THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 21.02.2019

CORAM

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

Civil Miscellaneous Appeal Nos.71 and 72 of 2014

Commissioner of Service Tax,
"Newry Towers", No.2054-I, 2nd Avenue,
12th Main Road, Anna Nagar,
Chennai-600 040. .. Appellant in both the Appeals

-vs-

M/s.Bharat Sanchar Nigam Limited,
Chennai Telephones,
Office of the General Manager (Landline Division),
No.10, Dams Road,
Chennai-600 002. .. Respondent in both the Appeals

APPEALS under Section 35G of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994 to set aside the common order dated 05.06.2012 made in Final Order Nos.601 and 602 of 2012 on the file of the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench at Chennai and restore OIO Nos.77 and 78 of 2009, dated 26.11.2009.

For Appellant (In both the Appeals) : Mr.V.Sundareswaran, Standing Counsel

For Respondent (In both the Appeals) : Mr.T.Ravikumar, Senior Standing Counsel

COMMON JUDGMENT

(Delivered by T.S.Sivagnanam, J.)

These appeals by the appellant/Revenue have been filed challenging the common order of the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench at Chennai, dated 05.06.2012, in Final Order Nos.601 and 602 of 2012.

2.The above appeals have been admitted, on 09.04.2014, on the following substantial questions of law:-

> "(i) Whether the CESTAT was correct in holding that there had been no contravention of the 2nd proviso to Rule 3(5) of CCR as it existed at the material time;
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> (ii) Whether the CESTAT was correct in setting aside the order of the adjudicating authority holding that there was no requirement for any demand of duty or reversal of credit; and
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> (iii) Whether the CESTAT was correct in applying the amended provision under Rule 3(5) of CCR which came into effect from 01.04.2008 for the period prior to that date?"

3.Heard Mr.V.Sundareswaran, learned Standing Counsel for the appellant; and Mr.T.Ravikumar, learned Senior Standing Counsel for the respondent.

4.The learned counsel on either side submitted that the substantial questions of arising for consideration in these cases were considered by us in the case of Commissioner of Central Excise and Service Tax vs. M/s.Ashok Leyland Ltd. [C.M.A.Nos.352 of 2016 and etc., batch: dated 06.12.2018] wherein though there may be slightly a factual difference in the said case, the legal issue is one and the same. The operative portions of the judgment read as follows:-

> "7.The assessee submitted their objections discussing about the importance of wind energy in the State, the necessity to locate the windmills outside the factory area, etc. The assessee also referred to the agreement entered into with the TNEB and stated that those agreements were entered into only for the purpose of utilizing the power generated by windmills for consumption at the factory in the manufacturing locations, which are connected through TNEB's power grid/high tension supply lines. Further, the assessee stated that the unutilised surplus power is taken by the TNEB and they could not sell the surplus power to third parties. Further, by referring to the terms of the agreement, it was stated that the agreement envisages generation of power by windmills as well as transmission to their factory, which shows that the electricity generated is being capable of physically delivered at the factory of the assessee. Thus, they contended that there is nexus between the power generated through windmills and the goods manufactured. That the three activities, viz., sale, supply and consumption take place immediately, even though the place of generation and manufacture

are different. Therefore, the assessee sought to sustain the availment of credit of service charges incurred in relation to windmills.

8.The assessee relied upon the decisions of the Tribunal in support of their contentions. They further contended that there is no condition with regard to input services that the same should be received at the factory, where manufacturing activity takes place for taking credit. In support of such contention also, they placed reliance on certain decisions of the Tribunal. The assessee distinguished the decision of the Hon'ble Supreme Court in the case of Maruti Suzuki Ltd. vs. Commissioner of Central Excise, Delhi-III, 2009 (240) E.L.T. 641 (S.C.) as being inapplicable to the facts of their cases. Further, it is submitted that no penalty or interest could be levied, as there is no intention to evade payment of duty.

