

(2015) 09 GUJ CK 0008
In the Gujarat High Court
Case No : Tax Appeal No. 363 of 2015

Commissioner

APPELLANT

Vs

Reliance Ports & Terminals Ltd.

RESPONDENT

Date of Decision : 11-09-2015

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35G
Finance Act, 1994 — Section 66, 66A, 73, 75

Citation : (2015) 52 GST 976

Hon'ble Judges : Harsha Devani and Abdullah Gulamahmed Uraizee, JJ.

Bench : Division Bench

Advocate : Sejal K. Mandavia, Advocate, for the Appellant; J.C. Patel, Shilpa Balani and Dilip Kanojiya, for the Respondent

Judgement

Harsha Devani, J.—In this appeal under section 35G of the Central Excise Act, 1944 (hereinafter referred to as "the Act"), the appellant has called in question the order dated 17.12.2014 passed by the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench, Ahmedabad (hereinafter referred to as "the Tribunal"), by proposing the following three questions stated to be substantial questions of law:

"(i) Whether the Hon'ble Customs, Excise and Service Tax Appellate Tribunal (CESTAT), West Zonal Bench, Ahmedabad, while passing the Order in CCE, Cus. & ST\.. Reliance Ports & Terminals Ltd. [2015] 55 taxmann.com 73, has correctly allowed the Cenvat Credit of Service Tax paid under section 66A of the Finance Act, 1994 for the services of "Consulting Engineer" and "Banking and other Financial Service" without confirming that the said service are "input service" of the respondent as contemplated under Board's letter.

(ii) Whether the Hon'ble Customs, Excise and Service Tax Appellate Tribunal (CESTAT), West Zonal Bench, Ahmedabad, while passing the Order No. A/12359/2014, dated 17.12.2014, has correctly allowed the Cenvat Credit of Capital Goods without ascertaining that the said capital goods were used for

providing output services provided by the respondent i.e. "Port Service" etc.

(iii) Whether in the facts and circumstances of the case, was the Tribunal right in law to allow the Cenvat Credit of Rs. 59,82,52,117/- and uphold the OIO No. 41/ Commr/2012, dated 27.08.2012, passed by the adjudicating authority?"

The respondent - M/s. Reliance Ports & Terminals Ltd., Jamnagar is a holder of Service Tax Registration. During the course of audit by the CERA audit party, it was noticed that the respondent had availed and utilized the CENVAT credit of service tax to the tune of Rs. 3,74,48,847/- paid as a recipient of service under section 66A during the financial years 2006-07 and 2007-08 on Consulting Engineers Service and Banking & Finance Service. According to the appellant, as the CENVAT Credit of service tax paid under section 66A is not allowed by rule 3 of the Cenvat Credit Rules, 2004 (hereinafter referred to as "the rules"), the CENVAT credit availed by the respondent on the above service tax paid by them as recipient of service appeared to be irregular and wrongly availed. Further, on scrutiny of the CENVAT credit records and other related records of the respondent, it was noticed that the respondent had availed and also utilized CENVAT credit of Rs. 56,08,03,270/- on duty paid on capital goods received for expansion in respect of "Coated Line Pipes" supplied by M/s. PSL Ltd., Gandhidham for "SPMs with Sea Base Pipelines Project" during financial years 2006-07 and 2007-08. However, the said project was completed only in May, 2008 by the respondent. As per rule 4(2) of the rules, the CENVAT credit in respect of the capital goods received in a factory or in the premises of the provider of output service at any point of time in given financial year, shall be taken only for an amount not exceeding 50% of the duty paid on such capital goods in the same financial year. As regards the balance 5096 of the CENVAT credit thereon, the same has to be taken in any financial year subsequent to the financial year in which such capital goods were received in the factory of the manufacturer subject to such capital goods (if not excluded) being in his possession, as provided under rule 4(2)(b) of the rules. It appeared that the availment and utilization of the above CENVAT credit by the respondent was even before the actual installation of the capital goods was irregular and caused unintended benefit to the respondent, which was required to be recovered from it along with interest under rule 14 of the rules, read with sections 73 and 75 of the Finance Act, 1994. It also appeared that the respondent had, by wrongly availing the CENVAT credit of service tax paid under section 66A of the Finance Act, 1994, which is not specified as a tax to be availed as CENVAT credit under rule 3 of the rules and by irregularly utilizing the CENVAT credit of duty paid on capital goods before the actual installation of the credit availed capital goods, had contravened the provisions of rules 3 and 4 of the Rules.

