Dixit

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

CENTRAL EXCISE APPEAL NO.187 OF 2015
ALONG WITH
CENTRAL EXCISE APPEAL NO.192 OF 2015

SKF India Limited (ISD),]
A company incorporated under the]
Companies Act, 1956,]
having registered office at]
Mahatma Gandhi Memorial Building,]
Netaji Subhash Road, Charni Road,]
Mumbai – 400 002.] …. Appellant

Versus

The Commissioner of Central Excise, Pune-I,]
having his office at ICE House, 41-A,]
Opposite Wadia College, Sasson Road,]
Pune – 411 001.] …. Respondent

Mr. V. Sridharan, Senior Counsel, a/w. Mr. Prakash Shah and Mr. Jas Sanghavi, i/by M/s. PDS Legal, for the Appellant in both the Appeals.

Mr. Vijay H. Kantharia, a/w. Mr. Jitendra B. Mishra for the Respondent in both the Appeals.

CORAM : S.C. DHARMADHIKARI &
DR. SHALINI PHANSALKAR-JOSHI, J.J.

DATE : 20th JUNE, 2016.

ORAL ORDER

1. These two Appeals are filed by the Assessee under Section 35G of the Central Excise Act, 1944, r/w. Section 83 of the Finance Act, 1994, thereby challenging the Final Order No.A/947-948/15/EB dated 21st April

2015 passed by the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench, Mumbai in Appeals No.E/758/12-Mum and E/759/12-Mum.

2. It will be necessary to reproduce the questions, which the Appellant / Assessee termed as 'substantial questions of law', in both the Appeals. They read as under :-

Substantial Questions of Law raised in Central Excise Appeal No.187 of 2015

(a) Whether on the facts and circumstances, the credit of service tax paid on common input services used in relation to manufacture of dutiable goods and for trading activity is not available in full ?

(b) Whether on the facts and circumstances, the demand raised against the Appellants is correct when no mechanism was provided in Cenvat Credit Rules, 2004 till 31.03.2011, to calculate proportionate service tax credit to be reversed, in respect of input service used for trading of goods ?

(c) Whether on the facts and circumstances, the entire amount of credit of common input services mentioned in Rule 6(5) of the Cenvat Credit Rules, 2004 is available to Appellants ?

(d) Whether in the facts and circumstances of the case, the Appellate Tribunal erred in not extending the full Cenvat

Credit of the services directly used for manufacturing activity of the Appellants ?

(e) Whether in the facts and circumstances of the case, Appellate Tribunal erred in not setting aside the demand for the period prior to 31.3.2008 ?

(f) Whether on the facts and circumstances, in calculating amount of the eligible Cenvat Credit of service tax paid on common input services margin / value addition on trading of goods is to be considered and not entire sale price / turnover of traded goods ?

(g) Whether on the facts and circumstances, the formula for reversal of Cenvat Credit with respect to trading activity prescribed under rule 6(3D) of the Cenvat Credit Rules can be applied for the period prior to 01.04.2011 ?

(h) Whether in the facts and circumstances of the case, the Appellate Tribunal was correct and justified in relying on the decision of the co-ordinate bench of the Appellate Tribunal at Mumbai in the case of Mercedes Benz India Ltd. reported at 2014-TIOL-476-CESTAT-MUM without going into the facts of the present case.

(i) Whether in the facts and circumstances of the case, the impugned order being passed without considering all the submissions made by the Appellants, is in gross violation of the principles of natural justice ?

(j) Whether in the facts and circumstances of the case, the Appellate Tribunal has erred in rejecting the contention of the Appellants that the impugned show cause notice should have been issued to the ISD of the Appellants and not to the Appellants ?

(k) Whether in the facts and circumstances of the case, the Appellate Tribunal erred in invocation of extended period of limitation as envisaged under Section 11A of the Central Excise Act, 1944 ?

(l) Whether in the facts and circumstances of the case, the Appellate Tribunal was justified in upholding the penalty under Rule 15(2) of the Cenvat Credit Rules read with Section 11AC of the Central Excise Act, 1944 ?

(m) Whether in the facts and circumstances of the case, the Appellate Tribunal was justified in upholding the penalty under Rule 15A of the Cenvat Credit Rules, 2004 ?

Substantial Question of Law raised in Central Excise Appeal No.192 of 2015

(a) Whether in the facts and circumstances of the case, the Appellate Tribunal was justified in upholding the penalty under Rule 15A of the Cenvat Credit Rules, 2004 ?

