(2014) 08 BOM CK 0021

In the Bombay High Court

Case No : Central Excise Appeal No. 295 of 2013

Lear Automotive India Pvt. Ltd. APPELLANT

Vs

Commissioner of Central Excise RESPONDENT

Date of Decision : 19-08-2014

Acts Referred:
Finance Act, 1994 — Section 66, 66A

Citation : (2014) 35 STR 918

Hon'ble Judges : S.C. Dharmadhikari, J;A.K. Menon, J

Bench : Division Bench

Advocate : V. Sridharan, Senior Advocate, Prakash Shah and Jas Sanghavi i/by PDS Legal, Advocate for the Appellant; A.S. Rao, Advocate for the Respondent

Judgement

1. This Appeal by the Assessee challenges the order passed by the Customs, Excise & Service Tax Appellate Tribunal delivered on 3rd/28th May, 2013 in two Appeals 2014 (35) S.T.R. 614 This common order was passed in the Appeals of the Assessee, as also, the Revenue. We are only concerned with that part of the order which deals with the Assessee''s appeal. After hearing both sides at some length we are of the opinion that the Tribunal has failed to render a complete finding with regard to applicability of a taxing provision and sustainability of the demand in the show cause notice qua rendering of service. Therefore, we admit this Appeal on the following substantial questions of law:-

(a) Whether in the facts and circumstances of this case the portion of the impugned order dated 28-5-2013 upholding the demand of service tax on the amount paid by the Appellants to the foreign party for the design services provided during the period 2004-2005 and 2005-2006 is correct in law?

(b) Whether in the facts and circumstances of this case the portion of the impugned order dated 28-5-2013 passed by the Appellate Tribunal upholding that there was no evidence to show that the design services in question were received prior to 18-4-2006 or prior to 1-6-2007 is correct in law especially when the demand of service tax itself is for the amount paid by the Appellants for the design services for which invoices were raised by the provider of service during the period 2004-2005 and 2005-2006?

(c) Whether in the facts and circumstances of this case the portion of the impugned order dated 28-5-2013 passed by the Appellate Tribunal upholding the demand of service tax on the amount paid by the Appellants to the foreign party for the design services is correct in law especially merely for the reason that the payment was made in the year 2008-2009 for the invoices raised by the service provider on the Appellants for the year 2004-2005 and 2005-2006 which indicate the date on which services were provided?

(d) Whether in the facts and circumstances of this case, the portion of the impugned order dated 28-5-2013 ignoring the evidence placed by the Appellants in the form of invoices and ledger account to show that services were received prior to 18-4-2006 is correct in law?

2. Mr. Sridharan, learned Senior Counsel appearing for the Appellant/Assessee, submits that apart from being very brief, the Tribunal in one paragraph reasoning, namely, paragraph 8 of the impugned order, disposed of the Assessee''s appeal by a perverse finding. In his submission, the Tribunal has completely overlooked the documentary material on record in holding that there is no evidence by way of agreement or copy of the order placed or any other correspondence to prove that the service was performed prior to 1-6-2007. Mr. Sridharan would submit that the Tribunal failed to take note of the finding in the order of the Adjudicating Authority in which it is categorically held that in this case the service tax is being demanded on payments made by the Assessee after 16-6-2006, therefore, the judgments of this Court are of no relevance.

3. Mr. Sridharan would submit that the Tribunal also overlooked the fact that the Revenue argued before it that the Assessee has produced some of the invoices and the copy of the Ledger Account, but majority of the invoices are not reflected in the Ledger Account. This finding in paragraph 7 of the impugned order, according to Mr. Sridharan, contradicts the finding in paragraph 8 where the Tribunal holds that there is no evidence on record and in the form observed therein. Further finding that there is no evidence as to why the payment was made in 2008-2009 in respect of the services received in 2004-2005, according to Mr. Sridharan, presupposes that there was some material with regard to rendering of services in the concerned period and the payment being made subsequently is the only issue. In such circumstances according to Mr. Sridharan the Tribunal has failed to apply its mind and with regard to applicability of a taxing provision to the services rendered.

4. On the other hand, Mr. Rao, learned counsel appearing for the Revenue, would submit that this is an attempt to re-appreciate and reappraise the factual material. The Tribunal has not observed that the record does not indicate any invoices raised or bills, but that the Assessee has failed to prove that the services as noted in these invoices were factually rendered prior to 1-6-2007. It is in that

regard the Tribunal insists on contemporaneous evidence being produced. Such insistence cannot be said to be erroneous or much less perverse. Therefore, the Appeal does not raise any substantial question of law and it deserves to be dismissed.

