

(2016) 08 AHC CK 0275

In the Allahabad High Court

Case No : Central Excise Appeal No. 214 of 2016

Commissioner, Service Tax

APPELLANT

Vs

M/s Atrenta India Pvt. Ltd.

RESPONDENT

Date of Decision : 30-08-2016

Acts Referred:

Citation : (2017) 2 ADJ 590

Hon'ble Judges : Sudhir Agarwal and Dr. Kaushal Jayendra Thaker, JJ.

Bench : Division Bench

Advocate : Krishna Agarawal, Advocate, for the Appellant

Final Decision : Dismissed

Judgement

1. This appeal has arisen from judgment and order dated 15.12.2015 passed by Customs, Excise & Service Tax Appellate Tribunal, Allahabad (hereinafter referred to as "Tribunal") in Excise Appeal Nos. 52520 and 53049 of 2014 whereby Tribunal has rejected appeal of Revenue against order passed by Commissioner allowing refund to Assessee.

2. Learned Counsel for appellant contended that Assessee was registered with Department on 20.12.2011 but refund was claimed for the period earlier thereto, i.e April 2011 to September 2011, and no refund therefore, could have been claimed when Assessee was not registered.

3. Shri Krishna Agarwal learned counsel appearing for appellant relied on a Madras High Court decision in Commissioner of Central Excise, Coimbatore v. Sutham Nylocots wherein refund of duty for the period prior to registration of Assessee was denied. We find that in the present case, Tribunal has followed a judgment of Karnataka High Court in Portal India Wireless Sollution P.Ltd. v. C.S.T, Bangalore wherein it has been held that registration with Department is not a pre requisit for claiming Cenvat Credit and therefore, refund cannot be denied for this reason above.

4. Thus the only question up for consideration in this appeal is "whether appellant is justified in denying refund to the Assessee for the period, prior to his registration with Department".

5. The Assessee M/s Atrenta India Private Limited is engaged in providing Information Services namely Information Technology Software Service falling under section 65(105)(zzzze) of Chapter V of Finance Act, 1994 (hereinafter referred to as "Finance Act, 1994").

6. Application for the period July 2011 to September 2011 was filed for claiming refund of Rs.6,09,808/- on 28.9.2012.

7. Application was rejected by Assistant Commissioner , Customs & Central Excise Division-1 Noida (hereinafter referred to as "ACCCE"). The ground taken by ACCCE is that Assessee was not registered during claim period hence not eligible to take refund of Cenvat Credit under rule 3 of Rules, 2004 read with Rule 4 of Service Tax Rules 1994.

8. Assessee preferred an appeal before Commissioner(Appeals) who allowed the same by order dated 28.10.2013 and directed ACCCE to examine to claim of refund subject to verification of documents etc.

9. Commissioner(Appeals) held that Adjudicating Authority wrongly interpreted Section 69 of Finance Act 1994 read with Rule 4 of Export of Services Rule 2005 in observing that Assessee was required to pay service tax, hence, was obliged to obtain service tax registration. Commissioner(Appeals) held that service provided by Assessee were chargeable to "Service Tax" under section 65(105) of Finance Act 1994 but the same was not liable to pay service tax in terms of Rule 4 of Export of Services Rules 2005. It also referred and relied on Tribunal's decisions in Commissioner of Service Tax Chennai v. E-Care India Pvt. Ltd. 2011 (022) STR 0529 and M/s Sutham Nylocots v. CCE, 2005 (188) ELT 26. It held that in view of Karnataka High Court judgment in Portal India Wireless Solutions P.Ltd. v. C.S.T Bangalore 2012 (27) S.T.R.134 (Kar.), service tax registration was not mandatory for refund of accumulated Cenvat credit tax, paid on inputs Services, used for export services.

10. It is also said that a similar view that non registration of unit cannot be a basis for denial of refund especially when there is no such condition in notification for allowing benefit of Cenvat credit in terms of Rule 5 of Cenvat Credit Rule, 2004 was taken by Tribunal at Delhi in M/s Intellirisk Management India Pvt.Ltd. v. CCE Noida in Excise Appeal No.2216-2217 of 2010 and M/s IQORR India Services Pvt.Ltd. v. GCE, Noida in Excise Appeal No.2218-2223 of 2010 which have been accepted by Commissioner of Central Excise, Noida.

11. Appellant thereafter filed appeal before Tribunal at Allahabad which has been dismissed by impugned judgment and order relying on the judgment of Karnataka High Court in Portal India Wireless Solutions P.Ltd.(Supra).

12. Learned counsel for appellant has placed before us the rules made for refund

of Cenvat Credit vide Notification:5/2006-C.E(N.T) dated 14.3.2006. The aforesaid rules have been framed in exercise of powers conferred by rule 5 of CENVAT Credit Rules 2004 and in supersession of earlier Notification. It provides that refund of Cenvat Credit shall be allowed in respect of:

(a) Input or input service used in the manufacture of final product which is cleared for export under bond or letter of undertaking:

(b) Input or input service used in providing output service which has been exported without payment of service tax.

