(2013) 09 AHC CK 0217

In the Allahabad High Court

Case No : CEA No. 221 of 2013 (Arising out of order of CESTAT in 24-7-2013)

Galaxy Mercantiles Ltd. APPELLANT

Vs

Commissioner of Customs, Excise and Service Tax RESPONDENT

Date of Decision : 05-09-2013

Acts Referred:

Citation : (2013) 42 GST 314 : (2014) 33 STR 3

Hon'ble Judges : Surya Prakash Keswarwani, J;Sunil Ambwani, J

Bench : Division Bench

Advocate : M.P. Devnath and Nishant Mishra, for the Appellant;

Judgement

Surya Prakash Keswarwani, J.—We have heard Shri M.P. Devnath and Shri Nishant Mishra for the appellant. Shri B.K.S. Raghuvansi appears for Commissioner of Customs, Excise and Service Tax, Noida. In this appeal u/s 35G of the Central Excise Act, 1944 against the pre-deposit order/stay order passed by Customs, Excise & Service Tax Appellate Tribunal (CESTAT) dated 24.7.2013 the appellant is aggrieved against the pre-deposit of 35% of Cenvat Credit of inputs denied by the respondent.

2. The appellant is a real estate company engaged in construction of shopping malls. A show cause notice was issued on 7.3.2011 for the period ranging from July, 2007 to August, 2010, alleging that the CENVAT credit amounting to Rs. 4,08,08,286/- has been wrongly availed on input services and inputs and the CENVAT credit amounting to Rs. 3,20,84,784/- has been wrongly utilized. The appellant had availed CENVAT credit on input services valued at Rs. 2,28,01,762/- and CENVAT credit on inputs (Cement, Glass, Steel, Iron etc.) used for construction of buildings at Rs. 1,80,06,524/-.

3. A reply was submitted to the show cause notice, denying the allegations and demand. By the Order-in-Original the respondent had disallowed CENVAT credit of Rs. 4,08,08,286/- for the period from 2007-08 to 2010-11 availed by the appellant and ordered for recovery of the same under Rule 14 of CENVAT Credit

Rules, 2004 and further confirmed the demand of service tax amounting to Rs. 3,20,84,784/- u/s 73(1) of the Finance Act, 1994. A penalty of equal amount was imposed under Rule 15 of CENVAT Credit Rules, 2004.

4. In an appeal before the CESTAT, the appellant moved a stay application on which there was a difference of opinion between the Judicial Member and the Technical Member. Both Judicial Member and the Technical Member agreed that the appellant is not entitled to CENVAT credits on inputs, they, however, disagreed on the question as to whether the appellant was entitled to CENVAT credit on input services. They referred the following question to the 3rd Member:--

28. POINT OF DIFFERENCE IN OPINION TO BE RESOLVED

In the facts and circumstances of the case:--

Whether pre-deposit of 35% of the total Cenvat Credit denied by the impugned order is to be called for admitting these appeals as directed by the Judicial Member?

or

Whether pre-deposit of only 35% of the Cenvat Credit denied by the impugned order and attributable to inputs and capital goods alone is to be called for admitting these appeals as directed by the Technical Member?

5. Shri Sahab Singh, Member (Technical), the 3rd Member was of the opinion, that the differences between Judicial Member and Technical Member have narrowed down to some services, which are utilised by provider of work contract service in construction of malls. In 2012 (28) S.T.R. 166 the Tribunal had allowed CENVAT credit of service tax in respect of such input services. He held that the owner of the property, who engages architect for preparing design of the building; and takes services of design engineer for preparation of design and contractor, is required to execute the work as per design of architect, design engineer and consulting engineer. Under CENVAT Credit Rules, credit can be taken by service recipient on the basis of invoices issued by the service provider. If invoices issued in respect of architect services, design service, consulting engineers service are in name of owner of property, prima facie there is no reason to deny the credit to the appellant. The 3rd Member agreed with the view of the Member (Technical) holding that 35% of CENVAT credit availed on input services is not required to be paid as pre-deposit.

6. The difference of opinion was only with regard to the requirement of pre-deposit of CENVAT credit availed on input services. So far as the CENVAT credit ? on inputs namely Cement, Glass, Steel, Iron etc., both the Judicial Member and Technical Member opined that prima facie the appellant was not entitled to the CENVAT credit for the purposes of considering the prima facie case for grant of stay of pre-deposit.

7. The appellant did not make out nor has raised any submission of any financial hardships either before the CESTAT or in this Court.

