

(2019) 04 BOM CK 0100

In the Bombay High Court

Case No : Central Excise Appeal No. 118 Of 2018

Commissioner Of CGST, ST & Central Excise

APPELLANT

Vs

Rashtriya Chemicals & Fertilizers Ltd

RESPONDENT

Date of Decision : 18-04-2019

Acts Referred:

Central Excise Act, 1944 — Section 35G
Finance Act, 1994 — Section 65(105)(zzzzj)
Customs Act, 1962 — Section 129(b)

Citation : (2019) 04 BOM CK 0100

Hon'ble Judges : S.C. Dharmadhikari, J;M.S. Karnik, J

Bench : Division Bench

Advocate : Sham Walve, Nikhil Nitin Wadikar, H.G. Dharmadhikari, L.S. Phadke

Final Decision : Allowed

Judgement

M.S. Karnik, J.

1. Admit.

2. Filing of the paper-book is dispensed with. By consent of the parties, the Appeal is taken up for hearing forthwith.

3. This Appeal is filed by the appellant - Commissioner of CGST, ST & Central Excise, Raigad Commissionerate challenging the order dated 05/04/2017 passed by the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench, Mumbai ('CESTAT' for short) under the provisions of Finance Act, 1994 and under section 35G of the Central Excise Act, 1944. The respondent-Rashtriya Chemicals and Fertilizers Ltd.- a public limited company is an Assessee under the provisions of the Finance Act, 1994. The CESTAT by the impugned order allowed the Appeal filed by the respondent - Assessee.

The facts of the case in brief are as under :

4. The Assessee is registered with the Central Excise Department for

manufacture of products falling under chapter 28, 29, 31 of the First Schedule of Central Excise Tariff Act, 1985. The Assessee has opted to function as 'Large Taxpayer's Unit' in July, 2008. The Assessee also holds service tax registration. By an agreement dated 12/06/2009 between the Assessee and the Central Railways, the respondent - Assessee has given 416 wagons to Railways on lease/rent for 20 years.

By letters dated 29/09/2011 and 07/12/2011, the Assessee informed the Railways that they had received an amount of Rs. 13,04,29,833/- from Railways during the financial year 2008-09 to 2011-12 (upto December 2011). According to the appellant, the said activity of the leasing of wagons is liable to service tax under the category of "supply of tangible goods services under section 65(105) (zzzzj) of the Finance Act, 1994. These facts were concealed by the Assessee and found by the auditors of the Central Excise, Raigad Commissionerate. A show cause notice came to be issued on 02/04/2012 for recovery of service tax of Rs. 1,53,50,737/- and for interest and penalty. The respondent - Assessee filed reply on 19/06/2012 contesting the show cause notice. The respondents were heard on 13/01/2015.

5. The Commissioner (Central Excise and Service Tax) passed Order-in-Original dated 16/03/2015 confirming the demand of service tax, interest and also imposed penalty. Aggrieved by the said order, the respondent - Assessee filed an Appeal before CESTAT. By the impugned order dated 05/04/2017, CESTAT allowed the Appeal. Being aggrieved by this impugned order, the present Appeal is filed on the following substantial question of law under 35G of the Central Excise Act, 1944 and under the Finance Act, 1994.

"Whether the Ld.Tribunal erred in holding that there is no foundation in the show cause notice bringing out whether any service element was involved while renting the wagons by the Assessee to railways?"

6. Learned Counsel for the appellant impugning the order passed by the CESTAT contended that CESTAT allowed the respondent's Appeal in a perfunctory manner. Inviting our attention to the Order-in-Original passed by the Commissioner while adjudicating show cause notice demanding service tax, learned Counsel would submit that the Commissioner had after considering the contentions raised by the respondent, recorded detailed findings and by a reasoned order adjudicated the show cause notice. Learned Counsel would submit that while reversing the well reasoned order of the Commissioner, there is absolutely no discussion in the impugned order as to why the Appeal deserves to be allowed. Learned Counsel would submit that the CESTAT, while hearing the Appeal filed under section 35G of the Central Excise Act, 1944, section 129(B) of the Customs Act, 1962 and Finance Act, 1994, is a fact finding authority and expected to pass a reasoned order in support of its conclusions. Learned Counsel would submit that the CESTAT has recorded an abrupt finding without discussing the issue raised before it and without recording any reasons for its conclusion. Learned Counsel next contended that CESTAT while hearing the Appeal was

required to refer to all materials before the Commissioner [Appeals] and in complete details. According to him even if the appeal were to be allowed, the Commissioner's findings should have been dealt with extensively to conclude whether they are perverse and vitiated by error of law apparent on face of record.

7. Learned Counsel for the appellant relied upon the following decisions of the Hon'ble Supreme Court in support of his submissions as to the manner in which CESTAT is expected to decide the Appeal, more particularly, when the order of the Commissioner is to be reversed.

(i) CCE, Mumbai -III Vs. EMCO Ltd. [2015 (322) E.L.T. 394 (SC)];

(ii) Commissioner Vs. SAIL [2015 (320) E.L.T. A39 (SC)];

(iii) CCE, Rajkot Vs. Amul Industries [2010 (260) E.L.T. 499 (SC)].

