

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED : 12.04.2017
CORAM

THE HONOURABLE MR.JUSTICE RAJIV SHAKDHER
And
THE HONOURABLE MR.JUSTICE R.SURESH KUMAR

C.M.A.Nos.3065 and 3066 of 2011

The Commissioner of Central Excise,
Chennai III Commissionerate,
121, Utthamar Gandhi Salai,
Nungambakkam, Chennai - 34.

... Appellant/Respondent
in both C.M.As.

Vs.

1.M/s.Intimate Fashions India (P) Ltd.,
Thiruporur - Kottamedu High Road,
Nandivaram Village,
Guduvancherry - 603 202.

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

... Respondents/Appellant
in both C.M.As.

Common Prayer:

Appeals filed under Section 35 G of the Central Excise Act, 1944, against the order dated 13.01.2011 passed in Final Order Nos.73 and 74 of 2011 respectively, by the Customs, Excise and Service Tax Appellate Tribunal, Chennai.

For Appellant : Mr.A.P.Srinivas
For Respondent No.1 : Mr.Muthu Venkatraman

C O M M O N J U D G M E N T

(Judgment of the Court was delivered by RAJIV SHAKDHER, J.)

1.These appeals have been filed under Section 35 G of the Central Excise Act, 1944, whereby, challenge is laid to the final order dated 13.01.2011, passed by the Customs, Excise and

Service Tax Appellate Tribunal, Chennai.

2.The appeals were admitted by this Court vide order dated 20.10.2011, when, the following questions of law, were framed for the Court's consideration:

"1.Whether the CESTAT, Chennai erred in its decision which is based solely on the judgment of the CCE, Jalandhar VS Ambika Overseas-2010(2) STR 514 and that of Ms.Cadila Health Care Ltd., Vs. CCE, Ahmedabad 2010 (17) STR 134 which has not reached finality as the department has gone on appeal to High Court.

2.Whether the decision of CESTAT is correct in law as it had not gone into the facts and circumstances of the case in hand in detail and passed the order without discussing in detail the merits of the case which appears to be different than the facts of the case which appears to be different than the facts of the cases that were relied upon."

3.We are informed that both the judgments referred to, in Question no.1 above, are judgments rendered, by the Tribunal.

3.1.We are further informed by the learned counsels for the parties that in so far as the Tribunal's judgment in the case of Ambika Overseas is concerned, that has been affirmed by the Punjab and Haryana High Court in the judgment titled: Commissioner of Central Excise, Ludhiana Vs. Ambika Overseas, 2012 (25) S.T.R. 348 (P & H).

3.2.As regards, the judgment rendered by the Tribunal in Cadila Healthcare Limited is concerned, (which was in favour of the Assessee), it has been reversed by the Gujarat High Court, in the case titled: Commissioner of Central Excise, Ahmedabad - II Vs. Cadila Healthcare Limited, 2013 (30) S.T.R.3 (Guj.).

4.A reading of the judgment and order of the Tribunal would show that the Tribunal did not make any observation, with regard to the facts, on account of the stand taken by the Department before it, that the issue raised in the appeal before the Tribunal was covered at the relevant point of time by the two judgments rendered by it, to which, we have made reference above.

4.1.To be noted, this fact is conceded by the learned counsels appearing for both the parties i.e., the Assessee, as well as, the Revenue.

5.Given the fact, that one judgment i.e., the judgment rendered in Ambika Overseas has been confirmed by the Punjab and

Haryana High Court, whereas, the other judgment i.e., Cadila Healthcare Limited has been reversed by the Gujarat High Court, we are of the view that the matter would have to be remanded to the Tribunal, for a fresh adjudication, on merits.

6.As a matter of fact, the second question of law, raised before us, relates to this aspect of the matter.

6.1.We may, also note that the learned counsel for the Assessee has referred to the judgment of the Tribunal, in the matter of: Essar Steel India Ltd., vs. Commissioner of Central Excise & ST, 2016 (335) E.L.T. 660 (Tri. - Ahmd.).

6.2.Based on this judgment, learned counsel says that via Notification No.2/2016 - CX (N.T.), an explanation has been inserted in Rule 2(1) of the Cenvat Rules, 2004, whereby, a clarification has been provided to the effect that the Assessee could avail of cenvat credit on sales promotion services which are availed of on commission basis to enable sale of goods.

