

(2011) 08 KAR CK 0031
In the Karnataka High Court
Case No : C.E. A. No. 98 of 2010

Shell India Markets Private Limited (Earlier Shell Technology India Private Limited) APPELLANT

Vs

Commissioner of Central Excise, Bangalore RESPONDENT

Date of Decision : 25-08-2011

Acts Referred:

Central Excise Act, 1944 — Section 11 B
Finance Act, 1994 — Section 69

Citation : (2012) 28 STR 87 : (2012) 50 VST 140

Hon'ble Judges : Ravi Malimath, J;N. Kumar, J

Bench : Division Bench

Advocate : Prasad Paranjape and P. Dinesh for M/s. PDS Legal Advocates and Solicitors, for the Appellant; C. Shashikantha, for the Respondent

Judgement

N. Kumar, J.—The assessee has preferred this appeal against the order passed by the Tribunal, which has remanded the matter to the revisional authority for fresh disposal and in accordance with law. The assessee, M/s. Shell Technology Private Limited, are registered under the taxable service category of consulting engineering services as per section 69 of the Finance Act, 1994. The assessee is a 100 per cent export oriented unit, engaged in providing consulting engineering services. They filed Cenvat refund claim on January 28, 2008 of Rs. 66,49,805 for the period November, 2006 to March, 2007. In pursuance of the Notification No. 5/2006 CE (NT) dated March 14, 2006 for the unutilized Cenvat credit of service tax which has been paid by them on input services. The claim was based on the ground that all their services were exported to their group companies located outside India and the said activity fall under the definition of "consulting engineering services", which is a taxable service. The claim was scrutinized and found that the claimant has not produced certain documents. Therefore, a show-cause notice was issued on March 10, 2008, whereupon the assessee was called upon to show cause why their claim should not be rejected in terms of section 11B of the Central Excise Act, 1944, for short, hereinafter referred to as "the

Act". The assessee submitted the reply. They explained that the company is engaged in providing engineering design and support services to group companies outside India. The engineering design and support services in the nature of developing high and technical studies, developing solutions that captures the science of technical study and technical modeling and stimulation service in relation to oil fields, refineries and petrochemical installations. All input services received by the assessee are used only in relation to the export of consulting engineering service and in the absence of any other activities being performed by the assessee, the input services cannot be used for any purpose other than in relation to export of taxable services. Therefore they claim Cenvat credit in respect of 20 input services. They also relied on the judgment of the Tribunal in the case of Commissioner of Central Excise, Hyderabad IV, Commissionerate, Hyderabad v. Deloitte Tax Services India Pvt. Limited reported in (2008) TIOL 629 (CESTAT-Bang). They claimed refund of Rs. 66,49,805 of service tax paid on the above input services.

2. The revisional authority on due verification held that there is no nexus between the 15 services and the services exported. However, it was found that the assessee is eligible for refund claim in respect of five services. Therefore the claim of the assessee was partially allowed. Aggrieved by the said order rejecting the claim for refund in respect of 15 services, the assessee preferred an appeal to the Commissioner of Central Excise (Appeals II). Out of 15 services, which were the subject-matter of appeal, the appellate authority held that in respect of 10 services they are not directly or indirectly related to export services rendered and there were no concrete evidence given before the original authority and therefore the original authority has correctly rejected the claim to that extent. Accordingly, it also rejected the said claim. However, in respect of five services, holding that they directly or indirectly related to the export services rendered, refund was allowed. Aggrieved by the said order rejecting refund in respect of 10 services, the assessee preferred an appeal to the Tribunal. The Revenue also preferred an appeal in respect of five services for which refund was allowed.

3. In fact, there were number of appeals where similar question was involved. Therefore the Tribunal clubbed all the appeals and by common order, disposed of the appeals setting aside the order of the Appellate Commissioner and remanded the matter back to the revisional authority, however, without disturbing the refund granted by the revisional authority in respect of five services. Aggrieved by the said order, the assessee is in appeal.

4. This appeal came to be admitted by this court to consider the following substantial question of law :

(i) Whether the Tribunal was correct in passing the impugned order, which was beyond the scope of the show-cause notice as the show-cause notice did not dispute the powers of the Central Government to grant refund of Cenvat credit ?

(ii) Whether the Tribunal was right in holding that the Central Government had

no power to grant refund of Cenvat credit, when the same was not an issue before it ?

(iii) Whether the Tribunal was right in acting beyond jurisdiction in interpreting the provisions of statute and holding that the Central Government does not have powers to grant refund ?