2. Accordingly, a show cause notice dated 13.10.2011 came to be issued to the respondent, which culminated into an order-in-original dated 27.08.2012 passed by the Commissioner, Central Excise & Customs, Rajkot, who observed that the two issues to be decided were (i) whether the noticee is eligible to avail CENVAT

credit of the service tax paid on input services as recipient during the period 2006-07 to 2007-08 under the category of "Consulting Engineers" and "Banking and other Financial Services", and (ii) whether the credit availed on capital goods without installation is proper or not. On the issue of CENVAT credit of the service tax paid on input service of "Consulting Engineers" and "Banking and other Financial Services", the Commissioner observed that the issue was examined by the Ministry who, after examining the provisions of law, had issued instructions in their letter dated 16.07.2009 whereby, it was clarified that the provisions under section 66A state that in case service is provided from abroad and received in India, such taxable service shall be treated as if the recipient had himself provided the service in India, and accordingly, all the provisions of Chapter V of the Finance Act, 1994 would apply. Therefore, it is clear that section 66A is not a charging section by itself. In fact, it only creates a legal fiction to deem import of service as provision of service within India so that the provisions of Chapter V of the Finance Act, 1994 can be applied thereto. The charging section remains section 66 even for the service imported. In other words, the tax collected from the recipient in terms of section 66A is also tax chargeable under section 66 of the Finance Act, 1994. Therefore, there is no mistake or omission in the relevant provisions of the CENVAT Credit Rules, 2004 and that credit of tax paid on imported services should be allowed if they are in the nature of input services. The Commissioner placed reliance upon a clause (ixa) inserted in sub-rule (1) of rule 3 of the rules, with retrospective effect from 18.04.2006, thereby allowing credit of service tax paid under section 66A of the Finance Act, 1994 and held that the respondent was eligible to take CENVAT credit of the service tax paid under section 66A of the Finance Act, 1994.

3. On the second aspect of taking CENVAT credit on capital goods prior to its installation, the Commissioner found that the respondent could avail 50% CENVAT credit of duty paid on capital goods in the same financial year in which the capital goods were received and the balance 50% in the subsequent financial year under the provisions of rule 3(1), read with rule 4(2)(a) of the rules. The Commissioner further observed that rule 3(1) of the Cenvat Credit Rules, 2004 allows availment of the CENVAT credit of any input or capital goods received in the factory of manufacture of final product or premises of the provider of output service on or after the 10th day of September, 2004. Rule 4(2)(a) of the Cenvat Credit Rules, 2004 provides that Cenvat Credit in respect of capital goods received in a factory or in the premises of the provider of output service at any point of time in a given financial year can be taken only for an amount not exceeding fifty per cent of the duty paid on such capital goods in the same financial year. After taking into consideration and discussing two Board's circulars dated 03.04.2000 and that of 28.04.2006, the Commissioner observed that, from the two circulars, it is clear that the condition of installation and usage for availing Cenvat credit on capital goods was effective till 09.09.2004 and not thereafter. In the present case, the capital goods have been procured after that date, in the year 2007-08. The Commissioner further observed that there is no

specific debarring provision in the Cenvat Credit Rules, 2004 and the only condition is that the capital goods must be used for manufacture of excisable goods or for providing output service. Placing reliance upon various decisions on the issue of availment of CENVAT credit on capital goods without installation, the Commissioner observed that there is no pre-condition of installation of capital goods for availing the CENVAT credit on the same in the Cenvat Credit Rules, 2004 which was also clarified by the CBEC vide the above referred circulars. He, accordingly, held that the allegations made in the show cause notice are not sustainable and dropped the demand on merits.

4. The Department carried the matter in appeal before the Tribunal. By the impugned order dated 17.12.2014, the Tribunal dismissed the appeal and confirmed the findings recorded by the Commissioner.

5. Ms. Sejal Mandavia, learned standing counsel for the appellant assailed the impugned order by submitting that the Tribunal has totally overlooked the contention of the revenue made in the grounds of appeal that the services, namely, "Consulting Engineers" and "Banking and other Financial Services" would not qualify as "input service" of the respondent for providing of output service, that is, "Port Service", etc. and also overlooked the contention of the department that the capital goods on which the respondent had taken and utilized the credits were not used for providing output service, that is, "Port Service" etc. The Tribunal has observed that the said contention was not made earlier by the revenue and disputed the same only in the grounds of appeal filed by the Department. Referring to the findings recorded by the Commissioner, it was pointed out that the Commissioner has failed to take note of the fact that the credit of tax paid on imported services (viz. tax paid under section 66A) can be allowed/taken if they are in the nature of "input services". Therefore, the Commissioner has erred in relying upon the Board's letters to assert that the credit of service tax paid on the imported services can be allowed, without ascertaining the basic premise of the said letters, as to whether the services of "Consulting Engineers" and "Banking and other Financial Services" used by the respondent would qualify as "Input Service" in its case. It was submitted that the Commissioner has not at all examined the proposition as to the eligibility of the above services used by the respondent, as "input service", which he ought to have done before allowing the credit.