3. At the outset, in all fairness, Mr. Sridharan, learned counsel appearing on behalf of the Appellant submits that question No.(a), (b), (i) and (j), in Excise Appeal No.187 of 2005, are not pressed by him. On instructions, he would press questions (c), (d), (e), (f), (g), (h), (k), (l) and (m) only.

4. Mr. Sridharan, learned Senior Counsel appearing on behalf of the Appellant, further submits that as far as questions (d) and (e) are concerned, they have not been dealt with by the Tribunal, though specifically raised; whereas, the findings on the remaining questions, except (f), are cryptic and there are certain inaccurate particulars incorporated by the Tribunal in its order. Hence, the request of the learned counsel for the Appellant is that these questions be remanded back to the Tribunal for a decision afresh.

5. As far as question (f) is concerned, it is submitted that the findings of the Tribunal relating to this question are purely and solely based on its decision in ***Mercedes Benz India Private Limited Vs. The Commissioner of Central Excise, Pune-1 in Appeals No.E/370, 456 and 385, all of 2011, and Appeal No.E/1019 of 2012***. It is urged that in Para No.14 of its order, the Tribunal has categorically upheld its decision in the case of ***Mercedes Benz India Private Limited (Supra)*** as 100% fully applicable to the facts of the case and observed as follows :-

> *"14.In our view, the said decision of the Tribunal in the case of Mercedes Benz is 100% fully applicable to the facts of the present case. In the said case, Mercedes Benz were manufacturing cars in India as also trading by importing certain models from abroad. This is exactly*

what is being done by the Appellant. They are manufacturing certain types of ball bearings and they are also involved in trading of certain ball bearings by importing from their associates or procuring from their subsidiary companies in India. We, therefore, do not find any strength whatsoever in the said contention of the appellant that the ratio of the judgment in the case of Mercedes Benz is not applicable. We also do not find any strength in the contention of the appellant that the judgment of the Mercedes Benz case was in the peculiar set of circumstances."

6. It was further held in the same para as follows :-

"The Appellant has given the break-up of credit taken on various services. In fact, after going through the said list, in our view, the decision in the case of Mercedes Benz in squarely applicable in the present case even for determining the quantum of credit to be reversed i.e. on turnover basis. Almost 50% of credit is for business support service which will be equally applicable for trading and manufacturing. Similar is the position in respect of I.T. Services as also all other services listed."

7. In Para Nos.15 and 16 of its order, the Tribunal has again relied upon its own observations in Para Nos.16 to 18 of its decision in ***Mercedes Benz India Private Limited (Supra)*** while dealing with Rule 6(5) of Cenvat Credit Rules, 2004.

8. Thus, it is apparent, as rightly submitted by learned counsel for the Appellant, that the finding of the Tribunal to question (f), in the instant case, is based entirely on its own finding in the decision of ***Mercedes Benz India Private Limited (Supra)***.

9. At this stage, it may be stated that this Court has vide its order dated 11th January 2016, in Central Excise Appeal No.255 of 2014, dealt with the order passed by the Tribunal in the Appeal of *Mercedes Benz India Private Limited* at length and coming to the conclusion that findings recorded in the said decision on this question of law cannot be sustained. Thus keeping open contentions of both the sides, this Court allowed the Appeal filed by Assessee - Mercedes Benz India Private Limited, set aside the findings of the Tribunal and remanded the matter back to the Tribunal for fresh finding on this question of law and on the other remaining questions of law raised therein, as they were arising out of the finding to this question of law, referred above.

10. In the instant case also, as the other questions of law are incidental and arising out of the finding to question (f) and as the finding to question (f) being based on the decision of the Tribunal in *Mercedes Benz India Private Limited* and the questions of law raised for consideration in the decision of ***Mercedes Benz India Private Limited (Supra)*** being remitted

back, it becomes necessary to remit the questions of law raised in the present Appeals also to the Tribunal for its fresh decision.

11. Accordingly, keeping open contentions of both the sides, we allow these two Appeals by setting aside the impugned order of the Tribunal to the extent that the same fails to deal with question of law (f) raised in Appeal No.187 of 2015. The remaining questions in the said Appeal, except those which are not pressed, being incidental and arising out of question (f), they are also remitted back for the Tribunal to answer them as well. In consequence, Question (a), referred above, in Appeal No.192 of 2015 is also remitted back for the Tribunal to answer it afresh.

[DR. SHALINI PHANSALKAR-JOSHI, J.]   [S.C. DHARMADHIKARI, J.]