(2013) 07 MAD CK 0017

In the Madras High Court

Case No : C.M.A. No. 894 of 2008

Commissioner of Central Excise, Salem — APPELLANT

Vs

Cheran Spinners Limited — RESPONDENT

Date of Decision : 05-07-2013

Acts Referred:

Citation : (2014) 43 GST 274 : (2014) 24 GST 296 : (2014) 24 GSTR 296 : (2014) 33 STR 148 : (2013) 66 VST 312

Hon'ble Judges : K.B.K. Vasuki, J;Chitra Venkataraman, J

Bench : Division Bench

Advocate : V. Sundareswaran, SCCG, for the Appellant; S. Jaikumar, for the Respondent

Judgement

Chitra Venkataraman, J.—The above civil miscellaneous appeal is filed at the instance of the Revenue against Final Order Nos. 746 to 772

of 2007 dated June 22, 2007 passed by the Customs, Excise and Service Tax Appellate Tribunal, Chennai. The above civil miscellaneous appeal

was admitted on the following substantial questions of law:

(1) Whether, the learned Tribunal is correct in disregarding the Board Circular No. 345/4/2005 TRU dated October 3, 2005 while deciding the

appeal when it has been held by apex court and other High Courts that the interpretation of the Central Board of Excise and Customs will be

binding upon the Revenue?

(2) Whether the Tribunal is right in holding that the respondents did not provide any taxable service though they did manufacture an excisable

product? But for the above explanation, the GTA service so received by the respondents would have been covered under the definition of ''input service'' under rule 2(1) of the Cenvat Credit Rules. By virtue of the Explanation, it shall be deemed to be ''output service'' even after deletion of

the Explanation given at rule 2(p) read with definition given at rule 2(q) and (r) convey similar meaning.

The assessee herein is engaged in the manufacture of yarn of different kinds. The assessee holds service tax registration for the service goods

transport agency (hereinafter referred to as ""GTA""). It is seen from the narration of facts that during the period between January 1, 2005 and

September 30, 2005, the assessee had paid the service tax due on the GTA service by utilizing the CENVAT credit availed on inputs and capital

goods. The adjudicating authority viewed that such adjustment of the CENVAT credit side towards the liability on service tax was contrary to the

rule. It was held that the CENVAT credit could be utilised only in respect of ""input service"" as per definition of rule 2(1) of the CENVAT Credit

Rules, 2004. Thus, utilisation of CENVAT credit for payment of service tax due was improper and consequently show-cause notice was issued,

proposing to demand service tax on GTA u/s 73 of Chapter V of the Finance Act, 1994 along with interest u/s 75 of the Finance Act, apart from

proposing levy of penalty u/s 76 of the Act.

2. Aggrieved by the order of the adjudicating authority, the assessee went on appeal before the Commissioner of Central Excise (Appeals),

contending that the understanding of the Revenue that the service would fall within the definition of ""output service"" in view of Explanation to rule

2(p) of the CENVAT Credit Rules, 2004 was contrary to law. Consequently, the order denying the CENVAT credit as available for payment of

the service tax was held as bad in law. The first appellate authority pointed out that going by section 68(2) of Chapter V of the Finance Act, 1994,

the recipient of GTA services was also treated as deemed provider of services. Thus, there could no dispute that the assessee was liable to pay

service tax from January 1, 2005 to September 30, 2005. The Commissioner pointed out that as far as the quantum of service tax liability was

concerned, there was no dispute. The adjudicating authority denied the facility utilising the CENVAT credit on the simple ground that the activity of

the assessee would fall under rule 2(p) of the CENVAT Credit Rules, 2004. Referring to CENVAT Credit Rules, particularly to rule 3(4), the

Commissioner held that the assessee was not entitled to the benefit of adjustment of the service tax liability as against CENVAT credit available.