5.1 On the second issue, it was submitted that the Commissioner had permitted CENVAT credit on capital goods, by solely relying on the Board's letters dated 03.04.2000 and 28.06.2006, for the proposition that the condition of installation of capital goods prior to availing CENVAT credit is no longer required, without ascertaining as to whether the goods in respect of which CENVAT credit was availed are "capital Goods" as defined in rule 2(a) of the rules, and also whether the same were used for providing "output services" of the type provided by the respondent, viz. "Port Services", etc. It was, accordingly, urged that the appeal deserves to be admitted on the questions as proposed or as may be formulated

by the court.

6. Opposing the appeal, Mr. J.C. Patel, learned counsel with Ms. Shilpa Balani and Mr. Dilip Kanojia, learned advocates for the respondent invited the attention of the court to the show cause notice dated 13.10.2011, to point out that the same has been issued only on two grounds. Firstly, that CENVAT credit on service tax paid under section 66A is not allowed by rule 3 of the rules and CENVAT credit availed by the assessee was irregular and wrongly availed and required to be recovered with interest under rule 14 of the rules, read with sections 73 and 75 of the Finance Act, 1994; and secondly, that the assessee had availed and utilized CENVAT credit of duty paid on capital goods received for expansion in respect of "Coated Line Pipes" supplied by M/s. PSL Ltd., Gandhidham for "SPMs with Sea base Pipelines Project" during 2006-07 and 2007-08, and that the project was completed only in May 2008. That the CENVAT credit availed and utilized by the assessee before the actual installation of the capital goods is irregular and caused unintended benefit to it, which was required to be recovered from it with interest under rule 14 of the rules, read with sections 73 and 75 of the Finance Act, 1994. It was submitted that in the entire show cause notice, there is no ground as to whether the services used by the assessee would qualify as "input service" and as to whether the capital goods were used in providing "output service" of the type provided by the assessee. It was pointed out that insofar as the merits of the impugned orders passed by the Commissioner and the Tribunal is concerned, the appellant does not dispute the same. However, the impugned order as well as the order-in-original are sought to be challenged on grounds which are beyond the scope of the show cause notice.

6.1 Reference was made to the decision of the Supreme Court in the case of Commissioner of Central Excise, Nagpur Vs. Ballarpur Industries Ltd., wherein the court held that it is well settled that the show cause notice is the foundation in the matter of levy and recovery of duty, penalty and interest. In the facts of the said case the court observed that if there is no invocation of rule 7 of the Valuation Rules 1975 in the show cause notice, it would not be open to the Commissioner to invoke the said rule. Reference was also made to the decision of the Supreme Court in the case of CCE v. Gas Authority of India Ltd. 2008 taxmann.com 847, for the proposition that the show cause notice is the foundation of the demand under Central Excise Act and if the show cause notice in that case itself proceeded on the basis that the product in question was a by-product and not a final product, then, in that event, the court need not answer the larger question of law framed. The court was in agreement with the view expressed by the Tribunal that nowhere in the show cause notice it had been alleged by the Department that Lean Gas was a final product. The court observed that ultimately, an assessee is required to reply to the show cause notice and if the allegation proceeds on the basis that Lean Gas is a by-product, then there is no question of the assessee disputing that statement made in the show cause notice. The court dismissed the appeals only on the ground that there was no allegation made in the show cause notice that Lean Gas was the final product. It

was, accordingly, urged that as the revenue is not disputing the merits of the impugned order on the grounds decided by the Commissioner, there is no warrant for interference by this court.

7. This court has considered the submissions advanced by the learned counsel for the respective parties and has perused the impugned orders passed by the Tribunal as well as by the Commissioner as well as the decisions cited by the learned counsel for the respondent.

8. On a conjoint reading of the show cause notice issued to the assessee and the questions proposed in this appeal, it is evident that the issues raised in the questions proposed do not find place in the show cause notice. From the averments made in the memorandum of appeal and the grounds raised therein as well as on a perusal of the impugned order passed by the Tribunal, it appears that the appellant does not dispute the validity of the order of the Tribunal on the grounds decided by the Commissioner, but on grounds, which were not subject matter of the show cause notice. In the show cause notice, the assessee was not called upon to state as to whether the services of "Consulting Engineers" and "Banking and other Financial Services" are "input services" of the respondent or as to whether the capital goods were used for providing "output services" provided by the respondent viz. "Port Services", etc. Evidently therefore, in the present appeal, the appellant seeks to challenge the impugned order passed by the Tribunal on grounds which were never subject matter of the show cause notice. Under the circumstances, in the light of the settled legal position as emerging from the above referred decisions of the Supreme Court, that the show cause notice is the foundation of the demand under the Central Excise Act and that the order-in-original and the subsequent orders passed by the appellate authorities under the statute would be confined to the show cause notice, the question of examining the validity of the impugned order on grounds which were not subject matter of the show cause notice would not arise. In the aforesaid premises, in the absence of any infirmity in the findings recorded by the Commissioner or the Tribunal, there is no warrant for interference. The questions proposed by the appellant which were not subject matter of the show cause notice, do not arise out of the impugned order passed by the Tribunal. The appeal being devoid of any merit, is, accordingly, dismissed.