5. With the assistance of Mr. Sridharan and Mr. Rao we have perused the order passed by the Tribunal and equally that of the Adjudicating Authority stated to be the order-in-original. We have also perused some of other annexures to this Appeal paper book. The notice to show cause was issued to the Assessee and which is forming part of the order-in-original dated 25-10-2011. That is on the footing that one M/s. Lear Automotive India Pvt. Ltd. and registered with the Central Excise Authorities engaged in manufacturing of automobile seats and parts of motor vehicles, had provided the services such as technical inspection and certification services, consulting engineering services, business auxiliary service, etc. All services are taxable under the Finance Act, 1994 and chargeable to Service Tax under the appropriate classified heads at the rate specified u/s 66 of the Finance Act, 1994. Pertinently, the Audit was carried out and during the course of the audit it was noticed that the Assessee has availed the services, namely, (i) Technical testing and Analysis of goods services and (ii) Design services, in India from the agencies having their establishments outside India and on receipt of services, the Assessee has made payments to them in foreign currency. We are not concerned in this case with the Technical Services and Analysis of Goods Services as the order-in-original grants necessary reliefs and benefits in favour of the Assessee. That part of the order-in-original was appealed by the Revenue, but the Tribunal upheld the order-in-original and dismissed the Revenue''s appeal. The Revenue has not brought any appeal before us against that dismissal.

6. We are concerned in this case with the Assessee''s cross appeal wherein the allegation was that the Assessee received the services of Maintenance & Repairs in India from the Agencies having their establishments outside India and on receipt of services the Assessee made payments to them in foreign currency. On receipt of services in India from abroad the tax became leviable from 19-4-2006 in terms of the provisions of Rule 2(1)(d)(iv) of the Service Tax Rules, 1994 read with the provisions of Section 66A of the Finance Act, 1994. The order-in-original thereafter refers to the facts and other contents of the show cause notice including the Design Services. Same also refers to the written submissions of the Assessee and eventually the oral submissions during the course of adjudication also have been referred.

7. The findings are from internal page 11 running page 115 of the paper book. It is clear from perusal thereof that the Adjudicating Authority holds that there is no doubt regarding levy of tax in respect of the services received by the Assessee outside India and the Assessee being recipient of such services is liable to pay service tax thereon. Then, the Taxation of Services (Provided from outside India and received in India) Rules, 2006 are referred to and their date of

enforcement is stated to be 19-4-2006. The services that are referred to in Rule 3(i) and (ii) of the aforesaid Rules are being treated as performed in India and hence, liable to service tax in hands of recipient. The Adjudicating Authority then refers to the Rules and arrives at the conclusion which is emphasized by Mr. Sridharan, namely, the service tax is being demanded on the payments made after 16-6-2006 and therefore, reliance by the Assessee on the provisions is stated to be misplaced.

8. We find that once the Adjudicating Authority while passing the order-in-original proceeds on the assumption that there is material on record with regard to rendering of services, but the controversy is whether the tax or taxable event occurred after the notification or rule being brought into force or not, then, the Tribunal was obliged in law to consider this aspect and in its entirety. It ought to have then commented upon the presumption or the basis on which the Adjudicating Authority proceeded. If the Adjudicating Authority proceeded on an erroneous basis and there was indeed no material which would support the legal argument of the Assessee, then, the Tribunal could have observed that the legal argument is not required to be answered in the absence of necessary factual basis. That we do not find to be the basis in the order of the Adjudicating Authority. In such circumstances the Tribunal was obliged not only to peruse the entire record and consider this issue, but render its findings after scrutiny thereof. We find that there is substance in the arguments of Mr. Sridharan that the Adjudicating Authority as also the Tribunal were aware of the Audit Report and contents thereof. We have been shown a copy of this Audit Report and which is at page 59 of the paper book. We have also been shown the relevant extracts therefrom. In the Audit Report the finding with regard to service tax not paid on testing and design charges reads thus:-

"During scrutiny of Trial Balance for 2008-09 & Foreign Remittance Ledger & related Vouchers, it has been observed that the assessee had remitted an amount of Rs. 50,66,904/- towards Testing Charges to M/s. Lear Corporation Technology Centre Allershausen carried out outside the India & Rs. 52,09,620/- towards Design Charges to M/s. Lear Corporation, Dearborn Interior Systems Division, France.

