IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 27.01.2021

CORAM:

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

C.M.A.No.2616 of 2017

The Commissioner of Central Excise,
O/o the Commissioner of Central Excise,
Customs & Service Tax,
6/7, A.T.D. Street, Race Course Road,
Coimbatore-641 018. .. Appellant/Respondent

-vs-

1.M/s.PRICOL Ltd.,
702/7, Avinashi Road,
Coimbatore-641 037. .. 1st Respondent/Appellant

2.Customs, Excise & Service Tax Appellate Tribunal,
South Zonal Bench, Shastri Bhawan Annexe I,
1st Floor, 6, Haddows Road,
Chennai-600 006. .. 2nd Respondent/2nd Respondent

Appeal under Section 35G of the Central Excise Act, 1944 against the order dated 05.01.2015 made in Final Order No.40006 of 2015 on the file of the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai.

For Appellant : Mr.A.P.Srinivas

For Respondents: R1 - Mr.M.Karthikeyan,
for Mr.S.Jaikumar

: R2 - Tribunal

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

This appeal by the appellant/Revenue under Section 35G of the Central Excise Act, 1944 (hereinafter referred to as "the Act"), is directed against the order dated 05.01.2015, made in Final Order No.40006 of 2015 on the file of the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai (for brevity "the Tribunal").

2.The appeal was admitted on 06.10.2017, on the following substantial questions of law:-

"(1) Whether the Tribunal is correct in allowing the CENVAT credit availed and distributed by the respondent prior to getting registered as an input service Distributor under the Act;

(2) Whether the Tribunal is correct in setting aside the imposition of penalty under erstwhile Rule 15(4) of the CENVAT Credit Rules, 2004, on the facts and circumstances of the case? and

(3) Whether Tribunal is correct in allowing the CENVAT Credit on CHA services when the same is availed after the goods has been cleared from the place of removal?"

3.So far as the first and second substantial questions of law are concerned, the issue has already been decided in the case of Commissioner of Central Excise vs. Dashion Ltd., [2016 (41) S.T.R. 884 (Guj.)] wherein, the Court held as follows:-

"7. The second objection of the Revenue as noted was with respect of non-registration of the unit as input service distributor. It is true that the Government had framed Rules of 2005 for registration of input service distributors, who would have to make application to the jurisdictional Superintendent of Central Excise in terms of Rule 3 thereof. Sub-rule (2) of Rule 3 further required any provider of taxable service whose aggregate value of taxable service exceeds certain limit to make an application for registration within the time prescribed. However, there is nothing in the said Rules of 2005 or in the Rules of 2004 which would automatically and without any additional reasons dis-entitle an input service distributor from availing Cenvat credit unless and until such registration was applied and granted. It was in this background that the Tribunal viewed the requirement as curable. Particularly when it was found that full records were maintained and the irregularity, if at all, was procedural and when it was further found that the records were available for the Revenue to verify the correctness, the Tribunal, in our opinion, rightly did not dis-entitle the assessee from the entire Cenvat credit availed for payment of duty. Question No. 1 therefore shall have to be answered in favour of the respondent and against the assessee."

4.The above decision has been accepted by the Central Board of Excise and Customs, vide Circular dated 16.02.2018. Therefore, the above questions have to be decided against the Revenue and accordingly, decided so.

5.So far as the third substantial question of law is concerned, Mr.A.P.Srinivas, learned Senior Standing Counsel strenuously argued that the Tribunal committed an error in allowing the CENVAT credit on Customs House Agents (CHA) services. It is submitted that these services are not in relation to the manufacturing activities of the assessee and these services are with reference to the clearance of goods after they were moved out of the factory and credit has been availed and utilized by the assessee all relate to post manufacturing activity. In this regard, the learned counsel referred to various decisions of the Tribunal and the decision of the High Court of Gujarat in CCE vs. Gujarat Heavy Chemicals Ltd., [2011 (22) STR 616 (Guj.)] wherein, it was held that there is no connection between such service as having direct and indirect relation to manufacture. In the said decision, the Court relied upon the decision of the Hon'ble Supreme Court in M/s.Maruti Suzuki India Ltd., vs. Commissioner, Central Excise Commissionerate, Delhi-III [(2009) 240 ELT 641 (SC)]. The learned counsel has also referred to the definition "input service" as defined under Rule 2(l) of the CENVAT Credit Rules, 2004, as well as the definition of "place of removal" as defined under Rule 2(qa).

