(2021) 08 CESTAT CK 0037

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Service Tax Appeal No. 26822, 26824, 26825, 26826, 26827, 26828, 26829, 26830 Of 2013

M/s. ABB Limited — APPELLANT

Vs

Commissioner Of Central Excise, Customs And Service Tax, BANGALORE-LTU — RESPONDENT

Date of Decision : 03-08-2021

Acts Referred:

li>Central Excise Tariff Act, 1985 — Chapter 85
Finance Act, 1994 — Section 65(105)
Cenvat Credit Rules, 2004 — Rule 2(e), 6
Central Excise Act, 1944 — Section 11A

Citation : (2021) 08 CESTAT CK 0037

Hon'ble Judges : S.S. Garg, J

Bench : Single Bench

Advocate : Ravi Raghavan, Narendrababu P. Byahatti

Final Decision : Allowed

Judgement

1. These appeals have been received from the Hon'ble High Court of Karnataka and the Hon'ble High Court vide its Order dated 4th March, 2021 has remanded the matter back to the Tribunal for fresh decision after considering the various submissions which may be submitted by the appellant. The appellant had filed 8 appeals against the common impugned order dated 07.03.2013 passed by the Commissioner (Appeals) whereby the Commissioner (Appeals) disposed of all the 8 appeals by the common impugned order. Since the issue involved in all the 8 appeals is identical therefore all the appeals are being disposed of by this common order.

2. A statement showing the details of appeal-wise period involved, amounts of CENVAT credit and penalty imposed is appended below:

Sl. No.

Appeal No.

Period involved

Demand of credit (Rs.)

Penalty u/s78

1.

ST/26822/2013

2005-2009

2,53,476/-

2,53,476/-

2.

ST/26824/2013

2005-2009

12,74,632/-

12,74,632/-

3.

ST/26825/2013

2005-2009

2,59,266/-

2,59,266/-

4.

ST/26826/2013

2005-2009

4,00,755/-

4,00,755/-

5.

ST/26827/2013

2005-2009

46,673/-

46,673/-

6.

ST/26828/2013

2005-2009

2,52,815/-

2,52,815/-

7.

ST/26829/2013

2005-2009

1,21,975/-

1,21,975/-

8.

ST/26830/2013

2005-2009

81,017/-

81,017/-

TOTAL

26,09,609/-

26,09,609/-

3. Briefly the facts of the present case are that the appellant is engaged in the manufacture and clearance of excisable goods falling under Chapter 85 of Central Excise Tariff Act, 1985. They are also providing various taxable output services defined under Section 65(105) of the Finance Act, 1994. The appellants are mainly engaged in supply, erection and installation of electrical equipment to various agencies like State Electricity Boards, National Thermal Power Corporations, Delhi Metro Rail Corporation, Damodar Valley Corporation, Reliance Infrastructure Ltd and various other agencies. For undertaking the said projects, the appellant used various goods manufactured as well as imported and locally procured. The appellants in the course of their business received various input services like catering service, courier service, event management, house keeping, manpower recruitment etc. and availed CENVAT credit of input services under the provisions of CENVAT Credit Rules, 2004. The Department issued a Show-Cause Notice dated 19.10.2010 requiring the appellant to show cause as to why credit availed on input services pertaining to trading will not be available as per Rule 6 of CENVAT Credit Rules, 2004. The appellant filed reply rebutting all allegations in the Show-Cause Notices. The Assistant Commissioner vide various Order-in-Original confirmed the demand relating to input service credit along with applicable interest and imposition of penalty. Aggrieved by the said order, the appellant filed 8 appeals before the Commissioner (Appeals) and the

Commissioner (Appeals) vide impugned order dated 07.03.2013 upheld the Order-in-Original and rejected the appeals of the appellants. Aggrieved by the said order, the appellant filed the present 8 appeals before the Tribunal.

4. Heard both the parties and perused the records.

5. Learned Counsel for the appellant submitted that the impugned order is not sustainable in law as the same has been passed without properly appreciating the facts and the law and the binding judicial precedents. He further submitted that the activity of trading was brought within the scope of "exempted service" through amendments made in the Finance Act, 2011 effective from 01.04.2011. He further submitted that the amendment brought in the definition in Rule 2(e) by way of explanation whereby the trading activity was also considered as exempted service would have effected only after 01.04.2011 and thus applicable prospectively and not retrospectively. He also submitted that there was no mechanism to reverse credit prior to 01.04.2011. For this submission, he relied upon the decision in the case of CCE, Kerala Vs Larsen & Toubro Ltd. 2015 (39) STR 913 (SC) in support of the contention that no demand can survive in absence of recovery mechanism. Learned Counsel also submitted that trading activity cannot be considered as an exempted service for the period prior to 01.04.2011 and the provisions of Rule 6 of CENVAT Credit Rules, 2004 cannot be made applicable for the period prior to 01.04.2011. For this submission, he relied upon the following decisions:

? Mercedes Benz India Pvt. Ltd. Vs CCE, Pune-I, 2016 (41) STR 577 (Bom.).

