

(2014) 01 GUJ CK 0067
In the Gujarat High Court

Case No : Tax Appeal Nos. 1044 & 1048 of 2013

Commissioner of Central Excise, Ahmedabad-III

APPELLANT

Vs

Gujarat State Petronet Ltd.

RESPONDENT

Date of Decision : 09-01-2014

Acts Referred:

Finance Act, 1994 — Section 73, 76, 77, 78, 78(1)

Citation : (2014) 43 GST 635 : (2014) 34 STR 321 : (2014) 73 VST 92

Hon'ble Judges : Sonia Gokani, J; Akil Abdul Hamid Kureshi, J

Bench : Division Bench

Advocate : Y.N. Ravani, Advocate for the Appellant; Sujit Ghosh, Maulik Nanavati, Ms. Kanupriya Bhargava and Ms. Nikita Mehta, Advocate for the Respondent

Judgement

Akil Abdul Hamid Kureshi, J.—Tax Appeals are ADMITTED for consideration for the following substantial questions of law:

(i) Whether Customs, Excise and Service Tax Appellate Tribunal committed an error in holding that M/s. GSPL is entitled to CENVAT credit in respect of the services provided by independent service provider in respect of Engineering Consultancy, Inspection Services, ROU/ROW Consultancy, which was paid by M/s. GSPL directly?

(ii) Whether the Tribunal committed an error in entertaining the ground of the respondent M/s. GSPL on such question of CENVAT credit in a Rectification Application and whether the Tribunal can be stated to have corrected the error apparent on the face of record?

To be heard with Tax Appeal Nos. 452, 453 and 454 of 2013.

2. We notice that the appellant-Department has in these appeals also raised additional question with respect to the view of the Tribunal regarding not permitting the extended period of limitation to the Department for recovery of the dues and also of receiving penalties imposed by the Adjudicating Authority.

However, for the reasons mentioned hereinafter, we are not inclined to entertain such questions.

3. The respondent-M/s. GSPL engaged contractors for laying down the pipelines for transportation of its gas. Various issues with respect to the credit for input services and capital goods purchased, in the process of executing such contracts, are at issue in this group of appeals. The Commissioner as an Adjudicating Authority held that M/s. GSPL was not entitled to avail credit for such input services and capital goods utilised. The Tribunal substantially confirmed the view of the Commissioner, against which M/s. GSPL preferred appeals which we have admitted. To the limited extent the Tribunal ruled in favour of the respondent-M/s. GSPL, appeals have been preferred by the appellant-Department and we have admitted such appeals also. However, presently we are considering the question whether the Tribunal committed an error in not permitting the extended period of limitation and recovering penalty, and whether such view of the Tribunal has given rise to the substantial question of law.

4. We have heard the learned counsel appearing for the parties on this issue. From the order of the Commissioner, we notice that for permitting the extended period of limitation and imposing penalty, he made the following observations:

82.3 Findings: As discussed in foregoing paras, pipes were directly an input for the EPC contractors. Pipes are procured and used for providing service of construction of pipeline by the EPC contractors. I further observe that the direct nexus between pipes and the output service of "construction of pipeline or other conduit" provided by EPC contractors, is much stronger than the indirect nexus between pipes and the output service of "Transport of goods through pipeline or other conduit" provided by GSPL, because pipes are first used for construction of pipeline and thereafter pipeline is used for transportation of gas through pipeline. Therefore I hold that pipes were used directly for construction of pipeline and then later on indirectly for transportation of gas through pipeline. As discussed above, EPC contractors were eligible for credit on inputs but they have not taken the credit of pipes as they have availed benefit of notification No. 12/2003.

83.1 I have perused the opinion of Price Waterhouse Coopers (hereinafter referred to as PWC) tendered vide letter dated 24.11.2005. They have expressed in their opinion that GSPL should be entitled for credit on pipes. However, in Para 3.2.2, they had opined that departmental authorities may interpret that credit cannot be passed on by EPC contractor. They had further advised that "before availing credit by GSPL, it would be prudent to obtain a suitable clarification from CBEC that under Notification Nos. 12/2003-ST, 19/2003-ST & 15/2004-ST, the EPC Contractor by passing the CENVAT credit of duty paid on goods and materials used in the project is not violating the conditions of these notifications that credit should not be availed by EPC Contractor.

83.2 Therefore, I find that GSPL cannot plead innocence that they were not aware of law. They were aware as advised by PWC that the matter is not free

from doubt and departmental authorities may take different interpretation. They have intentionally taken credit on pipes without informing the department. I find that though they had sought advice from CBEC, they never informed department that they had taken credit on pipes. Therefore, I find that in this case there is (i) suppression of facts, as they never informed department that they have taken credit on pipes procured by EPC contractors, and(ii) contravention of Finance Act, 1994 and rules made thereunder with intent to evade payment of duty as they were fully aware that the matter is not free from the doubt and contrary to advice given by PWC, they took credit without obtaining clearance from CBEC/ Department.

84.1 find that on part of GSPL showing their fraudulent mindset, suppression of facts from the department and contravention of the Finance Act, 1994, and the rules made thereunder and Notification No. 12/2003-ST with an intent to evade payment of Service Tax (Para 83 refers) and thus renders them liable for the penalty u/s 76 of the Finance Act, 1994 since, GSPL have made payment of Service Tax on their output service by utilizing the credit which was not eligible at first instance itself.

