IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :11.02.2021

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MS.JUSTICE R.N.MANJULA

C.M.A.Nos.2200 to 2202 of 2010
and
M.P.Nos.1, 2 & 2 of 2010

M/s.Chemplast Sanmar Ltd.,
Plant III, Mettur Dam,
Mettur-636 403. .. Appellant in all Appeals/ Appellant

-vs-

The Commissioner of Central Excise,
No.1, Foulks Compound,
Anaimedu, Salem-636 001. .. Respondent in all Appeals/ Respondent

Appeals under Section 35-G of the Central Excise Act, 1944 against the order dated 18.12.2009, made in Final Order Nos.2 to 4 of 2010 respectively, on the file of the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai.

For Appellant : Mr.S.Manoj
(In all Appeals)

For Respondent : Mr.A.P.Srinivas,
(In all Appeals) Senior Standing Counsel

JUDGMENT

(Judgment of the Court was delivered by T.S.Sivagnanam, J.)

These appeals have been filed by the appellant/assessee under Section 35G of the Central Excise Act, 1944 (hereinafter referred to as "the Act") challenging the order dated 18.12.2009, passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai (for brevity "the Tribunal") in Final Order Nos.2 to 4 of 2010 respectively.

2.The appeals were admitted, on 18.03.2011, on the following substantial questions of law:-

> "1.Whether in the facts and circumstances of the case, the Tribunal was correct in law in travelling beyond the Show Cause Notice and remanding the matter for fresh adjudication on a ground which was never raised by the Revenue in the Show Cause Notice or in the adjudication order?
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> 2.Whether in the facts and circumstances of the case, the Tribunal was right in law in directing the adjudicating authority to examine the eligibility of credit in the light of Section 37(2) of the Central Excise Act when no such contention was raised by the Revenue in the Show Cause Notice?
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> 3.Whether in the facts and circumstances of the case, the Tribunal was right in holding that the adjudicating authority should examine whether the impugned services can be considered as eligible input services under the Cenvat Credit Rules when the only issue in appeal was whether a debit note is a valid document or not for availing cenvat credit? And
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> 4.Whether in the facts and circumstances of the case, the Tribunal was correct in holding even after accepting the submissions made by the Appellant with reference to the allegations in the Show Cause Notice that they can remand the matter for denovo adjudication with a fresh proposal which was not the subject matter of the appeal?"

3.We have elaborately heard Mr.S.Manoj, learned counsel appearing for the appellant/assessee and Mr.A.P.Srinivas, learned Senior Standing Counsel for the respondent/Revenue.

4.The short issue, which falls for consideration is whether the Tribunal had exceed its jurisdiction in making certain observations with regard to the validity of the CENVAT Credit Rules, 2004 (hereinafter referred to as "the CCR, 2004") qua the provisions of Section 37 of the Act and proceeding to direct the original authority to issue a show cause notice to the appellant/assessee as regards its very entitlement for CENVAT credit.

5.The facts, which are necessary for the disposal of these appeals, are as below:-

5.1.The Assistant Commissioner of Central Excise, Salem-II Division, issued show cause notices dated 02.11.2006, 02.01.2007 and 05.04.2007 alleging wrong availment of service tax credit based on debit notes. The allegation in all the three show cause notices were identical except that the period during which such credit was availed is different. In the show cause notice dated 02.11.2006, it is stated that the appellant/assessee is engaged in the manufacture of caustic soda and chloromethane products falling under Chapters 28 and 29 of the Central Excise Tariff Act, 1985 and the appellant has contravened the provisions of Rule 9(1) of the CCR, 2004, inasmuch as they have wrongly availed service tax input credit based on ineligible documents, that is, debit notes issued by their service providers and utilized the said credit towards payment of duty and thereby rendering themselves liable for penal action under Rule 14 and Rule 15 of the CCR, 2004.

5.2.The show cause notice further states that under Rule 9 (1) of the CCR, 2004, CENVAT/service tax credit can be taken by the manufacturer or provider of output service or input service distributor based on the following documents, viz., (i) an invoice; (ii) a supplementary invoice; (iii) a bill of entry; (iv) a certificate issued by an Appraiser of Customs in respect of goods imported through Foreign Post Office; (v) a challan; (vi) an invoice, bill or challan issued by an input service distributor under Rule 4A of the Service Tax Rules, 1994 (hereinafter referred to as "the STR, 1994"); and (vii) an invoice, bill or challan issued by an output service distributor under Rule 4A of the STR, 1994.

5.3.The show cause notice further states that Rule 9(1) of the CCR, 2004 does not prescribe debit note as a document on the basis of which CENVAT/service tax credit can be taken.

5.4.With the above allegation, the appellant was directed to show cause as to why the service tax credit availed and utilized in contravention of Rule 9(1) of the CCR, 2004 should not be recovered from them under Rule 14 of the CCR, 2004 read with Section 11A of the Act; why interest should not be demanded and why penalty should not be imposed under Rule 15(1) of the CCR, 2004.

