

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 18.04.2017

Coram

THE HON'BLE MR.JUSTICE RAJIV SHAKDER
&
THE HON'BLE MR.JUSTICE R.SURESH KUMAR

C.M.A.No.1226 of 2015
and M.P.No.1 of 2015

M/s. Ruchika Global Interlinks
No.315 (Old No.152) Thambu Chetty Street
Chennai - 600 001. ...Appellant/Respondent

Vs.

1. The Customs Excise and Service Tax
Appellate Tribunal, South Regional Bench
Haddows Road, Chennai - 600 006.
2. The Commissioner of Service Tax,
Chennai. ...Respondents/Appellant

Prayer : This Civil Miscellaneous Appeal is filed under section 35-G of Central Excise Act, praying to set aside the Final Order passed by the 1st respondent-Tribunal in Final Order Nos. 40175 of 2015 made in ST/88/2010 dated 19-2-2015.

For Appellant : Mr.K.Jayachandran
For Respondents : Mr.A.P.Srinivas
Standing Counsel for R2

JUDGMENT

(Judgment of the court was delivered by RAJIV SHAKDER.J.,)

This appeal is preferred against the Judgment and order dated 19.02.2015 passed by the Customs, Excise and Service Tax Appellate Tribunal. (in short the "Tribunal".)

1.1. The captioned appeal was admitted on 02.07.2015, when the following questions of law were framed for consideration by this Court:

- a) Whether in the facts and circumstances of the case, Rule 6(3)(c) of Cenvat Credit Rules, 2002, attracted, in cases, where the service tax on input services are not used in respect of trading activity but used only

for taxable services?

b) Whether in the facts and circumstances of the case, trading activity can be categorized as an exempted service for the purpose of invoking Rule 6 of Cenvat Credit Rules, 2002 prior to 1-4-2011.

c) Whether in the facts and circumstances of the case, when trading was not a service or exempted service at the relevant time, requiring the appellant for reversal of any part of the credit on input services is legal?

2. In order to adjudicate upon the issues arising in the appeal, the following facts are required to be noticed:

2.1. The appellant herein is engaged in trading activities as well as in commission business. The record shows that the appellant during the relevant period traded in MS Scraps, MS Angles, CTD Bars, Shredded Steel Scrap, Iron ore, etc. The appellant, it appears, largely, bought and sold the aforementioned articles from M/s Essar Steels Ltd.

2.2. This apart, the appellant, as it emerges from the record, also acted as a commission agent for and on behalf of M/s Essar Steels Ltd. In its capacity as the commission agent, the appellant sold HBI fines, which emerges as a by-product in the process of manufacturing the steel to various parties on behalf of M/s Essar Steels Ltd. For carrying out the sale to third parties on behalf of M/s Essar Steels Ltd, the appellant earned commission.

2.3. It appears that apart from M/s Essar Steels Ltd, the appellant also acted as commission agent for M/S.Meenakshi Steels and M/S.Pulkit Steels.

2.4. It appears that the appellant had obtained Centralized registration with the Service Tax Department for services provided by them under the category "Business Auxiliary Services".

2.5. Evidently, the appellant's records were examined by the internal audit party of the Department on two consecutive days, i.e., 23.06.2008 and 24.06.2008. The audit carried out revealed that the appellant had been claiming credit of service tax on various common input services like telephone services, maintenance and repair services, which were used not only for its trading activity but also qua its commission agent business.

2.6. Admittedly, in so far as the Commission Agency business was concerned, service tax was paid by the appellant, while no service tax was paid for trading activity. The latter stands

affirmed upon a query being put, in that behalf, to Mr.K.Jayachandran, learned counsel for the appellant.

2.7 It is for this reason, that the audit party came to the conclusion that excess credit of service tax had been claimed by the Assessee, contrary to the restriction imposed as per rule 6 (3) (c) of the Cenvat Credit Rules 2004, (in short "2004 Rules"). The excess amount worked out, in that behalf, by the Department was a sum of Rs.6,78,459/-. The other irregularity, which was pointed out by the Audit Department, was with regard to the availment of Cenvat Credit not used by the appellant qua their output services.

