

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 9/7/2018

C O R A M

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE MR.JUSTICE SUBRAMONIUM PRASAD

C.M.A.No.1457 of 2018

The Commissioner of GST & Central Excise,
Chennai South Commissionerate
MHU Complex,
No.692, Anna Salai,
Nandanam, Chennai-600 035. ... Appellant

Vs.

M/s. Visual Graphics Computing Services
India Pvt Ltd
Ascendas International Tech Park
Unit 1-4, 10th Floor
Zenith, CSIR Road
Taramani
Chennai 600 113. ... Respondent

Prayer: Civil Miscellaneous Appeal filed under Section 35 G (2) of Central Excise Act, 1944, against the Final Order No.42324 of 2017, dated 11/10/2017, on the file of the Customs Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai.

For appellant ... Mrs.R.Hemalatha

J U D G M E N T

(Judgment of this Court was made by S.MANIKUMAR, J.)

Civil Miscellaneous Appeal is filed against the Final Order No.42324 of 2017, dated 11/10/2017, on the file of the Customs Excise and Service Tax Appellate Tribunal, South Zone Bench, Chennai.

2. Short facts leading to the appeal are that, M/s.Visual Graphics Computing Services India Pvt Ltd., Chennai are the provider of services under the category of "Information Technology Software Service." Appellant had filed refund claim of Rs.2,50,07,166/-, for the period April 2012 to June 2012, under Rule 5 of Cenvat Credit Rules, 2004. Original Authority

rejected part of the refund claim of Rs.1,72,05,940/- on the ground of non-registration of premises.

3. On appeal, Commissioner (Appeals), vide, impugned order, dated 10/6/2016, allowed the appeal. Aggrieved, department has filed an appeal, before the CESTAT, challenging the order of the Commissioner of Appeals. Vide, Final Order No.42324/2017, dated 11/10/2017, CESTAT, Madras, dismissed the appeal filed by the revenue, relying on the following judgments.

(i). Sciainspire Consulting Services (India) Pvt Ltd {2017-TIOL-798-HC-MAD-ST}

(ii). E-Care India Private Ltd {2017 (52) STR - 246 (Mad)}.

4. Final Order of CESTAT, is assailed on the following substantial questions of law:

"1. Whether the decision of CESTAT passed Final Order No.42324 of 2017, dated 11/10/2017, in allowing refund of CENVAT Credit even without registration is correct?

2. Whether the CESTAT is correct in not considering the safeguards, conditions and limitations as stipulated in the Appendix to the Notification No.27/2012-CE(NT), dated 18/6/2012?"

5. Supporting the prayer, Ms.R.Hemalatha, learned counsel for the appellant submitted that registration is an act by which every manufacturer/assessee/service provider, comes under the ambit of Central Excise Act, 1944 / Finance Act, 1994. In order to avail any substantive benefit, like, CENVAT Credit available under the statute, registration of premises from which the taxable service is rendered is a pre-requisite. Therefore, when registration has not been done as per Section 69 of the Act, the respondent is not entitled for refund of CENVAT read with rule 4(1) of the Rules which render them ineligible for CENVAT credit on input services accumulated prior to registration.

6. Learned counsel for the appellant further submitted that the respondent is not entitled for refund of CENVAT credit in respect of input or input service used, in export of service, without payment of service tax, prior to the date of their being registered with service tax department. According to her, the issue involved in this appeal, is not a mere technical lapse. In order to derive any substantive benefit of any Act/Rule, the person claiming such substantive benefit has to strictly follow the conditions and procedures stipulated. CESTAT, Madras, has

failed to consider the safeguards and conditions stipulated in Appendix to Notification No.5/2006-CE(NT), dated 14/3/2006 {condition NO.3(b)} wherein, it is stated that refund of CENVAT credit shall be allowed only in respect of the registered premises of the service provider from where the output services are exported.

7. Learned counsel for the appellant also submitted that a Larger Bench of CESTAT, New Delhi in the case of Steel Strips vs CCE, Ludhiana - 2011 (269) ELT (Tri-Del) vide para 5.16 held as follows:

