(2010) 09 BOM CK 0179

In the Bombay High Court

Case No : Central Excise Appeal No. 4 of 2010

The Commissioner of Central Excise — APPELLANT

Vs

Ultratech Cement and The Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench — RESPONDENT

Date of Decision : 27-09-2010

Acts Referred:
CENVAT (Credit) Rules, 2004 — Rule 16, 16(1), 2(1), 3, 9(5)
Service Tax Credit Rules, 2002 — Rule 3(6)

Citation : (2010) 20 STR 589 : (2010) 29 STT 281

Hon'ble Judges : J.P. Devadhar, J;A.B. Chaudhari, J

Bench : Division Bench

Advocate : S.K. Mishra, for the Appellant; V. Shridharan, for the Respondent

Final Decision : Dismissed

Judgement

J.P. Devadhar, J.—Heard. Admit on the following questions of law:

(1) Whether the Hon''ble CESTAT was correct in holding that the credit of Service Tax paid on Mobile Phone service is allowable especially when the Circular No. 59/8/2003 dated 20th June, 2003 issued by the Central Board of Excise and Customs under the Service Tax Credit Rules, 2002, restricted such credit, and statutory provisions of Rule 16(1) of CENVAT Credit Rules, 2004 stipulates that Board''s Circular shall remain in force and valid for deciding the eligibility for Credit under CENVAT Credit Rules, 2004.

(2) Whether in the facts and circumstances of the present case the Hon''ble CESTAT was right in holding that the Respondents were entitled to avail CENVAT Credit on Service Tax paid on mobile phones services in terms of Rule 3 read with Rule 2(1) of the CENVAT Credit Rules, 2004 despite the Respondents not having established that the same was in relation to the business activity as envisaged under Rule 9(5) of the CENVAT Credit Rules, 2004.

2. By consent of Learned Counsel for the parties, the appeal is taken up for final

hearing.

3. The relevant facts are that - In 2006-2007 the respondent-assessee had availed CENVAT Credit of Service Tax paid on various input services including Mobile Phone service.

4. Show cause notices were issued to the assessee to show cause as to why credit on mobile phone service availed by the assessee and therefore, CENVAT Credit Rules, 2004 ("2004 Rules" for short) during the above period should not be disallowed and recovered.

5. On being shown cause and considering the Central Board of Excise & Customs'' Circular dated 23-8-2007, the Assistant Commissioner, Central Excise, Chandrapur by his order dated 26/10/2007 dropped the proceedings.

6. On appeal filed by the Revenue, the Commissioner (Appeals), Central Excise, Nagpur by his order dated 19-2-2008, dismissed the appeal filed by the Revenue by following various decisions of the Tribunal.

7. On further appeal filed by the Revenue, the Customs, Excise & Service Tax Appellate Tribunal by the impugned order dated 02-6-2009, dismissed the appeal filed by the Revenue inter alia following the decision of the Gujrat High Court in the case of The Commissioner of Central Excise Vs. Excel Crop Care Ltd., . The present appeal is filed to challenge the aforesaid decision of the Tribunal dated 02-6-2009.

8. It is contended on behalf of the Revenue that as per Rule 3(6) of the Service Tax Credit Rules, 2002, the Service Tax Credit is available only in respect of such telephone connections which are installed in the premises from where output service is provided. It is contended that by Central Board of Excise & Customs'' Circular dated 20th June, 2003, the Board has clarified that the credit of Service Tax is not available on mobile phone. It is further contended that as per Rule 16 of CENVAT Credit Rules 2004, the Central Board of Excise & Customs'' Circular dated 20-6-2003 in force at the commencement of 2004 Rules, shall be deemed to be valid and issued under the corresponding provisions of 2004 Rules. Accordingly, it is contended on behalf of the Revenue that Service Tax Credit could not be allowed on mobile service.

9. We see no merit in the above contentions. The dispute in the present case relates to availing Service Tax Credit on mobile phones supplied to the employees during the period 2006-2007, that is, after 2004 Rules came into force. Under Rule 3(6) of the Service Tax Credit Rules, 2002, service tax credit was available in respect of such telephone connections which are installed in the premises from where output service is provided. There is no such provision contained in the 2004 Rules. Therefore, reliance placed on Rule 3(6) of the Service Tax Credit Rules, 2002 for the period in question is totally misplaced because, during the period in question the 2002 Rules were not in force and the said rules were replaced by 2004 Rules. Similarly the circular dated 20th June, 2003 which

interprets 2002 Rules would also be not relevant for the period governed by 2004 Rules.

10. Strong reliance was placed by the Counsel for the Revenue on Rule 16 of the 2004 Rules, which provides that the Circular in force at the commencement of 2004 Rules, shall to the extent relevant and consistent with the 2004 Rules, shall be deemed to be valid and issued under the corresponding provisions of 2004 Rules. As noted earlier, there is no rule in 2004 Rules corresponding Rule 3(6) of the Service Tax Credit Rules, 2002. Under Rule 2(1) of the 2004 Rules, CENVAT Credit is available on any input service used by a manufacturer directly or indirectly, in or in relation to the manufacture of the final products and includes services used in activities relating to business. Thus, unlike in the CENVAT Credit Rules, 2002, the service tax credit under 2004 Rules are not restricted. As there are no rules in 2004 Rules corresponding to Rule 3(6) of 2002 Rules, the question of applying circular dated 20-6-2003 by relying upon Rule 16 of the 2004 Rules does not arise at all.

11. In fact, interpreting the provisions of 2004 Rules, the Central Board of Excise and customs has issued a circular on 23rd August, 2007 superseding all earlier circulars and has held that credit of service tax on mobile phones would be available under the 2004 Rules.

12. In these circumstances, we are of the opinion that no fault can be found in the order of the Customs, Excise & Service Ta x Appellate Tribunal in granting credit of service tax paid on mobile phones. Accordingly, the appeal is dismissed by answering the questions in favour of the assessee and against the revenue. No order as to costs.