IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 27.06.2019

CORAM

THE HON'BLE DR.JUSTICE VINEET KOTHARI
AND
THE HON'BLE MR.JUSTICE C.V.KARTHIKEYAN

Civil Miscellaneous Appeal Nos.2387 and 2388 of 2012
and M.P.Nos.1 and 2 of 2012

M/s.Areva T&D India Limited
19/1, GST, Pallavaram, Chennai-600 043.
..Appellant in both appeals

-Vs-

1.Customs Excise and Service Tax Appellate Tribunal
South Zonal Bench, 26, Haddows Road
Chennai 600 006.
2.The Commissioner of Central Excise and Service
Tax, Large Taxpayer Unit, No.1775, Jawaharlal
Nehru Inner Ring Road, Anna Nagar, Western
Extension, Chennai 600 101 ...Respondents in both appeals

For Appellant : Mr.Joseph Prabakar
For Respondents: Mr.A.P.Srinivas,
Senior Standing Counsel - for R2

Prayer : Civil Miscellaneous Appeals under Section 35G of Central Excise Act, 1944 against the Final Order Nos.408/2011 and 409/2011 dated 03.03.2011 passed by the first respondent.

J U D G M E N T

(Judgment of the Court was delivered by DR.VINEET KOTHARI, J.)

The assessee M/s.Areva T&D India Limited, Chennai has filed the present appeals aggrieved by the order passed by the learned Customs Excise and Service Tax Appellate Tribunal South Zonal Bench (hereinafter referred to as 'CESTAT') on 03.03.2011, whereby the learned Tribunal dismissed the appeals filed by the assessee and held that the assessee was not entitled to exemption under Notification No.32/2004 ST dated 03.12.2004 to the extent of abatement of 75% from the gross freight value in the absence of any declaration furnished by the transport agencies from whom the services in question were availed by the assessee, to the effect that the transport agents had not taken CENVAT credit on inputs / capital goods. The relevant portion of the order of the CESTAT is quoted below for ready reference.

> "3. We find that the abatement of 75% from the gross freight value under Notification No.32/2004-ST dated 03.12.2004 as amended is not available in the absence of such declaration / consignment note containing transaction particulars. The Commissioner has therefore rightly confirmed the demand in respect of 14 transporters. The plea of limitation also cannot be considered by the Tribunal as earlier remand order of the Tribunal does not contain any direction for reconsideration of the issue of time bar. We, therefore, uphold the impugned orders and reject the appeals."

2. Mr.Joseph Prabakar, learned counsel for the appellant / assessee urged that in the cases where the appellant assessee could furnish such declaration from the transport agencies, the revenue has already allowed such partial exemption or abatement in terms of the Notification No.32/2004 dated 03.12.2004 to the assessee, but in the cases where such declarations were not furnished, they disallowed exemption in favour of the assessee, which has been upheld by the Tribunal. He sought to rely upon the decision of the Gujarat High Court in "Commissioner of Service Tax, Ahmedabad -Vs- Cadila Pharmaceuticals Ltd.," reported in 2012 (27) S.T.R. 127 (Guj), and the Tribunal decision in case of "Lykes Line Ltd. -vs- Commissioner of Service Tax, Mumbai-I" reported in 2017 (50) STR 51 (Tri-Mumbai).

3. Learned Senior Standing Counsel Mr.A.P.Srinivas, appearing for the respondent Revenue, however, supported the order of the learned Tribunal.

4. We have heard the learned counsel on either side. The Notification No.32/2004 dated 03.12.2004 is quoted below for ready reference.

> " Notification : 32/2004-S.T. Dated 03-Dec-2004
> Service tax payable on 25% of the gross amount charged by Goods Transport Agency (w.e.f.1-1-2005)
> In exercise of the powers conferred by sub-section(1) of Section 93 of the Finance Act,1994 (32 of 1994), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the taxable service provided by a goods transport agency to a customer, in relation to

transport of goods by road in a goods carriage, from so much of the service tax leviable thereon under Section 66 of the said Act, as in excess of the service tax calculated on a value which is equivalent to twenty five per cent of the gross amount charged from the customer by such goods transport agency for providing the said taxable service :
Provided that this exemption shall not apply in such cases where -

(i) the credit of duty paid on inputs or capital goods used for providing such taxable service has been taken under the provisions of the CENVAT Credit Rules, 2004; or

(ii) the goods transport agency has vailed the benefit under the notification of the Government of India in the Ministry of Finance (Department of Revenue) No.12/2003-Service Tax, dated 20th June 2003 (G.S.R.503(E) dated the 20th June 2003 (G.S.R.503(E) dated the 20th June, 2003).

2. This notification shall come into force on the first day of January, 2005.
(Notification No.32/2004 - S.T., dated 3-12-2004)"

5. The Central Board of Excise and Customs, New Delhi issued a clarification with respect to the procedures to avail the exemption vide Circular No.5/1/2007 -S.T. dated 12.03.2007, which is produced on record before us, reads as under:

" Circular : 5/1/2007-S.T.dated 12-Mar-2007
Goods Transport Agency (GTA) Services - Exemption under Notification No.1/2006 - S.T. Available to person made liable to pay Service Tax.

