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(2016) 01 BOM CK 0066

In the Bombay High Court

Case No : Central Excise Appeal No. 255 of 2014

Mercedes Benz India Pvt. Ltd. — APPELLANT

Vs

Commissioner of C. Ex. — RESPONDENT

Date of Decision : 11-01-2016

Acts Referred:
Central Excise Tariff Act, 1985 — Section 3, Section 4

Citation : (2016) 41 STR 577

Hon'ble Judges : S.C. Dharmadhikari and G.S. Patel, JJ.

Bench : Division Bench

Advocate : V. Sridharan, Sr. Advocate, Prakash Shah, Prasad Pranjape, Jas Sanghavi and Arun Jain, i/b. PDS Legal, for the Appellant; Y.S. Bhate and Jitendra B. Mishra, for the Respondent

Final Decision : Dismissed

Judgement

1. This appeal is of the assessee. It challenges the order dated 3rd January, 2014/20th/22nd February, 2014 passed by the Customs, Excise & Service Tax Appellate Tribunal, Mumbai ("Tribunal") [, 2014 (36) S.T.R. 704 (Tri. -Mum.)]. By this appellate order, the Tribunal dealt with four appeals, being Appeal Nos. E/370,456 and 385 all of 2011 and Appeal No. E/1019 of 2012.

2. It is stated that these appeals arise out of the Orders-in-Original dated 30th November, 2010, 30th March, 2012 and 15th December, 2011 of the Commissioner of Central Excise Pune-I and Commissioner of Customs (Appeals) Pune-1.

3. It would be necessary to reproduce the questions which the appellants/ assessees term as substantial questions of law. They read as under:

"(a) Whether the credit of service tax paid on common input services used in relation to manufacture and sale of cars as well as import and sale of cars is not available in full including that portion import and sell of cars?

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(b) Whether the demand raised against appellants is correct when no mechanism was provided in Cenvat Credit Rules, 2004 till 31-3-2011, to calculate proportionate service tax credit to be reversed, in respect of ''input service used for trading of goods?

(c) Whether the entire amount of credit of common input services mentioned in Rule 6(5) of the Cenvat Credit Rules, 2004 is available to appellants?

(d) Whether in the facts and circumstances of case, Appellate Tribunal erred in not setting aside the demand for the period prior to 31-3-2008?

(e) Whether in calculating amount of the eligible Cenvat credit of service tax paid on common input services margin/value addition on trading of goods is to be considered and not entire sale price/turnover of traded goods?

(f) Whether in the facts and circumstances of the case, extended period of limitation under Section 11A of the Act is applicable?

(g) Whether in the facts and circumstances of the case, penalty under Section 11AC of the Act?

(h) Whether in the facts and circumstances of the case, penalty under Section 11 AC of Act is imposable in respect of subsequent show cause notices dated 26-4-2010, 31-12-2010 and 26-8-2011?

(i) Whether in the facts and circumstances of the case, no interest is imposable to the extent Cenvat credit sought to be denied has not been utilized, particularly when there is no error or illegality in taking of the Cenvat credit?

(j) Whether in the facts and circumstances of the case, the Hon''ble Appellate Tribunal has erred in not allowing Appeal No. E/1019/12 for the period August, 2010 to March, 2011 in its entirety and erred in remanding the matter back to the adjudicating authority to recompute the demand based on a completely different basis, not proposed in the show cause notice?"

4. At the outset, in all fairness, Mr. Sridharan, learned Senior Advocate appearing on behalf of the appellant in support of this appeal would submit that questions (a), (b), (i) and (j) are not pressed by him on instructions. He would press questions (c), (d), (e), (f), (g) and (h).

5. Mr. Sridharan would submit that as far as questions (c) and (d) are concerned, they have not been dealt with by the Tribunal, though specifically raised.

6. The findings on questions (f), (g) and (h) as reproduced above are cryptic and there are certain inaccurate particulars incorporated by the Tribunal in its order. Hence, the request of Mr. Sridharan is that these questions, viz., (f), (g) and (h), so also questions (c) and (d) be remanded back to the Tribunal for a decision afresh.