8. Shri M.P. Devnath has place reliance on a judgment of Andhra Pradesh High Court in CCE v. Sai Sahmita Storage (P.) Ltd. (2012) 34 STT 306/17 tax-mann 107. In this judgment the input credit was denied on the service tax of rentals of storage and warehousing provider on the ground that the appellants providing storage and warehousing services were not entitled to input credit on the materials used in the constructions of the warehouses. The Andhra Pradesh High Court, after considering the definition of ''input'', in Rule 2(k) and the judgment in Maruti Suzuki Ltd. Vs. Commissioner of Central Excise, Delhi-III, , held as follows:

9. There is no dispute in these cases that the assessee used cement and TMT bar for providing storage facility without which storage and warehousing services could not have been provided. Therefore the finding of the original authority as well as the appellate authority are clearly erroneous, which was correctly rectified by the CESTAT. In so far as the levy of penalty under Rule 15(2) of the Rules is concerned, unless and until there is a finding that there was suppression of fact, and irregular claim of CENVAT credit, the question of levying penalty under Rule 15(2) of the Rules does not arise. In that view of the matter, the order levying penalty was rightly set aside by the CESTAT.

9. In the present case, the CESTAT has distinguished the judgment of Andhra Pradesh High Court on the ground that the appellant is engaged in the business of construction of commercial malls and renting of space in other malls in the market. The mall was not constructed by the appellant but was constructed by a person providing such facilities under the works contract. The credit of service tax paid by the works contract services provider already stands availed by the appellant. In the course of hearing, on a question was put to Shri V. Lakshmi Kumaran on which he fairly agreed that the works contract service provider has not availed the credit of these duties as paid on the inputs used by him for construction but has opted for payment of service tax equivalent to the amount of 296. The Judicial Member on such statement held in para 8 as follows:--

8. The question, which arises is that when the ''Works Contract Services provider has opted for payment of service tax at a lesser rate on the condition of non-availment of credit of duty paid on the inputs used for construction of building, whether the same very credit can travel to the appellants, who are the recipient of ''Works Contract Services''. It is well settled law that what cannot be done directly can not be allowed to be done indirectly. In the present situation, the work contract service provider has already foregone the Cenvat credit paid on the raw materials so as to avail the credit of concessional rate of service tax; that foregone credit cannot travel to the appellant by jumping the ''Works Contract Service provider''. We really fail to understand as to how and in which manner the appellants are claiming the Cenvat credit of duty paid on the raw materials, which are in fact inputs for ''Works Contract Service provider and on which he

has already decided not to avail the credit as a condition of availment of lower payment of Service Tax. As such at this stage, we prima facie agree with the revenue that the input credit availed by the appellants is not in accordance with the law.

10. Insofar as the judgment of Andhra Pradesh High Court is concerned, the Judicial Member, with which the Technical Member had agreed, held that the warehouse is constructed for providing storage and warehouse services and in which the cement and TMT bar are used for construction. The storage and warehouse services are separate services provided u/s 65(102) of the Finance Act, and cannot be equated with the renting of immovable property. The construction of warehouse can be equated to the construction of a factory for manufacture of goods in which case the inputs used for construction of the building are eligible cenvatable inputs whereas renting of immovable property is a temporary service and a building constructed can be rented for a limited period and thereafter can be used by the owner himself. There is nothing in the order of the Andhra Pradesh High Court to reflect on the fact that warehouse was constructed by availing the services of the Works Contract Service provider or the construction of commercial institution service provider.

11. In the present case, the appellant got the building constructed from the works contract service provider. The credit of service tax paid by the work contract service provider already stand availed by the appellant and as such apart from the fact that judgment of Andhra Pradesh High Court did not deal with the input credit but with the input service credit, the ratio is not applicable inasmuch as in that case the appellant had himself constructed the godown and warehouse and was not availing the service of works contract service provider.

12. We have carefully considered the judgment of Andhra Pradesh High Court and find that it has been distinguished by CESTAT on valid grounds. We are of the view that even if there was any doubt with regard to any benefit of CENVAT credit on the inputs for construction of building, which may have arisen out of the judgment of the Andhra Pradesh High Court, the fact that the appellant had engaged works contract service provider, who had availed the benefit of CENVAT credit by opting for payment of service tax at a lesser rate on the condition of non-availability of credit of duty paid on inputs used in construction of building, such benefit could not have been claimed by the appellant.

13. We are informed that by an amendment vide Notification dated 10.9.2004 CENVAT Credit Rules, 2004 have been amended and by which the input credit on any goods used for construction of buildings, civil structures or parts has been excluded from the meaning "input" under Rule 2(k).

14. In view of the aforesaid we do not find any error in the orders passed by the CESTAT directing the appellant to deposit 35% of the CENVAT credit. We make it clear that the appellant has been given stay of pre-deposit of the entire CENVAT credit availed of input service and thus Rs. 63,02,283/- amounts to small fraction

of entire liability of CENVAT Credit and input denied, which is still subject matter of the appeal. The Central Excise Appeal is dismissed. It is made clear that the observations made in this judgment shall not affect the merits of the case at the time of final hearing in the CESTAT.