5. However, when the matter was carried in appeal before the Tribunal, the Tribunal gave detailed reasons for coming to a conclusion that there was no wilful mis-statement made by the respondent-assessee. The Tribunal observed that when the assessee availed certain benefits claiming to be covered by the statute and when it is found that such benefits were not available, surely the assessee can be stated to have made mis-statement. However, whether such mis-statement was wilful or not is to be examined. In this context, the Tribunal was influenced by the fact that the issue was not free from doubt. The assessee had obtained a legal opinion from experts. Even thereafter the assessee had approached the CBEC for clarification. The CBEC did not respond to such communication. The Tribunal, therefore, held that when two views were possible and when the legal opinion was also available, it can be held that the assessee held a bona fide belief that the credit was available. The Tribunal, therefore, held that there was no wilful mis-statement on the part of the assessee. There was no suppression of facts. The Tribunal observed that the assessee is a public sector unit and the tax or duty evaded would not benefit any individual. Considering such circumstances, the Tribunal did not grant extended period to the Department and also deleted the penalty imposed by the Commissioner.

6. We notice that the penalties were sought to be imposed for breach of sections 76 and 78 of the Finance Act, 1994. Section 76 provides for penalty for failure to pay service tax and provides that any person, liable to pay service tax fails to pay the same, shall pay, in addition to such tax and the interest on that tax, be liable to a penalty which shall not be less than two hundred rupees for every day during which such failure continues or at the rate of two per cent per month, whichever is higher. Sub-section (1) of section 78 provides for penalty where any service tax has not been levied or paid or has been short-levied or short-paid or

erroneously refunded, by reason of fraud, collusion, wilful mis-statement or suppression of facts or contravention of any of the provisions of the Chapter in which the section is contained or the rules made thereunder with intent to evade the payment of service tax.

7. Section 80 of the Finance Act, 1994, pertains to penalty not to be imposed in certain cases, which reads as under:

80. Penalty not to be imposed in certain cases

Notwithstanding anything contained in the provisions of section 76 (section 77 or section 78), no penalty shall be imposable on the assessee for any failure referred to in the said provisions, if the assessee proves that there was reasonable cause for the said failure.

8. It can, thus, be seen that the penalty u/s 78(1) of the Finance Act, 1994, can be imposed if the tax has not been levied or paid or has been short-paid or short-levied or erroneously refunded for the reason of fraud, collusion, wilful mis-statement, suppression of facts or contravention of provision with an intent to evade payment of tax. While section 76 does not use such expressions, nevertheless it is to be seen in light of section 80, which provides that no penalty shall be imposable on the assessee for any failure referred to in the said provisions, if the assessee proves that there was reasonable cause for such failure.

9. Observations and conclusions of the Tribunal, therefore, shall have to be seen in light of such statutory provisions.

10. To begin with, the Commissioner in the order-in-original, in our opinion, did not give any elaborate reasons why he came to the conclusion that there was wilful default on the part of the assessee. On the contrary, the Tribunal gave detailed and convincing reasons how there were bona fides on the part of the assessee in claiming the tax credit. The issue itself was complex and by no means free from doubt. The assessee obtained legal opinion, which subject to certain riders provided that the tax credit would be available. However, the assessee approached the CBEC for guidance. It may be that the CBEC would not give such individual opinion. Nevertheless, this would further establish the bona fides of the assessee as observed by the Tribunal. The contention of the learned counsel for the Department that the communication of the CBEC was not on record, does not appear to be accurate as pointed out by the learned counsel for the respondent. Our attention was drawn to the communication dated February 14, 2006 from the assessee to the CBEC, which we were informed, was on record before the Tribunal also.

11. Like in the case of penalty u/s 78(1) of the Finance Act, 1994, under sub-section (1) of section 73, the extended period of limitation for recovery of service tax would be available to the Department if the same is occasioned by the reason of fraud, collusion, wilful mis-statement, suppression of material facts or

contravention of any of the statutory provisions with intent to evade payment of tax. When we find that the Tribunal gave sufficient reasons to come to the conclusion that such facts did not arise in the present case, the Tribunal's direction for deleting the penalty and not permitting the extended period of limitation, was based on materials on record and would not give rise to any question of law. Our attention was drawn by the learned counsel for the Department to certain decisions of the Supreme Court to canvass that these questions are also required to be admitted. However, such judgments touch on the aspect of imposing penalty below the minimum prescribed by the statute. This was the issue in the case of CCE v. Prudential Spinners Ltd. 2011 (267) ELT 291 (SC) and also in the case of Union of India (UOI) and Others Vs. Dharamendra Textile Processors and Others, as well as in the case of Union of India (UOI) Vs. Rajasthan Spinning and Weaving Mills, . In the case of The Commissioner of Central Excise, Aurangabad Vs. Bajaj Auto Ltd., Waluj, Aurangabad, through its Vice President (Materials) and Others, , the Supreme Court had disapproved the finding of the Tribunal that since both the assesseees were situated in the jurisdiction of the same division, the Revenue must be aware about the transaction and, therefore, penalty could not be imposed. Such are not the facts in the present case. We are, therefore, not inclined to consider the additional questions presented by the Department.