6.3.Learned counsel says, that the Tribunal in Essar Steel India Limited case, has held that since such explanation is declaratory in nature, it would apply, retrospectively.

7.As indicated above, the Tribunal has not ruled on the merits of the case and in particular, has not returned a finding, one way or the other, as to whether expenses incurred by the Assessee in the form of commission paid to foreign agents was a pre-removal expense. The Tribunal would have to rule on the said aspect, and it is, perhaps, only, when, it comes to the conclusion that the service in issue purportedly, rendered by the foreign agents was rendered prior to the removal, can credit be taken for duty paid on the same. It is the case of respondent no.1 that services of foreign agents are used in locating foreign buyers, which in turn, enabled manufacture and export the requisite goods. In other words, it is the stand of respondent no.1 that the said service falls within the definition of "inputs services", which is a pre-removal expense, and not, an expense incurred post clearance as contended by the Revenue.

7.1.We may, also note that the learned counsel for the Assessee has submitted that on a reverse charge basis, the Assessee has been paying service tax, on such Commission paid to foreign agents and that the same has been dutifully collected by the Revenue, without giving the necessary credit.

8.Therefore, having regard to the aforesaid, the impugned judgment and order is set aside, with a direction to the Tribunal to decide the matter, on merits, as expeditiously as possible, though, not later than, eight weeks from the date of

receipt of a copy of the order.

9.The appeals are disposed of accordingly. However, there shall be no order as to costs.

-s/d-
Assistant Registrar(CSVI)

True Copy

Sub-Assistant Registrar

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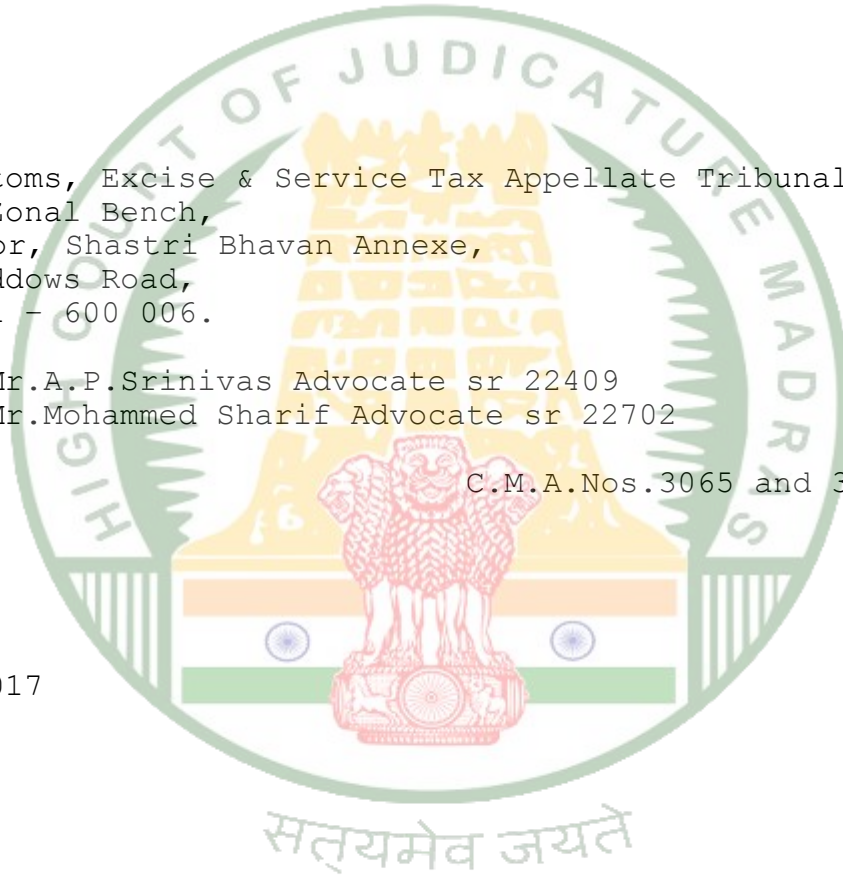
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+1 cc to Mr.A.P.Srinivas Advocate sr 22409

+1 cc to Mr.Mohammed Sharif Advocate sr 22702

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