5. We have gone through the judgment of the Tribunal. Normally, where the Tribunal or this court takes up group of cases, where common question of law is involved and decides the said question of law which will have application to all the cases, on the basis of which each case is decided on merits. In the entire order of the Tribunal, we do not find any such common question of law, which arose for consideration. On the contrary, as is clear from the order, the question was whether the assessee is entitled to claim for refund, which depended upon each case. In those circumstances, the clubbing of cases itself was not proper. It is evident from the impugned order that the entire discussion of the Tribunal has proceeded on the footing whether a particular circular issued by the Department is in accordance with law or not. A question which never arose for consideration before the Tribunal. Assuming that the Tribunal was not willing to grant the relief to the appellant on the basis of any of those circulars, a duty was cast upon the Tribunal to state what is the law on the point, what the statutory provision says, what the rule framed under the statutory provisions says and how, any circular issued by the Department runs counter to those statutory provisions, before declining to give effect to the said circular. Merely saying that circulars are contrary to the statute and Rules, does not satisfy the legal requirement. The Tribunal had ignored the fact that these circulars are issued in terms of the powers vested under the statutory provisions, which also will have the effect of statutory provisions. It cannot be lightly ignored. In the instant case, there is no question of interpretation of law. There is no question of any procedural irregularity, but still, the Tribunal proceeds on the footing that procedural law is hand made of justice and a harmonious interpretation is to be placed and if so placed, the circulars on the basis of which the assessee was claiming benefit, cannot be granted. This entire discussion by the Tribunal is in total vacuum without referring to any statutory provisions or rules and how the circulars are contrary to any statutory provisions. In fact, the amendment on which reliance is placed by the assessee was effected by way of the Finance Act, 2010 and by the Parliament. The said fact has been completely lost sight of by the Tribunal. In those circumstances, we are satisfied that whatever is stated as law by the Tribunal, is not supported by any statutory provisions and therefore it is unsustainable. It has not laid down any law as such. Therefore, we are unable to make out in what context the Tribunal wants the revisional authority to decide the case on the basis of the facts. However, we have gone through the order passed by the revisional authority as well as by the first appellate Tribunal. When the revisional authority rejected the claim for refund in respect of 15 services, all that they have said is there is no evidence produced by the assessee to show direct nexus between the input services and output services. In fact, the

assessee has produced tabular column showing how each input service is utilized in output service and have also produced separate documents, which has not been looked into by the revisional authority. In appeal, though the appellate authority has allowed the claim in respect of five services, again they have not given any reasons for rejecting the claim of the assessee in respect of 10 services. The bald statement is that there is no evidence to substantiate the nexus between the input service and output service. When the assessee has produced material and also has given tabular column showing how input service is utilized in the output service, the minimum that was required of the revisional authority as well as the appellate authority is to refer to what they have said and then say what they feel about it. Therefore, both the orders passed are wholly unsatisfactory. It is here the Tribunal is not justified in observing that the officials sanctioning refund have to necessarily examine if the credit relates to services consumed for providing the output service in view of the statutory provision unless the statute is amended. Further they have observed that no examination has been done at the time the credit has been taken as to whether such credit is admissible in terms of the statutory provision and the rules and notifications made thereunder. They have also observed that before granting refund the field officials will be at liberty to verify the admissibility of the credit. Finally they have concluded by saying that decision is to be taken by the field officials regarding eligibility of not only a particular service as an input service, but also the service received under a particular invoice must be shown to have been consumed for providing output service exported. In other words, it is not only necessary to verify that a particular kind of input service is consumed for providing a particular kind of output service but it is necessary to ensure that the eligible service received under various invoices have actually gone into consumption for providing the exported output service in question and not utilized for other purposes. This exercise has not been done both by the revisional authority as well as by the first appellate authority. Therefore, to that extent, the order of remand is proper. In that view of the matter, we pass the following order :

(i) The order of remand passed by the Tribunal is affirmed.

(ii) However, the revisional authority shall consider the claim for refund by the assessee keeping in mind the statutory provisions, rules, as well as the circulars and notifications issued from time to time by the Department. The revisional authority shall ignore all the observations made by the Tribunal in so far as the applicability or correctness or legality of the circulars issued by the Department, while deciding the claims of the assessee on the merits and in accordance with law.

(iii) These refund claims are made in the year 2008. Already more than three years have elapsed. These are in the nature of incentives given to the exporters to encourage them from getting the precious foreign exchange to the country and also to see that the price which they keep in the international market is competitive. If these benefits to which they are legally entitled to and is

conferred on them by the policies of the Government as well as the statutory provisions is not settled expeditiously, the very object of granting these benefits would be defeated and the enthusiasm on part of these exporters to carry on the business is seriously hampered. Therefore, it is of utmost importance that these refund claims are settled expeditiously.

(iv) Therefore, we direct the revisional authority to settle these refund claims within three months from the date of receipt of the copy of this order, after issuing notice to the assessee and after hearing them and if necessary after taking note of any other documents which are necessary.

(v) Parties to bear their own costs.