7. As far as question (e) is concerned, there are extensive arguments canvassed before us.

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8. That would require some reference to the facts. The facts in a nutshell are that: the appellants are manufacturers of motor vehicles and parts thereof falling under Chapter 87 of the Central Excise Tariff Act, 1985. They are selling the said vehicles through a dealer network spread across India. The appellants claim that they are paying Central Excise Duty on the final products thus manufactured and sold by them and they are registered with the Central Excise Department. The appellants also import Completely Built-up Units ("CBU") from the parent company, Daimler AG, Germany on payment of appropriate Customs Duties. These are imports made to meet the customer demand and expectations in India. The intent is to provide a wider choice to the customers. However, these vehicles are also sold by the appellants through their same dealer network to the ultimate customers. The appellants claim that they have not availed of credit of Countervailing Duty ("CVD") paid on imported cars for sale in the domestic market. The details of such imported CBUs on payment of CVD are set out in a table at page 5. The appellants are taking and are allowed, according to them, Cenvat credit of duties paid on inputs relatable to manufacture and sale of cars. The appellants claim that they are eligible for Cenvat credit of service tax paid on input service relatable to manufacture and sale of cars. The appellants accept that they are not entitled to Cenvat credit on input service relatable to import and sale of cars. They say that they have not taken such credit and, therefore, presently they are not claiming Cenvat credit on input service exclusively relatable to activity of import and sale of cars. The credit availed of in this respect in the past is also reversed with interest. However, the contention is that there are common input services used for manufacture and sale of cars as also import and sale of cars. The Revenue states that credit of service tax paid on common input services attributable to the activity of import and sale of cars is not available but the same can be availed of only in respect of the manufacture and sale of cars, and the assessee/appellant accepts this position as correct.

9. However, the appellants rely on the existing provisions of the Cenvat Credit Rules, 2004 and state that at the first instance they take the entire credit of service tax paid on common input services. Subsequently to the extent credit is ineligible or not permissible to be availed of, it has to be disallowed/reversed. The question is about the true and correct method of quantifying the said credit for reversal or disallowance. The appellants state that total common input service must be considered and multiplied by a suitable fraction/percentage. Thereafter, common input service credit relatable to manufacturing activity and to trading activity can be arrived at. The former can be allowed while the latter must be disallowed. The question, therefore, is the basis for determining this fraction/ percentage.

10. Mr. Sridharan, learned senior advocate submitted insofar as question (e) is concerned, that is a substantial question of law. The Tribunal ought to have considered that the amount of credit attributable to trading and to be disallowed must be calculated as per the method suggested by the Revenue or otherwise. If that is taken and accepted, the disallowance would come to Rs. 20,67,552/- for

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the period September, 2004 to March, 2011. This is the method prescribed by the Rules themselves from April, 2011. However, according to the Department, this amount should be Rs. 2,65,73,384/- based on the simple pro rata formula of trading turnover divided by total turnover.

11. Rule 6(3A) came into effect from 1st April, 2011. According to the assessees the amendment is correct, reasonable and avoids distortions. Therefore, there is no question of any retrospectivity or applying it retrospectively. But to interpret the Rule consistent with the understanding and practice followed throughout that it would have to be held that merely because this substantive portion is inserted from a subsequent date would not make any difference. The computation can be made on the basis that the Rule always read as above and not otherwise.

12. We have extensively heard Mr. Sridharan and with his assistance perused that part of the order passed by the Tribunal wherein this question is discussed. We have also taken the written submissions of Mr. Sridharan on record together with the case law relied upon. We have a compilation before us of the Rules and it has been extensively referred during the course of the oral arguments.

13. Mr. Bhate, learned Advocate appearing on behalf of the Revenue, has also been heard and he would support the conclusion of the Tribunal. He would submit that this question not being a substantial question of law but a matter of mere computation having been considered and dealt with reasonably, the Tribunal''s order is neither perverse nor vitiated by any error of law apparent on the face of the record.

