

(2013) 12 GUJ CK 0216
In the Gujarat High Court
Case No : Tax Appeal No. 1078 of 2013

Astik Dyestuff (P.) Ltd.

APPELLANT

Vs

Commissioner of Central Excise and Customs

RESPONDENT

Date of Decision : 04-12-2013

Acts Referred:

Citation : (2014) 43 GST 409 : (2014) 25 GSTR 425 : (2014) 34 STR 814 :
(2014) 70 VST 61

Hon'ble Judges : R.P. Dholaria, J;M.R. Shah, J

Bench : Division Bench

Advocate : Dhaval Shah, for the Appellant;

Judgement

M.R. Shah, J.—Present Tax Appeal has been preferred by the appellant herein challenging the impugned judgment and order dated 1.3.2013 passed by the learned Customs, Excise and Service Tax Appellate Tribunal (hereinafter referred to as the "Appellate Tribunal") passed in Appeal No. E/936/2011 with the following proposed substantial questions of law:

A. Whether the Tribunal was justified in law in passing the impugned order dated 01.03.2013 allowing the revenue's appeal without considering the contrary decisions of the Punjab and Haryana High Court and the Gujarat High Court in respect of CENVAT credit eligibility of service tax on sales commission in their entirety and the consequences of revenue not filing any appeal against the decision of the Punjab and Haryana High Court in Commissioner of Central Excise, Ludhiana Vs. Ambika Overseas,

B. Whether the Tribunal was justified in facts and law in passing the impugned order dated 1.3.2013 by relying exclusively on the Gujarat High Court decision in Commissioner of C. Ex., Ahmedabad-II Vs. Cadila Healthcare Ltd.,

C. Whether the Tribunal was justified in facts and law in passing the impugned order dated 1.3.2013 by overlooking the settled law that the CENVAT is a central levy imposed through an All India Statute and therefore, such a levy has to be

collected uniformly from all similarly situated manufacturers located all throughout the country and if excise authority of a particular Commissionerate or State refuses to allow benefit of CENVAT credit of service tax on sales commission to manufacturers located in that Commissionerate or State but other manufacturers located elsewhere are allowed such CENVAT credit, then the said law and/or practice would be in utter violation of Article 14 of the Constitution of India and also of Article 19(1)(g) of the Constitution of India?

D. Whether the Tribunal committed a manifest error of law in passing the impugned order dated 01.03.2013 by overlooking the patent discrimination involved in upholding in the order in original and the settled law that in cases involving legal interpretation of All India Statutes and in which contrary decisions are in existence on the date of the revenue appeal, allowing revenue appeal without considering the issues involved in depth is illegal as well as absurd?

E. Whether the Tribunal's order dated 1.3.2013 impugned in this appeal amounts to a manifest injustice as well as discrimination in not considering the final orders in favour of the assessee in previous cases involving same issue and same definition of "input service" under the CENVAT Credit Rules, 2004?

F. Whether the Tribunal's order dated 1.3.2013 allowing the appeal of revenue by relying only on Gujarat High Court decision reported as Commissioner of C. Ex., Ahmedabad-II Vs. Cadila Healthcare Ltd., is perverse, absurd and patently illegal inasmuch as the services of commission agents/brokers are availed for procuring the sales orders against which the manufacturer makes direct supplies to the customers and the commission agents/brokers get the commission and therefore, these services of commission agents/brokers are in the nature of sales promotions, an activity specifically covered in the inclusive in the definition of "input service"?

G. Whether in the facts and circumstances of the case and in the light of the precedent orders of the Punjab and Haryana High Court other co-ordinate benches of CESTAT in cases involving same definition of "input services", the Tribunal was justified in mechanically allowing the appeal of revenue and restoring the order in original?

That the appellant herein availed Cenvat Credit on Sales Commission Services obtained by them. That the Assistant Commissioner of Central Excise, Division- I, Ankleshwar issued show-cause notice on 30.7.2009 proposing recovery of Cenvat Credit of service tax paid on commission for the period July 2008 to April 2009 along with interest. That the appellant filed its reply to the show-cause notice dated 28.8.2009. That the learned Assistant Commissioner passed order in original dated 6.1.2010 upholding show-cause notice and held that sales commission services are not eligible for Cenvat Credit, as per definition of "Input Service" defined under rule 2(1) of the Cenvat Credit Rules, 2004. At the outset, it is required to be noted that while holding so, the adjudicating authority relied upon the decision of the jurisdictional High Court in the case of CCE v. Cadila

Healthcare Ltd. [2013] 32 taxmann.com 105 (Guj.).

1.1 Feeling aggrieved and dissatisfied with Order in Original dated 6.1.2010, the appellant preferred appeal before the Commissioner (Appeals) and vide order dated 23.5.2011, the Commissioner (Appeals) allowed the said appeal and quashed and set aside the order in original.

1.2 Feeling aggrieved and dissatisfied with the order passed by the Commissioner (Appeals) dated 23.5.2011, the Department preferred appeal before the CESTAT and by impugned judgment and order the learned CESTAT has allowed the said appeal and has restored the order in original by holding that in view of the decision of the Jurisdictional High Court in the case of Cadila Healthcare Ltd. (supra), the appellant was not eligible for Cenvat Credit on Sales Commission Services obtained by them.

1.3 Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the learned CESTAT, the appellant has preferred the present appeal with the aforesaid proposed substantial question of law.

