

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

CENTRAL EXCISE APPEAL NO. 76 OF 2019

M/s. Gunnebo India Pvt. Ltd.

.. Appellant

v/s.

Commissioner of Service Tax-VII,
Navi Mumbai

.. Respondent

Mr. Anil Balani for the appellant

Mr. Pradeep S. Jetly a/w Mr. J.B. Mishra for the respondent

**CORAM : M.S. SANKLECHA &
M.S. SONAK, J.J.**

DATED : 18th JUNE, 2019

P.C.

1. This appeal under Section 35G of the Central Excise Act, 1944 challenges the order dated 16th November, 2018 passed by the Customs, Excise and Service Tax Appellate Tribunal (Tribunal).

2. The appellant urges the following questions of law for our consideration :-

(i) Whether in the facts and circumstances of the case and in law, the decision / Order of the Tribunal is vitiated as it has been passed ignoring various submissions of the appellants, both on merits and on limitation?

(ii) Whether the Tribunal was right in holding that examining

the contention of nature imported service would become more of academic exercise because of the fact that the appellant had already paid during the stage of investigation the entire amount of service tax demanded ignoring the legal principle that there is no estoppel against law?

(iii) Whether such legal fiction created amending Rule 2(e) of Cenvat Credit Rules, 2004 by Notification No.3/2011-CE(NT) dated 01.03.2011 can have retrospective effect especially when the notification itself declares that the amendment “shall come into force on 1st day of April 2011” and given the fact that there was no machinery provision prior to 01.04.2011 so as to determine the value of “trading” for the purpose of paying an amount as required in Rule 6(3) or Rule 6(3A) of Cenvat Credit Rules, 2004?

(iv) Whether in the facts and circumstances of the case, the Appellate Tribunal is correct in holding that the extended period of limitation is invokable?

(v) Whether the Tribunal was right in confirming the penalty equal to the amount of service tax demanded in terms of Section 78 of the Customs Act, 1962 given the fact that it is a clear case of revenue neutrality?

3. The appeal is admitted on the substantial question of law at question no. (i) above.

4. While considering this appeal for admission, we noticed that the controversy is within a narrow compass namely that the impugned order dated 16th November, 2018 was passed in breach of principles of natural justice inasmuch as various submissions made on merits as well as limitation by the appellant were not considered while disposing of the appeal by the Tribunal. Therefore, at the request of the parties, the appeal itself is taken up for final disposal at this stage as the issue requiring consideration in this appeal is within a very narrow compass.

5. Briefly, the facts leading to this appeal are as under.

(a) The appellant is engaged in manufacturing of safe, lockers and vaults etc. The appellant is also engaged in trading of items related to safe, lockers and vaults etc. During investigation by the Revenue, it was noticed that the respondent had not paid service tax (on reverse charge basis) in respect of the services received from foreign entities. Thus, before the issue of show-cause notice, the appellant paid the entire service tax on services received from abroad, payable on reverse charge basis along with the interest thereon. Nevertheless, on 22nd April, 2014, the Revenue issued the show-cause notice seeking to recover for the period 2008 to 2013 the service tax payable on reverse charge basis as well as the inadmissible credit taken on input services used for

trading activities. The appellant contested the notice. However, the Commissioner of Service Tax by order dated 18th June, 2017 confirmed / appropriated the service tax amount of Rs.94.53 lakhs which was paid by the appellant before the issue of show-cause notice and also ordered recovery of inadmissible credit to the extent of Rs.1.69 crores which was utilized in its trading activities during the subject period. Besides, equivalent penalty was also imposed upon the respondents.

(b) Being aggrieved by order dated 18th June, 2017, the appellant preferred an appeal to the Tribunal. The issues raised before the Tribunal were the questions urged before us for consideration. In fact, the impugned order of the Tribunal itself records that the following two issues arise before it :-

- (i) Liability to pay service tax on services received from a foreign company under reverse charge mechanism.*
- (ii) Liability to recover provisional cenvat credit availed on input services used for trading activity under Rule 6(3A) of the Cenvat Credit.*