14. To be fair to both Advocates insofar as other questions and to which we have referred above, the matter is left to Court. In all fairness, however, the Revenue also agrees that the Tribunal''s order does not discuss the questions and to be precise questions (c) and (d). As far as other questions are concerned, according to the Revenue, there are findings of fact and, therefore, the appeal should not be entertained.

15. After having perused the Tribunal''s order what we have noted is that insofar as question (e) is concerned, the Tribunal commences its discussion from Paragraph 8 at page 84 of the paperbook. The Tribunal determines that as a first issue, viz., whether trading activity could be considered as an exempted service. It refers to series of judgments starting from Orion Appliances Limited [2010 (19) S.T.R. 205 (Tribunal)]. In all fairness as recorded earlier, it is not disputed even by the assessee that as far as credit of input service on cars which are imported from the parent company and traded, that is inadmissible. Therefore, as far as the trading activity is concerned Mr. Sridharan does not dispute the correctness of the finding in the Tribunal''s order.

16. The main contention thereafter was with regard to the apportionment. The Tribunal commences its discussion as far as this aspect is concerned, after referring to the definitions, from Paragraphs 12, 13 and 14. The Tribunal agrees with the assessee that the common services are not covered by the definition of

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"activity" relating to business. The effect of the amendment made in 2011 is then considered from Paragraph 14. The argument of the assessee''s Advocate that these amendments are substantive in nature and though they are introduced in the form of an explanation, they would cover certain cases prior to the insertion or introduction of the same appears to have been rejected but in the same paragraph it is held that Rules are delegated legislation and the Government has no power to amend them with retrospective effect. To that extent, the Tribunal agrees with the learned Senior Advocate appearing on behalf of the assessee. From there onwards and then in Paragraph 15, at page 99 of the paperbook, the Tribunal holds that changes made by the Explanation are substantive. The Explanations have been made in Rules by a Notification without giving it retrospective effect and though the same was issued on 1st March, 2011 it came into force on 1st April, 2011. Thus, it cannot have retrospective effect. The Revenue''s action in considering trading as an exempted service for the period from August, 2010 to March, 2011 and covered by Appeal No. E/1019/2012 and demanding 6% of the trading turnover is not correct. To that extent, the Tribunal agrees with the assessee and renders a finding against the Revenue. The Revenue has not challenged the same before us. In paragraph 16 onwards after reiterating this conclusion, the Tribunal deals with the apportionment of the credit of the common input service where such input services have been used both in relation to the manufacture of goods and trading activities in respect of the imported goods. From there onwards, we find that the Tribunal has referred to the arguments of the assessee''s Senior Advocate. It refers to a judgment relied upon and that is by the High Court of Justice of England and Wales, Queen''s Bench Division. Another judgment which was relied upon was in the case of Commissioner of Wealth Tax, Meerut v. Shravan Kumar Swamp & Sons. [, (1994) 6 SCC 623]. The Tribunal in paragraph 17 comes to a conclusion that clause (c) of Explanation 1 has no application for determining the apportionment of the credit of service tax on input services.

17. For that purpose, we reproduce the relevant Rule with the Explanation which has come into force from 1st April, 2011.

"RULE 6. Obligation of a manufacturer or producer of final products and a provider of output service. - (1) The CENVAT credit shall not be allowed on such quantity of input used in or in relation to the manufacture of exempted goods or for provision of exempted services, or input service used in or in relation to the manufacture of exempted goods and their clearance up to the place of removal or for provision of exempted services, except in the circumstances mentioned in sub-rule (2):

Provided that the CENVAT credit on inputs shall not be denied to job worker referred to in Rule 12AA of the Central Excise Rules, 2002, on the ground that the said inputs are used in the manufacture of goods cleared without payment of duty under the provisions of that rule.

