

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 14.08.2018

CORAM:

THE HON'BLE MR. JUSTICE T.S.SIVAGNANAM
and
THE HON'BLE MRS. JUSTICE BHAVANI SUBBAROYAN

C.M.A.Nos.723 to 725, 795 and 806 to 810 of 2018
and
CMP.Nos.6636, 6720 to 6724 and 6206 to 6208 of 2018

M/s.Modular Auto Limited,
B-5 South Phase Industrial Estate,
Ambattur, Chennai - 98. ... Appellant
in C.M.A.No.723/18

M/s.Modular Auto Limited,
B-17 First Main Road,
Ambattur Industrial Estate,
Ambattur, Chennai - 58. ... Appellant
in CMA.No.724/18

M/s.Task Pressings Limited.,
No.85-Survey No.72 & 73
Maduravoyal Bye Pass
Ayyonambakkam.
Chennai - 95. ... Appellant
in CMA.No.725/18

M/s. Friens Metal Limited.,
Plot No.21G North Phase,
Ambattur Industrial Estate,
Chennai-98. ... Appellant
in CMA.No.795/18
and 809 & 810/10

M/s. Aztec Auto Limited.,
88 Sidco Industrial Estate,
Ambattur, Chennai-98. ... Appellant
in CMA.No.806/18
in CMA.No.807/18

M/s.Wichitra Auto Limited.,
No.84/3 SIDCO Industrial Estate,
Ambattur, Chennai-98 ... Appellant
in CMA.No.808/18

Vs

Commissioner of Central Excise,
Chennai - North Commissionerate,
26/1, Mahatma Gandhi Road,
Nungambakkam,
Chennai - 34.

.. Respondent
in all CMA's

Prayer in C.M.A.No.723 of 2018: Civil Miscellaneous Appeal is filed under Section 35G of the Central Excise Act, 1944, seeking to set aside the Final Order No.42408, dated 23.10.2017 relating to Order-in-Appeal No.492/2016 (CXA-II), dated 20.12.2016 of the Commissioner of Central Excise (A) and Order-in-Original No.7/2016, dated 27.02.2016 of the Additional Commissioner of Central Excise.

Prayer in C.M.A.No.724 of 2018: Civil Miscellaneous Appeal is filed under Section 35G of the Central Excise Act, 1944, seeking to set aside the Final Order No.42409, dated 23.10.2017 relating to Order-in-Appeal No.493/2016 (CXA-II), dated 20.12.2016 of the Commissioner of Central Excise (A) and Order-in-Original No.8/2016, dated 27.02.2016 of the Additional Commissioner of Central Excise.

Prayer in C.M.A.No.725 of 2018: Set aside the Final Order No.42406/2017 dated 24.10.2017 relating to order in Appeal No.105/2017(CXA-II) dated 21.02.2017 of commissioner of Central Excise (A) and Order-in-Original No.4/2016, dated 25.02.2016 of the Assistant Commissioner of Central Excise.

Prayer in C.M.A.No.795 of 2018: Set aside the Final Order No.41632/2017 dated 10.08.2017 relating to order in Appeal No.104/2017(CXA-II) dated 21.02.2017 of commissioner of Central Excise (A) and Order-in-Original No.10/2016, dated 26.07.2016 of the Assistant Commissioner of Central Excise.

Prayer in C.M.A.No.806 of 2018: Set aside the Final Order No.41184/2017 dated 29.06.2017 relating to order in Appeal No.278/2016(CXA-II) dated 29.07.2016 of commissioner of Central Excise (A) and Order-in-Original No.1/2015, dated 29.05.2016 of the Assistant Commissioner of Central Excise the demand of Rs.1,32,241/- confirmed in the above orders.

Prayer in C.M.A.No.807 of 2018: Set aside the Final Order No.41185/2017 dated 29.06.2017 relating to order in Appeal No.279/2016(CXA-II) dated 29.07.2016 of commissioner of Central Excise (A) and Order-in-Original No.11/2015, dated

07.05.2015 of the Assistant Commissioner of Central Excise the demand of Rs.44,124/- confirmed in the above orders.