8. Learned Counsel also relied upon the decision of this Court in the case of Raymond Ltd V/s. Commissioner of Central Excise & Customs, Nashik [2015 (320) E.L.T. 760 (Bom.)] in support of his submission that the Tribunal is required to refer to all materials before the Commissioner [Appeals] and in complete details and while allowing the appeal, the Commissioner's findings should be dealt with extensively to conclude whether they are perverse and vitiated by error of law apparent on face of record.

9. Per contra, learned Counsel for the respondent- Assessee contended that perusal of the order passed by the Commissioner is sufficient to conclude that the order passed by the CESTAT does not call for any interference. He would submit that if Tribunal holds that there is no foundation in the show cause notice bringing out whether any service element is involved while renting wagons by the respondent -Assessee to the Railways, and 'in absence of any such foundation, there cannot be any taxability'. According to him, it cannot be said that the view of the Tribunal is perverse so as to warrant any interference. He would submit that though the Tribunal is a fact finding authority, but when the very foundation of the appellant's case about there being any service element involved while renting out wagons is missing in the show cause notice, no fault can be had with the order passed by the CESTAT. He would therefore submit that the order passed by the Tribunal does not call for any interference.

10. We have heard learned Counsel for the appellant and also learned Counsel for the respondent. We have gone through the Appeal Memo and also annexures thereto.

11. A Notice to show cause cum demand dated 02/04/2012 made by the appellant to the respondent -Assessee refers to an agreement dated 12/06/2009 entered into between the respondent - Assessee and Indian Railways. As per the agreement, Railways had taken 416 wagons on lease/rent from Assessee for 20 years. The appellant noticed that activity of respondent -Assessee of leasing railway wagons to Railways is liable to service tax under the category "supply of tangible goods service" under section 65 (105)(zzzzj). Thereupon the respondent

- Assessee filed reply vide letter dated 19/06/2012 through their Advocate. Written submissions were also filed on 13/01/2015.

12. After giving an opportunity of hearing to the respondent-Assessee, Order-in-Original was passed by the Commissioner. During the course of audit conducted by the Central Excise Raigad, Commissionerate, it was revealed as under :

(a) M/s.RCF Ltd.Thal Unit is receiving certain amount from Railways for renting out their own Wagons to the Railways. The assessee and Indian Railways have entered into an agreement dated 12.06.2009. As per this agreement the Railways have taken 416 Wagons on lease from the assessee for 20 years on the lease/rent charges mutually agreed upon by the both the parties.

(b) The assessee vide their letter F.No. RCF/Thal Excise/2011-12 dated 29.09.2011 and on 07.12.2011 submitted the information that they have received lease rent amounting to Rs.13,04,29,833/- from the Railways during the period 2008-09 to 2011-12 (Upto December, 2011).

(c) This activity of the assessee of leasing railway wagons to Railways is liable to Service Tax under the category of "Supply of tangible goods service" under Section 65(105)(zzzzj).

13. After considering the defence of the Assessee, by a reasoned order, the Commissioner dealt with the facts of the case in detail confirming the demand of service tax and further consequential order of interest and penalty was passed.

14. The CESTAT vide impugned order dated 05/04/2017 allowed the Appeal. It would be material to reproduce the order passed by the CESTAT which reads thus :

" There is no foundation in the show cause notice bringing out whether any service element was involved while renting the wagons by the appellant to railways. In the absence of any such foundation there cannot be any taxability.

Accordingly appeal is allowed."

15. The CESTAT except for stating that there is no foundation in the show cause notice bringing out whether any service element is involved while renting the wagons by the appellant to the Railways, by recording aforesaid one sentence as its conclusion disposed of the entire Appeal. It is by now well settled that in Appeal filed before the CESTAT, it is required to refer to all the materials before the Commissioner (Appeals). The order passed by CESTAT is devoid of any reason. It has only recorded an abrupt finding without discussing the issue raised before it and without mentioning any reason for the conclusion. We find that there is a detailed discussion in the order of the Commissioner on the facts of the case. Thus, even the facts are not adverted to or dealt with. The decision of the Commissioner is overruled with a single observation that there is no foundation in the show cause notice bringing out whether any service element is involved while renting the wagons by the respondent -Assessee to the Railways and that

in the absence of any such foundation, there cannot be taxability. CESTAT while deciding the Appeal has to exercise its jurisdiction as a fact finding authority. We find that the CESTAT has recorded only an abrupt finding without discussing the issue and without mentioning any reason for their conclusion.

16. The Commissioner after a detailed discussion on the facts of the case passed a reasoned order and decided the Appeal. These facts are not adverted to or dealt with by CESTAT. The perfunctory manner in which Appeal is allowed cannot be countenanced in as much as the order passed by CESTAT is a cryptic order. If at all, the CESTAT was of the view that Order-in-Original passed by the Commissioner deserves reversal, then, it was necessary for the CESTAT to have so done by giving reasons after considering the materials on record. The CESTAT is an ultimate fact finding Tribunal. Even this Court can entertain Appeal against the order of CESTAT only if substantial question of law arises. This Court while considering whether the Appeal involves substantial question of law gets the benefit of fact finding exercise and the reasons recorded by the Tribunal, more so when the Order-in-Original passed by the Commissioner is to be reversed. In this view of the matter, following order is passed.

O R D E R

(i) Appeal is allowed.

(ii) The impugned order passed by the CESTAT is quashed and set aside.

(iii) Appeal No. ST/86284 of 2015 filed by the respondent - Assessee is remitted back to the CESTAT for considering the same afresh on its own merits and in accordance with law. There shall no order as to costs.