

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 19.09.2018

CORAM :

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

Civil Miscellaneous Appeal No.2926 of 2017

M/s.Ganesan Builders Ltd.,
No.46-A, C.P. Ramasamy Road,
Abiramapuram, Chennai-600 018. ... Appellant

Vs.

The Commissioner of Service Tax,
Service Tax II Commissionerate, Newry Towers,
Ground Floor, Plot No.2054, I Block,
12th Main Road, Anna Nagar,
Chennai-600 040. ... Respondent

* * *

Prayer : Civil Miscellaneous Appeal filed under Section 35G of Central Excise Act against the Final Order No.40713 of 2017, dated 17.05.2017 on the file of the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai arising against the order in Appeal No.123/2016 (STA-II) dated 01.08.2016 passed by the Commissioner of Service Tax (Appeals-II) Chennai against the order in Original No.89/2015-2016-ST-II, dated 29.02.2016, passed by the Additional Commissioner; Service Tax II Commissionerate, Chennai-40 and show cause Notice No.69/2015, of the Additional Commissioner, O/o.Commissioner of Service Tax, dated 21.09.2015.

For Appellant : Mr.K.Jayachandran

For Respondent : Mr.A.P.Srinivas
Senior Standing Counsel

J U D G M E N T

[Judgement of the Court was delivered by T.S.Sivagnanam, J.]

This appeal under Section 35G of the Central Excise Act, 1944, as made applicable under Section 83 of the Finance Act, 1994, is directed against the Final Order No.40713 of 2017 dated 17.05.2017 on the file of the Customs, Excise and Service Tax

Appellate Tribunal, South Zonal Bench, Chennai, (in short, "the Tribunal") is filed by the assessee.

2. The appeal has been admitted vide order dated 05.10.2017 on the following substantial questions of law :

"(i) Whether the Service Tax amount, paid on insurance services provided by the appellant to workers working at their site, as per the mandatory requirement of labour laws, is one of the excluded services for the purposes of clause (c) of the definition of "input services" under Rule 2(1) of Cenvat Credit Rules, 2004 ?

(ii) Whether such insurance services to be mandatorily provided by employer under labour laws, being a cost to the appellant in relation to the rendering of taxable service of the appellant, be an eligible input service for availing cenvat credit of Service Tax paid thereon, or to be considered as ineligible and excluded category of input service coming within the ambit of expression "are used primarily for personal use or consumption of any employee" under clause (c) ?

(iii) Whether in the facts and circumstances of the case, the expression used primarily for personal use of consumption of any employer, would denote and mean only a particular or individual employee or to be applied to employees in general, all employees ?"

3. The assessee is a builder and is engaged in rendering commercial construction service ; construction of residential complex ; works contract services ; and GTA Services (as a recipient) and it is registered with the Service Tax Commissionerate. The Additional Commissioner of Service Tax issued a Show Cause Notice (in short, "SCN") to the assessee dated 21.09.2015 seeking as to (a) why ineligible cenvat credit availed and utilized amounting to Rs.6,03,808/-, being the Service Tax (including Cesses) credit availed during the period from October 2013 to February, 2014, should not be demanded from the assessee under Section 73(1) of the Finance Act, 1994 read with Rule 14 of the CENVAT Credit Rules, 2004 ; (b) why interest at appropriate rates should not be charged from the assessee under Section 75 of the Finance Act, 1994 read with Rule 14 of the CENVAT Credit Rules, 2004 ; and (c) why penalty should not be imposed on the assessee under Rule 15(1) of the CENVAT Credit Rules, 2004 for the contravention, as mentioned supra.

4. The assessee filed their reply dated 22.10.2015 contending that their right to avail CENVAT credit cannot be restricted by bringing it under the exclusion clause issued by

Notification under Section 94 of the Act and the expression "personal use or consumption of any employee" is not defined under the CENVAT Credit Rules and thus, the expression is left open for interpretation and the term "personal use of a service" by an employee is in contrast with "official use". Further, the assessee contended that the services which are essentially consumed by the employees in their official capacity is distinguishable from the services which are consumed by them purely in their personal capacity and Circular of the CBEC dated 28.02.2011 is to curtail the category of services consumed by the employees purely in their personal capacity.

