(2013) 11 CAL CK 0047

In the Calcutta High Court

Case No : GA No. 1578 of 2013 CEXA No. 8 of 2013

Commissioner of Central Excise APPELLANT

Vs

Vesuvious India Ltd. RESPONDENT

Date of Decision : 28-11-2013

Acts Referred:

Citation : (2013) 42 GST 543 : (2014) 26 GSTR 360 : (2014) 34 STR 26 : (2014) 71 VST 210

Hon'ble Judges : Subrata Talukdar, J;Girish Chandra Gupta, J

Bench : Division Bench

Advocate : S.B. Saraf and P.D. Mukherjee, for the Appellant;Satyaprem Majumder, for the Respondent

Judgement

1. The Court: The subject matter of challenge in this appeal is a judgment and order dated 18th September, 2012 passed by the Customs, Excise and Services Tax (Appellate) Tribunal, Kolkata by which the learned Tribunal dismissed the appeal preferred by the Revenue following the judgment in the case of Commissioner of Central Excise and Service Tax, LTU. Vs. ABB Ltd., holding that service tax paid by the manufacturer for outward transportation of the goods upto the point of delivery to the customer is claimable as an input service under the Cenvat Rules. Challenging the aforesaid order, the Revenue has come up in appeal.

2. Mr. Saraf, learned advocate appearing for the appellant, submitted that the judgment in the case of ABB Ltd. (supra) rendered by the Karnataka High Court is open to questions and, therefore, the Tribunal should not have followed the judgment. The Tribunal should have instead considered the submissions advanced on behalf of the Revenue and decided the matter independently which the Tribunal did not do.

3. Mr. Majumder, learned advocate, appearing for the respondent-assessee, drew our attention to the judgment in the case of ABB Ltd. (supra). He relied upon the following lines appearing in paragraph 29 of the report, which reads as follows:

29. Input service per se is not confined to pre-manufacturing stage. It also refers to post manufacturing stage. As is clear from the Circular issued by the Board on 23-8-2007, where a manufacture/consignor may claim that the sale has taken place at the destination point because in terms of sale contract/agreement (i) the ownership of goods and the property in the goods remained with the seller of the goods till the delivery of the goods in acceptable condition to the purchaser at his door step (ii) the seller bore the risk of loss of or damage to the goods during transit to the destination; and (iii) the freight charges were an integral part of the price of goods. In such cases, the credit of the service tax paid on the transportation up to such place of sale would be admissible if it can be established by the claimant, of such credit, that the sale and the transfer of property in goods (in terms of the definition as u/s 2 of the Central Excise Act, 1944 as also in terms of the provisions under the Sale of Goods Act, 1930) occurred at the said place. Therefore, if the service tax is paid on transportation charges, in such cases, it fell within the phrase "clearance of final products from the place of removal" and therefore, the assessee was entitled to CENVAT credit.

4. The aforesaid reasoning, we are sorry to say, has not appealed to us. ''Input service'' as defined in Rule 2(1)(ii) does not include the expenses with regard to post-manufacturing stage except for the purpose of transportation of goods from one place of removal to another place of removal. It is, however, true that relaxation in that regard was made by the Circular issued by the Board on 23rd August, 2007. When the Board has made the relaxation, the assessee is entitled to take the benefit thereof. But, we are not prepared to accept that effect of the Circular would be to amend the Rules. Rules remain what they were. On the basis of the Circular issued by the Board, it cannot be said that under the Rules, ''input service'' includes the transportation service made available to the customer for the purpose of delivering the goods at the destination. The finding, "Therefore, if the service tax is paid on transportation charges, in such cases, it fell within the phrase "clearance of final products from the place of removal" and therefore, the assessee was entitled to CENVAT credit", is erroneous in any event because even the Circular issued by the Board on 23rd August, 2007 does not provide for the allowance as widely as indicated in the judgment of the Karnataka High Court quoted above. The Board in its Circular has made the relaxation in some cases having the factual background as indicated therein. On that basis it cannot be said that because in some cases the outward transportation charges or the service tax payable thereon is claimable as input service, in all cases such benefit may be available.

5. We have not been able to persuade ourselves to accept this reasoning given by the Hon''ble Judges of the Karnataka High Court.

6. Mr. Majumder in support of his submission also relied upon the judgment of the Hon''ble Gujarat High Court in the case of Commissioner of C. Ex. and Customs Vs. Parth Poly Wooven Pvt. Ltd., . He relied upon paragraphs 18, 21 and 22. Paragraphs 18 and 21 do not support the contention of Mr. Majumder as

would appear from a plain reading of those two paragraphs. Paragraph 22 of the judgment relied upon by Mr. Majumder reads as follows:

22. Be that as it may, we are of the opinion that the outward transport service used by the manufacturers for transportation of finished goods from the place of removal upto the premises of the purchaser is covered within the definition of "input service" provided in Rule 2(1) of the Cenvat Credit Rules, 2004.

7. The Hon''ble Division Bench expressed their aforesaid opinion, but no reasons or appropriate reasons are ascertainable by us for the purpose of aforesaid proposition.

8. We are, as such, of the considered view that the opinion expressed by the Hon''ble Division Bench of the Gujarat High Court cannot be accepted. No other submission was made. We find that the Tribunal has dismissed the appeal of the Revenue only on the basis of the judgment of the Karnataka High Court. We already have discussed one reason as to why the judgment of the Karnataka High Court has not impressed us.

9. There are more reasons. In paragraph 30, the Hon''ble Division Bench of the Karnataka High Court opined that "The definition of "input service" contains both the word means'' and includes, but not ''means and includes''. The portion of the definition to which the word means applies has to be construed restrictively as it is exhaustive. However, the portion of the definition to which the word includes applies has to be construed liberally as it is extensive. The exhaustive portion of the definition of ''input service'' deals with service used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products, it also includes clearance of final products from the place of removal. Therefore, services received or rendered by the manufacturer from the place of removal till it reaches its destination falls within the definition of input service."

10. We are, with respect to the Hon''ble Division Bench, unable to see how can it be said from the restrictive part of the definition that "the services received or rendered by the manufacturer from the place of removal till it reaches its destination falls within the definition of input service".

11. Yet another reasoning given by the Hon''ble Division Bench is as follows:

Therefore, it is clear that till such amendment made effective from 1-4-2008 notwithstanding the clarification issued by the Central Government by way of their circular, transportation charges incurred by the manufacturer for ''clearance of final . products from the place of removal'' was included in the definition of input service.

12. By the amendment made with effect from 1st April, 2008 substituting the word "from" by the word "upto" all that has been done is to clarify the issue. Neither the services rendered to the customer for the purpose of delivering the goods at the destination was covered by the definition of input service prior to 1st April, 2008, nor is the same covered after 1st April, 2008. If the definition

provided in section 2 is read as a whole, it would appear that outward transportation charges or taxes paid in regard thereto is claimable only with regard to those transports which were made from one place of removal to another place of removal.

13. We are, as such, of the considered view that the judgment rendered by the learned Tribunal cannot be sustained and the same is, therefore, set aside.

14. Mr. Majumder prayed for stay of operation of the judgment for six weeks. Such prayer is allowed.