Prayer in C.M.A.No.808 of 2018: Set aside Final Order No.41186/2017 dt.29/06/2017 relatable to Order-in-Appeal No.282/2016(CXA_II)dt.29/07/2016 of Commissioner of Central Excise(A) and Order-in-Original No.9/2015 dt.24/11/2015 of the Assistant Commissioner or Central Excise the demand of Rs.3,44,671/- confirmed in the above orders.

Prayer in C.M.A.No.808 of 2018 : Set aside Final Order No.41187/2017 dt.29/06/2017 relatable to Order-in-Appeal No.280/2016(CXA_II)dt.29/07/2016 of Commissioner of Central Excise(A) and Order-in-Original No.5/2015 dt.14/08/2015 of the Assistant Commissioner or Central Excise the demand of Rs.46,351/- confirmed in the above orders.

Prayer in C.M.A.No.808 of 2018 : Set aside Final Order No.41188/2017 dt.29/06/2017 relatable to Order-in-Appeal No.281/2016(CXA_II)dt.29/07/2016 of Commissioner of Central Excise(A) and Order-in-Original No.6/2015 dt.17/08/2015 of the Assistant Commissioner or Central Excise the demand of Rs.28,812/- confirmed in the above orders. Penalty of Rs.10,000/- in the above said orders.

For Appellants
in all CMAs : Mr.P.R.Renganath
For Respondent in
CMA.Nos.795, 806 to 810/18 : Mrs.Aparna Nandakumar, SPC
For Respondent in
CMA.Nos.723 to 725/18 : Mr.Thirumalaisamy

COMMON JUDGMENT
(Judgment of the Court was delivered by
T.S.SIVAGNANAM, J.)

These appeals have been filed by the assesseees against the common order passed by the Customs, Excise & Service Tax Appellate Tribunal, South Zone, Chennai, dated 29.06.2017. The appeals were filed by the appellants/assesseees before the Tribunal challenging the orders passed by the Commissioner of Central Excise (Appeals-II), Chennai, vide order dated 29.07.2016, affirming the order-in-Original dated 29.05.2015 of the Assistant Commissioner.

2. The above appeals are admitted on the following substantial questions of law;

a) When the service provider was not before the Tribunal, whether the Tribunal can go into the question as to whether the said service provider had provided service to the appellant or not, more so when the said service provider has been assessed to service tax under Business Support Service for the service rendered by them to the appellant.

b) Is the Tribunal not in error in refusing credit to the appellant for service tax paid by them to service provider when payment of service tax by the appellant for the service rendered by service provider is not in dispute and that it is settled, the assessment to tax at the hands of the service provider end cannot be questioned in the hand of service receiver (appellant in this case)

3. The factual background, which is necessary for considering the merits of these appeals, is stated below:-

The appellants/assesseees are all job workers for M/s.Brakes India Limited, Chennai (hereinafter referred to as "BIL"). The assesseees are engaged in the manufacture of excisable goods and hold the registration for the said activity. The assesseees contended that they are eligible to avail credit for Central Excise Duty paid for Inputs & Capital Goods and also eligible to avail credit for the service tax paid for Input Service received. The credits so availed are utilised by the appellants/assesseees for payment of duty on excisable goods manufactured and cleared by them.