(c) So far as issue no.(i) is concerned, the liability to pay service tax on the amount received from the foreign company on reverse charge mechanism, it was the appellant's contention that as the service tax

payable on reverse charge mechanism on the basis of services received from the foreign company is concerned, the same had been paid before the issue of show-cause notice. Thus, in view of Section 73 (3) of the Finance Act, 1994, no show-cause notice ought to have been issued to the appellant. The appellant had also submitted that no occasion to invoke Sub-section 4 of section 73 of the Finance Act arose in the present fact as there was no suppression of facts. This as the show-cause notice had been issued based on the balance-sheet and other documents maintained by the appellant. In support of the above, reliance was placed upon the decision of the Tribunal in the case of ***Rolex Logistics Pvt. Ltd. Vs. Commissioner of Service Tax (2009) 13 STR 147.*** Consequently it was contended that the extended period also could not be invoked as show-cause notice is based on the balance sheet of the assessee. Reliance was also placed upon the decision in the case of ***Nirlon Ltd. Vs. Commissioner of Central Excise, 2015 (320) E.L.T. 22*** to contend that extended period is not invocable when the situation is Revenue neutral. This as any credit taken in respect of services received from abroad, would be utilized on payment of duty on output services and goods. In spite of the aforesaid submission made on behalf of the appellant, as is evident from the written submissions taken on record by the Tribunal, the impugned order does not consider

any of the submission and disposes of this issue by holding that the appellant had already paid the service tax along with interest, the issue urged by the appellant would be a mere academic exercise and consequential order of the lower Authority calls for no interference.

(d) Similarly, so far as the issue no.(ii) as recorded by the Tribunal is concerned, the appellant had contended that so far as common inputs used for providing taxable services and trading activity is concerned, prior to the period 1st April, 2011 there was no occasion to reverse the credit taken in respect of input services used in trading activity in terms of Rule 6(3) of the Cenvat Credit Rules, 2004. In support, reliance was placed upon the decision of the Tribunal in ***Commissioner of Central Excise Ghaziabad Vs. Avon International Pvt. Ltd. 2017 (5) G.S.T.L. 376*** wherein on identical facts, the Tribunal has held that prior to 1st April, 2011 there has been no definition of trading services. Thus, the occasion to reverse the credit to the extent the input services have been used in trading activity does not arise. This decision though specifically relied upon in the written submissions which is evident from the order, was taken on record and has not been considered at all by the impugned order of the Tribunal. In fact, no reference to the same has been made to the impugned order. The impugned order of the Tribunal merely relies upon certain other case laws which were

favourable to the Revenue without taking into account the decisions which were favourable to the assessee.

(e) Similarly, we note that on the issue on limitation as urged by the appellant, the impugned order completely ignores the fact that there were decisions of the Tribunal which were in favour of the view taken by the appellant. Thus, the extended period could not be invoked in such facts. In any event, we find that the impugned order of the Tribunal merely applies the decision of the Tribunal in the case of ***Godfrey Philips Ltd. Vs. Commissioner of Central Excise 2016, TIOL 3096 CESTAT, Mumbai.*** This without considering the facts which arise in this case in the context of the plea of limitation raised by the assessee in contrast to the facts in the case of Godfrey Philips Ltd. (supra).

6. From the above, it is clear that the manner in which the impugned order of the Tribunal has dealt with the appellant's appeal leaves much to be desired. The Tribunal is an authority under the Act to decide the disputes between the State and the assessee. Therefore, it is expected to deal with the contentions raised before it by the parties and give reasons in coming to the conclusion whether the contention raised by the parties before it are to be accepted or not. It is not

expected of the Tribunal to ignore the submissions of the parties as raised in the written statement which are taken on record as evident from the order and proceed to decide the issue as if no submissions and / or case law in support of the appellant's case was made before it. Therefore, the impugned order of the Tribunal is a non-speaking order in as much as it does not consider the contentions of the appellant as supported by case law. It is of cardinal importance that the Tribunal passes orders with reasons. As observed by the Apex Court in ***Siemen Engineering & Mfg. Co. Ltd. Vs. Union of India, AIR 1976 (SC) 1785***, that “the rule requiring reasons to be given in support of an order is, like the principle of audi alteram partem, a basic principle of natural justice which must inform every quasi-judicial process and this rule must be observed in its proper spirit and mere pretence of compliance with it would not satisfy the requirement of law.” Moreover, the request of giving reasons also ensures that the orders are not arbitrary. Besides, it enables the parties to know the reason why their submissions have been accepted or not accepted. Further, giving of reasons enable the appellate Court to appreciate and understand the basis for the Tribunal coming to a particular conclusion so as too appropriately deal with a challenge to it.

7. In the above view, we answer question (i) in the affirmative i.e. in favour of the appellant and against the respondent Revenue. As a consequence of the above, we set aside the impugned order of the Tribunal and restore the appeal of the appellant to the Tribunal for fresh disposal in accordance with law. All contentions are kept open.

8. The appeal is disposed of in the above terms.

(M.S. SONAK, J.)

(M.S. SANKLECHA, J.)