(2) Where a manufacturer or provider of output service avails of CENVAT credit in

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respect of any inputs or input services and manufactures such final products or provides such output service which are chargeable to duty or tax as well as exempted goods or services, then, the manufacturer or provider of output service shall maintain separate accounts for -

(a) the receipt, consumption and inventory of inputs used -

(i) in or in relation to the manufacture of exempted goods;

(ii) in or in relation to the manufacture of dutiable final products excluding exempted goods;

(iii) for the provision of exempted services;

(iv) for the provision of output services excluding exempted services; and

(b) the receipt and use of input services -

(i) in or in relation to the manufacture of exempted goods and their clearance upto the place of removal;

(ii) in or in relation to the manufacture of dutiable final products, excluding exempted goods, and their clearance up to the place of removal;

(iii) for the provision of exempted services; and

(iv) for the provision of output services excluding exempted services,

and shall take CENVAT credit only on inputs under subclauses (ii) and (iv) of clause (a) and input services under sub-clauses (ii) and (iv) of clause (b).

(3) Notwithstanding anything contained in sub-rules (1) and (2), the manufacturer of goods or the provider of output service, opting not to maintain separate accounts, shall follow any one of the following options, as applicable to him, namely:-

(i) pay an amount equal to five percent of value of the exempted goods and exempted services; or

(ii) pay an amount as determined under sub-rule (3A); or

(iii) maintain separate accounts for the receipt, consumption and inventory of inputs as provided for in clause (a) of sub-rule (2), take CENVAT credit only on inputs under sub-clauses (ii) and (iv) of said clause (a) and pay an amount as determined under sub-rule (3A) in respect of input services. The provisions of sub-clauses (i) and (ii) of clause (b) and sub-clauses (i) and (ii) of clause (c) of sub-rule (3A) shall not apply for such payment:

Provided that if any duty of excise is paid on the exempted goods, the same shall be reduced from the amount payable under clause (i):

Provided further that if any part of the value of a taxable service has been exempted on the condition that no CENVAT credit of inputs and input services

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used for providing such taxable service, shall be taken then the amount specified in clause (i) shall be five percent of the value so exempted:

Explanation I. - If the manufacturer of goods or the provider of output service, avails any of the option under this sub-rule, he shall exercise such option for all exempted goods manufactured by him or, as the case may be, all exempted services provided by him, and such option shall not be withdrawn during the remaining part of the financial year.

Explanation II. - For removal of doubt, it is hereby clarified that the credit shall not be allowed on inputs used exclusively in or in relation to the manufacture of exempted goods or for provision of exempted services and on input services used exclusively in or in relation to the manufacture of exempted goods and their clearance up to the place of removal or for provision of exempted services.

Explanation III. - No CENVAT credit shall be taken on the duty or tax paid on any goods and services that are not inputs or input services.

(3A) For determination and payment of amount payable under clause (ii) of sub-rule (3), the manufacturer of goods or the provider of output service shall follow the following procedure and conditions, namely:-

(a) while exercising this option, the manufacturer of goods or the provider of output service shall intimate in writing to the Superintendent of Central Excise giving the following particulars, namely:-

(i) name, address and registration No. of the manufacturer of goods or provider of output service;

(ii) date from which the option under this clause is exercised or proposed to be exercised;

(iii) description of dutiable goods or output services;

(iv) description of exempted goods or exempted services;

(v) CENVAT credit of inputs and input services lying in balance as on the date of exercising the option under this condition;

(b) the manufacturer of goods or the provider of output service shall, determine and pay, provisionally, for every month, -

(i) the amount equivalent to CENVAT credit attributable to inputs used in or in relation to manufacture of exempted goods, denoted as A;

(ii) the amount of CENVAT credit attributable to inputs used for provision of exempted services (provisional) = (B/C) multiplied by D, where B denotes the total value of exempted services provided during the preceding financial year, C denotes the total value of dutiable goods manufactured and removed plus the total value of output services provided plus the total value of exempted services provided, during the preceding financial year and D denotes total CENVAT credit

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taken on inputs during the month minus A;

(iii) the amount attributable to input services used in or in relation to manufacture of exempted goods and their clearance up to the place of removal or provision of exempted services (provisional) = (E/F) multiplied by G, where E denotes total value of exempted services provided plus the total value of exempted goods manufactured and removed during the preceding financial year, F denotes total value of output and exempted services provided, and total value of dutiable and exempted goods manufactured and removed, during the preceding financial year, and G denotes total CENVAT credit taken on input services during the month;

