(2015) 06 MAD CK 0443

In the Madras High Court

Case No : C.M.A. No. 837 of 2010

The Commissioner of Central Excise, Chennai II Commissionerate	APPELLANT
Vs	
Hyderabad Industries Ltd. and Others	RESPONDENT

Date of Decision : 18-06-2015

Acts Referred:

Citation : (2015) 06 MAD CK 0443

Hon'ble Judges : R. Sudhakar, J;K.B.K. Vasuki, J

Bench : Division Bench

Advocate : Xavier Felix, for the Appellant

Judgement

R. Sudhakar, J—This Civil Miscellaneous Appeal is filed by the Revenue as against the order of the Tribunal allowing the appeal filed by the assessee granting the benefit of Cenvat credit on the service tax paid on outdoor catering services provided for employees of the factory. This Court, vide order dated 29.4.2010, while admitting the appeal, framed the following substantial questions of law for consideration:-

"1. In the facts and circumstances of the case, whether the first respondent can avail Cenvat credit of service tax paid on the services of tour operators/travels for transporting the staff working at their factory (pickup and drop) treating them as ''input service''?

2. Whether the second respondent was correct in law in applying the ratio of the decision in the case of CCE, Chennai Vs. Thirumalai Chemicals Ltd., as reported in 2009-TIOL-1739 CESTAT MAD , which was appealed before the Hon''ble High Court, Madras in October, 2009 and SR No. 99190 of 2009 has been allotted.?"

2. The facts, in a nutshell, are as follows:

The first respondent/assessee engaged the services of Tour Operators/Travels for transporting staff at their factory (pickup and drop). During the period from

June, 2006 to March, 2007, the first respondent availed service tax credit of Rs. 53,407/- paid to the Tour Operators/Travels. The first respondent paid the service tax to the tour operators/travels and availed the same as input service. The Department was of the view that the said services were neither used in or in relation to the manufacture of excisable goods and, therefore, a show cause notice was issued on the first respondent and after adjudication, order was passed demanding payment of Rs. 53,407/- for wrongful availment along with interest and imposed penalty of Rs. 2,000/-. Aggrieved by the said order, the assessee pursued the matter before the Commissioner (Appeals), who allowed the appeal. As against the said order of the Commissioner (Appeals), the Department filed appeal before the Tribunal.

3. The Tribunal following the ratio in the Tribunals'' decisions in the case of CCE, Nasik Vs. Cable Corporation of India Ltd. (2008 TIOL 1180 CESTAT-Mum.), CCE, Jaipur-II Vs. Cement Works (2009-TIOL-411 CESTAT-Del) and CCE, Chennai Vs. Thirumalai Chemicals Ltd. (2009-TIOL-1739 CESTAT-Mad) , dismissed the appeal holding that Cenvat credit is admissible on ''rent-a-cab services'' used for transporting the employees to and from the place of work, as the same is an input service relating to business. Aggrieved by the said order of the Tribunal, the Revenue has filed the present appeal before this Court.

4. Heard learned Standing Counsel appearing for the Revenue and the learned counsel appearing for the assessee and perused the materials placed before this Court.

5. The core issue involved in this appeal is "whether the assessee can utilise the cenvat credit facilities in respect of rent-a-cab services, used for transporting the employees to and from the place of work, as input service.

6. In an identical circumstance, this Court dealt with the issue in a batch of appeals in C.M.A. Nos. 2 of 2010, etc., batch and vide judgment dated 13.02.2015 held in favour of the assessee by following the decision of the Bombay High Court in the case of The Commissioner Central Excise Vs. Ultratech Cement Ltd. and The Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench, (2010) 112 BOMLR 4552 : (2011) 237 CTR 16 : (2010) 181 ECR 201 : (2010) 260 ELT 369 : (2010) 20 STR 577 : (2010) 29 STT 224 : (2010) 36 VST 505 , wherein all the contentions raised by the Revenue have been considered in extenso including the definition of ''input service'' as defined in the case of Maruti Suzuki Ltd. Vs. Commissioner of Central Excise, Delhi-III, (2009) 168 ECR 87 : (2009) 240 ELT 641 : (2009) 11 JT 8 : (2009) 11 SCALE 446 : (2009) 9 SCC 193 : (2009) 13 SCR 301 : (2009) 22 STT 54 : (2009) 7 UJ 3257 . The Bombay High Court, in Ultratech''s case (supra) came to the conclusion that the decision of the Larger Bench of CESTAT in the case of CCE vs. GTC Industries Ltd.(2008) 15 STJ 485 is correct law, however, with a rider that where the cost is borne by the worker, the manufacturer cannot take credit of that part of the service tax which is borne by the consumer.