3. A perusal of the record by the audit party had revealed that the appellant had taken credit to a banking services, which was not a service used for providing the said output service.

3.1 What is important is that in so far as the first aspect was concerned, i.e., excess utilization of Cenvat Credit vis-a-vis non-taxable trading activity, the appellant, in the very first instance, paid the quantified tax, equivalent to Rs.6,78,459/- along with appropriate interest, which was pegged at Rs.98,421/-.

3.2. In so far as the second aspect is concerned, which involved, as indicated above, irregular availment of Cenvat Credit for services not used for generating output services, the credit wrongly availed of, which was quantified at Rs.7,01,979 was reversed, after making a suitable entry in the Cenvat Credit Account Balance leaving a closing balance of Rs.28,359/- as on 31.03.2008. The appropriate interest on this amount, which was quantified at Rs.1,08,787/- upon paid by the Assessee. The common ground before us, is that, in so far as this aspect of the matter is concerned, there is no lis obtaining between the parties.

4. Continuing with the narrative, based on this ground, a Show Cause Notice dated 03.03.2009, (in short "SCN"), was issued to the appellant, to which, a reply was filed.

4.1. The stand taken by the appellant, in the reply, was that due to an incorrect audit objection with regard to the alleged excess utilization of Cenvat Credit qua the exempted services, the appellant had paid up the purported excess amount, which was, otherwise not payable.

4.2. The Adjudicating Authority, however, was not impressed with the stand taken by the appellant, and therefore, proceeded to reject its claim for refund with regard to both aspects, to which, we have made a reference above.

5. Being aggrieved, the appellant preferred an appeal to the Commissioner of Central Excise, [(in short "the Commissioner (Appeals)"]].

5.1. The Commissioner (Appeals) set aside the Order-in-Original in entirety vide dated 29.04.2009. Against this order, an appeal was preferred by the Revenue to the Tribunal.

5.2 The Tribunal with regard to the aspect concerning irregular availment of Cenvat Credit, which was purportedly not used for output services, sustained the view taken by the Commissioner (Appeals) and thus, in effect, held that the appellant was eligible for input credit amounting to Rs.7,01,979/-. As indicated hereinabove, this aspect of the matter is not subject matter of the appeal before us, as the Revenue has not initiated, we are told, any appeal as regards this issue. However, in so far as the other aspects of the matter is concerned, which is, excess utilization of Cenvat Credit for exempted service, the Tribunal ruled against the appellant and in that behalf has made the following observation the paragraph 10 of the impugned judgment and order:

10) As regards the excess credit of Rs.6,78,459/- availed by the respondents on the common input services, used for both output service as well as for trading activity, I find that the respondents holding centralised registration and not maintained separate accounts of input services for the trading activity as well as for the taxable service. I find from the records and findings of the OIO, there is no dispute on the fact that respondents are carrying out both trading activity and taxable service under BAS as commission agents. The Division Bench of the Tribunal in the case of Mercedes Benz India Pvt.Ltd. Vs CCE Pune-I (supra) has clearly held that entire credit on trading activity is not eligible and only proportionate credit with reference to turnover is eligible. The relevant portion of the said judgment is reproduced as under :-

"16. In view of the above, we have come to the conclusion that trading was not a service and therefore, cannot be considered as an exempted service during the period prior to 1-4-2011 and the amended provision with effect from 1-4-2011 will not have retrospective effect. The next issue to be decided is how to apportion the credit of input service taken by the appellant, where such input services have been used both in the manufactured goods and trading activities of the imported goods. It is in this context that the Ld. Sr. Advocate for appellant has argued that the same should be computed with reference to clause (c) of Explanation I appended after Rule 6(3D) of Cenvat

