

(2017) 05 DEL CK 0055

In the Delhi High Court

Case No : 1 of 2017

AMBUJA CEMENTS LTD.

APPELLANT

Vs

SERVICE TAX COMMISSIONERATE, DELHI

RESPONDENT

Date of Decision : 08-05-2017

Acts Referred:

Constitution of India, Article 32 -
Remedies for enforcement of rights conferred by this Part
Central Excise Act, 1944, Section 35G -
Appeal to High Court
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Citation : (2017) 05 DEL CK 0055

Hon'ble Judges : S Muralidhar, Anil Kumar Chawla

Bench : DIVISION BENCH

Advocate : M.P. Devnath, Abhishek Anand,Yogendra Aldak, Deepak Anand

Judgement

1. This is an appeal under Section 35G of the Central Excise Act, 1944 ("CE Act") read with Section 83 of the Finance Act, 1994 ("FA") against the final order dated 20th September, 2016 passed by the Customs, Excise and Service Tax Appellate Tribunal, Delhi ("CESTAT") dismissing appeal No.ST/A/53726/2016-CU(DB).

2. The facts in brief are that the Appellant/Assessee is inter alia engaged in the manufacture of clinker and cement falling under Chapter heading 25 of the CE Tariff Act, 1985. Between 16th July, 1997 and 30th September, 1999, the Appellant received "Clearing and Forwarding Agent Service" from various services providers. In terms of the provisions that existed during the

relevant period, the Appellant paid service tax of Rs.35,42,021 for the period 16th July, 1997 to 30th September, 1999 under the category of "Clearing and Forwarding Agent Service" on the services so received.

3. In its decision in Laghu Udyog Bharti v. Union of India 1999 (112) ELT 365 (SC), the Supreme Court by its judgment dated 27th July, 1999 held that the

person who is receiving services cannot be made responsible for filing returns and paying tax. To overcome the said judgment, on 23rd August, 1999 Notification No.7/1999-ST was issued with effect from 1st September, 1999 whereby sub-clause (iii) in Rule 2(1)(d) of the Service Tax Rules, 1994 was omitted. Meanwhile on 18th November, 1999, following the judgment of the Supreme Court in *Laghu Udyog Bharti* (supra), the Appellant filed refund claim of Rs.35,42,021 being the service tax paid during the period 16th July, 1997 to 30th September, 1999.

4. However, by the order dated 24th January, 2000, the Assistant Commissioner rejected the refund claim on account of unjust enrichment. The amount was asked to be transferred to the Government welfare fund.

5. While the Appellant's appeal was pending before the Commissioner (Appeals), by the Finance Act with effect from 13th May, 2000 a retrospective amendment was made to the FA, 1994 to overcome the effect of the decision of the Supreme Court in *Laghu Udyog Bharti* (supra).

6. In view of the retrospective amendments, the Commissioner (Appeals) by an order dated 12th October 2000, dismissed the Petitioner's appeal confirming the order rejecting the refund claim.

7. Under the Finance Act 2003, the levy of service tax on recipients of service with effect from 16th July, 1997 to 16th October, 1998 was validated. Aggrieved by the above amendment many of the Assesseees including the Appellant herein filed writ petitions directly in the Supreme Court under Article 32 of the Constitution.

8. By its judgment dated 17th March 2005 in a batch of cases in which the lead case was *The Associated Cement Cos. Ltd. v. Union of India* [WP (C) No.411/2000] and which included WP (C) No.539/2000 filed by the Appellant herein (earlier known as Gujarat Ambuja Cement Ltd.), the Supreme Court inter alia rejected the challenge to the constitutional validity of the amendments. The Supreme Court further observed as under:

"Although the challenge to the constitutional validity and legality of the levy of service tax is rejected, the writ petitioners have some subsidiary complaints. They say that although the levy of service tax from the users of the services rendered by the goods transport operators was introduced with effect from 16th November, 1997, the levy was exempted for the period subsequent to 2nd June, 1998 in view of the notification dated 2nd June, 1998 which is still operative. Yet the respondents had raised demands for service tax for periods subsequent to 2nd June, 1998. It has been conceded by the Union of India that the amendments made in the Act would have to be read along with the notifications so that the levy and collection of service tax would be only in respect of services rendered by goods transport operators between the period from 16th November, 1997 to 2nd June, 1998. Similarly there can be no tax liability on users of the services of the clearing and forwarding agents beyond

1.9.1999 when by notification No.7/99 dated 23.8.99, the levy of servicetax on the services provided by clearing and forwarding agents were exempted. Furthermore the liability to pay interest or penalty on outstanding amounts will arise only if the dues are not paid within the period of two weeks from the order passed by this Court on 17th November, 2003. In those cases in which the tax may have been paid but not refunded to the writ petitioners, for whatever reason, there is no question of levy of any interest or penalty at all. With these clarifications, the writ petitions are dismissed without any order as to costs."

9. Subsequently the Supreme Court disposed of an application filed being IA No.3/2005 in WP(C) No.450/2000 (Birla Corporation Limited v. Union of India), on 3rd February 2006 and directed substitution of the words "beyond 01.09.1999" with the words and figures "beyond 16.10.1998" occurring in the penultimate paragraph of the decision dated 17th March, 2005.

10. The net effect of the said change was that there could be no service tax liability on user of the services of clearing and forwarding agents beyond 16th October, 1998.

11. Learned counsel for the Respondent sought to contend that when the entire paragraph of the decision dated 17th March, 2005 of the Supreme Court is read as a whole then it was plain that the intention was not to exempt from payment of tax the users of services of clearing and forwarding agents beyond 16th October, 1998.

12. The fact remains that the Union of India did not challenge the order dated 3rd February, 2006 passed by the Supreme Court making a minor but significant change to its judgment dated 17th March, 2005. The Supreme Court was clear that the exemption from payment of service tax on services provided by clearing and forwarding agents stood exempted from 16th October, 1998 itself.

13. In the light of the above decision of the Supreme Court as clarified by its order dated 3rd February 2006, there can be no manner of doubt that the Appellant would be entitled to refund of the service tax for the period beyond 16th October, 1998. Since there is no ambiguity in the order of the Supreme Court and the Union of India has not sought any further clarification, the law as explained by the Supreme Court in its judgment dated 17th March, 2005 read with its order dated 3rd February 2006 has to be strictly applied.

14. It was submitted that the Appellant ought to have appealed against the dismissal of its appeal and not straightway approached this Court with the petition under Article 226 of the Constitution. It is seen that the Petitioner was before the Supreme Court with its petition under Article 32 of the Constitution, which was a remedy available to the Petitioner and rightly availed by it. Merely because it did not choose to exhaust a statutory remedy which was also available, does not preclude the Appellant from seeking legal redress by filing a writ petition directly in the Supreme Court.

15. While admitting this appeal on 14th March, 2017, this Court framed the following question of law: "Whether the CESTAT erred in upholding the denial of refund claimed by the appellant for the period 16.10.1998 to 01.09.1999 in respect of service tax paid by it"

16. In view of the above discussion, the Court answers the above question in the affirmative by holding that the CESTAT erred in upholding the denial of refund claim by the Appellant for the period 16th October, 1998 to 1st September, 1999 in respect of service tax paid by it on the clearing and forwarding services availed by it. The impugned orders of the Commissioner (Appeals) and CESTAT are hereby set aside. The appeal is allowed in the above terms but in the circumstances with no orders as to costs.

17. The Respondent will now refund to the Appellant the refund amount due for the period 16th October, 1998 to 1st September 1999, together with the interest due thereon, within a period of four weeks. If there is any non-compliance with the above directions of the Court, it would be open to the Appellant to seek appropriate remedies in accordance with law. CM No.10183/2017 (Exemption)

18. Allowed subject to just exceptions.