"Modvat law has codified procedure for adjustment of duty liability against Modvat Account. That is required to be carried out in accordance with law and unadjusted amount is not expressly permitted to be refunded. In absence of express provision to grant refund, that is difficult to entertain except in the case of export. There cannot be presumption that in the absence of debarment to make refund, in other cases that is permissible. Refund results in outflow from treasury, which needs sanction of law and an order of refund for such purpose is sine qua non. Law has only recognized the event of export of goods for refund of Modvat credit as has been rightly pleaded by Revenue and present reference is neither the case of "otherwise due" of the refund nor the case of exported goods. Similarly absence of express grant in statute does not imply ipso facto entitlement to refund. So also absence of express grant is an implied bar for refund. When right to refund does not accrue under law, claim thereof is inconceivable. Therefore, present reference is to be answered negatively and in favour of Revenue since refund of unutilized credit is only permissible in case of export of goods and for no other reason whatsoever that may be"

8. Learned counsel for the appellant submitted that CESTAT, Madras, erred by stating that the respondent was entitled to credit and refund, in view of non-taxability of export service. This is for the reason that Rule 4 of Export of Service Rules, 2005 permitted a service provider to export services, without payment of service tax, and there is liability to pay service tax, on export of service, but for this rule. Hence, for export of service by a service provider, registration is a sine qua non for procedural and substantive compliance. The judgment of this Court, in the case of Commissioner of Service Tax, Chennai -III Vs. M/s Scioinspire Consulting Services (India) P Ltd., applied by CESTAT, Madras, for deciding the appeal in favour of the

respondent, was accepted by the department due to monetary limit and not on merits, and therefore, learned counsel for the appellant submitted that the ratio of the said judgment, should not have been taken as a binding precedent, in view of Section 35R (3) of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994. The subsequent decision of CESTAT, Madras, vide FO No. 42500/2016 dated 20/12/2016 in the case of the same party viz., M/s Scioinspire Consulting Services (India) P Ltd. was also appealed in this Hon'ble Court, by the department vide CMA. Sr. No.54980 of 2017.

9. Learned counsel for the appellant further submitted that a Hon'ble Division Bench of this Court, in the case of Commissioner of Central Excise, Coimbatore Vs Sutham Nylocots, vide final order in CMA No.926/2006, dated 09.01.2014, reported in 2014 (306) E.L.T. 255 (Mad) held that 'if at all the assessee is entitled to any credit it would accrue only subsequently to the date of the registration with the Department'. Hence, refund of unutilized input CENVAT credit taken towards rendering the input services availed and used in providing taxable output services exported would not arise, prior to the date of registration.

10. We have heard learned counsel for the appellant and perused the materials available on record.

11. On same set of facts, namely, in the matter of Commissioner of Services Tax-III, Chennai Vs. M/s. Scioinspire Consulting Services India Private Limited, Chennai and another, in C.M.A.No.860 of 2017, the following substantial questions of law have been framed:-

"1. Whether the decision of CESTAT i.e. Respondent No.1 in allowing refund of Cenvat credit even without registration is correct?

2. Whether CESTAT i.e. Respondent No.1 is correct in not considering the safe guards, conditions and limitations as stipulated in the Appendix to Notification No.05/2006-CE(NT) dated 14.03.2006?

3. Whether CESTAT i.e. Respondent No.1 is correct in applying the ratio of the judgment of the Hon'ble Karnataka High Court in the case of M/s.mPortal Wireless Solutions Private Limited when the said judgment was not accepted on merits but due to low revenue effects?"

12. After considering the provisions, relevant notifications and decisions in M/s.mPortal India Wireless Solutions Private Limited V. Commissioner of Service Tax, Bangalore, reported in 2012 (27) S.T.R.134 (Kar.); in Commissioner of Service Tax V. Tavant Technologies India Private Limited, reported in 2016 (3) TMI 535; in Commissioner, Service Tax Commissionerate V. Atrenta India Private Limited, reported in 2017 (2) ADJ 590; and in Commissioner of Central Excise, Coimbatore Vs. Sutham Nylocots, reported in 2014 (306) E.L.T. 255 (Mad), a Hon'ble Division Bench, answered the above said substantial questions of law, raised therein, against the revenue. Following the decision in C.M.A.No.860 of 2017, dated 10/4/2017, instant Civil Miscellaneous Appeal No.3493 of 2017, filed by the revenue, on the same substantial questions of law is liable to be dismissed.

13. Accordingly, Civil Miscellaneous Appeal is dismissed. No costs. The facts and circumstances of the substantial questions of law are answered against the revenue.

Sd/-
Assistant Registrar(Audit)

//True Copy//

Sub Assistant Registrar

mvs.

To

The Commissioner of GST & Central Excise,
Chennai South Commissionerate
MHU Complex,
No.692, Anna Salai,
Nandanam, Chennai-600 035.

+lcc to Mrs.R.Hemalatha, Advocate sr.no.44664

C.M.A.No.1457 of 2018

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