IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

C.E.A. No.58 of 2014 (O&M)
DATE OF DECISION: 16.07.2015

Commissioner Central Excise Commissionerate, Delhi-III
…..Appellant

versus

M/s Bellsonica Auto Components India P. Ltd.
.....Respondents

CORAM:- HON'BLE MR.JUSTICE S.J.VAZIFDAR, ACTING CHIEF JUSTICE
HON'BLE MR. JUSTICE G.S.SANDHAWALIA

Present: Mr. Sukhdev Sharma, Advocate for the appellant
Mr. Amrinder Singh, Advocate for the respondents

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S.J.VAZIFDAR, ACTING CHIEF JUSTICE:

This appeal under Section 35(G) of the Central Excise Act, 1944, challenges the order of the Customs, Excise and Service Tax Appellate Tribunal setting aside the order of the Commissioner disallowing the assessees/respondents Cenvat Credit in the sum of Rs.1,45,32,300/- availed by them holding that it was availed on inadmissible services. The Commissioner ordered recovery of interest and also imposed a penalty of Rs.1,45,32,300/-. The matter pertains to the period 2007-08 to 2009-10.

2. The appeal is admitted on the following substantial questions of law:-

> "(i) Whether the Decision of the Tribunal was justified to allow the Cenvat Credit of Service Tax paid on Civil Construction service which is an input services to the immoveable property i.e. Factory whereas the factory is neither a service nor goods?
>
> ii) Whether the civil Construction can be defined as an input under Rule 2(i) of the C C Rules, 2004 as such service

> has no relation to the manufacturing process or any business activity of the Respondent?"

3. The respondents are registered with the department. They are entitled to avail the Cenvat Credit facilities as admissible in law. They manufacture metal-sheet components for motor vehicles which fall under heading No.87082100 of the Central Excise Tariff Act, 1985. The department during an audit in the year 2010 observed that the respondents had availed Cenvat Credit for service tax paid on civil work of constructing a plant/factory in the premises, namely, the manufacturing plant and for rental of the immovable property leased by them on which the plant is erected.

4. Mr. Sukhdev Sharma, the learned counsel appearing on behalf of the appellant, contended that the Cenvat Credit for service tax paid on civil work and on lease rental paid by the respondents is inadmissible. As we mentioned earlier, the respondents manufacture metal components for automobiles and supply the same to Maruti Udyog Limited who use the same in respect of the automobiles manufactured by them. The respondents set up a factory for the manufacture of this material on the land leased by them. The respondents paid the service tax in respect of the lease rent. The respondents set up the factory for which they availed the service of erection, installation and commissioning engineers who had paid the service tax in respect of the amounts paid to them. The respondents availed Cenvat Credit in respect of the said service tax paid.

5. It was not contended before us that service tax was not payable. The only question is whether the said services fall within the meaning of the term "input service" in Section 2(l)(ii).

Rule 2(l)(ii) and rule 3(1)(ix) of the Cenvat Credit Rules, 2004, in so far as they are relevant, read as under:-

> "Definitions.
> 2. In these rules, unless the context otherwise requires,-
> (a) to (k) …… …… …….. …..
> (l) "input service" means any service,-
> (i) … … …. ….
> (ii) used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products, upto the place of removal and includes services used in relation to setting up, modernization, renovation or repairs of a factory, premises of provider of output service or an office relating to such factory or premises, advertisement or sales promotion, market research, storage upto the place of removal, procurement of inputs, activities relating to business such as accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry, and security, inward transportation of inputs or capital goods and outward transportation upto the place of removal."
>
> "CENVAT credit.
> 3.(1) A manufacturer or producer of final products or a provider of taxable service shall be allowed to take credit (hereafter referred to as the CENVAT credit) of-
> (i) to (viii) … … …. ….
> (ix) the service tax leviable under section 66 of the Finance Act;"

6. The department contended that the said services were not eligible for Cenvat Credit and accordingly issued show cause notice for recovery of the credit along with interest and for imposition of penalty. The Commissioner confirmed the demand along with interest and imposed penalty. The Commissioner held as follows. Though the definition of "input service" is wide, it does not cover services that remotely or in a roundabout way contribute to the manufacture of the final products; that any and every connection however remote and indirect it may be is not contemplated by the definition of "input service" and that a line has to be drawn somewhere to avoid undue extension of the phrases 'directly or indirectly' and 'in or in relation to' by adopting a common sense

approach. Immovable property is neither service nor goods and, therefore, input credit cannot be taken. Although civil construction work is a taxable service under the Finance Act, 1994, it is basically civil in nature relatable to the immovable property not chargeable to central excise duty. Immovable property is neither 'service' nor 'goods'. Input credit is not available to them. Commercial or industrial construction service or works contract service is an input service for immovable property which is neither subjected to central excise duty nor to service tax. In this regard, the Commissioner referred to a CBEC Circular dated 04.01.2008. The Commissioner also held that the service tax paid on lease rentals is not covered under the "input service" as the same is not remotely connected to the manufacturing activity and that the nexus thereof with the manufacture of the final product is far-fetched as the same is not used directly or indirectly in or in relation to the final product i.e. metal-sheet.

