IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19.02.2018

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
AND
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

C.M.A.No.74 of 2011
and
CMP.No.1 OF 2011

M/s.TVS Motor Company Ltd.,
Rep., by Authorised Signatory,
P.B.No.4, Harita, Hosur 635 109. ..Appellant/Appellant

versus

1. The Commissioner of Central Excise,
Chennai III Commissionerate,
26/1, Mahatma Gandhi Road,
Nungambakkam, Chennai 600 034.

2. The Customs, Excise and Service
Tax Appellate Tribunal,
South Zonal Bench, Shastri Bhavan Annexe,
26, Haddows Road, Chennai 600 006. .. Respondent

Prayer: Civil Miscellaneous Appeal is filed under Section 35G of Central Excise Act, 1944, against the Stay Order No.520 of 2010, dated 09.11.2010 of the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai (CESTAT).

For Appellant : M/s.Lakshmi Kumaran

For 1st Respondent : Mr.R.Hemalatha

For 2nd Respondent : Tribunal

COMMON JUDGMENT
(Judgement of this Court was made by S.MANIKUMAR, J.)

Civil Miscellaneous Appeal is directed against the order of the Customs Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai (CESTAT), dated 09.11.2010 in Stay Order No.520 of 2010, by which, the Tribunal has directed the appellant to deposit 50% of the demand, towards pre-deposit, on the ground that they have availed Cenvat Credit, irregularly.

2. It is the case of the appellant that they are the manufacturers of Motor cycles, I.C. Engines and parts thereof, registered with the Central Excise Department and paying appropriate Central Excise Duty on their clearances, after complying with all statutory requirements. They sell their products, through Authorized Dealers, appointed on a non-exclusive basis, for marketing, selling and servicing the products, in various locations all over the country. They have entered into a Dealership agreement, with the Authorized Dealers.

3. According to the appellant, they are availing Cenvat credit of duty paid on inputs/capital goods and service tax paid on various input services, as per Cenvat Credit Rules, 2004, after complying with the statutory requirements. It is a normal practice in the automobile industries for vehicle manufacturers to enter into exclusive arrangement with finance companies to provide financial assistance to the buyers of their products.

4. Therefore, the appellant entered into a Memorandum of Understanding ("MOU") with TVS Financial Services Ltd., a Public Limited Company, incorporated under the provisions of Companies Act, 1956, on 01.04.2003, for financing the purchase of their two wheelers. The underlying purpose of the memorandum, is to require TVS Financial Services Ltd., to finance the purchase of the two wheelers, manufactured by the appellant, by financing the ultimate consumers and thereby, promoting the sale of two wheelers.

5. The appellant renewed the memorandum of understanding, with TVS Financial Services Ltd., upto 2007-08, with a view to expand and promote their business operations. In terms of the said memorandum, TVS Financial Services Ltd., is required to provide the following services,

(a) To continue expansion of networks in the various states and to penetrate in the semi-urban and rural areas to promote business practice.

(b) To maintain and set up and add necessary new infrastructure in all these centres to cater to expansion.

(c) Representatives of TVSFS shall be present at dealers/authorized service centres.

(d) To expand financing business in the new territories in the Northern States.

As consideration for the above services rendered and for providing infrastructure in semi-urban and rural areas in Tamil

Nadu, Pondicherry, etc, the appellant should pay, an amount calculated on per vehicle basis, as below, to TVS Financial Services Ltd., subject to a maximum of Rs.10 crores per annum.

Motorcycles	Rs.2,000 per vehicle financed
Scooters	Rs.1,500 per vehicle financed
Mopeds	Rs.1,000 per vehicle financed

The Appellant also undertook to reimburse the expenses incurred in setting up infrastructure in Northern States of Rajasthan and Western UP, upto a limit of Rs.50 lakhs for the year 2005-06.

6. Memorandum of Understanding, dated 05.04.2005 widened the scope of the earlier Memorandum of Understanding, dated 01.04.2003, whereby, TVS Financial Services Ltd., was required to penetrate into semi-urban and rural territories and set up the required infrastructure in the premises of dealers and Authorised Service Centers (ASC), with a view to expand and promote the business operations mutually. Thus, under the Memorandum of Understanding, dated 5.4.2005, the additional obligations of TVS Financial Services Ltd., were to promote retail financing and sale of two-wheelers manufactured by the Appellant.