? Marudhan Motors Vs CCE & ST, Jaipur-II, 2017 (47) STR 261 (Tri.Del.).

? Franke Faber India Ltd. Vs CCE, Aurangabad, 2017 (52) STR 155 (Tri. Mumbai).

? CCE, Ghaziabad Vs Avon International Pvt. Ltd., 2017 (5) GSTL 376 (Tri. All.).

6. He further submitted that there was no clarity on the requirement of reversal of CENVAT credit availed on common input services attributable to trading for the period prior to 01.04.2011. The clarity was brought in by way of amendment to Rule 2(e) of CENVAT Credit Rules and consequent application of Rule 6 of CENVAT Credit Rules with effect from 01.04.2011. Learned Counsel fairly conceded that there have been conflicting judgments on the issue whether the amendment brought in the definition in Rule 2(e) is applicable retrospectively or prospectively and therefore he did not press these appeals on merits and has confined his arguments only on the point of limitation. Learned Counsel submitted that the entire demand has been confirmed by invoking the extended period of limitation which is not legally justified because the appellant has never suppressed any facts relating to the availment of CENVAT credit from the Department. The appellant has regularly filed half-yearly service tax Returns in Form ST-3 with the Department during the relevant period and the details of the availment of CENVAT credit is duly disclosed in ST-3 Returns. He further submitted that on the same issue for the subsequent periods in respect of

different units of the appellant, this Tribunal has allowed the appeals on the ground of limitation in ABB Ltd. Vs CCE, Bangalore, Final Order No. 20056-20057/2018 dated 12.01.2018 and in ABB Ltd, Maneja Vs CCE, Bangalore, 2018-TIOL-3272-CESTAT-BANG. He also submitted that there is no requirement under law to disclose that the input services have been used in relation to trading in the ST-3 Returns. The information which is not required to be supplied under law if not supplied does not amount to suppression. For this submission, he relied upon the decision in the Hon'ble Madras High Court in the case of CCE, Indore Vs Zyg Pharma Pvt. Ltd., 2017 (358) ELT 101 (MP). He also submitted that the SCNs in these present appeals were issued relying on annual reports filed by the appellant and hence there is no suppression of facts of availment of CENVAT credit and mala fide intention to evade the duty on part of the appellant is missing. The matter involves interpretation of legal provision and therefore the extended period of limitation cannot be invoked. For this submission, he relied upon the decision of the Tribunal in the case of Honeywell Electrical Devices & Systems India Ltd. Vs CESTAT, Chennai- 2019 (367) ELT 916 (Mad.). He also submitted that the appellants were under a bona fide belief that the CENVAT credit on common input service is eligible in view of the conflicting decisions of the Tribunals during the relevant period. Hence, the extended period of limitation cannot be invoked. For this submission, he placed reliance on the decision of the Hon'ble Madras High Court in the case of AC GST & C.Ex., Chennai Vs Shriram Value Services Pvt. Ltd.-2019 (368) ELT 928 (Mad.). Learned Counsel also tried to distinguish the ratio in the case of FL Smidth Pvt. Ltd. Vs CCE, 2014-TIOL-2186-HC-MAD-CX and submitted that the said decision is not applicable in the facts of the present case because in that case, the Hon'ble High Court did not have an opportunity to examine whether the input service received in relation to the activity of providing taxable service can be denied only because the provision of service also involves supply of goods. Learned Counsel also submitted that the appellant did not utilize the CENVAT credit and the proportionate credit attributable to trading was reversed prior to utilization and therefore, the demand of interest and imposition of penalty is not sustainable in view of the following decisions:

? CCE & ST LTU, Bangalore Vs Bill Forge Pvt. Ltd.-2012 (279) ELT 209 (Kar.)

? CCE, Madurai Vs Strategic Engineering (P) Ltd.-2014 (310) ELT 509 (Mad.)

? J.K. Tyre & Industries Ltd. Vs CCE-2016 (340) ELT 193 (Tri. LB)

? Commissioner of Central Tax Bangalore Vs Yaskawa India Pvt. Ltd, 2019-TIOL-3128-CESTAT-BANG

? FCI OEN Connectors Ltd. Vs CCE, Kerala, 2019-TIOL-1387-CESTAT-BANG

7. On the other hand, learned AR reiterated the findings of the impugned order and submitted that trading is not at all a service. He further submitted that Rule 2(e) was amended from 01.04.2011 to include trading as an exempted service. This amendment was made applicable retrospectively and this has been held as

retrospective in the case of Ruchi Global Enterprises reported in 2017-TIOL-1235 (HC Madras) wherein it has been held that trading activity is not amenable to service tax at the relevant period and therefore the assessee was required to reverse the proportionate CENVAT credit attributable to trading. Learned AR also relied upon the decision in the case of Micro Lab Ltd., Final Order No.21265-21285/2016 dated 23.11.2016.

