

In the High Court of Judicature at Madras

Dated : 10.9.2018

Coram :

The Honourable Mr.Justice T.S.SIVAGNANAM

and

The Honourable Mrs.Justice V.BHAVANI SUBBAROYAN

Civil Miscellaneous Appeal No.2021 of 2018
& CMP.No.15699 of 2018

The Commissioner of GST & Central
Excise, Chennai Outer, Chennai-40. ..Appellant
Vs

M/s.Dymos India Automotive Private
Limited, Thiruvallore. ...Respondent

APPEAL under Section 35G of the Central Excise Act, 1944 read with Section 83 of Chapter V of the Finance Act, 1994 against final order No. 40112/2018 on the file of the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai dated 04.1.2018.

For Appellant : Mr.V.Sundareswaran

Judgment was delivered by T.S.SIVAGNANAM,J

We have heard the learned Senior Standing Counsel for the appellant.

2. The appeal by the Revenue, filed under Section 35G of the Central Excise Act, 1944 read with Section 83 of Chapter V of the Finance Act, 1994, is directed against the final order passed by the Customs, Excise and Service Tax Appellate Tribunal dated 04.1.2018.

3. The appeal is admitted on the following substantial questions of law:

[i. Whether the CENVAT Credit relating to 'commercial or industrial construction service' can be utilized for payment of service tax on 'renting of immovable property services'? And
ii. Whether the Tribunal was correct in allowing the entire CENVAT credit availed by the respondent in March 2009 when 1968.10 sq.mts of the portion of immovable property (factory) was deleted from the registered place of manufacture vide letter dated 30.7.2008?]

4. The assessee is engaged in the manufacture PU foam meant for automobile seat cushion falling under Chapter Sub-Heading No.94012000 of the Central Excise Tariff Act, 1985. The Preventive Unit of the Department made a verification of the records of the assessee and noted that the assessee availed CENVAT credit basic excise duty to the tune of Rs.1,16,68,776/-, education cess to the tune of Rs.2,33,376/- and secondary and higher education cess to the tune of Rs.1,16,688/- as input with respect to service tax amount of Rs.5,08,20,984/- towards 'commercial or industrial construction service' during 2008-09 for the payment of service tax towards 'renting of immovable property services'.

5. The case of the Department was that the assessee leased out a part of the factory premises to one

M/s.Hanil Lear India Private Limited (for brevity the HLIPL) vide land and licence agreement dated 18.8.2008 for a period of 11 months. However, in March 2009, the CENVAT credit was taken. Hence, the Department was of the view that the assessee had not used the input service relating to that portion in or in relation to the manufacture of their finished products.

6. Summons were issued to the assessee, pursuant which, a statement was recorded. Subsequently, the assessee paid a sum of Rs.1,20,18,840/- including cess from their CENVAT credit account on 23.9.2009 under protest and intimated the same vide their letter dated 24.9.2009. In response to the letter sent by the Department, the assessee, vide letter dated 29.12.2009, stated that an area of 1968.10 sq.meters was leased out to the HLIPL and the proportionate credit was reversed. It was further stated that they are both manufacturers and service providers, as they were also paying service tax on the rent collected from the HLIPL, that the CENVAT credit was eligible both on the inputs, input services and capital goods, that the CENVAT credit taken could be utilized both for payment of excise duty on their final products and for payment of service tax on their output services in terms of Rule 3(4) of the CENVAT Credit Rules, 2004 and that therefore, the proportionate credit need not have been debited by them.

7. Pursuant to such response by the assessee, a show cause notice dated 31.3.2010 was issued proposing to recover the wrongly availed CENVAT credit along with interest and penalty. The assessee submitted their response. After due adjudication, the Adjudicating Authority confirmed the demand made in the said show cause notice vide order dated 14.9.2010. Challenging the order of the Adjudicating Authority, the assessee preferred an appeal before the Tribunal. The Tribunal allowed the appeal filed by the assessee vide order dated 04.1.2018, which is impugned in this appeal.

8. We have heard Mr.V.Sundareswaran, learned Senior Standing Counsel for the appellant.

9. The Tribunal took note of the allegations in the said show cause notice ie. the assessee was not eligible for input service credit availed under the head 'commercial or industrial construction activities' during the period 2008-09. The Tribunal, after referring to the definition 'input service' as it stood at the material time under Rule 2(3) of the said Rules, pointed out that the first limb of the definition made it clear that in the case of service provider, the service tax paid would be eligible input service, if the service is used for providing output service. The assessee contended that they were both manufacturer and provider of output service, that for the portion of the building used for manufacturing activity, the appellant was eligible for credit of service tax paid on construction services, that there was no dispute on this credit and that the dispute was confined to the quantum of credit availed on construction services on that portion of the building leased out to the HLIPL. 10. The Tribunal also referred to the decision in the case of CCE, Coimbatore Vs. Lakshmi Technology & Engineering Indus Ltd. [reported in (2011) 23 STR 265 (Tri.-Chennai)] and also the decision in the case of Navaratna S.G. Highway Property Private Limited Vs. CST [reported in (2012) 28 STR 166 (Tri.-Ahmd.)] and held that without construction of the building, the renting of immovable property services cannot be provided and that therefore, construction service is an eligible service for credit for providing output service of renting of immovable property.

11. In our considered view, the conclusion of the Tribunal is well founded, as construction service is an eligible service for credit for providing output service of renting of immovable property and without construction of the building, the renting of immovable property cannot be provided. We are also of the opinion that there is no error in the decision taken by the Tribunal.

12. For the above reasons, the above civil miscellaneous appeal is dismissed and the substantial questions of law framed are answered against the Revenue. Consequently, the connected CMP is also dismissed.

10.9.2018

Internet : Yes

To
The Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench,
No.26, Sastri Bhavan Annexe Building, Haddows Road, Chennai-6.

RS
T.S.SIVAGNANAM,J
AND
V.BHAVANI SUBBAROYAN,J

RS

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