4. The respondent department issued show cause notices based upon a verification done by the Internal Audit Wing of the department. The allegation against the assesseees were that they were availing Cenvat Credit facility on the inputs, inputs service and capital goods used in the manufacture and clearance of their finished goods under the Cenvat Credit Rules, 2004. During the course of verification, it was noticed that the assesseees had availed Input Service Credit on "Multi Protocol Label Switching" (MPLS) service based on the invoices issued by BIL. The assesseees stated that the BIL are receiving MPLS service from BSNL and Reliance Communications Limited and the server for the same is situated at the premises of BIL. The service has been utilized by BIL for communicating and retrieving the data from the job workers, namely, assesseees. The department alleged that the services are rendered by BSNL and Reliance Communications Limited and received by BIL, whereas the BIL have raised the bill on the assesseees claiming reimbursement of the above said MPLS charges with the Service

Tax. The department pointed out that the invoice was raised for reimbursement of expenses incurred and it appears that no service was rendered by BIL and the availment of credit on the said Service Tax based on the invoices issued by BIL by the assesseees is incorrect. Thus, the department opined that the assesseees have contravened the provisions of Rule 3 of the Cenvat Credit Rules, 2004, inasmuch as the services were not received by the assesseees. Hence, it was held that the assesseees have taken ineligible credit and but for the detection by audit officers, these facts would not have come to the light and therefore, they invoked the extended period of limitation under the provisions of Central Excise Act, 1944, and issued show cause notices proposing to recover the credit of service tax wrongly availed by the assesseees for the period from 2010-2011 to 2013-2014 and also proposed to recover the interest on the said amount and also imposed penalty. The assesseees were directed to show cause against the above proposal.

5. The assesseees, in response to the show cause notices, among other things, pointed out that the services have been utilized by BIL for communicating with and retrieving data relating to assesseees, who are sub-contractors/job workers and therefore, the service is rendered by the BSNL and Reliance Communication Limited and is received by BIL and the BIL have raised the bill on the assesseees claiming reimbursement of the aforesaid MPLS charges with service tax and since the invoice is for reimbursement of expenses incurred, it has been alleged that no service was rendered by BIL and availment of credit by the assesseees on the service tax paid by BIL is ineligible credit. The assesseees contended that the show cause notices have been issued without proper verification of facts and understanding of the transaction. By referring to paragraph 2.1 of the show cause notices, the assesseees contended that the BIL are retrieving data relating to the assesseees from the server and are further processing the same for their end use and but for assesseees providing the details, the BIL themselves are retrieving the data and therefore, by retrieving data relating to assesseees for utilizing the same for further operations, the BIL is rendering the service. Further, the assesseees have explained that but for BIL retrieving data, assesseees would have retrieved the data and passed on the same to BIL. It was further explained that reimbursement means, on behalf of assesseees, the BIL have already incurred certain expenditure for the service and therefore, that expenditure is being recovered by BIL and paid by the assesseees and in the instant cases, the expenditure incurred by BIL is towards certain services relating to assesseees. Further, it was contended that only because in the hands of BIL, it was insisted by the Service Tax authorities that since there have been service by BIL to assesseees in the matter of retrieval of data, service tax has

been collected and paid by BIL. Therefore, the correctness, legality or otherwise of the tax paid by subject service provider cannot be called into question by Central Excise Officers having jurisdiction over the assessee availing credit. Thus, it was pointed out that in the show cause notices, the department seeks to object the service tax payment by BIL on the plea that no service has been rendered by BIL to the assessee and this is without jurisdiction. Further, it was pointed out that when payment of service tax by BIL is not in doubt and only to the extent of service charged in the invoice raised on the assessee they have availed the credit, there could be no further enquiry. Further, it was pointed out that the show cause notices incorrectly assume that the BIL have passed on the credit to assessee under Rule 7 of the CENVAT Credit Rules, 2004, and it is further stated that the BIL could transfer credit under Rule 7 of CCR 2004 as ISD only where the recipient is also BIL and in this case, the assessee being a different legal entity, the BIL was not eligible to transfer credit as ISD and therefore, the BIL have not issued invoice as ISD, whereas it has issued invoice as service provider.

6. Further, with regard to invocation of longer period of limitation, it was pointed out that the allegation relating to the transaction referred has not been disclosed in the ER1 returns, whereas ER1 returns only require credit availed to be disclosed and no further information is called for. Further, the assessee has already disclosed the credit availed with reference to the aforesaid service tax payment by BIL and their only obligation is to disclose certain facts in the return and such information has been disclosed, therefore, the allegation of suppression is false and the show cause notices are barred by limitation.