3. Aggrieved by the same, the assessee went on further appeal before the Customs, Excise and Service Tax Appellate Tribunal. It pointed out that

the question raised by the assessee was directly covered in its favour by the decision in the case of R.R.D. Tex (?) Limited v. Commissioner of

Service Tax, Salem (Appeal No. S/12 of 2007) vide Final Order No. 606/2007 dated May 18, 2007, wherein the Tribunal referred to the

Explanation to rule 2(p) of the CENVAT Credit Rules as to the definition of ""output service"", whereunder, where a person liable for paying service

tax did not provide any taxable service, the service for which he was liable to pay service tax shall be deemed to be ""output service"". The Tribunal

also referred to the Tribunal''s order in Final Order No. 262/2007 dated March 20, 2007, wherein the Tribunal considered the Explanation to rule

2(p) of the CENVAT Credit Rules, 2004 as well as the decision of the Delhi Tribunal reported in [2007] TIOL 555 (CESTAT-Delhi) in the case

of Commissioner of Central Excise, Chandigarh v. Nahar Industrial Enterprises Limited in Appeal No. 22/2007 NB(SM) dated March 7, 2007

and thus allowed the appeal preferred by the assessee. In so holding the Tribunal also rejected the reliance placed by the Revenue to the circular

dated October 3, 2005 of the Central Board accepting the contention of the assessee, thereby, set aside the order of the Revenue rejecting the

adjustment thereon. Aggrieved by the same, the Revenue is on appeal before us.

4. The learned standing counsel appearing for the Revenue submitted that the view of the Tribunal based on the Explanation to rule 2(p) of the

CENVAT Credit Rules, is totally unsustainable in the context of the circular issued by the Central Board explaining the provisions thereon on using

CENVAT credit towards service tax liability. Learned standing counsel further pointed out that the case of 2007 (7) S.T.R. 26 , relied on by the

Tribunal, was appealed by the Revenue before the Punjab and Haryana High Court in the decision reported in Commr. of C. Ex., Chandigarh Vs.

Nahar Industrial Enterprises Ltd., . In the said decision, the High Court upheld the order of the Tribunal. Pointing out to Rule 3(4)(e) of the Cenvat

Credit Rules, 2004, the High Court held that Cenvat credit could be utilized for payment of service tax on any output service. The said decision was followed by the Delhi High Court in the decision reported in Commissioner of Service Tax Vs. M/s. Hero Honda Motors Ltd., and

Commissioner of Central Excise Vs. Auro Spinning Mills and Others, . The Delhi High Court pointed out that in view of the fiction created u/s

68(2) of the Finance Act, 1994, that the recipient of the services who discharged the liability on behalf of the provider was also treated as a person

liable to pay service tax in relation to such service. Thus, in view of the fiction u/s 68(2) of the Finance Act with the CENVAT Credit Rules, the

High Court agreed with the decision reported in the case of Nahar Industrial Enterprises Limited reported in 2007 (7) S.T.R. 26 .

5. The learned standing counsel for the Revenue however pointed out that Nahar Industrial Enterprises Limited reported in 2007 (7) S.T.R. 26 is

now pending in appeal before the apex court in SLP (Civil) 19542 of 2010 as well as in the case of Allena Auto Industries P. Limited, SLP (Civil)

No. 5276 of 2011. In the background of the pendency of the appeals and in the context of the provisions of the CENVAT Credit Rules, the

question of the assessee adjusting the liability of service tax as against the CENVAT credit would not be a justifiable one. We disagree with the line

of reasoning put forth by the Revenue.

6. As already seen in the preceding paragraph, u/s 68 of the Finance Act, 1994, every person providing taxable service to any person shall pay

service tax at the rate specified in section 68 in such manner and within such period as may be prescribed. Sub-section (2) of section 68 however

states that in respect of any taxable service notified by the Central Government in the Official Gazette, the service tax thereon shall be paid by such

person and in such manner as may be prescribed at the rate specified in section 66 and all the provisions of the Chapter on service tax shall apply

to such person ""as if he is the person liable for paying the service tax in relation to such service"".