2. Shri S. Suriyanarayan, learned advocate has appeared with Shri Dhaval Shah, learned advocate for the appellant and has vehemently submitted that in view of circular issued by CBEC dated 29.4.2011, the appellant shall be entitled to Cenvat Credit on Sales Commission Services obtained by them. It is further submitted that as such CBEC circular is binding to the department. It is submitted that therefore, the department could not have taken a contrary decision to the circular issued by the CBEC. Number of decisions have been relied upon by Shri S. Suriyanarayan, learned advocate for the appellant in support of his above submissions.

2.1 It is further submitted by Shri S. Suriyanarayan, learned advocate for the appellant that as such in view of decision of the Punjab and Haryana High Court in the case of Commissioner of Central Excise, Ludhiana Vs. Ambika Overseas, the appellant shall be entitled to Cenvat Credit on Sales Commission Services obtained by them. It is submitted that therefore, the decision of this Court in the case of Cadila Healthcare Ltd. (supra) would be just contrary to the decision of the Punjab and Haryana High Court in the case of Ambika Overseas (supra), therefore, it is requested to refer the matter to the Larger Bench.

2.2 Making above submissions and relying upon the above decision, it is requested to allow/admit the present appeal.

3. Heard Shri S. Suriyanarayan, learned advocate for the appellant. At the outset, it is required to be noted that issue involved in the present appeal i.e. whether the appellant would be entitled to Cenvat credit on Sales Commission Services obtained by them is now not res Integra in view of the decision of this Court in the case of Cadila Healthcare Ltd. (supra). At this stage, it is required to be noted that while passing the OIO the department relied upon and followed the decision of the jurisdictional High Court in the case of Cadila Healthcare Ltd.

(supra). The appellant has heavily relied upon the CBEC circular dated 29.4.2011 and according to the appellant, as per the CBEC circular dated 29.4.2011, the appellant shall be entitled to Cenvat Credit on Sales Commission Services obtained by them. As contended/submitted on behalf of the appellant, CBEC circular dated 29.4.2011 is binding to the department and therefore, while passing OIO the adjudicating authority ought not have taken a contrary view/decision then the CBEC circular. On interpretation of the relevant provision of law in the case of Cadila Healthcare Ltd. (supra) jurisdictional High Court has held that on Sales Commission Services obtained by them, Cenvat credit is not permissible. It appears that while issuing the circular dated 29.4.2011, CBEC has not considered the decision of this Court in the case of Cadila Healthcare Ltd. (supra). In any case, the decision of the jurisdictional High Court is binding to the department rather than the circular issued by the CBEC. If there is any conflict between the jurisdictional High Court and the CBEC circular, the decision of the jurisdictional High Court is binding to the department rather than CBEC circular. Under the circumstances, the contention on behalf of the appellant that the department has erred in taking contrary decision then the CBEC circular, cannot be accepted. As such the adjudicating authority rightly relied upon and followed the binding decision of this Court in the case of Cadila Healthcare Ltd. (supra).

4. Now, so far as request made by Shri S. Suriyanarayan, learned advocate for the appellant that in view of the contrary decision of the Punjab and Haryana High Court in the case of Ambika Overseas (supra) matter may be referred to the Larger Bench as there would be discrimination amongst the similar unit is concerned, the said cannot be accepted. At the outset, it is required to be noted that decision of the jurisdictional High Court - this Court in the case of Cadila Healthcare Ltd. (supra) is challenged before the Hon"ble Supreme Court and the Hon"ble Supreme Court is seized with the matter. It is reported that judgment and order passed by this Court in the case of Cadila Healthcare Ltd. (supra), has not been stayed. The decision of the jurisdictional High Court is binding to the department rather than decision of the other High Court. When there are two contrary decisions, one of jurisdictional High Court and another of the other High Court, then the decision of the jurisdictional High Court is binding to the department and not the decision of another High Court. Under the circumstances, while passing OIO and while passing the impugned judgment and order, the learned CESTAT has rightly relied upon the binding decision of the jurisdictional High Court in the case of Cadila Healthcare Ltd. (supra).

5. Now, so far as request made by Shri S. Suriyanarayan, learned advocate for the appellant to refer the matter to the Larger Bench in view of the two contrary decisions - one of this Court in the case of Cadila Healthcare Ltd. (supra) and another of Punjab and Haryana High Court in the case of Ambika Overseas (supra) is concerned, the same also cannot be accepted. As stated above, appeal against the decision of this Court in the case of Cadila Healthcare Ltd. (supra) is pending before the Hon"ble Supreme Court and the Hon"ble Supreme Court is

seized with the matter. Under the circumstances, it will not be proper on our part to refer the matter to the Larger Bench. Even otherwise, we see no reason to take a contrary view then the decision of this Court in the case of Cadila Healthcare Limited (supra). Merely because, there might be a contrary decision of another High Court, is no ground to refer the matter to the Larger Bench against the decision of this Court, to which, as such we are in agreement. Under the circumstances, the request made by Shri S. Suriyanarayan, learned advocate for the appellant to refer the matter to the Larger Bench is hereby rejected.

6. As stated above and as such it is not disputed by the learned advocate for the appellant that as such issue whether the appellant would be entitled to Cenvat Credit on Sales Commission Services obtained by them is squarely covered against the appellant by the decision of this Court in the case of Cadila Healthcare Ltd. (supra). No error has been committed by the learned CESTAT in relying upon the decision of this Court in the case of Cadila Healthcare Ltd. (supra) and allowing the appeal preferred by the revenue and in restoring the order passed in OIO and in holding that the appellant would not be entitled to Cenvat Credit on Sales Commission Services obtained by them. In view of the above and for the reasons stated above, present appeal deserves to be dismissed and is accordingly dismissed. In view of dismissal of appeal, no order in OJCA No. 696 of 2013 and is accordingly dismissed.