(c) the manufacturer of goods or the provider of output service, shall determine finally the amount of CENVAT credit attributable to exempted goods and exempted services for the whole financial year in the following manner, namely:-

(i) the amount of CENVAT credit attributable to inputs used in or in relation to manufacture of exempted goods, on the basis of total quantity of inputs used in or in relation to manufacture of said exempted goods, denoted as H;

(ii) the amount of CENVAT credit attributable to inputs used for provision of exempted services = (J/K) multiplied by L, where J denotes the total value of exempted services provided during the financial year, K denotes the total value of dutiable goods manufactured and removed plus the total value of output services provided plus the total value of exempted services provided, during the financial year and L denotes total CENVAT credit taken on inputs during the financial year minus H;

(iii) the amount attributable to input services used in or in relation to manufacture of exempted goods and their clearance up to the place of removal or provision of exempted services = (M/N) multiplied by P, where [M] denotes total value of exempted services provided plus the total value of exempted goods manufactured and removed during the financial year, [N] denotes total value of output and exempted services provided, and total value of dutiable and exempted goods manufactured and removed, during the financial year, and [P] denotes total CENVAT credit taken on input services during the financial year;

(d) the manufacturer of goods or the provider of output service, shall pay an amount equal to the difference between the aggregate amount determined as per condition (c) and the aggregate amount determined and paid as per condition (b), on or before the 30th June of the succeeding financial year, where the amount determined as per condition (c) is more than the amount paid;

(e) the manufacturer of goods or the provider of output service, shall, in addition to the amount short-paid, be liable to pay interest at the rate of twenty-four percent, per annum from the due date, i.e., 30th June till the date of payment, where the amount short-paid is not paid within the said due date;

(f) where the amount determined as per condition (c) is less than the amount

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determined and paid as per condition (b), the said manufacturer of goods or the provider of output service may adjust the excess amount on his own, by taking credit of such amount;

(g) the manufacturer of goods or the provider of output service shall intimate to the jurisdictional Superintendent of Central Excise, within a period of fifteen days from the date of payment or adjustment, as per condition (d) and (f) respectively, the following particulars, namely:-

(i) details of CENVAT credit attributable to exempted goods and exempted services, monthwise, for the whole financial year, determined provisionally as per condition (b),

(ii) CENVAT credit attributable to exempted goods and exempted services for the whole financial year, determined as per condition (c),

(iii) amount short-paid determined as per condition (d), alongwith the date of payment of the amount short-paid,

(iv) interest payable and paid, if any, on the amount short-paid, determined as per condition (e), and

(v) credit taken on account of excess payment, if any, determined as per condition (f);

(h) where the amount equivalent to CENVAT credit attributable to exempted goods or exempted services cannot be determined provisionally, as prescribed in condition (b), due to reasons that no dutiable goods were manufactured and no output service was provided in the preceding financial year, then the manufacturer of goods or the provider of output service is not required to determine and pay such amount provisionally for each month, but shall determine the CENVAT credit attributable to exempted goods or exempted services for the whole year as prescribed in condition (c) and pay the amount so calculated on or before 30th June of the succeeding financial year.

(i) where the amount determined under condition (h) is not paid within the said due date, i.e., the 30th June, the manufacturer of goods or the provider of output service shall, in addition to the said amount, be liable to pay interest at the rate of twenty four percent, per annum from the due date till the date of payment.

[Explanation 1 to 111 ***]

(3B) Notwithstanding anything contained in sub-rules (1), (2) and (3), a banking company and a financial institution including a non-banking financial company, providing financial taxable service specified in sub-clause (zm) of clause (105) of section 65 of the Finance Act, engaged in providing services by way of extending deposits, loans or advances shall pay for every month an amount equal to fifty percent, of the CENVAT credit availed on inputs and input services in that month.

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(3C) Notwithstanding anything contained in sub-rules (1), (2), & (3) and (3B), a provider of output service providing taxable services as specified in sub-clauses (zx) and (zzzzf) of clause (105) of section 65 of the Finance Act, shall pay for every month an amount equal to twenty percent of the CENVAT credit availed on inputs and input services in that month.