5. The Adjudicating Authority did not agree with the stand taken by the assessee and by the Order-in-Original dated 29.02.2016, confirmed the proposal in the SCN. Challenging the said order, the assessee preferred an appeal before the Commissioner of Service Tax (Appeals-II) [in short, "the Commissioner (Appeals)"], which was dismissed by the order dated 01.08.2016. The assessee filed an appeal to the Tribunal, which, by the impugned order dated 17.05.2017 has confirmed the order passed by the First Appellate Authority and the Adjudicating Authority. Challenging the same, the assessee is before us by way of this appeal.

6. Heard Mr.K.Jayachandran, learned counsel assisted by Mr.M.A.Mudi Mannan, learned counsel for the appellant/assessee and Mr.A.P.Srinivas, learned Senior Standing Counsel for the Revenue.

7. The Department has denied the CENVAT credit availed by the assessee on the ground that the payment of insurance premium for availing the insurance policy stand excluded from the definition of "input services", pursuant to the definition of "Input Services", after 01.04.2011. For better appreciation of the stand taken by the Revenue, we extract the definition of "Input Services", as it stood after 01.04.2011, as hereunder :

"2(1) "Input Service" means any service-

(i) used by a provider of output service for providing an output service; or

(ii) used by a manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products, upto the place of removal,

and includes services used in relation to modernisation, renovation or repairs of a factory, premises of provider of output service or an office relating to such factory or premises, advertisement or sales promotion, market research, storage upto the place of removal, procurement of inputs, accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit

rating, share registry, security, business exhibition, legal services, inward transportation of inputs or capital goods and outward transportation upto the place of removal;

but excludes --

(A) Service portion in the execution of a works contract and construction services including service listed under clause (b) of section 66E of the Finance Act (hereinafter referred as specified services) in so far as they are used for --

(a) construction or execution of works contract of a building or a civil structure or a part thereof; or

(b) laying of foundation or making of structures for support of capital goods, except for the provision of one or more of the specified services; or

(B) services provided by way of renting of a motor vehicle, in so far as they relate to a motor vehicle which is not a capital goods; or

(BA) service of general insurance business, servicing, repair and maintenance, in so far as they relate to a motor vehicle which is not a capital goods, except when used by--

(a) a manufacturer of a motor vehicle in respect of a motor vehicle manufactured by such person; or

(b) an insurance company in respect of a motor vehicle insured or reinsured by such person; or

(C) such as those provided in relation to outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, membership of a club, health and fitness centre, life insurance, health insurance and travel benefits extended to employees on vacation such as Leave or Home Travel Concession, when such services are used primarily for personal use or consumption of any employee."

8. The Tribunal interpreted Clause (C) above and stated that in so far as the expression "and" used between two expressions "health insurance" and "Travel benefits" is disjunctive and is not required to be read along with the expression "health insurance". Further, it held that the exclusion clearly mentions various services, including life insurance and health insurance, as not covered by input services. It is further held that the travel benefits extended to the employees at the time of leave or home travel concession also stand excluded and therefore, there is no warrant to read excluded health insurance services with the travel benefits for leave etc. and the contention of the assessee that the health insurance services, which stand excluded are only which are extended during leave, cannot be accepted. Further, the Tribunal observed that the contention of the assessee that they are obliged to provide such

services under the Employees' State Insurance Act, 1948 cannot be a ground to allow the credit, in as much the legislation is within its right to amend the definition of "input services" and to include or exclude any of the services from its ambit and that the Tribunal is not within its jurisdiction to decide the vires of the said amendments.

9. In our considered view, the Tribunal missed a very significant point, while taking a decision as to whether the credit availed by the assessee is eligible or not ?. The first and foremost factor, which should have weighed the mind of the Tribunal is the nature of the policy availed by the assessee ; the beneficiary of the policy ; and the Statute, under which, the policy is required to be availed. These three are very important factors in the instant case.

10. As noticed above, the assessee is rendering commercial or industrial construction service, construction of residential complex, works contract services and GTA Service (as a recipient) and the assessee is registered with the Service Tax Commissionerate. The copies of a few policies, which have been availed by the assessee, have been produced before us, which show that they are Workmen Compensation Policies. The name of the insured is the assessee, namely, M/s.Ganesan Builders Limited. The policies specify the area, where the construction works are being carried on and in the copies given to us the addresses are : No.144, Rajiv Gandhi Salai, Chennai-41 and (ii) SIPCOT Industrial Park, Irungulam, Podur Village, Sriperumbudur. The description of the employees for whom premium has been paid are not described by their names, but by their vocation/skill, namely, Mason, Helper, Stone Cutter, Barbender and his Helper, Carpenter and his Helper, Painter and his Helper, Store Keeper, Electrician, Supervisor, Plumper, Welder, Tiles Mason, etc. Therefore, we are required to consider as to why the assessee is required to avail such a policy. This is so because of a statutory requirement under the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 (in short, "the 1996 Act"). Under the said Act, the Workmen's Compensation Act, 1923 has been included in the Second Schedule of the 1996 Act and the provisions of Workmen's Compensation Act, 1923 has been made applicable to the building workers.

