IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 10.02.2022

CORAM:

THE HON'BLE MR.JUSTICE R.MAHADEVAN
AND
THE HON'BLE MR.JUSTICE J.SATHYA NARAYANA PRASAD

C.M.A.NO.2363 OF 2007

M/s.Saint Gobain Glass (I) Ltd.,
Represented by its Team Leader
(Finance & Accounts),
J.Krishnamurthy,
Plot No.41, SIPCOT Industrial Park,
Sriperumpudur,
Kancheepuram - 602 105. ... Appellant

Versus

1. The Commissioner of Central Excise,
Office of the Commissioner
of Central Excise,
M.H.U. Complex,
692, Anna Salai,
Nandanam,
Chennai - 600 035.

2. The Customs,
The Excise and Service Tax Appellate Tribunal,
Shastri Bhavan Annex,
26, Haddows Road,
Chennai - 600 006. ... Respondents

PRAYER:-

Civil Miscellaneous Appeal filed under Section 35G of the Central Excise Act, 1994, against the Final Order No.869 of 2007 dated 13.07.2007, in Appeal No.E/345/2007 on the file of the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai.

For Appellant : Mrs.Jayalakshmi

For Respondents : Mr.A.P.Srinivas
Senior Panel Counsel

J U D G M E N T

(Judgment of the court was delivered by R.MAHADEVAN, J.)

The appellant viz., M/s.Saint Gobain Glass (I) Ltd (SGGL), is the manufacturer of glass. They are availing CENVAT credit on inputs, capital goods and input services under the CENVAT Credit Rules, 2004 (CCR 2004, in short). During the period from June 2005 to September 2006, they availed the credit of the service tax paid on freight incurred for the outward transportation of the final products from factory to customers' premises and utilized the same for payment of duty on final products; and they determined the duty on the basis of the price at factory gate, which did not include the above freight. While so, the department issued a show cause notice dated 27.11.2006, proposing to recover the credit amounting to Rs.1,73,53,490/- along with Education Cess for the period in question as also to impose interest and penalty on them. The said proposal was put to challenge by the appellant/assessee, before the Commissioner of Appeals, who confirmed the said demand against the assessee under section 11A of the Central Excise Act along with interest under section 11AB and imposed penalty equal to tax + cess under section 11AC. Challenging the said order of the Appellate Authority, the appellant preferred further appeal before the CESTAT, which, after detailed analysis, decided the issue against the assessee and disposed of the appeal, by final order dated 13.07.2007, the relevant paragraphs of which, are usefully extracted below:

> "9.For the reasons recorded hereinbefore, we hold that goods transport service used by the appellants for transportation of their final products from factory to customer's premises cannot be considered to have been used, directly or indirectly, in relation to the clearance of the goods from the factory (place of removal).
>
> 10....Therefore, we hold that the demand on M/s.SGGL for the period prior to 8.8.05 is sustainable under the proviso to section 11A(1) of the Central Excise Act. The demand for the normal period is, of course, valid on merits. We set aside the demand for the remaining period as time-barred.
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> 11....We have already sustained the ground (suppression of facts) raised by the lower authority for recovering the wrongly availed/utilized CENVAT credit from them for a part of the period of dispute. Hence, the party is prima facie liable for penalty

under section 11AC of the Central Excise Act. Under this provision, the Commissioner impose the maximum penalty (equal to Tax + Cess) which is extremely harsh even on this own findings.

> 12.....The order of the Commissioner against M/s.SGGL is set aside and the case is remanded to him for requantification of demand in terms of this order and fresh consideration of the question whether the party is liable for penalty under Section 11AC and if so, to what extent. The said question may be addressed without regard to our observations. Needless to say, the assessee shall be given an effective opportunity of being heard also. Both the appeals are, accordingly, disposed of."

Aggrieved by the final order of the Tribunal, the appellant/ assessee has come up with this appeal.

2. This Civil Miscellaneous Appeal was admitted on 28.09.2007 on the following substantial questions of law :

> 1.Whether the Tribunal went wrong in equating the definition of "ïnput'" under Section 2(k) and input service under Section 2(1) especially when the expressions "clearance of final products from the place of removal"is conspicuous by its absence under the definition of input"?
>
> 2.Whether the Tribunal went wrong in disallowing outward transportation in the light of the definition of input service under Section 2(1) which extends the benefit to input services extending the same to "used" by the manufacturer whether directly or indirectly in or in relation to manufacture of finished products and clearance of final products from the place of removal?"

3. The learned counsel for the appellant/assessee and the learned senior panel counsel appearing for the respondent/ Revenue jointly submitted that the issue involved herein has already been dealt with in Commissioner of Central Excise and Service Tax, Coimbatore v. Pricol Limited, Coimbatore and another [C.M.A.No.1265 of 2012, dated 22.07.2019], wherein a Co-ordinate Bench of this Court, after following the decisions of the Hon'ble Supreme Court, namely, CCE v. Vasavadatta Cements Limited [2018 (11) GSTL 3 (SC)], dated 17.01.2018, and CCE v. Andhra Sugars [(2018) 10 GSTL 12 (SC)] decided on 05.02.2018, disposed of the appeal, by remitting the matter to the Tribunal for fresh consideration, in accordance with law, after hearing

both the parties on the applicability of the two judgments of the Hon'ble Supreme Court. The judgment passed by the Co-ordinate Bench are usefully extracted below:

