commissionerate, Chennai, proposing recovery of the unauthorised credit along with interest and penalty. After adjudication, order was passed by the Joint Commissioner, Service Tax Commissionerate, Chennai, disallowed the wrongly utilised credit along with interest and imposed a penalty of Rs.100/= per day under Section 76 of the Finance Act.

5. Aggrieved by the said order, the assessee preferred appeal before the Commissioner (Appeals), who set aside the order vide order dated 12.11.2009. The Department moved the Tribunal by filing an appeal. The Tribunal, after considering the matter dismissed the appeal filed by the assessee following its earlier decisions in the case of India Cements Ltd. (2007 (7) STR 569) and RRD Tex Pvt. Ltd. (2007 (8) STR 186).

6. Aggrieved over the same, the Department is before this Court by filing the present appeals.

7. Heard the learned standing counsel appearing for the appellant/Department and the learned counsel appearing for the assessee and perused the materials available on record.

8. It is fairly stated by the learned counsel appearing for the parties that the two questions of law raised above have already been considered by this Court in the case of Commissioner of Central

Excise, Salem - Vs - Cheran Spinners Ltd. (2014 (33) STR 148 (Mad.)) and, therefore, it is submitted that the questions raised no longer survives for consideration and that similar order may be passed in these appeals as well.

9. In the case of Cheran Spinners (supra), this Court had occasion to deal with identical questions of law and answered the questions in favour of the assessee and against the Revenue. For better clarity, the portion of the order is quoted hereinbelow :-

> "The above Civil Miscellaneous Appeal is filed at the instance of the Revenue against Final Order Nos. 746 to 772 of 2007, dated 22-6-2007 passed by the Customs, Excise and Service Tax Appellate Tribunal, Chennai. The above Civil Miscellaneous Appeal was admitted on the following substantial questions of law :-
>
> (1) Whether the learned Tribunal is correct in disregarding the Board Circular No. 345/4/2005-TRU, dated 3-10-2005 while deciding the appeal when it has been held by Apex Court and other High Courts that the interpretation of the Central Board of Excise and Customs will be binding upon the Revenue?
>
> (2) Whether the Tribunal is right in holding that the respondents did not provide any taxable service though they did manufacture an excisable product? But for the above explanation, the GTA service so received by the respondents would have been covered under the definition of "input service" under Rule 2(l) of Cenvat Credit Rules. By virtue of the explanation, it shall be deemed to be "output service" even after deletion of the explanation given at Rule 2(p) read with definition given at Rule 2(q) and (r) convey similar meaning".
>
> 2. The assessee herein is engaged in manufacture of yarn of different kinds. The assessee holds Service Tax Registration for the Service Goods Transport Agency (hereinafter referred to as "GTA"). It is seen from the narration of facts that during the period between 1-1-2005 and 30-9-2005, the assessee had paid the Service Tax due on the GTA service by utilizing the Cenvat credit availed on inputs and capital goods. The adjudicating authority viewed that such adjustment of the Cenvat credit side towards the liability on Service Tax was contrary to the Rule. It was held that the Cenvat credit could be utilised only in respect of

"input service" as per definition of 2(l) of Cenvat Credit Rules, 2004. Thus, utilisation of Cenvat credit for payment of Service Tax due was improper and consequently show cause notice was issued, proposing to demand Service Tax on GTA under Section 73 of Chapter V of Finance Act, 1994 along with interest under Section 75 of the Finance Act, apart from proposing levy of penalty under Section 76 of the Act.

* * * * * * * * *

10. Going by the fiction under Section 68(2) of the Finance Act, 1994 and Cenvat Credit Rules, 2004, deeming the payer of Service Tax as the person liable for paying the Service Tax in relation to such service, it is clear that while in the case of "input service", any service used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products from the place of removal, is considered as "input service", in contrast to this, the explanation given under "output service" in Rule 2 (l) of Cenvat Credit Rules, thus deems that in the case of a person not proving taxable service or manufacture final products but liable for paying Service Tax, the service for which he is liable to pay Service Tax by reason Section 62(2) of the Finance Act, 1994 shall be deemed as "output service". Thus, while Rule 2(l) and 2(p) cover two classes of persons, the recipient of GTA services, by virtue of the Explanation to Rule 2(p) of the Cenvat Credit Rules, as a provider of output service, is entitled to all benefits that a person providing input service would be entitled to in the matter of Cenvat credit adjustment. Thus, a reading of Rule 2(l) and 2(p) would show that they cover two different situations and though their operations are totally different, yet, for the purpose of giving credit to the Service Tax payable from the Cenvat credit available, the recipient is also entitled to the same relief as a provider of the service. Thus, we do not find any error in the reasoning of the Tribunal that in the payment of Service Tax liability by the recipient of taxable service, such assessees are also entitled to make use of Cenvat credit to discharge their liability under the Service Tax provisions. Consequently, we do not agree with the submission of the Revenue to set aside the order of the Tribunal.

11. Learned Standing Counsel appearing for the Revenue also placed reliance on the circular issued by the Board clarifying the provisions under Rule 2(l) and 2(p) of the Rules. Considering the fact that Rule 2(l) and 2(p) cover two different situations, in either event, the Rules contemplated adjustment of Service Tax liability as against the Cenvat credit available to the assessee, the circular relied on would not be of any assistance to the Revenue."

10. The decision relied on by the Tribunal in R.R.D. Tex case (supra - 2007 (8) STR 186 (Tri. - Chennai), was also upheld by this Court in Commissioner - Vs - R.R.D. Tex Pvt. Ltd. (2014 (33) STR J192 (Mad.)).

11. A cursory reading of the above orders clearly reveal that the decision is squarely applicable to the facts of the present case. Following the same, the substantial questions of law are answered in favour of the assessee and against the Revenue.

12. In the result, the appeals fail and the same are dismissed confirming the orders passed by the Tribunal. 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. Commissioner of Central
Excise & Service Tax
Large Taxpayer Unit
1775, Jawaharlal Nehru
Inner Ring Road
Anna Nagar Western Extn.
Chennai 600 101.

2. The Customs, Excise & Service
Tax Appellate Tribunal
South Zonal Bench
Chennai.

2 CCs to Mr. Karthik Sundaram, Advocate SR.No. 32846

C.M.A. NOS. 1558 & 1559 OF 2010

ALA (CO)
PSI (23.09.2015)