9.The adjudicating authority pointed out that the services involved in the assessee's case are operations and maintenance of windmills, the windmills are located far away from the factory in a wind-potential area and the power generated is transmitted to the TNEB grid. Further, it was held that generation, sale and consumption are not possible immediately, unless the power plant is located near the factory and directly connected to the factory. Thus, the authority concluded there is no direct nexus between the electricity generated by the windmill and that was consumed in the factory and the transaction, can at the, most be treated as a book adjustment. Accordingly, the proposal in the show cause notice was confirmed. Aggrieved by the same, the assessee preferred appeal before the Tribunal. Before the Tribunal, all the cases were heard together and the Tribunal placed reliance on the decision of the High Court of Bombay in the case of C.C.E. & Cus., Aurangabad vs. Endurance Technology Pvt. Ltd., 2017 (52) S.T.R. 361 (Bom.) and held that credit is admissible in the nature of transaction done by the assessee. Further, the Tribunal recorded a factual finding that in the absence of any material on record showing energy generated by windmills was used for the purpose other than manufacture or providing of service, all the appeals were allowed. The Tribunal also set aside the interest levied and the penalty imposed.

10.We have heard Mr.A.P.Srinivas, learned Senior Standing Counsel for the appellant/Revenue, Mr.P.R.Renganath, learned counsel for M/s.Ashok Leyland Ltd., and M/s.L.Maithili, learned counsel appearing for M/s.ITC Ltd.

11.The Tribunal in the impugned order has followed the decision of the High Court of Bombay in Endurance Technology Pvt. Ltd., (supra). The said decision has attained finality, as the Revenue has not preferred any appeal, and it appears that refund was also granted to the said assessee. Therefore, the decision would bind the Department. Nevertheless we heard Mr.A.P.Srinivas, for a considerable length of time.

12.The argument of the learned counsel is that the windmill is situated far away from the manufacturing plant, there is no nexus and the type of transaction between the assessee and the TNEB is a barter system and it is, in effect, a sale of electricity at one point and purchase of electricity at the other. Therefore, it is submitted that there are two distinct and independent transaction and they had no nexus with each other and therefore, the question of giving credit, with regard to input services, does not arise. To support his argument, the learned counsel relied on a decision of the Tribunal in the case of Ellora Times Ltd. vs. Commissioner of Central Excise, Rajkot., 2009 (13) S.T.R. 168 (Tri. - Ahmd.).

13.Further, by referring to the decision in Maruti Suzuki Ltd. (supra), it is contended that the Court though was examining a case with regard to inputs, the Hon'ble Supreme Court has observed that electricity generation is a separate and distinct activity, it is an independent activity, it has its own economics and it does not form part of the process in which inputs are transformed into separate identifiable commodity, though it may stand connected to such processes. Further, it was held that electricity generation is an ancillary activity, it is an activity, which is anterior to the activity of the process of manufacture of the final product. Therefore, it is submitted that this is to be borne in mind to consider as to whether the input services on which credit has been availed could at all be availed especially when there is no direct nexus between the electricity generated and the manufacturing activity.

14.The learned counsels appearing for the assessees on the other hand submitted that much of the arguments of the learned counsel for the Revenue is beyond the allegations made in the show cause notice, which they are not entitled to do especially in an appeal filed under Section 35G of the CEA, 1944. It is their submission that the allegation in the show cause notice is that the windmill is situated far away from the factory and therefore, there is no nexus. Further, it is submitted that the decision in the case of Endurance Technology Pvt. Ltd. (supra) having attained finality, the same would bind the Revenue.

15.In terms of Section 35G of the CEA, 1944, the High Court can entertain an appeal against the order of Tribunal, if it is satisfied that the case involves a substantial question of law. Sub-Section 3 empowers the High Court to formulate a substantial questions of law, if the same is involved and the appeal shall be heard only on the question so formulated. The substantial questions of law formulated in these appeals stem out of the case, which were taken for adjudication, which especially involve factual details. Therefore, we are not persuaded by the contentions raised by Mr.A.P.Srinivas to travel beyond the allegation made in the show cause notice against the assessee. If that is to be done, then it would not only amount to an exercise being without jurisdiction, but it would also violate the principles of natural justice. Furthermore, this would expand the scope of the allegation against the assessee, which cannot be done at this stage. Therefore, we will have to answer the substantial questions of law framed for consideration on the allegations, which were set out against the assessee in the show cause notice.