Since assessee being recipient of the services performed by foreign based Co. who does not have any office in India, they should pay the Service Tax Liability. On being pointed out by the Audit, they paid Rs. 5,36,591/- "Under Protest" towards S. Tax on Design Charges vide E-Payment dated 6-1-2010. In respect of remaining amount assessee not agreed with the audit objection with the reason that the testing has been done outside India and wanted to contest the issue.

A.C./D.C. (Service Tax), Nasik-III Division is directed to take necessary action to safeguard the Govt. Revenue under intimation to Audit."

9. We do not see as to why the Tribunal also omits to make any reference to the contents of the communications and which emanate from the Assessee, but

which are on the file of the Adjudicating Authority or at least the Superintendent of Service Tax. In that regard, reliance placed by Mr. Sridharan on pages 61 and 62 of the paper book which are copies of the letters addressed to these Authorities is well placed.

10. If the services were received during the period 2004-2005 and the stand of the Assessee is that no service tax is liable to be paid on the said services and which have been availed of prior to the date of notification or rule coming into force, then, there was some material on record and in the form of at least Audit Report. These documents and in comparison to the contents of the Ledger Account, dates of bills/invoices should have been considered and thereafter, a proper and complete finding should have been rendered by the Tribunal.

11. We find and repeatedly that the Tribunal in undue haste and uncalled hurry proceeds to pass the orders which have to be often set aside by this Court. This Court has repeatedly reminded the Tribunal that it is the last fact finding authority and which the Assessee and the Revenue approaches so as to have complete adjudication on facts and law. In these circumstances it was bounden duty of the Tribunal to have referred to the findings of the Adjudicating Authority and in their entirety. It may be that in all matters and in all cases the Tribunal is not required to pass a lengthy order. It is also equally true that on some occasions few words speak the entire truth. It could be that an efficient and experienced Judicial Officer does not require many words to say something which is very obvious and clear. However, that alone does not permit brushing aside the record. If after reference to the entire record the precise point for determination is framed and adjudicated or the ultimate decision and conclusion rests only on the same, then, one can understand a short order being passed. However, when various issues are raised and going to the root of the case, then, the Tribunal is required to apply its mind and to all facets of the matter. Even if a lengthy order is necessitated the Tribunal must not fail to deliver it. Eventually justice is not only to be done, but must be seen to be done.

12. In the present case the only conclusion that is rendered on the Assessee''s appeal is to be found in paragraph 8 of the impugned order. That reads thus:-

"8. We find, that in the present case the payment regarding design service was made in 2008-09. The contention is that the service was performed prior to 1-6-2007 i.e. in the year 2004-2005. We find that there is no evidence as to why the payment was made in 2008-2009 in respect of the service received in 2004-2005. There is no evidence on record by way of agreement or copy of order placed or any other correspondence to prove that the service was performed prior to 1-6-2007. In these circumstances we find no infirmity in the impugned order, whereby the demand with interest and consequent penalty in respect of design service. We find no merit in the appeal filed by the assessee."

13. A perusal of the same would indicate that there is absolutely no reference made to the Audit Report, letters of the Assessee, Ledger Accounts and Bills.

Rather they were on record is evident from paragraph 7 of the impugned order. There is, therefore, inconsistency and contradiction in the impugned order. In these circumstances we are left with no alternative but to quash and set aside the order of the Tribunal to the extent it deals and disposes of the Assessee''s Appeal. It is, therefore, quashed and set aside. This Appeal is disposed of finally with the consent of both sides. We direct that the Appeal preferred by the Assessee only shall stand revived to the file of the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench, Mumbai. That Appeal filed by the Appellant/Assessee shall be heard and disposed of afresh on merits and in accordance with law by the Tribunal within a period of four months from the date of receipt of a copy of this order. All contentions of both sides and in relation to the issue involved in the Assessee''s Appeal are kept open. We would expect the Tribunal not to be influenced by any of its earlier conclusions and particularly as recorded in paragraph 8 of the impugned order. The Assessee''s Appeal shall be decided uninfluenced by any prior findings and conclusions. This Appeal is allowed in these terms, with no order as to costs.