> "The Revenue has filed this Appeal aggrieved by the order dated 27.07.2011 passed by the learned Tribunal disposing of a batch of appeals on the issue, whether the transportation charges incurred by the manufacturer for clearance of final product from the place of removal, are included in the definition of ''input service'' for eligibility to availment of CENVAT credit of service tax or not?
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> 2.The learned Tribunal followed the decisions of the Karnataka High Court in the case of CCE & ST, LTU, Bangalore Vs. ABB Limited reported in 2011 [23] STR 97 [Kar.] and held in favour of the assessee that the transportation charges incurred by the manufacturer for clearance of final product from the place of removal upto 01.04.2008, when the law was amended in this regard, were included in the definition of ''input service''.
>
> 3.The learned counsel for the appellant/Revenue has submitted that after the Tribunal decided these appeals, the Hon'ble Supreme Court of India, has dealt with this issue in two of the judgments cited at the Bar, viz., [1]CCE Vs. Vasavadatta Cements Limited reported in 2018 [11] GSTL 3 [SC] decided on 17.01.2018 ; and [2] CCE Vs. Andhra Sugars reported in 2018 [10] GSTL 12 [SC] decided on 05.02.2018. The relevant paras relied on by the learned counsel for the appellant/Revenue are quoted below from these two judgments:-
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> [1]CCE Vs. Vasava Dutta reported in 2018 [11] GSTL 3 [SC]:
>
>> ''7.As mentioned above, the expression used in the aforesaid Rule is ''from the place of removal''. It has to be from the place of removal upto a certain point. Therefore, tax paid on the transportation of the final product from the place of removal upto the first point, whether it is depot or the customer, has to be allowed.''
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> [2]Customs Vs. Andhra Sugars reported in 2018 [10] GSTL 12 [SC]:

''5.We may refer to Circular No.97/8/2007- S.T., dated August 23, 2007 issued by the Central Board of Excise and Customs [CBEC] [hereinafter referred to as the ''Board''] as per which the definition of ''input service'' was clarified and the Circular also provided the conditions which are to be satisfied to cover the case within ''place of removal''. The three conditions contained in the circular are [i]regarding ownership of the goods till the delivery of the goods at the purchaser's door steps; [ii] seller bearing the risk of or loss or damage to the goods during transit to the destination and [iii]freight charges to be integral part of the price of the goods.
...

8.As can be seen from the reading of the aforesaid portion of the circular, the issue was examined after keeping in mind judgments of CESTAT in Gujarat Ambuja Cement Ltd [2017 [6] STR 249 [Tribunal]] and M/s. Ultratech Cement Ltd [2007 [6] STR 364 [Tribunal]]. Those judgments, obviously, dealt with unamended Rule 2[l] of Rules 2004. The three conditions which were mentioned explaining the 'place of removal' are defined in Section 4 of the Act. It is not the case of the Department that the three conditions laid down in the said Circular are not satisfied. If we accept the contention of the Department, it would nullify the effect of the word ''from'' the place of removal appearing in the aforesaid definition. Once it is accepted that place of removal is the factory premises of the assessee, outward transportation 'from the said place' would clearly amount to input service. That place can be warehouse of the manufacturer or it can be customer's place if from the place of removal of goods are directly dispatched to the place of the customer. One such outbound transportation from the place of removal gets covered by the definition of input service.''

4.The learned counsel for the respondent/ Assessee would submit that the controversy is now covered by the above cited judgments of the Apex Court and the learned Tribunal was justified in allowing the appeals of the assessee and with respect to the remand of the matter to the learned Tribunal, the appeal of the Revenue deserves to be dismissed in the light of the above cited judgments.

5.Having heard the learned counsel for the parties, we are satisfied that the matter may go back to the learned Tribunal to look into the factual aspects of the matter again with respect to the applicability of the above two judgments of the Apex Court in the case of assessee and therefore, we are disposing of the present appeal of Revenue and remit the matter back to the Tribunal to decide the matter afresh in accordance with law, after hearing both parties on the applicability of the above cited two judgments of the Hon'ble Supreme Court of India. No costs.”

4. Following the aforesaid judgment, which holds the field, we are inclined to remand the matter to the Tribunal for fresh consideration, in the light of the aforesaid two decisions of the Hon'ble Supreme Court, which according to the assessee, are in their favour.

5. Accordingly, the order impugned herein is set aside and the matter is remanded to the Tribunal to decide the matter afresh in accordance with law, after hearing both the parties, on the applicability of the above referred two judgments of the Hon'ble Supreme Court. This Civil Miscellaneous Appeal stands disposed of, on the said terms. Consequently, the substantial questions of law are left open. No costs.

Sd/-
Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

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To

1. The Commissioner of Central Excise,
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of Central Excise,
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2. The Customs,
The Excise and Service Tax Appellate Tribunal,
Shastri Bhavan Annex,
26, Haddows Road,
Hennaing - 600 006.

+1cc to Mr.R.Karthikeyan, Advocate, S.R.No.8484
+1cc to Mr.A.P.Srinivas, Advocate, S.R.No.8783

C.M.A.NO.2363 OF 2007

KK(CO)
PBS/22/02/2022