16.As pointed out earlier, the adjudicating authority did not dispute the fact that the assessee had drawn equal quantity of electricity from the TNEB grid equivalent to the amount which it had generated through windmills and supplied to the TNEB. Therefore, we are not required to go into the question as to whether there was any excess energy generated, whether it was sold to third parties or whether the assessee had sold it to the Electricity Board on costs, etc., and these issues become hypothetical in the instant case because, there is no such allegation against the assessee on any excess generation than what was utilised. The only allegation against the assessee is with regard to the fact that the windmills are located far away from the manufacturing unit. Undoubtedly, the windmills cannot be located at any place, and it is to be erected, wherever the wind power is available.

Therefore, such an interpretation if to be accepted, would defeat the very concept of generation of green power in the country. Therefore, this interpretation should lean towards the sustenance of such environmental friendly measures for which the Government has granted certain special concessions.

17.Thus, we are to consider as to whether there has been any nexus between the energy generated and the manufacturing activity of the assessee. This very issue was considered in Endurance Technology Pvt. Ltd. (supra). In fact, we find two substantial questions of law framed for consideration in Endurance Technology Pvt. Ltd. (supra), which are more or less identical to that of the questions of law framed in these appeals. The first question framed for consideration was whether the assessee is entitled to avail Cenvat credit on management, maintenance or repair services provided on services to windmills installed and situated away from the factory premises. The second question was whether electricity generated on two different places far away could be said to have been used for manufacture of the final product of the assessee in its factory at Aurangabad.

18.So far as the second substantial question of law is concerned, it was answered in the affirmative in the light of the stand taken that admittedly, such electricity generated at those two different locations was adjusted to the electricity used in the factory at Aurangabad and this adjustment was admitted by the Revenue and accordingly, the second question was answered in favour of the assessee. In the case on hand also, in the show cause notice, the adjudicating authority does not dispute the fact that equivalent quantity, that is, the quantity generated is the same as the quantity drawn by the assessees from the TNEB grid. On the first question of law, with regard to the availment of cenvat credit on input services, the Hon'ble Supreme Court referred to the decisions of the High Court of Bombay in the case of Commissioner of Central Excise, Nagpur vs. Ultratech Cement, 2010 (20) S.T.R.589 (Bom.); Commissioner of Central Excise, Nagpur vs. Ultratech Cement Ltd., 2010 (260) E.L.T. 369 (Bom.); and Deepak Fertilizers & Petrochemicals Corporation Ltd. vs. C.C.Ex. Belapur, 2013 (32) S.T.R. 532 (Bom.). The Hon'ble Supreme Court, after taking note of the relevant rules, held that it becomes clear that management, maintenance and repair of windmills installed by the respondents is input service as defined in Clause I of Rule 2. It was held that Rules 3 and 4 provide that any input or capital goods received in the factory or any input service received for manufacture of final product would be susceptible to Cenvat credit. Further, it was held that Rule does not say that input service received by a manufacturer must be received at the factory premises and the decisions relied on also interpret the word "input service" in similar fashion.

19.Further, by referring to the decision in Commissioner of Central Excise, Nagpur vs. Ultratech Cement, 2010 (20) S.T.R.589 (Bom.) (supra), it was held that the definition of "input service" is very wide and covers not only services which are directly or indirectly used in or in relation to manufacture of final product, but also includes various services used in relation to business of manufacture of final product. Further, the expression "activities" in relation to business was also discussed in the said decision following the decisions of the Apex Court.

20.By placing reliance on the decision in the case of Deepak Fertilizers & Petrochemicals Corporation Ltd. (supra), the first question was answered in the affirmative. At this juncture, it would be beneficial to refer to the operative portions of the said judgment.