11. Thus, the inclusion of the Workmen's Compensation Act in the 1996 Act, a beneficial legislation, is for the purpose of protecting workmen, who generally belong to unorganized sector. The policy does not name the employees, but categorized the employees based on their vocation/skill. The insured is the assessee and the intention of the policy is to protect the employees, who work in the site and not to drive them to various forums for availing compensation in the event of an injury or

death. Therefore, even viewed from this angle, the availment of the policy appears to be a statutory requirement and as rightly contended by the assessee, this service is not used primarily for personal use or consumption of an employee and this, being the statutory requirement, it is insured (assessee) specific and not employees specific.

12. Before us, learned counsel for the assessee had referred to the decision of the Tribunal in the case of Sundaram Fasteners Limited V. CCE, Chennai-II, 2016 (43) S.T.R. 454 (Tri.-Chennai), wherein, Pest Control Service, which was availed and service tax paid to avail such services was held to be eligible to CENVAT Credit.

12.1. In Hindustan Coca Cola Beverages Pvt. Ltd. V. CCE, Hyderabad, 2017 (49) S.T.R. 88 (Tri.-Hyd.), Outdoor Catering Services provided to employees/labourers within the factory premises, in compliance of statutory requirement under the Factories Act, 1948, was held to be eligible to input service credit even after amendment dated 01.04.2011 in Rule 2(1) of CENVAT Credit Rules, 2004.

12.2. In Hydus Technologies India Pvt. Ltd. V. CCE, Hyderabad, 2017 (52) S.T.R. 186 (Tri.-Hyd.), input service to Group Gratuity Insurance, employee deposit linked insurance and employee health were held to be not insurance services used primarily for personal use or consumption of the employee and all insurance services availed under various Labour Legislations enacted for welfare of employees/workers, being the benefit bestowed by one legislation cannot be taken away or made highly difficult and impractical to be adhered to by another field of law. In the said decision, the Tribunal held that though in the definition of input services it is mentioned that life insurance, health insurance, etc., are excluded, it is subject to the condition that such services are primarily for personal use or consumption of employee and none of the insurance services, which were subject matter in the said cases can be said to be used primarily for personal use or consumption of employee.

12.3. The above referred decisions, though rendered by the Tribunals, have been relied on to impress upon this Court that consistently the Tribunals, in several cases, have uniformly held that they are eligible input service credits even after the amendment dated 01.04.2011.

13. In the preceding paragraphs we have analyzed the Workmens' Compensation Act policy which has been filed by the assessee, as being the statutory requirement with the laudable object to protect the employeess/workmen in the unorganized sector, in the instant case the construction sites of the assessee. The assessee is shown as "insured" and the beneficiaries are not individual employees, but they are covered by their vocation/skill.

14. Thus, in our considered view, the Tribunal fell in error in dismissing the appeal filed by the assessee and equally the First Appellate Authority as well as the Original Authority failed to interpret the statutory provisions, in the manner it is required to be done.

15. For the above reasons, the appeal filed by the assessee is allowed and the substantial questions of law are answered in favour of the assessee and against the Revenue. There will be no order as to costs.

Sd/-
Assistant Registrar(CS VII)

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Sub Assistant Registrar

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To

1. The Customs, Excise and Service
Tax Appellate Tribunal,
South Zonal Bench, Chennai.
2. The Commissioner of Service Tax,
Service Tax II Commissionerate, Newry Towers,
Ground Floor, Plot No.2054, I Block,
12th Main Road, Anna Nagar,
Chennai-600 040.
- 3.The Additional Commissioner,
Government of India,
Ministry of Finance, Department of Revenue,
Service Tax II Commissionerate Newry Towers,
No.2054-1 2nd Avenue, Anna Nagar, Chennai-40

+1 cc to Mr.K.Jayachandran Advocate sr 65291
+1 cc to Mr.A.P.Srinivas Standing Counsel sr 65468

C.M.A.No.2926 of 2017

aa16/10/2018