7. According to the appellant, TVS Financial Services Ltd., had set up the requisite infrastructure in the premises of dealers and Authorised Service Centers, comprising of computers, furniture and other peripherals. TVS Financial Services Ltd., appointed Territory Sales Executives and posted Direct Selling Agents in such centres. Through such centres, TVS Financial Services Ltd., made their presence in the areas of sale and promoted or marketed the financing service and sale of the two-wheeler manufactured by the appellant.

8. According to the appellant, through the aforesaid centre, TVS Financial Services Ltd., conducted loan 'melas' and campaigns, as part of their obligation, to expand and promote the business mutually. Such melas and campaigns were for promotion of financing and sale of the two-wheelers manufactured by the appellant. The advertisements, pamphlets and other means of propaganda were for the product of the appellant and for retail financing. Thus, it is the case of the appellant that TVS Financial Services Ltd., were incurring promotion expenses and promoting the business of retail financing and the sale of two wheelers manufactured by them.

9. In terms of the memorandum of understanding, TVS Financial Services Ltd., has to furnish periodical statements

duly certified by the auditors, indicating the business done in the various states and for the cost of expenses incurred towards setting up of infrastructure and thereafter, consideration has to be paid based on the said periodical statements. During the period 2005-06 to 2007-08, TVS Financial Services Ltd., provided services in terms of the memorandums and raised invoices on the appellant and they made payments, restricting the amount of a maximum of Rs.10 crores, in terms of the memorandum of understandings.

10. It is the case of the appellant that they also availed Cenvat Credit of the service tax paid on the services provided by TVS Financial Services Ltd., with reference to the actual amount paid. The total amount of Cenvat credit availed by the appellant is Rs.4,39,03,272/-. Officers attached to the Commissioner of Central Excise, Chennai III Commissionerate, Chennai, visited the factory of the appellant on 13.03.2008 and made enquiries regarding the services provided by TVS Financial Services Ltd., and Cenvat credit availed on input services, rendered by the financial services to the appellant, in regard to sales promotion activities. A Statement was also recorded by the department from Mr.G.Ramachandran, General Manager (Finance) of the company on 11.06.2008. Office of TVS Financial Services Ltd., was also visited by the said officers on 10.04.2008 and enquiries were made. Statements were also recorded from Mr.S.Sridhar, Manager (Accounts) on 19.09.2008 and 13.10.2008.

11. It is the further case of the appellant that the 1st respondent herein, has issued a Show Cause Notice No.79/2008, dated 23.10.2008 on them, proposing to recover Cenvat Credit of Rs.4,39,03,272/-, availed of service tax paid on the services received by them, from TVS Financial Services Ltd., in relation to promotion of their sales, with interest, in terms of Rule 1 of Cenvat Credit Rules, 2004 read with Section llA(I) of Central Excise Act, 1944. Besides, the notice also proposed to impose penalty under Rule 15 of Cenvat Credit Rules, 2004 read with Section 11AC of Central Excise Act, 1944. The notice further proposed to impose penalty against TVS Financial Services Ltd., under Rule 26(2)(ii) of the Central Excise Rules, 2002.

12. In the said notice, it is alleged that the appellant has wrongly availed Cenvat credit of service tax paid to TVS Financial Services Ltd., since the service rendered by TVSFS was not a service in relation to promotion or marketing or sale of goods produced or provided by or belonging to the appellant and the service was not used by the appellant either directly or indirectly, in relation to manufacture of final products and clearance of final products from the factory premises of the appellant. The notice further alleged that the appellant have taken and utilized Cenvat credit by willful mis-statement and by

suppressing the facts. The Appellant contested the said notice, vide their reply, dated 31.03.2009, contending inter alia that,

(a) The appellant has entered into memorandum of understanding with TVS Financial Services Ltd., for financing exclusively the purchase of two wheelers of the appellant by the ultimate consumers and thereby promoting the sale of two wheelers manufactured by the appellant.

(b) TVS Financial Services Ltd., were incurring promotional expenses and promoting the business of retail financing and sale of two wheelers, manufactured by the appellant.

(c) A manufacturer engages various agencies to promote the sale of the products manufactured by them. The appellant is engaged in manufacture of consumer products and the sale of the products depends upon the purchase of the products by the ultimate customers. Thus, the financing of two wheelers rendered by TVS Financial Services Ltd., to the appellant is directly in relation to promotion of sale and is an input service to the appellant.

(d) The definition of 'input service' is very wide and takes within its ambit any service which has nexus, whether such a nexus is direct or indirect, in or in relation to manufacture and clearance of final products/activities relating to business of the Appellant.

(e) Expenses incurred towards procuring the input service forms part of the assessable value of the final products and hence credit of service tax paid on such service is available to the appellant.