> "4.Question No.1 is main bone of contention between the parties. Even the law on this subject is very well settled by alteast three prominent judgments of our High Court reported in [1] 2010 (20) S.T.R. 589 (Bom.) in the case of Commissioner of Central Excise, Nagpur v. Ultratech Cement [2] 2010 (260) E.L.T. 369 (Bom.) = 2010 (20) S.T.R. 577 (Bom.) in the case of Commissioner of Central Excise, Nagpur v. Ultratech Cement Ltd. And [3] 2013 (32) S.T.R. 532 (Bom.) in the case of Deepak Fertilizers & Petrochemicals Corporation Ltd. v. C.C.Ex. Belapur. The question between the parties is whether the respondent was entitled to credit on management, maintenance or repair services provided on windmills installed by the respondents. The answer lies in interpretation of Rule 2(B)(k), (l) (m), 3 and 4 of Cenvat Credit Rules, 2004. ....
>
> 5.On perusal of these Rules, it becomes clear that the management, maintenance and repair of windmills installed by the

respondents is input service as defined by clause "I" of Rule 2. Rule 3 and 4 provide that any input or capital goods received in the factory or any input service received by manufacture of final product would be susceptible to CENVAT credit. Rule does not say that input service received by a manufacturer must be received at the factory premises. The judgments referred to above, also interpret the word "input" service in similar fashion.

In the case of Commissioner of Central Excise, Nagpur v. Ultratech Cement Ltd. [cited supra], the Division Bench of this Court held that the definition of "input service" is very wide and covers not only services which are directly or indirectly used in or in relation to manufacture of final product but also includes various services used in relation to business of manufacture of final product. The expression "activities" in relation to business is also discussed in this judgment by referring to judgment of Apex Court.

In the case of Deepak Fertilizers & Petrochemcals Corporation Ltd. v. C.C.Ex. Belapur [cited supra] the Division Bench held as under :

"The definition of the expression 'input service' covers any services used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products. The words 'directly or indirectly' and 'in or in relation to' are words of width and amplitude. The subordinate legislation has advisedly used a broad and comprehensive expression while defining the expression 'input service'. Rule 2(l) initially provides that input service means any services of the description falling in subclauses (i) and (ii). Rule 2(l) then provides an inclusive definition by enumerating certain specified services. Among those services are services pertaining to the procurement of inputs and inward transportation of inputs. The Tribunal, proceeded to interpret the inclusive part of the definition and held that the Legislature restricted the benefit of Cenvat credit for input services used in respect of inputs only to these two categories viz. for the procurement of inputs and for the inward transportation of inputs. This interpretation which has been placed by the Tribunal is ex facie contrary to the provisions contained in Rules 2(l). The first part of Rule 2(l) inter alia covers any services used by the manufacturer directly or indirectly, in or in relation to the manufacture of final products. The inclusive part of the definition enumerates certain specified categories of services. However, it would be farfetched to interpret Rule 2(l) to mean that only two categories of services in relation to inputs viz. for the procurement of inputs and for the inward transportation of inputs were intended to be brought within the purview of Rule 2(l). Rule 2(l) must be read in its entirety. The Tribunal has placed an interpretation which runs contrary to the plain and literal meaning of the words used in Rule 2(l). Moreover as we have noted earlier, whereas Rule 3(l) allows a manufacturer of final products to take credit of excise duty and Service Tax among others paid on any input or capital goods received in the factory of manufacturer of the final product, insofar as any input service in concerned, the only stipulation is that it should be received by the manufacturer of final product. This must be read with the broad and comprehensive meaning of the expression 'input service' in Rule 2(l). The input services in the present case were used by the appellant whether directly or indirectly, in or in relation to the manufacture of final products. The appellant, it is undisputed, manufactures dutiable final products and the storage and use of ammonia is an intrinsic part of that process."

6.In view of this discussion, we have no hesitation to hold that the answer to question No.(I) is in affirmative. Despite this settled position, learned counsel for the appellant tried to submit that the judgment cited at Sr. No. (2) is being challenged before Supreme Court. This submission does not really help us in deciding the appeals. Both appeals are dismissed."

21.In Deepak Fertilizers & Petrochemicals Corporation Ltd. (supra), which has been quoted in Endurance Technology Pvt. Ltd. (supra), the contention advanced by Mr.A.P.Srinivas, was taken note of and it was held that the input services were directly or indirectly in or in relation to the manufacture of final products.

