(2016) 01 KAR CK 0133

In the Karnataka High Court

Case No : CEA No. 11/2015

Commissioner of Service Tax APPELLANT

Vs

Kyocera Wireless [I] Pvt. Ltd. RESPONDENT

Date of Decision : 25-01-2016

Acts Referred:
Central Excises and Salt Act, 1944 — Section 11[b]

Citation : (2016) 54 GST 136

Hon'ble Judges : N.K. Patil and S. Sujatha, JJ.

Bench : Division Bench

Advocate : C. Shashikantha, CGC, for the Appellant; L.S. Karthikeyan, Advocate, for the Respondent

Final Decision : Disposed Off

Judgement

S. Sujatha, J.

1. This appeal is directed against the Judgment passed by the Central Excise and Service Tax Appellate Tribunal, South Zonal Bench at Bangalore, (hereinafter referred to as ''the Tribunal'', for short), in Final Order No. 21824/2014 dated 29.09.2014, raising the following substantial questions of law.

"[a] Whether Tribunal erred in following its own interim orders, when they were yet to reach finality and the concerned appeals were still pending for final hearing?

[b] Whether Tribunal is right in holding that even if ''Output service'' is not taxable, Cenvat credit should not be denied and refund should be granted?

[c] Whether Tribunal is right in holding that the refund claimed is within limitation, while ignoring the terms of Notification No. 5/2006 CE [NT] dated 14.03.2006 and Sec.11[b] of the Central Excise Act, 1944?

[d] Whether Tribunal is legally wrong while holding that the assessee is eligible for refund, if the refund claims are filed within one year from the date of

receiving export proceeds in foreign currency?

[e] Whether Tribunal is right in ignoring the legal position that in respect of export services, though there is no physical exports, the date of issue of invoice for export services, is the date of export for the purpose of ''relevant date''?

[f] Whether the impugned Final Order of the Tribunal is a non-speaking one and if so, whether Tribunal is empowered to pass non-speaking orders while disposing of statutory appeals and while discharging judicial functions?"

2. The facts in brief are:

"That the respondent is in the business of providing software engineering and support services including development of application software for accessories for commercial models, evaluation installment of software drivers, tests on to mobile handsets etc., and took credit on these services. Two refund claims were filed by the assessee for the period March 2007 and April 2007 to March 2008 and the amount involved was Rs. 4,87,439/- and Rs. 75,07,708/- respectively being the accumulated service credit due to export of services. Show cause notices dated 19.05.2008 and 23.05.2008 were issued by the Authorities since there was no nexus between input and output services, being IT and are exempt services. The Order in original was passed by the Deputy Commissioner of Service Tax rejecting the refund claims holding that the claims have been barred by limitation and the output service was not taxable prior to 16.05.2008. Another Order-in-original No. 190/2008 was passed by the Deputy Commissioner of Service Tax rejecting refund claims holding that the claims have been barred by limitation etc. Being aggrieved by the said Orders in original, the respondent preferred appeals before the Appellate Commissioner which were rejected by the Appellate Authority. Being aggrieved, the respondent filed an appeal before the Tribunal. The Tribunal by its Final Order No. 29.09.2014 allowed the appeals and remanded the matter to the original adjudicating authority to decide the refund claim in line with the observations made in the interim orders. The said order of the Tribunal is under challenge in this appeal."

3. Learned Counsel appearing for the appellant would contend that the Tribunal passed the Final Order based on the Interim Order dated 19.09.2014. Nearly about 192 cases were listed for hearing before the Tribunal, relating to the issue of refund of CENVAT credit under Rule - 5 of the CENVAT Credit Rules, 2004. These cases were clubbed together and a common Interim Order was passed on the issues involved in the batch of matters. This technique was adopted by the Tribunal to reduce the pendency of appeals. This clubbing of the cases and passing a common interim order was opposed by the learned counsels appearing for the parties. It was submitted before the tribunal that it would be appropriate to decide each case individually instead of passing common order on the common issues. After considering the said submissions, the Tribunal held that an order identifying common/legal issues will be passed and thereafter individual appeals will be taken up treating the matters as part heard. Accordingly,

subsequent to passing of the Interim Order on 18.09.2014, the Final Order in the present case was passed on 29.09.2014. The two issues involved in this case are [a] output service is not taxable, hence, CENVAT credit is not admissible [b] limitation- method of calculating relevant date. A reference is made by the Tribunal in the Final Order to paragraphs 6.12 and 6.16 of the Interim Order as far as output service and limitation are concerned. In terms of the Interim Order, the order impugned before the Tribunal is set aside and the matter is remanded to the original adjudicating Authority to decide the refund claim in line with the observations made in Interim Order which is unheard and unknown in the field of law. Accordingly, he seeks to set aside the Final Order passed by the Tribunal and to remand the matter back to the Tribunal to pass a speaking order in accordance with law.

4. Per contra, learned Counsel appearing for the assessee would submit that the two issues involved in this case are dealt extensively by the Tribunal while passing the Interim Order. At paragraph 6.12 of the Interim Order, it is categorically held that even though the software is not taxable service, service tax paid on input services is refundable. This view is taken by the Tribunal following the Judgment of this Court in the case of ''mPortal India Wireless Solutions P. Ltd., v. CST, Bangalore'' reported in [, (2012) 27 STR 134 (Kar.)].

5. It is further contended that the second issue regarding limitation is also considered at Paragraph 6.16 of the Interim Order. The Tribunal, after considering Judgments of several High Courts held, the claim made by the Assessee is within the normal period. In view of the said finding given by the Tribunal in the Interim Order, there was no necessity to reproduce the same in the Final Order. Common issues were involved in number of cases, in order to reduce pendency, the cases involving common issues were clubbed together and Interim Order was passed, so that the same can be adopted in the Final Order of individual cases. As such, this technique adopted by the Tribunal cannot be found fault with. Accordingly, he seeks to confirm the Order passed by the Tribunal and to answer the questions of law in favour of the Assessee and against the Revenue.

6. Having heard the learned Counsel appearing for the parties and perusing the material on record, it is clear that the Tribunal in all its eagerness to decide the pending cases, in order to reduce the pendency of appeals, has adopted a technique in clubbing nearly 192 cases and passing an interim order on all the issues involved in the batch of cases and the same is applied in the Final Order of the individual cases. We would have appreciated if, the Tribunal had passed the Final Order in one case and the same is adopted in other batch of cases. The scope of Interim Order is very limited. It is temporary and effective only during the pendency of litigation; ceases to exist as soon as the Final Order is passed. No law can be laid down in an interim order. The procedure adopted by the Tribunal is strange and contrary to the settled principles of law. Passing Final Order, referring to the paragraphs in the Interim Order is not a speaking order.

As such, the order passed by the Tribunal is not sustainable.

7. Accordingly, without answering the questions of law raised by the Revenue, we remand the matter back to the Tribunal to consider the matter afresh and to pass a speaking order assigning reasons, after providing an opportunity of hearing to the parties. The Tribunal is directed to pass orders in accordance with law as expeditiously as possible in the light of the observations made above. Parties are directed to appear before the Tribunal in person or through their Counsel on 05.02.2016 at 10:30 am without any further notice.

8. Accordingly, the appeal stands disposed of. Ordered accordingly.