7. Section 94(1) of the Finance Act gives power to Central Government to make rules for carrying out the provisions of this Chapter. Section

94(2)(ee) and (eee) read as under:

94. (2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters,

namely:--

(ee) the credit of service tax paid on the services consumed for providing a taxable service in case where the services consumed and the service

provided fall in the same category of taxable service;

(eee) the credit of service tax paid on the services consumed or duties paid or deemed to have been paid on goods used for providing a taxable

service.

8. In terms of section 37 of the Central Excise Act, 1944 (1 of 1944) and section 94 of the Finance Act (32 of 1994) and in supersession of

earlier CENVAT Credit Rules, 2002, the Central Government framed rule under Notification No. 23/2004 CE (NT), dated September 10, 2004.

The Rules thus framed covered the subject-matters given u/s 37 of the Central Excise Act and u/s 94 of the Finance Act. The rule 20) defines

input service"", which reads as follows:

2(1) ''input service'' means any service,--

(i) used by a provider of taxable service for providing an output service; or

(ii) used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products

from the place of removal,

and includes services used in relation to setting up, modernization, renovation or repairs of a factory, premises of provider of output service or an

office relating to such factory or premises, advertisement or sales promotion, market research, storage up to the place of removal, procurement of

inputs, activities relating to business, such as accounting, auditing, financing recruitment and quality control, coaching and training, computer

networking, credit rating, share registry and security, inward transportation of inputs or capital goods and outward transportation up to the place of

removal.

9. Rule 2(p), on which heavy reliance placed by the Revenue, defines ""output service"", which reads as under:

2(p) ''output service'' means any taxable service provided by the provider of taxable service, to a customer, client, subscriber, policy holder or any

other person, as the case may be, and the expressions ''provider'' and ''provided'' shall be construed accordingly;

Explanation.--For the removal of doubts it is herby clarified that if a person liable for paying service tax does not provide any taxable service or

does not manufacture final products, the service for which he is liable to pay service tax shall be deemed to be the output service.

10. Going by the fiction u/s 68(2) of the Finance Act, 1994 and CENVAT Credit Rules, 2004, deeming the payer of service tax as the person

liable for paying the service tax in relation to such service, it is clear that while in the case of ""input service"", any service used by the manufacturer,

whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products from the place of removal, is

considered as ""input service"", in contrast to this, the Explanation given under ""output service"" in rule 2(1) of the CENVAT Credit Rules, thus

deems that in the case of a person not proving taxable service or manufacture final products but liable for paying service tax, the service for which

he is liable to pay service tax by reason section 62(2) of the Finance Act, 1994 shall be deemed as ""output service"". Thus, while rule 2(1) and 2(p)

cover two classes of persons, the recipient of GTA services, by virtue of the Explanation to rule 2(p) of the CENVAT Credit Rules, as a provider

of output service, is entitled to all benefits that a person providing input service would be entitled to in the matter of CENVAT'' credit adjustment.

Thus, a reading of rules 2(1) and 2(p) would show that they cover two different situations and though their operations are totally different, yet, for

the purpose of giving credit to the service tax payable from the CENVAT credit available, the recipient is also entitled to the same relief as a

provider of the service. Thus, we do not find any error in the reasoning of the Tribunal that in the payment of service tax liability by the recipient of

taxable service, such assessees are also entitled to make use of CENVAT credit to discharge their liability under the service tax provisions.

Consequently, we do not agree with the submission of the Revenue to set aside the order of the Tribunal.

11. The learned standing counsel appearing for the Revenue also placed reliance on the circular issued by the Board clarifying the provisions under

rules 2(1) and 2(p) of the Rules. Considering the fact that rules 2(1) and 2(p) cover two different situations, in either event, the Rules contemplated

adjustment of service tax liability as against the CENVAT credit available to the assessee, the circular relied on would not be of any assistance to the Revenue. We respectfully endorse the view of the Punjab and Haryana High Court, the Delhi High Court and the Himachal Pradesh High

Court. In the light of the above discussion, we have no hesitation in affirming the view of the Tribunal, thereby, dismissing the above civil

miscellaneous appeal. No costs.

