

In the High Court of Judicature at Madras

Dated : 11.2.2016

Coram :

The Honourable Mr.Justice V.RAMASUBRAMANIAN

and

The Honourable Mr.Justice N.KIRUBAKARAN

Civil Miscellaneous Appeal No.157 of 2016

The Commissioner of Central Excise,
Chennai III Commissionerate,
Chennai-34.

...Appellant/Respondent

Vs

1.M/s.Bharath Heavy Electricals
Ltd., Boiler Auxillaries Plant,
Ranipet, Vellore.

2.The Customs, Excise & Service Tax
Appellate Tribunal, Chennai-6. ...Respondents/Appellant
/Second Respondent

APPEAL under Section 35G of the Central Excise Act, 1944
against the order dated 9.7.2015 made in Final Order
No.40770/2015 on the file of the Customs, Excise and Service
Tax Appellate Tribunal, South Zonal Bench, Chennai.

For Appellant : Mr.T.Chandrasekaran

JUDGMENT WAS DELIVERED BY V.RAMASUBRAMANIAN, J

The Revenue has come up with the above appeal under Section
35G of the Central Excise Act, 1944 questioning the correctness
of the order of the Customs, Excise and Service Tax Appellate
Tribunal.

2. Heard Mr.T.Chandrasekaran, learned counsel for the
appellant.

3. The first respondent herein is the manufacturer of
boiler auxillaries and components falling under Chapter Heading
No.84 of the First Schedule to the Central Excise Tariff Act,
1985. They availed credit of service tax paid on the out door
catering services as input services and utilized the same
towards payment of duty on the final products.

4. However, a show cause notice dated 5.3.2010 was issued by the Assistant Commissioner of Central Excise on the ground that as per Rule 2(1) of CENVAT Credit Rules, 2004, the credit of service tax paid on the input services can be availed only when the same are used in or in relation to the manufacture of final products or in providing output services. The show cause notice related to the period from March 2009. Another show cause notice dated 29.12.2010 was issued in respect of the period from January 2010 to September 2010.

5. The Commissioner of Central Excise passed a common Order in Original No.43/2011 dated 25.10.2011 confirming the demand under Rule 14 of the CENVAT Credit Rules read with Section 11A. A penalty was also imposed. The respondent/assessee filed an appeal, which was allowed by the Tribunal by an order dated 9.7.2015. As against the said order, the Revenue is on appeal.

6. The Revenue has raised the following substantial questions of law for consideration by this Court :

"(i) Whether the Tribunal was correct in holding that the assessee is entitled to avail the CENVAT credit on 'outdoor catering services' provided to the employees of the factory as an input service credit and allowing the assessee's appeal despite the fact that outdoor catering service does not fall under the ambit of the definition of 'input service' specified under Rule 2(1) of CENVAT Credit Rules, 2004 and in as much as the catering services are neither used in or in relation to the manufacture or clearance of final product nor can it be said to be an activity relating to business ?

(ii) Whether the Tribunal's decision was correct in holding that the outdoor catering service is an eligible input service in spite of specific ruling of the High Court, Kolkata Bench in the case of M/s. Pieco Electronics & Electricals Ltd. Vs. Commissioner of Income Tax IV, Kolkata [Appeal No.353 of 2004] [reported in 2001 ITR 477] that even if a factory has to maintain a canteen, it cannot be said that it is an integral part of manufacture or production carried on by the assessee? and

(iii) Whether the order passed by the Tribunal in F.O.No.40770/2015 dated 9.7.2015

is correct in the absence of any finding and discussion?"

7. Before proceeding further, it should be pointed out that in a batch of appeals in CMA.Nos.2 of 2011 etc cases, a Bench of this Court held the issues arising in this appeal in favour of the assessee on the basis of the decision of the Bombay High Court in C.C.E. Vs. Ultratech Cement Limited [(2010) TIOL 745] and the decision of the Supreme Court in Maruti Suzuki Limited Vs. C.C.E. [(2009) 240 ELT 641].

