(2014) 02 P&H CK 0117

In the Punjab And Haryana At Chandigarh

Case No : S.T.A. No. 1 of 2014 (O & M)

Commissioner of Central Excise — APPELLANT

Vs

BSNL (IUC) — RESPONDENT

Date of Decision : 03-02-2014

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35F, 35G
Finance Act, 1994 — Section 65(105)(zzzx), 65(109a), 73, 75, 76

Citation : (2014) 45 GST 24 : (2014) 35 STR 448 : (2014) 73 VST 522

Hon'ble Judges : Anita Chaudhary, J;Ajay Kumar Mittal, J

Bench : Division Bench

Advocate : Sukhdev Sharma, Advocate for the Appellant

Judgement

Ajay Kumar Mittal, J.—This appeal has been preferred by the revenue u/s 35G of the Central Excise Act, 1944 (in short, "the 1944 Act") read with Section 83 of the Finance Act, 1994 (for brevity, "the Act") against the order dated 15.10.2013, Annexure A. 4 passed by the Customs Excise and Service Tax Appellate Tribunal, New Delhi, (in short, "the Tribunal") in ST/STAY/58665/2013, claiming following substantial questions of law:--

(i) Whether the Tribunal is correct in holding that no prima facie case is made out to safeguard the interest of the revenue under the provisions of section 35F of Central Excise Act, 1944?

(ii) Whether the discretion exercised by the Tribunal for complete waiver of pre-deposit is judicious and in accordance with the judicial precedent and law evolved by the Hon''ble Supreme Court of India?

(iii) Whether the impugned order passed by the learned Tribunal is a justified and well reasoned order in accordance with law?

A few facts relevant for the decision of the controversy involved as narrated in the appeal may be noticed. The respondent-assessee is engaged in providing telecommunication (IUC) services as defined u/s 65(109a) of the Finance Act, 1994 as amended and is liable to pay service tax in terms of Section 65(105) (zzzx) of the Act. It is registered with the department for providing services under the category of ''Business Auxiliary services'' vide registration number AABCB5576GST289. It is availing the facility of CENVAT credit under Cenvat Credit Rules, 2004 (in short, "the CENVAT Rules"). During audit, it was noticed that the assessee was wrongly availing the Cenvat Credit of Inter Usage connection (IUC) charges. The case was referred by the Commissioner, Central Excise Commissionerate, Panchkula to the team comprising of jurisdictional range and preventive wing of the Central Excise Division Ambala for further investigation. The assessee was summoned to appear before the Superintendent (Prev.) Central Excise Ambala to submit certain documents, which were examined in detail. The assessee is raising bills and collecting payments regarding IUC charges. It has availed the Cenvat credit of the service tax paid against the bills raised by the other telecom operators considering them as the input services and has utilised the same on the services provided by them. The assessee was summoned to appear on 25.9.2012 and submit the details of payments made and received by them to other telecom operators. The assessee submitted the details of Cenvat credit availed by it during the period 2007-08 to 2011-12. According to the revenue, the input service credit of Rs. 25,82,82,437/- availed by it was inadmissible and recoverable from it under Rule 14 of the CENVAT Rules read with section 73 of the Finance Act, 1994. Accordingly, the assessee was issued a show cause notice dated 10.10.2012, Annexure A. 2 for recovery of inadmissible cenvat credit of Rs. 25,82,82,437/- u/s 73 of the Finance Act by invoking the extended period of limitation along with interest u/s 75 of the Act and proposing penal action under Sections 76, 77, 78 of the Act. The availment of cenvat credit of the said amount was disallowed by the adjudicating authority vide order dated 7.3.2013, Annexure A. 3. Penalties under Sections 76, 77 and 78 of the Act were also imposed. Aggrieved by the order, the assessee filed appeal alongwith stay application before the Tribunal. Vide order dated 15.10.21013, Annexure A. 4, the Tribunal allowed the stay application without any pre-deposit by the assessee. The Tribunal granted full waiver of pre deposit and stayed all further proceedings till disposal of the appeal relying upon earlier judgments of the Chennai and Bangalore Tribunals in the cases of BSNL v. CCE 2011(02) LCX 0123 and (2010) 21 STJ 140 . Hence the present appeal by the revenue.

2. Learned counsel for the revenue submitted that reliance by the Tribunal on the judgments of Chennai and Bangalore Tribunals in BSNL and Manipal Advertising Services (P.) Ltd. cases (supra) was misplaced as the same were distinguishable. Moreover, nothing has been provided to safeguard the interest of the revenue. No hardship had been shown by the assessee. He placed reliance on judgment of this Court in Krishan Kumar v. Commissioner of Customs [CWP No. 2667 of 2009, decided on 19.2.2009].

3. After hearing learned counsel for the appellant, we do no find any merit in the appeal

4. The Tribunal while ordering complete waiver vide order dated 15.10.2013, Annexure A. 4 had noticed as under:--

Prima facie, this area is covered by the decision of the Chennai Bench in BSNL v. CCE Tricky. The decision was rendered in the context of CENVAT credit on capital goods. In another decision of the Bangalore bench in Manipal v. CCE, Bangalore the position is reiterated.

3. In the light of the aforesaid decisions, the petitioner has a prima facie case in its favour. We therefore grant waiver of pre-deposit in full and stay all further proceedings pursuant to the adjudication order, pending disposal of the appeal. The application is disposed of accordingly.

5. The Tribunal had recorded that there was a prima facie case in favour of the assessee in view of the decisions of the Chennai and Bangalore Tribunals in BSNL and Manipal Advertising Services (P.) Ltd. cases (supra). In such a situation, the order of the Tribunal waiving of the pre-deposit in the case of BSNL-respondent cannot be said to be erroneous or perverse in any manner. The argument of the learned counsel for the revenue that these cases are distinguishable shall be examined by the Tribunal at the time of final hearing. Further, the judgment relied upon by learned counsel for the revenue in Krishan Kumar''s case (supra) relating to pre-deposit was based on its own facts and thus does not advance the case of the revenue. In view of the above, finding no merit in the appeal, the same is hereby dismissed. However, the hearing of the appeal be expedited.