Credit Rules, 2004. The said provision as noted earlier was inserted with effect from 1-4-2011. The argument of the Ld. Sr. Advocate is that the said explanation only provides that procedure for computation and since this change is procedural in nature it will have a retrospective effect. Ld. Sr. Advocate also argued that in case of traded goods, the value addition by the appellant is only the difference between the sale price and the purchase price of the goods which is not so in the case of manufactured goods. On a query by the Bench that since Ld. Sr. Advocate is arguing that only the value addition should be taken in respect of the traded goods, then why the same criteria should not be applied in the case of manufactured goods i.e. take the differential amount between the selling price and cost of various raw materials. Ld. Sr. Advocate stated that in case of manufactured goods so many things go into production process like labour, electricity and many other services and it will not be appropriate to take the value addition. In support of his contention that in case of traded goods only value addition should be taken, Ld. Sr. Advocate took us through the judgment of the Court (5th Chamber) dated 14-7-1998 in case C-172/96 which was passed on a reference under Article 177 of the EC Treaty by the High Court of Justice of England and Wales, Queen's Bench Division. We have gone through the said judgment carefully. In the said case, the issue was how to determine the turnover for purpose of value added tax in case of transactions in different currencies by the First National Bank of Chicago. The Bank used to purchase various currencies at a certain rate in other currencies. Similarly, the Bank used to sell various currencies in other currencies. The difference between the two is generally understood as spread and would be the income of the Bank. The question was what should be considered as the turnover for purpose of VAT. It is in that context, the said court has held that the spread the difference between the selling price and purchase price should be taken for the purpose of VAT. In the present case, the dispute is not relating to computation of turnover for purpose of charging a tax as there is no tax liability in case of traded goods. The question is how to apportion the credit of tax on the input service between the manufactured goods and the traded goods, whether we should take the turnover of the manufactured goods and traded goods for apportioning the credit of the service tax on input services or some other criteria should be followed. We, therefore, do not find any applicability whatsoever of the said judgment in the facts and circumstances of the present case.

Another judgment quoted by the Ld. Sr. Advocate is the judgment of the Hon'ble Supreme Court in the case of Commissioner of Wealth Tax, Meerut V. Sharvan Kumar Swarup & Sons reported in (1994) 6 SCC 623. In this case, wealth-tax was applicable on various assets. A new rule was inserted with effect from 1-4-1979 to determine the market value of properties. The question was whether the new inserted rule can be used for determining the value of properties for earlier period and hence determine the wealth-tax. It is in this context that the Hon'ble Supreme Court has taken a view that the same would be applicable to all the proceedings pending at the time of its enactment. In the present case, as mentioned earlier, it is not the computation of tax but apportionment of the credit of service tax on input services availed for manufactured goods and traded goods. As we have already held that trading was not a service and therefore cannot be considered as an exempted service before 1-4-2011, therefore, the substantive provision itself did not exist before the said date. Under the circumstances, we are of the view that the said judgment is not applicable in the facts and circumstances of the present case."

11) The Division Bench of Tribunal's decision (supra) is squarely applicable to the present case and the respondents are not eligible for the entire credit availed on the common input services. Since the department rightly demanded the excess credit of Rs.6,78,459/- which is in excess of 20% of the total service tax payable, the respondents paid the excess amount and they are not eligible to take re-credit in cenvat account nor they are eligible for refund. The adjudication order rejecting the refund of Rs. 6,78,459/- and the interest amount is upheld and the L.A.A. Order allowing credit is liable to be set aside.

5.3. Accordingly, the Tribunal partly allowed the appeal of the Revenue by interfering with the order of the Commissioner (Appeals) in so far as the purported irregular availment of Cenvat Credit for output services was concerned.

6. Mr. Jayachandran, who appears for the appellant, says that the view of the Tribunal cannot be sustained for the reason that the definition of section of rule 2 (e) of the 2004 Rules underwent amendment with effect from 01.04.2011, whereby, it was indicated that trading activity would fall in the category of exempted services. Learned counsel, thus, went on to say that, therefore, by logical corollary rule 6(3)(c) of the 2004 Rules could apply to trading activity only after 01.04.2011. In this

behalf, Mr.Jayachandran brought to our notice the fact that the period in issue involved in this case was 2006 - 2007 and 2007 - 2008.

7. As against this, Mr.A.P.Srinivas, rely upon the judgment of the Tribunal, and thus submitted that no interference called for. It was the learned counsel's submission that trading activity was also, at the relevant point in time an exempted activity and in that sense, the Explanation to Section 2(e) of the 2004 Rules, which sought to clarify that exempted services included trading activity did nothing more than reiterating the obvious.