13. Rule 2 & 3 state that claim for refund would be submitted not once for any quarter in a calendar year and by manufacturer or provider of out put service by submitting an application in Form-A. The said rules are quoted as under:

"(2) The claims for such refund are submitted not more than once for any quarter in a calendar year

Provided that where, -

(a) The average export clearances of final products or the output services in value terms is fifty percent or more of the total clearances of final products or output services, as the case may be, in the preceding quarter; or

(b) The claim is filed by Export Oriented Unit, the claim for such refund may be submitted for each calendar month

(3) The manufacturer or provider of output service, as the case may be, submits an application in Form A annexed to this notification to the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, in whose jurisdiction.

(a) the factory from which the final products are exported is situated, along with the Shipping Bill or Bill of Export, duly certified by the officer of customs to the effect that goods have in fact been exported; or

(b) the registered premises of the service provider from which output services are exported is situated, along with a copy of the invoice and a certificate from the bank certifying realization of export proceeds."

14. Rule 4 provides that refund is allowed only in those circumstances where a manufacturer or provider of output service is not in a position to utilize the input credit or input service credit allowed under rule 3 of said rules against goods exported during the quarter or month to which the claim relates.

15. We do not find anything in the aforesaid rules which require registration as a condition or eligibility to claim refund. Even Form-A no where suggests that any such condition must be observed.

16. Karnataka Hight Court in mPortal India Wireless Solutions P.Ltd. (Supra) has said in paragraph 7, as under:

"Insofar as requirement of registration with the department as a condition precedent for claiming Cenvat credit is concerned, learned counsel appearing for both parties were unable to point out any provision in the Cenvat Credit Rules which impose such restriction. In the absence of a statutory provision which prescribes that registration is mandatory and that if such a registration is not made the assessee is not entitled to the benefit of refund, the three authorities committed a serious error in rejecting the claim for refund on the ground which is not existence in law. Therefore, said finding recorded by the Tribunal as well as by the lower authorities cannot be sustained. Accordingly, it is set aside."

17. In *Commercial of Central Excise v. Sutham Nylocotes* (Supra), the decision of Madras High Court, relied by appellant, three issues which came up for consideration:

1. Whether the Appellate Tribunal is correct in setting aside the orders passed by the lower authorities with regard to payment of interest for the period in dispute namely, 1-4-2001 to 31-1-2002 when Section 11AB of Central Excise Act, 1944, which stands amended with effect from 11.5.2001?
2. Whether the Appellate Tribunal is correct in holding that the respondent has not misstated the description of the goods with intent to evade payment of duty when the respondent has not disputed the descriptions of the goods as proposed by the Department and paid the duty?
3. Whether the Appellate Tribunal is correct in holding that since the respondent has now registered with the Excise Department and is following the procedures and hence the respondent can legitimately claim the benefit of Modvat credit on the yarns used in the manufacture of fabrics for the period in dispute?

18. The third issue was considered by Madras High Court in paragraphs 16 to 18 of the judgment and it has observed that Assessee had not obtained Central Excise Registration Certificate while manufacturing industrial fabrics and had not followed any Central Excise procedural formalities while clearing such industrial fabrics. This fact was not admitted by Assessee. First Appellate Authority held that Assessee had not fulfilled several conditions stipulated statutorily such as duty paid, nature of inputs, use of duty paid inputs in the manufacture of dutiable finished goods to substantiate their claim for Cenvat credit. Having said so, Madras High Court has further observed in paragraph 17 that-

"First Appellate Authority pointed out that the Assessee had not satisfactorily explained before the original authority or substantiated before the First Appellate Authority that they are entitled to claim for Cenvat credit. This finding of fact recorded by the First Appellate Authority has not been set at naught by Tribunal rather no reasons have been given by Tribunal for permitting the credit to be availed by Assessee."

19. It is in this background, Madras High Court in *Commissioner of Central Excise v. Sutham Nylocots* (Supra) said in paragraph-18, as under:

"Admittedly, at the relevant point of time, Assessee was not registered with the Department and in fact, it subsequently obtained registration from the Department and therefore, if at all Assessee is entitled to any credit it would accrue only subsequent to the date of registration with the Department. Even though Assessee claimed exemption on the ground that they had subsequently registered with the Department, as regards liability as found in the order of adjudication as well as in the order of Tribunal, we do not find any justifiable ground to accept the plea of Assessee based on the exemption Notification alone that the registration being not a mandatory one, Assessee would be entitled to the benefit of Modvat credit."

20. The judgement of Madras High Court therefore, was clearly rendered in the facts of that case. Be that as it may, we are inclined to accept the view taken by Karnataka High Court considering the fact that in the rules of refund of Cenvat credit, we do not find any such requirement of registration as a condition precedent or eligibility condition for claiming refund.

21. Moreover, if refund is otherwise admissible to a party by a Tax Department, interpretation to the Statute which justify refund to the party must be given for the reason that State or Tax Department cannot be expected to retain Revenue which legally is refundable to the party. It should not be allowed to be retained when legally Revenue is not entitled to such money.

22. Moreover, in *Formica India Division v. Collector of Central Excise* 1995(77) E.L.T 511 (S.C.) Court has also observed that refund should not be denied on technical grounds. This shows that a view which does not contradict with any express fiscal provision, should be taken in favour of Assessee, if there is any scope of two views.

23. In view of above discussions, we answer the aforesaid question against appellant and dismissed this appeal.