(2013) 08 BOM CK 0083

In the Bombay High Court

Case No : Central Excise Appeal (L) No. 167 of 2013

M/s. Inox Air Products Ltd. APPELLANT

Vs

Commissioner of Central Excise RESPONDENT

Date of Decision : 05-08-2013

Acts Referred:
Central Excises and Salt Act, 1944 — Section 35G

Citation : (2014) 34 STR 29

Hon'ble Judges : Mohit S. Shah, C.J;M.S. Sanklecha, J

Bench : Division Bench

Final Decision : Disposed Off

Judgement

1. This appeal u/s 35G of the Central Excise Act 1944 (" the Act") challenges the order dated 29 April 2013 of Central Excise Customs Service Tax Appellate Tribunal ("Tribunal") requiring the appellant to predeposit 25% of the service tax demand of Rs. 1.61 crores for the period June 2006 to March 2007 as confirmed by order dated 29 October 2012 of the Adjudicating Authority. The above deposit was required for the purposes of entertaining the appellant''s appeal on merits. This demand of Rs. 1.61 crores in on account of incorrect availment of input credit of service tax paid for services used in installation of Oxygen plants and utilization of the credit for payment of service tax on service of maintenance and repair rendered by the appellant. The appellant had entered into three contracts with Ispat Industries Limited. Two for the lease of Oxygen plants and the other for operation and maintenance of the two plants. In the agreement for lease of the oxygen plant it was provided that the appellant would set up the plant and provide the same on lease to M/s. Ispat Industries. The ownership of the Oxygen plant continues to remain with the appellant during the term of the lease.

2. The appellant had during the course of setting up the plants had engaged the services of various input service providers and the tax paid to them was taken as credit by the appellant. The credit so taken was utilized by the appellant for discharging the service tax payable while providing of maintenance and repair

service. The case of the department as made out in the show cause notice and confirmed in the adjudication order appears to be that setting up of plant would result in immovable property and therefore, the appellant would not be entitled to avail of credit of input service tax paid on services received for construction of plant. Consequently demand was confirmed for Rs. 1.61 crores by the order dated 29 October 2012 being the service tax credit utilized by the appellant in discharge to service tax payable for maintenance and repair services rendered by it after having taken credit for the same in respect of services utilized for construction of the oxygen plant.

3. In appeal the Tribunal by the impugned order holds that the appellant is not entitled to utilize the credit of service tax paid taken in respect of services received during the installation and commissioning of the plant for discharge of service tax payable on providing services of maintenance and repairs as they are covered by two different agreements. The impugned order directs the appellant to pre-deposit 25% of Rs. 1.61 crores on the basis that there are two different agreements and therefore, credit taken under one agreement cannot be utilized in discharge of service tax payable under another agreement. This was after stating in Para 4 of the impugned order that revenue wants to deny credit on the ground that oxygen plant is an immovable property. However, thereafter this issue is not discussed at all in the impugned order.

4. In view of the above we set aside the impugned order and restore the application for dispensing with pre deposit of service tax and penalty for hearing before the Tribunal. In order to ensure that the stay application before the Tribunal is taken up expeditiously, we direct that the parties shall appear before the Tribunal on 19 August 2013 for further directions. Parties shall also cooperate with the Tribunal for expeditious disposal of the stay application within six weeks from today.

5. In view of the above time table, it is directed that till the disposal of the stay application there will be ad interim stay for recovery of service tax, interest and penalty on the basis of the adjudication order dated 29 October 2012 of the Commissioner of Central Excise and Customs. Accordingly the appeal is disposed of in the above terms. No order as to costs.