8. Despite the same, it is contended by Mr.T.Chandrasekaran, learned Standing Counsel for the Department that the Tribunal did not apply its mind to find out whether the outdoor catering services were actually used in or in relation to the manufacture of final products or in providing output services. In other words, his contention is that there is no finding of fact so as to apply Rule 2(1).

9. But, we do not agree with the said contention.

10. Even in the Order in Original, the Commissioner did not dispute the fact that the outdoor catering services were rendered to persons engaged by the assessee in or in relation to their business activities. On the contrary, the Commissioner, in paragraph 13.2 of his Order in Original, recorded a finding that the services of outdoor catering involved mere subsidisation of food consumed in the canteen by the employees and therefore, it was in the nature of perquisites enjoyed by the employees. Hence, when there is a clear finding of the Commissioner in his Order in Original that these services were actually consumed by the employees of the assessee, the question of the Tribunal recording a finding does not arise.

11. Though a notification was issued in Notification No.3/2011 dated 1.3.2011 excluding the outdoor catering services, it came into effect on 1.4.2011. The period in question in this case relates to a period prior to 1.4.2011.

12. Therefore, the questions of law are answered against the Revenue. Accordingly, the civil miscellaneous appeal is dismissed.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

To

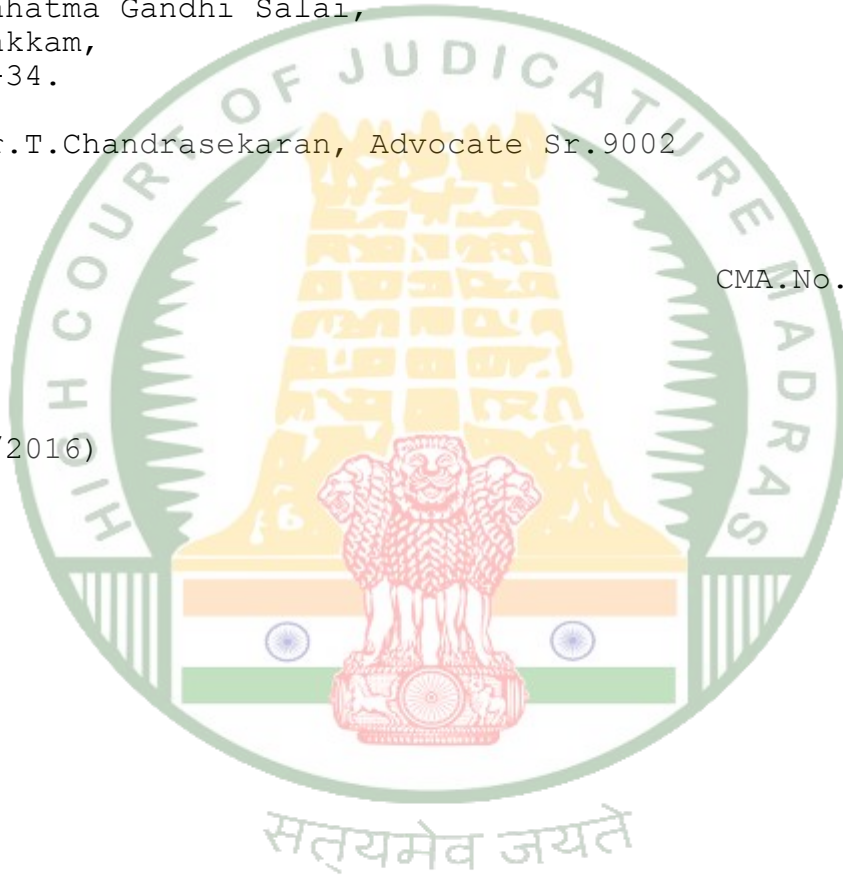
1.The Customs,
Excise & Service Tax Appellate Tribunal,
Haddows Road,
Chennai-6.

2.The Commissioner of Central Excise,
Chennai III Commissionerate,
26/1, Mahatma Gandhi Salai,
Nungambakkam,
Chennai-34.

+1cc to Mr.T.Chandrasekaran, Advocate Sr.9002

CMA.No.157 of 2016

skv (CO)
srg (16/03/2016)



WEB COPY