7. For better clarity, the relevant portion of the decision of the Bombay High Court in the case of The Commissioner Central Excise Vs. Ultratech Cement Ltd. and The Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench, (2010) 112 BOMLR 4552 : (2011) 237 CTR 16 : (2010) 181 ECR 201 : (2010) 260 ELT 369 : (2010) 20 STR 577 : (2010) 29 STT 224 : (2010) 36 VST 505 is extracted hereinbelow:-

"28. In the present case, the question is, whether outdoor catering services are covered under the inclusive part of the definition of "input service". The services covered under the inclusive part of the definition of input service are services which are rendered prior to the commencement of manufacturing activity (such as services for setting up, modernization, renovation or repairs of a factory) as well as services rendered after the manufacture of final products (such as advertisement, sales promotion, market research etc.) and includes services rendered in relation to business such as auditing, financing ... etc. Thus, the substantive part of the definition "input service" covers services used directly or indirectly in or in relation to the manufacture of final products, whereas the inclusive part of the definition of "input service" covers various services used in relation to the business of manufacturing the final products. In other words, the definition of "input service" is very wide and covers not only services, which are directly or indirectly used in or in relation to the manufacture of final products but also includes various services used in relation to the business of manufacture of final products, be it prior to the manufacture of final products or after the manufacture of final products. To put it differently, the definition of input service is not restricted to services used in or in relation to manufacture of final products, but extends to all services used in relation to the business of manufacturing the final product.

29. The expression "activities in relation to business" in the definition of "input service" postulates activities which are integrally connected with the business of the assessee. If the activity is not integrally connected with the business of the manufacture of final product, the service would not qualify to be a input service under rule 2(1) of the 2004 Rules.

30. The Apex Court in the case of Maruti Suzuki Ltd. (supra) has considered the expression ''used in or in relation to the manufacture of final product'' in the definition of "input" under rule 2(k) of 2004 Rules and held as follows:-

"14. ... Moreover, the said expression, viz., "used in or in relation to the manufacture of the final product" in the specific/substantive part of the definition is so wide that it would cover innumerable items as "input" and to avoid such contingency the Legislature has incorporated the inclusive part after the substantive part qualified by the place of use. For example, one of the categories mentioned in the inclusive part is "used as packing material". Packing material by itself would not suffice till it is proved that the item is used in the course of manufacture of final product. Mere fact that the item is a packing material whose value is included in the assessable value of final product will not entitle the manufacturer to take credit. Oils and lubricants mentioned in the definition are required for smooth running of machines, hence they are included as they are used in relation to manufacture of the final product. The intention of the Legislature is that inputs falling in the inclusive part must have nexus with the manufacture of the final product.

16. In our earlier discussion, we have referred to two considerations as irrelevant, namely, use of input in the manufacturing process, be it direct or indirect as also absence of the input in the final product on account of the use of the expression "used in or in relation to the manufacture of final product". Similarly, we are of the view that consideration such as input being used as packing material, input used as fuel, input used for generation of electricity or steam, input used as an accessory and input used as paint are per se also not relevant. All these considerations become relevant only when they are read with the expression "used in or in relation to the manufacture of final product" in the substantive/specific part of the definition. In each case it has to be established that inputs mentioned in the inclusive part is "used in or in relation to the manufacture of final product". It is the functional utility of the said item which would constitute the relevant consideration. Unless and until the said input is used in or in relation to the manufacture of final product within the factory of production, the said item would not become an eligible input. The said expression "used in or in relation to the manufacture" have many shades and would cover various situations based on the purpose for which the input is used. However, the specified input would become eligible for credit only when used in or in relation to the manufacture of final product. Hydrogen gas used in the manufacture of sodium cyanide is an eligible input, since it has a significant role to play in the manufacturing process and since the final product cannot emerge without the use of gas. Similarly, Heat Transfer Oil used as a heating medium in the manufacture of LAB is an eligible input since it has a persuasive role in the manufacturing process and without its use it is impossible to manufacture the final product. Therefore, none of the categories in the inclusive part of the definition would constitute relevant consideration per se. They become relevant only when the above crucial requirement of being "used in or in relation to the manufacture" stands complied with. In our view, one has to therefore, read the definition in its entirety."

31. In our opinion, the ratio laid down by the Apex Court in the case of Maruti Suzuki Ltd. (supra) in the context of the definition of ''input'' in rule 2(k) of 2004 Rules would equally apply while interpreting the expression "activities relating to business" in rule 2(l) of 2004 Rules. No doubt that the inclusive part of the definition of ''input'' is restricted to the inputs used in or in relation to the manufacture of final products, whereas the inclusive part of the definition of input service extends to services used prior to/during the course of/after the manufacture of the final products. The fact that the definition of ''input service'' is wider than the definition of ''input'' would make no difference in applying the ratio laid down in the case of Maruti Suzuki Ltd. (supra) while interpreting the

scope of ''input service''. Accordingly, in the light of the judgment of the Apex Court in the case of Maruti Suzuki Ltd. (supra), we hold that the services having nexus or integral connection with the manufacture of final products as well as the business of manufacture of final product would qualify to be input service under rule 2(l) of 2004 Rules.

32. As rightly contended by Shri Shridharan, learned Counsel for the respondent - assessee, in the present case, the assessee carrying on the business of manufacturing cement by employing more than 250 workers is mandatorily required under the provisions of the Factories Act, 1948 to provide canteen facilities to the workers. Failure to do so entails penal consequences under the Factories Act, 1948. To comply with the above statutory provision, the assessee had engaged the services of a outdoor caterer. Thus, in the facts of the present case, use of the services of an outdoor caterer has nexus or integral connection with the business of manufacturing the final product namely, cement. Hence, in our opinion, the Tribunal was justified in following the Larger Bench decision of the Tribunal in the case of GTC Industries Ltd. (supra) and holding that the assessee is entitled to the credit of service tax paid on outdoor catering service.