(3D) Payment of an amount under sub-rule (3) shall be deemed to be CENVAT credit not taken for the purpose of an exemption notification wherein any exemption is granted on the condition that no CENVAT credit of inputs and input services shall be taken.

Explanation I. - "Value" for the purpose of sub-rules (3) and (3A), -

(a) shall have the same meaning as assigned to it under section 67 of the Finance Act, read with rules made thereunder or, as the case may be, the value determined under section 3, 4 or 4A of the Excise Act, read with rules made thereunder;

(b) in the case of a taxable service, when the option available under sub-rule (7), (7A), (7B) or (7C) of Rule 6 of the Service Tax Rules, 1994, or the Works Contract (Composition Scheme for payment of Service Tax) Rules, 2007 has been availed, shall be the value on which the rate of service tax under section 66B of the Finance Act, read with an exemption notification, if any, relating to such rate, when applied for calculation of service tax results in the same amount of tax as calculated under the option availed;

(c) in case of trading, shall be the difference between the sale price and the cost of goods sold (determined as per the generally accepted accounting principles without including the expenses incurred towards their purchase) or ten percent, of the cost of goods sold, whichever is more;

18. The Tribunal gives an illustration and tries to work out a denominator. However, in doing so we find that at page 103 of the paperbook, in Paragraph 17 of its order, the Tribunal has misdirected itself completely. We reproduce that part of the order.

"17. ...In fact, we have gone through clause (c) of Explanation 1 added with effect from 1-4-2011 and are of the view that perhaps the said new method has been adopted to encourage the trading of the goods rather than the manufacturing of the goods (otherwise criterion should have been same viz. Based upon turnover or value addition). We, therefore, hold that for the period under dispute the credit of service tax paid on the common input services should be apportioned in the same ratio as the turnover of the manufactured and traded cars."

19. We had put it to Mr. Bhate as to how in the teeth of such finding could the Tribunal then sustain the formula and the working of the denominator arrived at by it. The Tribunal must firstly refer to the substantive Rule and as operative prior to 1st April, 2011 and then arrive at a conclusion in relation to the

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Explanation introduced with sub-clauses with effect from 1st April, 2011. On its introduction and even prior thereto, we do not find any justification then to hold that the Parliament intended to encourage trading of goods rather than manufacturing of the same.

20. The Parliamentary intent has to be gathered from the language used. If the words are plain, simple and clear, there is no scope for interpretation or applying any principle thereof. Once the Tribunal is bound to decide the controversy in the backdrop of the object and purpose sought to be achieved but has not arrived at any conclusion bearing in mind the same, then, we are required to step in. We cannot sustain this part of the finding and conclusion. Even Mr. Bhate found it difficult to support the same.

21. We are of the view that as far as working of the denominator is concerned (and even the numerator, technically speaking) and to apportion the input credit, it would be appropriate to send the matter back to the Tribunal. This course is also adopted because we do not find any discussion in the Tribunal''s order insofar as questions (c) and (d) reproduced above.

22. Insofar as questions (f), (g) and (h) are concerned, the same are consequential and in the event the numerator/denominator as suggested by the assessee is eventually upheld, then, the extended period of limitation would not be applicable. However, that part of the controversy need not be gone into as the essential question is going back for a fresh answer to the Tribunal.

23. In the light of above conclusion and by keeping open contentions of both sides, we allow this appeal by setting aside the impugned order to the extent the same fails to deal with questions (c) and (d).

24. As far as questions (f), (g) and (h) are concerned, they are incidental and arise out of question (e). That essential question and controversy being remitted back in the aforesaid terms, the Tribunal will have to answer them as well.

25. However, we clarify that the Tribunal should not reopen everything that is concluded in favour of the assessee and particularly the relief granted in Appeal No. E/1019 of 2012. Once the Revenue has not challenged the conclusion in that appeal by way of a substantive appeal, we conclude that against it and in favour of the assessee.

26. The other aspects and as clarified above shall go back to the Tribunal. However, the Tribunal should not arrive at a conclusion that the amendment has been adopted to encourage trading in goods rather than manufacturing of the same. There will be no order as to costs.

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