8. We heard the learned counsel for the parties and perused the record.

9. Clearly, during the period in issue, which we are told, i.e., 2006 - 2007 and 2007 - 2008, trading activity, which was one of the businesses, carried out by the appellant was not amenable to service tax. The amendment to rule 2(e), as correctly argued by Mr.A.P.Srinivas, only stated the obvious that there was no liability to pay service tax of trading activity, during the relevant period has been accepted by Mr.Jayachandran. The argument, though, of Mr.Jayachandran is that, since, the formula of apportionment provided in rule 6(3) (c) is applicable to exempted service, the same can only apply post 01.04.2011, as a clarification was made only on that day onwards.

10. To our minds, such a submission cannot be accepted. If, the appellant has accepted before us that he was not paying service tax on an activity, then the credit of services vis-a-vis input services could only be taken on a pro-rata basis, as per the formula stipulated in Rule 6(3) (c), as it then obtained at the relevant point in time.

10.1 In this context, it may also be relevant to note, how exempted services was defined in Rule 2(e) of the 2004 Rules till 31.03.2011 and thereafter.

Rule position till 31-3-2011

Rule 2(e): "exempted services" means taxable services which are exempt from the whole of the service tax leviable thereon, and includes services on which no service tax is leviable under Sec,.66 of the Finance Act"

Rule position with effect from 31-3-2011

Rule 2(e): Exempted services means taxable services which are exempt from the whole of the service tax leviable thereon,

and includes services on which no service tax is leviable under Sec.66 of the finance Act; and taxable services whose part of value is exempted on the condition that no credit of inputs and input services, used for providing such taxable service, shall be taken.

EXPLANATION: For the removal of doubts, it is hereby clarified that "exempted services" includes trading.

10.2. Clearly, both before and after amendment, "exempted services" meant those taxable services, which were exempt from whole of service tax and, included those services on which service tax was not leviable, under Section 66 of the Finance Act. The inclusion in Explanation to Rule 2(e) "trading" was, without doubt, only clarificatory. As accepted by Mr. Jayachandran, the appellant had not been paying service tax on trading activity during the relevant period.

10.3. Therefore, given the rule position, what would govern the matter would be the determination of the issue as to whether or not, a particular service is amenable to service tax under section 66 of the Finance Act.

10.4. Since, the trading activity was not amenable service tax at the relevant period, surely, the apportionment as provided in Rule 6(3)(c) would get triggered. This is apparent, upon a bare perusal of Rule 6(3)(c) the relevant part of which is as follows.

RULE 6. Obligation of manufacturer of dutiable and exempted goods and provider of taxable and exempted services.

(1) XXXX

(2) XXXX

(3) Notwithstanding anything contained in sub-rules (1) and (2), the manufacturer or the provider of output service, opting not to maintain separate accounts, shall follow either of the following conditions, as applicable to him, namely:-

(a) XXXX

(b) XXXX

(c) The provider of output service shall utilize credit only to extent of an amount not exceeding twenty per cent of the amount of service tax payable on taxable output service

11. Having regard to the rule position and given the admitted fact that no separate accounts were maintained by the appellant, with regard to the taxable and non taxable services, clause (c) of sub rule 3 of rules 6 of 2004 Rules would apply.

12. For the foregoing reasons, we feel no interference is called for with the order of the Tribunal. Accordingly, the questions of law framed are answered in favour of the Revenue and against the Assessee.

13. The appeal will stand dismissed. Resultantly, pending miscellaneous petition shall stand closed. There shall, however, be no order as to costs.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

raja/gg

To

1. The Customs Excise and Service Tax
Appellate Tribunal, South Regional Bench,
Haddows Road, Chennai - 600 006.

2. The Commissioner of Service Tax,
Chennai

+1 cc to M/s.K.Jayachandran Advocate sr 23402

+1 cc to M/s.A.P.Srinivas Senior Standing Counsel for Customs
Central Excise service tax sr 23756

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and

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