33. It is argued on behalf of the revenue that not only the ratio but the decision of the Apex Court in the case of Maruti Suzuki Ltd. (supra) must be applied ipso facto to hold that the credit of service tax paid on outdoor catering services is allowable only if the said services are used in relation to the manufacture of final products. That argument cannot be accepted because unlike the definition of input, which is restricted to the inputs used directly or indirectly in or in relation to the manufacture of final products, the definition of ''input service'' not only means services used directly or indirectly in or in relation to manufacture of final products, but also includes services used in relation to the business of manufacturing the final products. Therefore, while interpreting the words used in the definition of ''input service'', the ratio laid down by the Apex Court in the context of the definition of ''input'' alone would apply and not the judgment in its entirety. In other words, by applying the ratio laid down by the Apex Court in the case of Maruti Suzuki Ltd. (supra), it cannot be said that the definition of ''input service'' is restricted to the services used in relation to the manufacture of final products, because the definition of ''input service'' is wider than the definition of ''input''.

34. Therefore, the definition of input service read as a whole makes it clear that the said definition not only covers services, which are used directly or indirectly in or in relation to the manufacture of final product, but also includes other services, which have direct nexus or which are integrally connected with the business of manufacturing the final product. In the facts of the present case, use of the outdoor catering services is integrally connected with the business of manufacturing cement and therefore, credit of service tax paid on outdoor catering services would be allowable.

35. The argument of the revenue, that the expression "such as" in the definition

of input service is exhaustive and is restricted to the services named therein, is also devoid of any merit, because, the substantive part of the definition of ''input service'' as well as the inclusive part of the definition of ''input service'' purport to cover not only services used prior to the manufacture of final products, subsequent to the manufacture of final products but also services relating to the business such as accounting, auditing .... etc. Thus, the definition of input service seeks to cover every conceivable service used in the business of manufacturing the final products. Moreover, the categories of services enumerated after the expression ''such as'' in the definition of ''input service'' do not relate to any particular class or category of services, but refer to variety of services used in the business of manufacturing the final products. There is nothing in the definition of ''input service'' to suggest that the Legislature intended to define that expression restrictively. Therefore, in the absence of any intention of the Legislature to restrict the definition of ''input service'' to any particular class or category of services used in the business, it would be reasonable to construe that the expression ''such as'' in the inclusive part of the definition of input service is only illustrative and not exhaustive. Accordingly, we hold that all services used in relation to the business of manufacturing the final product are covered under the definition of ''input service'' and in the present case, the outdoor catering services being integrally connected with the business of the manufacture of cement, credit of service tax paid out on catering services has been rightly allowed by the Tribunal.

36. ....

37. ....

38. We concur with the above decision of this Court in the case of Coca Cola India (P.) Ltd. (supra). However, in that case, this Court has also held that the cost of any input service that forms part of value of final products would be eligible for CENVAT credit. That observation of the Division Bench is made in the context of a service which is held to be integrally connected with the business of manufacturing the final product. Therefore, the observation of the Division Bench in the case of Coca Cola India (P.) Ltd. (supra) has to be construed to mean that where the input service used is integrally connected with the business of manufacturing the final product and the cost of that input service forms part of the cost of the final product, then credit of service tax paid on such input service would be allowable.

39. The Larger Bench of CESTAT in the case of GTC Industries Ltd. (supra) has also observed that the credit of service tax would be allowable to a manufacturer even in cases where the cost of the food is borne by the worker. That part of the observation made by the Larger Bench cannot be upheld, because, once the service tax is borne by the ultimate consumer of the service, namely the worker, the manufacturer cannot take credit of that part of the service tax which is borne by the consumer. Shri Shridharan, learned Counsel for the assessee fairly conceded to the above position in law and in fact filed an affidavit affirmed by a

responsible officer of the assessee wherein it is stated that the proportionate credit to the extent embedded in the cost of food recovered from the employee/ worker has been reversed.

40. For all the aforesaid reasons, the question of law framed by the revenue is answered in the affirmative, i.e., in favour of the assessee and against the revenue. However, the CENVAT credit reversed by the assessee, belatedly, having not been verified by the Excise Authorities, the Excise Authorities are directed to verify the same and pass an appropriate order in that behalf."

8. It is relevant to note that various High Courts have concurred with the above-said principle of the Bombay High Court and followed the above-said decision.

9. Accordingly, following the abovesaid decision, this Court holds that the cenvat credit availed by the assessee on rent-a-cab services is admissible and, therefore, no interference is called for with the order passed by the Tribunal.

10. For the foregoing reasons, we pass the following order:

i) Following the above-said decisions, the issue involved in this appeal is answered in favour of the assessee and against the Revenue;

ii) Accordingly this appeal is dismissed affirming the order of the Tribunal.

However, in the circumstances of the case, there shall be no order as to costs.