8. After considering the submissions of both the parties and perusal of the material on record and after considering the various decisions relied upon by the appellant as well as by the learned AR, I find that the Department was very well aware of the trading activity carried out by the appellant because the details of trading was furnished by the appellant during the relevant period on the basis of which the demand has been raised. The appellant has been regularly filed half-yearly service tax Returns in Form ST-3 with the Department during the relevant period. Further, I find that on the issue of invoking the extended period of limitation, this Tribunal for the subsequent period has allowed the appeals of the appellant on the ground of limitation by holding that extended period cannot be invoked when there is no suppression of fact with intent to evade duty. Further, I find that the period involved in all the eight appeals is prior to amendment effected in Rule 2(e) of the CENVAT Credit Rules, 2004. Further, I find that the Chennai Bench of the CESTAT in the case of SHV LPG India Private Limited Vs CST Chennai reported in 2018-TIOL-2884 has also dropped the demand for the extended period of limitation and confirmed the demand only for the normal period and the penalties related to normal period was also set aside mainly on the ground that during the relevant period, there was much confusion as to whether credit can be availed in respect of trading activities and various litigations were pending during that time. Further, I find that the Hon'ble High Court of Madras in the case of Assistant Commissioner of GST Vs Shriram Value Services Pvt. Ltd. cited supra has considered the same issue of limitation and has observed in Paras 6, 7 & 8 which is reproduced herein below:

6. From the above, it is clear that the position was clarified by the Government by insertion of Explanation only with effect from 1-4-2011 that the trading activity will be Exempted Services. The Explanation is clarificatory in nature and can be held to be applicable even for the past period. Thus, at the relevant period of time, viz., from April 2009 to March 2011, the Assessee was, obviously, under bona fide belief in view of the conflicting decisions of the Tribunals during that period and taking the trading activity as Exempted Services, availed the CENVAT Credit which is sought to be reversed and recovered by the Department invoking the extended period of limitation. Such a bona fide belief cannot be held to be done with ulterior purpose for evading the Duty and therefore, the extended period of limitation would not be available to the Revenue Authority in view of the aforesaid decision rendered by the Hon'ble Supreme Court.

7. The judgments relied upon by the Learned Counsel for the Revenue viz., Gujarat High Court's decision in CCE v. Neminath Fabrics Pvt. Ltd. as well as

decision of a Division Bench of this Court in the case of M/s. King Bell Apparels (supra) are not applicable to the facts of the present case as even without attributing any knowledge to the Revenue Authority about such dispute, the fact remains that in view of the Explanation inserted later on in favour of the Assessee for the period prior to 1-4-2011, the Revenue Authority cannot be permitted to reverse such CENVAT Credit and recover the Duty, alleged to have been evaded by the Assessee, invoking the extended period of limitation under Section 11A of the Act.

8. Therefore, the controversy stands covered by the Supreme Court decision in Kolety Gum Industries case (supra), relied upon by the Learned Counsel for the Assessee and the present Appeal of Revenue is found to be devoid of any merit and the same is liable to be dismissed. Accordingly, it is dismissed. No costs.

8.1. Since the learned Counsel has only confined his arguments on limitation and has not pressed on merit on account of conflicting decisions of the various Tribunals and the High Courts, hence I restrict my findings with regard to limitation alone. Since there was no wrong utilization of CENVAT credit and the appellant has reversed the proportionate credit attributable to trading prior to its utilization and therefore the demand of interest and imposition of penalty is not sustainable in view of the decision of the Hon'ble Karnataka High Court in the case of Bill Forge Pvt. Ltd. cited supra. During the relevant time, there was a confusion regarding the said issue and appellant had a bona fide belief that CENVAT credit on input service is eligible hence the extended period of limitation cannot be invoked in view of the decision of the Hon'ble Madras High Court in the case of Shriram Value Services Pvt. Ltd cited supra.

9. Hence, by following the ratio of the various decisions relied upon by the appellant, I am of the considered view that in the present bunch of appeals, the extended period cannot be invoked and the demand of CENVAT credit can only be made with regard to normal period. Similarly interest and penalty are not to be demanded as the appellant had reversed the credit before utilization. Therefore, I allow the appeals of the appellant partly and hold that demand for the extended period of limitation is barred by limitation and only the demand for the normal period is confirmed and the matter is remanded to the Original Authority for quantification of the demand for the normal period. The Original Authority will also examine as to whether the appellant has already reversed the CENVAT credit then it should be adjusted from already reversed credit and the remaining credit should be allowed as re-credit to the appellant.

(Order pronounced in the open court on 03/08/2021.)