6.The appellant submitted their common reply dated 05.03.2007 and raised a preliminary objection with regard to the limitation for issuance of the show cause notices by invoking the power under Section 11A of the Act. In this regard, the learned counsel for the appellant relied as many as seven decisions of the Hon'ble Supreme Court as well as the Tribunal and more particularly, the decision of the Hon'ble Supreme Court in CCE vs. HMM Ltd., [1995 (76) E.L.T. 497 (SC)] for the proposition that the extended period of limitation cannot be invoked, unless the show cause notice puts the assessee to notice specifically of which, various commissions or omissions stated in the proviso to the Section had been committed. Further, on the allegation that debit notes are not eligible documents, the assessee gave an elaborate reply and highlighted that the debit note issued by the service providers is equivalent to a bill referred to in Rule 4A of the STR, 1994, it is an eligible document as provided under Rule 9(1) of the CCR, 2004. The Adjudicating Authority, by order dated 29.05.2007, held that the assessee has availed CENVAT/service tax credit based on debit notes, which does not contain the required details of transaction between the assessee and their consignment agent upon which, service tax liability arises and that the debit notes do not come under the ambit of the bill referred to in Rule 4A of the STR, 1994. Further, the Adjudicating Authority made certain comments on the veracity of the debit notes. With such reasoning, the reply submitted by the assessee was rejected and the proposal in the show cause notice was confirmed and penalty was also imposed. Aggrieved by such order, the assessee preferred appeal before the Commissioner of Customs and Central Excise (Appeals), Salem.

7.The first appellate authority by order dated 30.07.2008, dismissed the appeal by observing that debit note is used to deduct funds from the customer's account whereas, the bill/invoice is raised indicating details of the provider, receiver, services rendered and the amount due from the service receivers and hence, debit note cannot be equated with bill/invoice, since it is not one of the specified documents under Rule 9 of the CCR, 2004 and consequently, no CENVAT credit is available based on debit notes. Aggrieved by such order, the assessee preferred appeal to the Tribunal.

8.The Tribunal agreed with the assessee, after taking note of the decision of the Tribunal in the case of Pharmalab Process Equipments Pvt., Ltd., vs. CCE, Ahmedabad [2009 (16) STR 94], wherein it was held that debit notes issued by service providers contained details of service tax payable, description of taxable service, value of taxable service and registration number of service provider and name and address of service provider, which are the details required as per Rule 9(2) of the CCR, 2004. After recording such a finding, the Tribunal remanded the matter to the Original Authority for verifying the document, which contains the necessary details and allow the benefit of service tax credit on such verification.

9.The assessee is not aggrieved by such order of the Tribunal remanding the matter to the Original Authority for fresh consideration, but is aggrieved by the later part of the order passed by the Tribunal more particularly, from paragraphs

5 to 9 and portion of paragraph 10 of the impugned order. In these paragraphs, the Tribunal appears to have suo motu taken up for consideration as to whether credit of service tax paid or payable on taxable service is allowable. The Tribunal suo motu proceeded to refer to Section 37(2), Section 11AB of the Act and made certain observations, which are in the nature of conclusive observations. The learned counsel for the assessee had argued that the assessee had been put on notice only regarding the issue whether the debit note is an eligible document or not and not on the question whether the impugned taxable service is an eligible input service or an ineligible input service. After noting this submission, the Tribunal while remanding the matter to the Original Authority following the decision in Pharmalab Process Equipments Pvt., Ltd. (supra), issued one more direction to the Original Authority to issue a fresh show cause notice as to whether the impugned services are eligible input services or not. The assessee is aggrieved over such direction.

10.Experts explain Debit notes to be a form of proof that one business has created a legitimate debit entry in the course of dealing with another business. This might occur when a purchaser returns materials to a supplier and needs to validate the reimbursed amount. In this case, the purchaser issues a debit note reflecting the accounting transaction. Debit notes and credit notes are almost always involved in business-to-business (B2B) transactions. They correspond to debit and credit entries in accounting logs, which further serve as proof of a prior business transaction. They may also be referred to as debit memos. Further, debit notes usually all include the same general information: the date of the note, a serial number, a brief description of the prior business transaction, details of items returned (including sales taxes and a reference to the invoice), and the signatures of appropriate company authorities. Debit notes, debit memos, debit receipts, and invoices are all similar in nature and are all legitimate documents that demonstrate financial transactions between businesses. A debit note or debit receipt is very similar to an invoice. The main difference is that invoices always show a sale, where debit notes and debit receipts reflect adjustments or returns on transactions that have already taken place. B2B transactions are typically based on an extension of credit, where a vendor sends a shipment to a company before getting paid, then invoices the company for the amount owed after delivery. Debits and credits are the accounting method used to keep track of these transactions. Debit notes can also be substituted for traditional invoices when a good or service is provided that is outside of the normal scope of business. This helps distinguish the transaction for both accounting departments, and also keeps the issuing company from creating a new type of invoice. (https://www.investopedia.com)