(f) The issue involves interpretation and hence, extended period cannot be invoked."

13. Without appreciating any of the contentions raised by the appellant, the Commissioner of Central Excise, Chennai III Commissionerate, 1st respondent herein, vide his Order-in-Original No.29/2009, dated 30.10.2009, disallowed the Cenvat credit of Rs.4,39,03,272/- and imposed a penalty of Rs.2,000/-, under Rule 15(3) of the Cenvat Credit Rules, 2004. Findings of the 1st Respondent in the said order, are as follows:

(a) The Appellant had appointed various dealers to whom the goods are sold. The sale invoices raised on the dealers included the excise duty element and the sales tax element evidencing the sale has taken place. The ownership of the goods is transferred from the seller to the buyer and the buyer is the sole owner of the goods. Thus the service rendered by TVS Financial Service Ltd., is actually connected with the second sales by the dealers of the two wheelers manufactured by The Appellant. In order to be eligible for credit the service rendered should have some nexus to the manufacturing activity. In the instant case there is no nexus to the manufacturing activity and hence credit is not admissible.

(b) Sales promotion does not include appointment of an agent merely to sell the goods in the dealer's premises. Sales promotion is only an activity to increase consumer demand and providing finance to the customers after the sale has been made by The Appellant to an independent dealer cannot be termed as sales promotion. Thus the services rendered by TVS Financial Service Ltd., do not fall under the category of sales promotion to merit eligibility of credit.

(c) If all the activities relating to business are to be considered eligible for input service credit then there is no need for the primary definition stipulation "directly or indirectly" "in or in relation to manufacture of final products" in the said rule. Any interpretation which makes the existing definition redundant is untenable.

(d) As per the definition of 'input service' as defined under Rule 2(1) of CR, 2004, the legislative intent is to allow credit only upto the place of removal and hence the contention of the Appellant that the services rendered till the goods are sold to the ultimate customer is eligible for credit is not acceptable.

e) Cenvat credit is eligible in respect of those goods that are used in any activity concerned with or pertaining to the manufacture of final products but in the instant case the service has been rendered after the sale has taken place. The service rendered by TVS Financial Services Ltd., has no nexus with the manufacturing activity and the Cenvat credit on such service is not available to the Appellant."

14. Aggrieved by the same, the appellant has preferred Appeal No.E/36/2010 before the CESTAT. Application No.E/S/24/2010, has been filed in the appeal, seeking for stay of the Order-in-Appeal and waiver of the pre-deposit. However, the Tribunal has directed the appellant to pre-deposit 50% of

the amount of tax demanded. Against which, the present appeal has been filed, on the following substantial questions of law,

(i) Whether the CESTAT is right in holding that the services of sales promotion at the point of second sale cannot be considered to be connected with the activities of manufacture and consequently, not eligible for the CENVAT Credit?

(ii) Whether the CESTAT is right in holding that since the manufacture as well as the first sale have already been completed before the services are rendered at the premises of the dealer, consequently the CENVAT Credit could be denied on such ground and thereby, holding that there is no prima facie case for grant of stay or for complete waiver of pre-deposit?

15. In support of the above substantial questions of law, the appellant has raised several grounds.

Heard the learned counsel appearing for the parties and perused the materials available on record.

16. Though several grounds have been raised, on the entitlement of CENVAT credit, we are inclined to deal with the same in depth, as the said issue has to be decided by CESTAT. We are concerned with the only issue, as to whether, there is a prima facie case, for complete waiver of pre-deposit and as to whether, the Tribunal has exercised its discretion. Going through the material on record, we are of the view that the findings of the Tribunal cannot said to be totally erroneous. However, considering the parameters, to be taken note of, in the matter of pre-deposit, this Court directs the appellant to pre-deposit 30% of the amount of duty demanded, within a period of eight weeks, from the date of receipt of a copy of this order.

17. In the light of the above discussion and decisions, the instant Civil Miscellaneous Appeal is disposed of. No costs. Consequently, the connected Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

skm

To

1. The Commissioner of Central Excise,
   Chennai III Commissionerate,
   26/1, Mahatma Gandhi Road,
   Nungambakkam, Chennai 600 034.

2. The Customs, Excise and Service
   Tax Appellate Tribunal,
   South Zonal Bench, Shastri Bhavan Annexe,
   26, Haddows Road, Chennai 600 006.

+1cc to Mr.Lakshmikumaran, Advocate, S.R.No.14838
+1cc to Mr.R.Hemalatha, Advocate, S.R.No.12625

C.M.A.No.74 of 2011

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