7. The Adjudicating Authority, namely, the Assistant Commissioner of Central Excise, Commissionerate, Division IV, Chennai-2, held that the assessee's case is not acceptable inasmuch as they have not produced any proof to support their claim that the reimbursement was for certain services rendered by BIL other than MPLS service. Further, it was held that even the invoices issued by BIL to the assessee mentioned the description of the service as 'MPLS Cost' and the assessee has not produced any document to support their claim that the service tax was paid at the insistence of Service Tax Authorities and therefore, the credit availed by the assessee on the Service Tax paid on the services received at BIL is not in order and liable to be recovered from the assessee. Further, the Adjudicating Authority held that the BIL cannot be construed as an 'Input Service Distributor' as defined under Rule 2(m) of the CENVAT Credit Rules, 2004, since input service distributor can distribute credit of service tax paid on input

service only to its manufacturing units. Thus, it disallowed the Service Tax credit availed by the assesses for the relevant period.

8. The assesses have preferred an appeal before the Commissioner of Central Excise (Appeals), Chennai. The Appellate Authority confirmed the order passed by the Adjudicating Authority, largely on the ground that the BIL charged the assesseees vide their invoices, which are claimed as reimbursement by the department and further credit cannot be passed on by BIL to the assesses by Input Service Distribution and the facility of MPLS has been rendered by the assesseees by BIL for their own use and the CENVAT credit of such service tax paid by BIL was found ineligible to be utilized by the assesseees. Therefore, the Appellate Authority concluded that the BIL have not rendered any service to the consumption of the assesseees. The assesseees have preferred an appeal before the Tribunal and the Tribunal, vide impugned order, dismissed the appeal.

9. We find that the reasons assigned by the Tribunal are contained in paragraphs 6.1 and 6.2. The Tribunal was of the view that MPLS and SAP are utilized by BIL for the purpose of monitoring the manufacturing activities of the assesseees and there is no contention from the assesseees' end that they alone utilized these services. By referring to the reply given by the assesseees to the show cause notices, the Tribunal observed that BIL are retrieving data relating to them from the server and are further processing the same for their end use. Further, the Tribunal, in paragraph 6.2, held that the activities performed by BIL for monitoring of production activities of the assesseees cannot by any stretch of imagination be considered as an input service or in relation to the manufacture of final products of the assesseees and at the most, the billing made by BIL to the assesseees can be termed as an arrangement for passing on the costs. Finally, the Tribunal proceeded to interpret the language adopted in the invoice raised by BIL and held that it is only an exercise to shift part of the MPLS cost to the assesseees.

10. We have heard Mr.P.R.Renganath, learned counsel appearing for the appellants, Mrs.Aparna Nandakumar, learned Senior panel counsel for the respondent in CMA.Nos.795, 806 to 810 of 2018, and Mr.T.L.Thirumalaisamy, learned counsel for the respondent in CMA.Nos.723 to 725 of 2018.

11. The short question, which falls for consideration, is whether the department as well as Tribunal could have held what was availed by the assesseees as credit is only a reimbursement and it is an attempt of BIL to pass costs incurred

by them towards MPLS.

12. Mrs.Aparna Nandakumar, learned Senior panel counsel for the Revenue, produced a lecture on Multi Protocol Label Switching with Quality of Service in High Speed Computer Network to explain as to what is Multi Protocol Label Switching (MPLS) and it has been stated therein that it is a method that directs data from one system node to the next based on short path lables rather than long network addresses in high-performance telecommunication association. Referring to a chart showing the working methodology, it is submitted that it is a facility created and the beneficiary is BIL and no input service is rendered by the BIL to the assessees for them to claim Input Tax Credit.

13. To test the correctness of the said submission, we give the following illustration, which is broadly the nature of transactions done by the assessees with BIL.

