

(2014) 05 AHC CK 0050

In the Allahabad High Court

Case No : Central Excise Appeal No. 102 of 2014

Sports and Leisure Apparel Ltd.

APPELLANT

Vs

Commissioner of Central Excise

RESPONDENT

Date of Decision : 15-05-2014

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11A, 35F, 35G

Citation : (2014) 74 VST 282

Hon'ble Judges : Dr. Dhananjaya Yeshwant Chandrachud, C.J.; Dilip Gupta, J

Bench : Division Bench

Advocate : Nishant Mishra, Advocate for the Appellant; Amit Mahajan, Advocate for the Respondent

Judgement

1. This appeal has been filed by the assessee under section 35G of the Central Excise Act, 1944 to assail the order dated April 21, 2014 passed by the Customs Excise and Service Tax Appellate Tribunal, New Delhi. The appellant has raised the following substantial questions of law:

"(A) Whether, in facts and circumstances of present case, the impugned stay order dated April 21, 2014 passed by the Customs, Excise and Service Tax Appellate Tribunal directing the appellants to deposit Rs. 40 lakhs with interest as a condition precedent for hearing the appeal is correct in law inasmuch as the appellants have demonstrated strong prima-facie case and thus made out a case for complete waiver of pre-deposit of duty, interest and penalty?

(B) Whether, in facts and circumstances of present case, impugned stay order dated April 21, 2014 passed by the Customs, Excise and Service Tax Appellate Tribunal directing the appellants to deposit Rs. 40 lakhs with interest as a condition precedent for hearing the appeal is correct in law inasmuch as the appellants have demonstrated that duty-demand has no legs to stand in view of binding precedents namely Metro Shoes Pvt. Ltd. v. Commissioner of Central Excise [2008] 10 STR 382 (Trib.-Mum) affirmed by Bombay High Court and reported in [2012] 28 STRJ 19 (Bom HC) , Oracle Granito Ltd. v. Commissioner

of C. Ex. reported at [2013] 30 STR 357 (Trib.-Ahd) and Tally Solutions Pvt. Ltd. v. CCE reported at [2014] TIOL 705 (CESTAT-Delhi)?

(C) Whether in facts and circumstances of present case impugned stay order dated April 21, 2014 passed by the Customs, Excise and Service Tax Appellate Tribunal directing the appellants to deposit Rs. 40 lakhs with interest as a condition precedent for hearing the appeal is correct in law by relying on the decision of Ultratech Cement Ltd. v. CCE, Raipur reported at [2014] 74 VST 258 (CESTAT-New Delhi) : [2014] TIOL 478 (CESTAT-Delhi) which has been stayed by the Chhattisgarh High Court as reported in [2014] TIOL 543 HC (Chhattisgarh)?

(D) Whether in facts and circumstances of the present case impugned stay order dated April 21, 2014 passed by the Customs, Excise and Service Tax Appellate Tribunal directing the appellants to deposit Rs. 40 lakhs with interest as a condition precedent for hearing the appeal is correct in law in the light of conflicting judgment in the case of L.G. Electronics (India) Pvt. Ltd. v. Commissioner of C. Ex. reported at [2010] 19 STR 340 (Trib.-Delhi)?"

2. The appellant had filed the said appeal against the order dated March 31, 2013 passed by the Commissioner, Central Excise, Noida pursuant to the show-cause notice dated August 30, 2012 asking the assessee to show cause as to why the inadmissible credit of Rs. 51,44,507 availed of in respect of services availed of at the retail stores, outward freight, membership fees and sales commission may not be demanded and recovered from it under the provisions of rule 14 of the Cenvat Credit Rules, 2004 read with the provisions of section 11A of the Central Excise Act, 1944 together with interest and penalty. The order makes the following demand:

"(i) I hereby order for recovery of the service tax credit amounting to Rs. 51,44,507 availed of by the noticees, during the period from August, 2011 to March, 2012, under rule 14 of the Cenvat Credit Rules, 2004 read with section 11A of the Central Excise Act, 1944;

(ii) I order for recovery of the applicable interest on the amount of service tax credit wrongly availed of as above, under the provisions of rule 14 of the Cenvat Credit Rules, 2004 read with section 11AB of the Central Excise Act, 1944; and

(iii) I impose a penalty of Rs. 51,44,507 under rule 15(1) of the Cenvat Credit Rules, 2004 for availing of inadmissible service tax credit in contravention of various rules as above."

3. Along with the appeal filed to challenge the aforesaid order, the appellant also filed an application for stay and for waiver of pre-deposit under section 35F. This application was disposed of by the impugned order with the following observations:

"2. Prima facie, since the period in issue, i.e., August, 2011 to March, 2012 is after amendment of the definition of "input service" and in view of the decision of this Tribunal in Ultratech Cement Ltd. v. CCE [2014] 74 VST 258 (CESTAT-New

Delhi) dated November 18, 2013 in Excise Appeal No. 381 of 2010 and batch, it appears to us that credit availed of in respect of internet charges, labour supply, professional services, rent, security guard charges, store maintenance and cleaning charges, etc., would fall outside the ambit of the amended definition of "input service". Credit availed of in respect of store maintenance and cleaning charges and lease rent is of a value of Rs. 40 lakhs, approximately. The credit availed of by the petitioner on other services would however fall within, the ambit of input service.

3. In the circumstances and on the aforesaid prima facie analysis, we grant waiver of pre-deposit on condition that petitioner remits Rs. 40 lakhs plus the proportionate interest thereon to the credit of the Revenue within six weeks and reports compliance by June 25, 2014. In default, the appeal would stand rejected. The learned counsel for the petitioner is present and has noted the order. This is sufficient intimation to the petitioner of its obligations under this order. Stay application is accordingly disposed of."

4. The learned counsel for the appellant has submitted that the Appellate Tribunal was not justified in placing reliance upon a decision of the Tribunal rendered in Ultratech Cement v. CCE reported in [2014] 74 VST 258 (CESTAT-New Delhi) : [2014] TIOL 478 (CESTAT-Delhi) as the issue was actually covered by a decision of the Tribunal rendered in L.G. Electronics (India) P. Ltd. v. Commissioner of C. Ex. reported in [2010] 19 STR 340 (Trib.-Delhi).

5. It is seen that the decision of the Tribunal rendered in L.G. Electronics (India) P. Ltd. v. Commissioner of C. Ex. [2010] 19 STR 340 (Trib.-Delhi) has been considered by the Tribunal in the subsequent decision rendered in Ultratech Cement [2014] 74 VST 258 (CESTAT-New Delhi) : [2014] TIOL 478 (CESTAT-Delhi). It will not be appropriate for the court, at this stage, to examine the dispute on merits since any observation made by the court would prejudice the case of either of the parties in the pending appeal. Suffice it to state that the Appellate Tribunal, on a prima facie analysis, has granted waiver of pre-deposit on deposit of Rs. 40 lakhs together with proportionate interest which amount has been directed to be deposited within six weeks from the date of the order. The issue of financial hardship has not been raised before us and nor does it appear to have been raised before the Appellate Tribunal. The appeal, therefore, does not give rise to any substantial question of law. It is, accordingly, dismissed.