M.F.(D.R) Section 37B Order No.5/1/2007-S.T., dated 12-03-2007
F.No.166/13/2006-CX.4

Government of India
Ministry of Finance (Department of Revenue)
Central Board of Excise & Customs, New Delhi

Sub : Goods Transport by road service provided by a goods transport agency - Reg.

In exercise of the power conferred under Section 37B of the Central Excise Act, 1994, as made applicable to Service Tax by Section 83 of the Finance Act, 1994, the Central Board of Excise and Customs considers it necessary, for the purpose of uniformity with respect to levy of service tax, to issue the following orders:-

2. In terms of Notification No.32/2004-S.T., dated 03.12.2004 (rescinded on 01.03.2006) and No.1/2006-S.T., dated 01.03.2006, the Central Government has exempted the taxable service provided by a goods transport agency to a customer, in relation to transport of goods by road, in a goods carriage, from so much of service tax leviable thereon as is in excess of the service tax calculated on the value which is equivalent to twenty five percent of the gross amount charged from the customer by such goods transport agency, subject to the following conditions:-

(i) the credit of duty paid on inputs or capital goods used for providing such taxable service has not been taken;

(ii) the goods transport agency has not availed of the benefit under the Notification No.12/2003-S.T., dated 20-6-2003.

3. Vide Rule 2(1)(d) of the Service Tax Rules, 1994, in certain cases, the person who pays or is liable to pay freight, either himself or through his agent, for the transport of goods by road in a goods carriage, has been made liable to pay service tax, instead of the service provider namely, the goods transport agency. In such cases, the Revenue Audit of the Comptroller and Auditor General of India has objected to the availment of benefit of the aforesaid exemption.

4. The issue has been re-examined. These notifications exempt taxable services from so much of service tax as specified therein, irrespective of the person made liable to pay service tax. It is, therefore, clarified that any person who is made liable to pay service tax, while discharging service tax liability on such service, is entitled to avail of the benefit of exemption in terms of aforesaid Notifications No.32/2004-S.T., and No.1/2006-S.T., subject to fulfilment of the conditions prescribed therein by adopting the procedure prescribed vide para-31 of Circular No.B1/6/2005-TRU, dated 27.07.2005 [2005 (186) E.L.T.T14]. The procedure prescribed is that a declaration by the service provider, in all such cases, on the consignment note, to the

effect that the conditions of the aforesaid exemption notification have been satisfied, would be sufficient for availing of the benefit under the said notifications. Opinion of Law Ministry has also been sought in this matter. Law Ministry has concurred with the above views of the Department.

5. Therefore, in all such cases, where the above procedure has been followed, no demand notice may be issued on the basis of objection raised by the C&AG office, and all pending matters may be decided accordingly. Past instructions, circulars and orders on the issue stand suitably modified.
6. Suitable Trade notices may be issued for the information of trade.
7. Hindi version will follow."

6. Thus, it is very clear that for availing the exemption in terms of the said notification No.32/2004, satisfying the conditions stipulated in the said proviso with the help of the declaration of the service provider viz., transport agency was necessary and they could not be ignored. In the cases where such declaration was furnished by the assessee, the assesee himself has availed exemption under the very same notification by producing such declaration in terms of the Board Circular and in some other cases, where such declaration was not furnished, still the assessee claims such exemption. If such exemption was allowed to the assessee, without satisfying all the conditions of the proviso, it would violate the very basis of the exemption provided in the Notification No.32/2004 dated 03.12.2004.

7. It is trite law that the exemption notifications are to be strictly construed to the conditions stipulated in the notification for availing exemption and has to be complied with by the concerned assessee. There is no merit in the submissions made at Bar by the learned counsel for the assessee that even without declaration as stipulated in the notification, the assessee was entitled to such exemption, is over simplifying or glossing over the conditions itself, which cannot be permitted. The only way to prove that the conditions stipulated in the proviso of the said notification were satisfied, is to produce a certificate or declaration from the service provider that the service provider has not availed the CENVAT credit in respect of the service tax paid on the service provided to the assessee, which was clarified by the Board in the circular dated 5/1/2007-S.T dated 12-Mar-2007.

8. Therefore, in our considered opinion, the learned Tribunal was perfectly justified in denying such exemption in the cases where no such declaration from the service providers viz., transport agency was forthcoming from the assessee. We do not find any fault or error in the order passed by the tribunal. The judgments relied upon by the learned counsel for the appellant are not applicable to the facts of the present case, as in the case of Gujarat High Court, the conditions were satisfied with an endorsement on the consignment note supplied by the transport agency, which was taken as sufficient compliance of the conditions stipulated in the said notification. But, admittedly in the present case, no such compliance even in the form of consignment note bearing such endorsement from the transport agency was made by the assessee. Therefore, the said judgment is clearly distinguishable.

9.In result, the present civil miscellaneous appeals are dismissed. However, there shall be no order as to the costs. Consequently, connected miscellaneous petitions are also dismissed.

-s/d-
Assistant Registrar(CCC)

True Copy

Sub-Assistant Registrar

To

1.Customs Excise and Service Tax Appellate Tribunal
South Zonal Bench, 26, Haddows Road
Chennai 600 006.

2.The Commissioner of Central Excise and Service
Tax, Large Taxpayer Unit, No.1775, Jawaharlal
Nehru Inner Ring Road, Anna Nagar, Western
Extension, Chennai 600 101

C.M.A.Nos.2387 & 2388 of 2012

SP(04/09/2019)