6.Mr.M.Karthikeyan, learned counsel for Mr.S.Jaikumar, learned counsel for the 1st respondent/assessee submitted that the words "place of removal" have been considered in several decisions and one such decision being the case in Commissioner vs. Dynamic Industries Ltd., [2014 (307) E.L.T. 15 (Guj.)] wherein, the substantial question of law in respect of the three category of services, viz., Customs House Agents Services, Shipping Agents and Container Services and Services of Overseas Commission were answered in favour of the assessee. Further, the learned counsel referred to the circular issued by Central Board of Excise and Customs dated 28.02.2015 wherein, it has been clarified as follows:-

> "6. In the case of clearance of goods for export by manufacturer exporter, shipping bill is filed by the manufacturer exporter and goods are handed over to the shipping line. After Let Export Order is issued, it is the responsibility of the shipping line to ship the goods to the foreign buyer with the exporter having no

control over the goods. In such a situation, transfer of property can be saic to have taken place at the port where the shipping bill is filed by the manufacturer exporter and place of removal would be this Port/ICD/CFS. Needless to say eligibility to CENVAT Credit shall be determined accordingly.”

7.The above circular dated 28.02.2015, has been reiterated in Circular No.1065/4/2018-CS, dated 08.06.2018, wherein it has been clarified as follows:-

“4.Exceptions:

(i) The principle referred to in para 3 above would apply to all situations except where the contract for sale is FOR contract in the circumstances identical to the judgment in the case of CCE, Mumbai-III vs. Emco Ltd., 2015 (322) ELT 394 (SC) = 2015-TIOL-163-SC-CX and CCE vs. M/s.Roofit Industries Ltd., 2015 (319) ELT 221 (SC) = 2015-TIOL-87-SC-CX. To summarise, in the case of FOR destination sale such as M/s.Emco Ltd., and M/s.Roofit Industries where the ownership, risk in transit, remained with the seller till goods are accepted by buyer on delivery and till such time of delivery, seller alone remained the owner of goods retaining right of disposal, benefit has been extended by the Apex Court on the basis of facts of the cases.

(ii) Clearance for export of goods by a manufacturer shall continue to be dealt in terms of Circular no.999/6/2015-CX dated 28.02.2015 as the judgments cited above did not deal with issue of export of goods. In these cases otherwise also the buyer is located outside India.”

8.After we have elaborately heard the learned counsels for the parties and carefully examined the correctness of the order passed by the Tribunal, we find that there were no material facts and evidences available on record on this aspect as to whether this CHA services rendered to the assessee could also be availed for the purpose of CENVAT credit. Therefore, the Tribunal has granted relief to the assessee. Hence, we are of the considered view that there is no substantial question of law arises for consideration on this issue, viz., with regard to allowing CENVAT credit on CHA services and therefore, we are not inclined to interfere with the order passed by the Tribunal. However, we leave the substantial question of law open.

9.In the result, the appeal is dismissed. Substantial question of law Nos.1 and 2 are answered against the Revenue, in favour of the assessee and substantial question of law no.3 is left open, as the Tribunal granted relief to the assessee on the ground that there was no material evidence and therefore, we are of the view that this issue cannot be a substantial question of law in this appeal. No costs.

s/d-
Assistant Registrar(CS-III)

True Copy

Sub-Assistant Registrar

abr
To

The Customs, Excise & Service Tax Appellate Tribunal,
South Zonal Bench, Shastri Bhawan Annexe I,
1st Floor, 6, Haddows Road,
Chennai-600 006.

SS(CO)
SP(01/03/2021)