22.The decision in the case of Endurance Technology Pvt. Ltd. (supra) was followed by a Larger Bench of the Tribunal, in the case of Parry Engg. & Electronics P. Ltd. vs. C.C.E. & S.T., Ahmedabad-I, II, III, 2015 (40) S.T.R. 243 (Tri. - LB).

23.We are informed that there is a Larger Bench's decision of the Tribunal, which also has not been appealed and the said decision has attained finality.

24.The decision in the case of Maruti Suzuki Ltd. (supra) cannot be applied to the facts of the present case, as it was a case where the Court was considering as to whether electricity can be construed as an input. The facts in the case would be very important because, the allegation against the assessee therein was that they had generated electricity in their factory and wheeled out portion of the electricity to its joint ventures and the question was whether the extent of the clearance of excess electricity outside the factory to the joint ventures, vendors, grid etc., would be admissible for Cenvat credit, as it is cleared for a price. This question was answered against the assessee. However, the facts of the case on hand are totally different and therefore, the Revenue would not be justified in referring to the observations of the Hon'ble Supreme Court in the said judgment about the concept of generation of electricity, as we have to test the correctness of the impugned order on the given facts and circumstances of the case.

25.As already pointed out, there is no dispute that the electricity generated by the windmills are exclusively used in the manufacturing unit for final products, there is no nexus between the process of electricity generated and manufacture of final products and there is no necessity for the windmills to be situated in the place of manufacture. Further, as already noticed, the definition of "input service" is wider than the definition of "input". Furthermore, if one takes a look at the Rules, more particularly Rule 2(k), as it stood prior to 01.04.2011, which defines "input", the following has been specifically inserted.

"within the factory of production".

However, these words are physically missing in

Rule 2(l), which defines "input service" and it would mean any service used by a provider of taxable service for providing an output service or used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products from the place of removal. Though the definition of "input service" has to be widely construed, and in terms of Rule 3, which allows the manufacturer of final products to take the credit of service tax inputs or capital goods received in the factory of manufacture of final products, insofar as any input service is concerned, the only stipulation is that it should be received by the manufacturer of final products. Therefore, this would be the correct manner of interpreting Rule 2(l) of the Rules.

26.In the light of the above, we are of the considered view that the decision in the case of Ellora Times Ltd. (supra) does not lay down the correct legal position and we agree with the decision of the High Court of Bombay in Endurance Technology Pvt. Ltd. (supra), which has been followed by the Larger Bench of the Tribunal in Parry Engg. & Electronics P. Ltd.

27.Mr.A.P.Srinivas, placed reliance on the decision of the High Court of Bombay in Bharti Airtel Ltd. vs. Commissioner of Central Excise, Pune-III, 2014 (35) S.T.R. 865 (Bom.). In the said decision, the question to be decided was whether the assessee was entitled to credit of duty paid on cell phone towers, green shelter, printers and office chairs and they being immovable property do they qualify capital goods or inputs as defined under the Rules.

28.We find the said decision cannot be applied to the facts of the present case, which is entirely different, more so on account of the admitted position that whatever has been generated by the assessee in their windmills has been the equal quantity of electricity drawn from the power grid of the TNEB to the factory of the assessee. Thus, for the above reasons, we find that the Tribunal rightly allowed the assessee's appeal.

29.In the result, the appeals are dismissed and the substantial questions of law are answered against the Revenue. No costs."

5.Following the above cited judgment, these appeals are dismissed and the substantial questions of law are answered against the Revenue. No costs.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

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To

1.The Customs, Excise and Service Tax Appellate Tribunal,
South Zonal Bench, Shastri Bhawan Annexe,
1st Floor, 26 Haddows Road, Chennai-600 006.

2.The Commissioner of Service Tax,
"Newry Towers", No.2054-I, 2nd Avenue,
12th Main Road, Anna Nagar, Chennai 40.

+2 cc's to Mr.T.Ravikumar, Advocate Sr.No.16502

C.M.A.Nos.71 and 72 of 2014

CSL/25.04.2019