14. The BSNL / Reliance Communications Private Limited have provided the MPLS facility to BIL and assuming the amount to be paid is Rs.100/- towards the cost and Rs.10/- towards the Service Tax, when the invoice is raised by the BSNL/Reliance Communication Private Limited for the said amount and the BIL has paid Rs.110/- to BSNL/Reliance Communication Private Limited, which includes the cost as well as Service Tax element, the BIL, in turn, has raised an invoice on the assessees claiming proportionately the costs which they have incurred to BSNL/Reliance. By way of illustration, if Rs.20/- has been passed on to one of the assessee, a sum of Rs.2/- is collected as Service Tax and each of the assessee pays Rs.22/- to BIL, on which Rs.2/- is the Service Tax paid. The assessees have taken CENVAT credit on the said Rs.2/- paid by it as Service Tax to BIL. Therefore, the question would be as to whether the department can dispute the nature of transaction at this juncture, more particularly, when the assessment made on the BIL and the collection of Service Tax on them has not been reopened.

15. From the reasons assigned by the Commissioner (Appeals), we find that the Commissioner (Appeals) has travelled beyond the scope of allegation made in the show cause notices. By giving a different interpretation to the nature of transaction, which, in our considered view, could not have been done by the Appellate Authority in the light of the settled position with regard to the Service Tax liability admitted and paid by BIL. Therefore, unless and until, the assessment on BIL had been reopened, the nature of transaction as referred by BIL has to be held to be wrong and the Commissioner (Appeals) could not have given a different interpretation to the nature of claim

made by the BIL from the assessees by interpreting the terminology used in the invoice. The correct test, which ought to have been applied by the Adjudicating Authority, Appellate Authority and the Tribunal, is as to what is the character of payment made by the assessees on which they have availed the CENVAT credit.

16. In the instant cases, it is not in dispute that whatever the portion of Service Tax component which was collected from the assessees by BIL was only the amount on which the CENVAT credit has been claimed by the assessees. Therefore, unless and until the assessment made on BIL was revised, which obviously could have been done, at this juncture, on account of the expiry of the period of limitation, the interpretation given by the Commissioner (Appeals) as well as the Tribunal with regard to the nature of invoice raised on the assessee is unsustainable. Furthermore, we find that the reason assigned by the Tribunal in paragraph 6.2 stating that the activity performed by the BIL for monitoring of production activities of the assessee cannot by any stretch of imagination be considered as an input service or in relation to the manufacture of final products of the assessee, is a statement, which is unsubstantiated by any record. At best, it can be taken as a personal opinion of the Tribunal, which could not have been a reason to reverse the credit availed by the assessee.

17. What is important to note that the assessee's specific case is that there has been a service by BIL to the assessee in the matter of retrieval of data and service tax has been collected and paid by BIL and the correctness, legality or otherwise of the tax paid by the subject providers cannot be called in question by the Central Excise Officer having the jurisdiction over the assessee availing the credit. This question has not been considered. If the impugned orders are allowed to stand, then it would in effect mean that the jurisdictional assessment officers of the assessee are sitting in the judgment over the assessment made on BIL, over which, they have no jurisdiction.

18. Thus, for the reasons stated above, we are of the considered view that the order passed by the Tribunal calls for interference. Accordingly, the substantial questions of law framed for consideration are answered in favour of the assessee and the appeals are allowed on the above terms. No Costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (CS-IV)

//True copy//

Sub Assistant Registrar

rkm

To

Commissioner of Central Excise,
Chennai - North Commissionerate,
26/1, Mahatma Gandhi Road,
Nungambakkam,
Chennai - 34.

+1cc to Ms.Aparna Nandakumar, Advocate SR.No.56273

+1cc to Mr.R.Raghavan, Advocate SR.No.55998

C.M.A.Nos.723 to 725, 795 and
806 to 810 of 2018

and
CMP.Nos.6636, 6720 to 6724
and 6206 to 6208 of 2018

GMV (20/09/2018)



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