11.The endeavour before us by the Revenue to sustain the argument is by referring to the powers of the Tribunal and that the Tribunal would be entitled to examine all issues, when it seized of an appeal arising out of an order in original or an order in appeal. This submission is not well founded in the facts and circumstances of this case for more than one reason. Firstly, the appeal was filed by the assessee and not the Revenue. The Revenue did not prefer any cross appeal/objection. Therefore, the assessee cannot be worse off in its own appeal before the Tribunal. Further, the Tribunal has not recorded as to who had advanced such submission. In the absence of any such observation, we are compelled to observe that it is suo motu exercise by the Tribunal, which is uncalled for and without jurisdiction. We say so because, the allegation in the show cause notice, which gives the cause of action for the entire matter, is that the assessee availed service tax input credit based on ineligible documents. Therefore, the Department can never proceed beyond such allegation and if done so, it would be wholly without jurisdiction. In other words, the Tribunal cannot sustain the case of the Revenue against an assessee on a ground not raised by the Revenue either in the show cause notice or in the order in original passed by it. To support such conclusion, we place reliance on the decision of the Hon'ble Supreme Court in SACI Allied Products Ltd., vs. Commissioner of C. Ex., Meerut [2005 (183) ELT 225 (SC)]. The relevant paragraphs of the decision read as follows:-

> "16.The appellate Tribunal, by the impugned order, has upheld the order of the respondent-Collector, however, on a totally new and different basis which was never the case of the Department either in the show cause notice or in the impugned order. The appellate Tribunal, in the impugned order, has held as under:
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> "All the wholesale dealers and all the wholesale buyers in the whole of the country would not be taken to form a single class of buyers. M/s SACI and SCIL were related persons. M/s SACI sold their goods in the State of U.P. through SCIL and no direct sales were effected by SACI in the State of U.P. Seen in the light of the Tribunal's decision in the case of Goramal Hari Ram Ltd., the prices at which SCIL were disposing of the goods of SACI in the State of U.P. had been correctly taken as the normal price for determining the duty liability of SACI under Section 4 of the Act."
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> 17.Thus according to the appellate Tribunal, since the dealers in Uttar Pradesh who purchased

the goods from Syndet, and independent dealers in other parts of the country to whom the appellants directly sold the goods are different class of buyers, appellants' price to the independent dealers cannot be taken as the basis for assessing appellants' sales to Syndet in Uttar Pradesh. This finding of the appellate Tribunal is based on first proviso to Section 4(1(a) of the Act. While the show cause notice and the order of the Collector proceeded on the basis of the invocation of third proviso to Section 4(1)(a) of the Act, the appellate Tribunal for the first time in the impugned order has sustained the proceedings on the basis of first proviso to Section 4(1)(a) of the Act. It was argued that the first proviso to Section 4(1)(a) of the Act was never invoked by the Department either in the show cause notice or in the impugned order and it was for the first time that the appellate Tribunal in the impugned order has sought to sustain the impugned order by invoking the first proviso to Section 4(1)(a) of the Act. It is thus seen that the Tribunal has gone totally beyond the show cause notice and the order of the Collector, which is impermissible. The appellate Tribunal cannot sustain the case of the Revenue against the appellants on a ground not raised by the Revenue either in the show cause notice or in the order.

18.In this context, we may usefully refer to the judgment of this Court in the case of Reckitt & Colman of India Ltd. vs. CCE, 1996(88)ELT 641 (SC). This Court held that it is beyond the competence of the Tribunal to make out in favour of the Revenue a case which the Revenue had never convassed and which the appellants had never been required to meet.

19.The impugned order of the Tribunal which had gone beyond the show cause notice and the order of the respondent-Collector is, therefore, liable to be set aside."

Thus, the observation made by the Tribunal is wholly without jurisdiction and was beyond the scope of the appeal before it.

12.In the light of the above decision, we have no hesitation to hold that the direction issued by the Tribunal to issue a fresh show cause notice to the appellant/assessee as to whether the impugned services are eligible input services or not is wholly without jurisdiction and the same is liable to be set aside and accordingly, set aside.

13.In the result, the appeals are allowed and the substantial questions of law are answered in favour of the assessee. We make it clear the the order of remand passed by the Tribunal to examine the debit note in terms of the decision in the case of Pharmalab Process Equipments Pvt., Ltd. (supra) is sustained. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

abr

To

1.The Commissioner of Central Excise,
No.1, Foulks Compound,
Anaimedu, Salem-636 001.

2.The Customs, Excise and Service Tax Appellate Tribunal,
South Zonal Bench, Chennai.

+1 cc to Mr.A.P.Srinivas, Advocate Sr.No. 8032

C.M.A.Nos.2200 to 2202 of 2010

RSI(CO)
RMP(18/03/2021)