7. We are entirely in agreement with Mr. Amrinder Singh's submission on behalf of the respondents, that the Cenvat Credit taken of the tax paid in respect of the said input services can be utilized by the respondents in accordance with the Cenvat Credit Rules. Mr. Amrinder Singh rightly analysed Section 2(l) by dividing it into two parts terming them the 'mean' part and the 'includes' part and that the present case would fall under both the parts of the definition as the phraseology is wide enough to cover the said services, the same being directly or indirectly or in any event in relation to the manufacture of the respondents' final product.

8. The land was taken on lease to construct the factory. The factory was constructed to manufacture the final product. The

land and the factory were required directly and in any event indirectly in or in relation to the manufacture of the final product and for the clearance thereof up to the place of removal. But for the factory the final product could not have been manufactured and the factory needed to be constructed on land. The land and the factory are used by the manufacturer in any event indirectly in or in relation to the manufacture of the final product, namely, metal-sheets. The respondents' case, therefore, falls within the first part of Rule 2(l) aptly referred to by Mr. Amrinder Singh as the "means part".

9. The respondents' case also falls within the second part of Rule 2(l) i.e. the "inclusive" part. The definition of the words "input service" also specifically includes the services used in relation to setting up of a factory. Mr. Amrinder Singh rightly contended that it was not the appellant's case that the services were not used for the setting up of the factory. The doubt in this regard is set at rest by the second part of Section 2(l)(ii) which includes within the ambit of the words 'input service' the setting up of a factory and the premises of the provider of the output service. The inclusive definition, therefore, puts the matter, at least so far as the payment for services rendered by the civil contractor for setting up the factory is concerned, beyond doubt. As the plain language of Section 2(l)(ii) indicates, the services mentioned therein are only illustrative. The words "includes services" establish the same. It can hardly be suggested that the lease rental is not for the use of the land in relation to the manufacture of the final product.

10. This becomes clearer from the fact that by an amendment of the year 2011 to rule 2(l), construction services were excluded from the definition of "input service". The amended section in so far as it is relevant reads as under:-

> "(l) "input service" means any service, -
> (i) .. …. …..
> (ii) (A) specified in sub-clauses (p), (zn), (zzl),(zzm), (zzq), (zzzh) and (zzzza) of clause (105) of section 65 of the Finance Act (hereinafter referred as specified services), in so far as they are used for –
> (a) construction of a building or a civil structure or a part thereof; or"

Clause 105 (zzq) of Section 65 of the Finance Act reads as under:-

> "105) "taxable service" means any service provided or to be provided, -
> …… ……. …… …..
> (zzq) to any person, by any other person, in relation to commercial or industrial construction.
> *Explanation*.- For the purposes of this sub-clause, the construction of a new building which is intended for sale, wholly or partly, by a builder or any person authorised by the builder before, during or after construction (except in cases for which no sum is received from or on behalf of the prospective buyer by the builder or the person authorised by the builder before grant of completion certificate by the authority competent to issue such certificate under any law for the time being in force shall be deemed to be service provided by the builder to the buyer."

11. If in fact the said services were not covered by Rule 2(l), it would not have been necessary to introduce the amendment. It is clear, therefore, that prior to the amendment the setting up of a factory premises of a provider for output service relating to such a factory fell within the definition of 'input service'. The amendment of 2011 is not retrospective and is not applicable to the respondents' case.

12. Our view is supported by the judgment of a Division Bench of the Bombay High Court in *Coca Cola India Pvt. Ltd. vs.*

Commissioner of C. Ex., Pune-III, 2009 (242) E.L.T. 168 (Bom.). The Division Bench construed Section 2(l) as follows:-

> "39. The definition of input service which has been reproduced earlier, can be effectively divided into the following five categories, in so far as a manufacturer is concerned:
>
> (i) Any service used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products
>
> (ii) Any service used by the manufacturer whether directly or indirectly, in or in relation to clearance of final products from the place of removal
>
> (iii) Services used in relation to setting up, modernization, renovation or repairs of a factory, or an office relating to such factory,
>
> (iv) Services used in relation to advertisement or sales promotion, market research, storage upto the place of removal, procurement of inputs,
>
> (v) Services used in relation to activities relating to business and outward transportation upto the place of removal;
>
> Each limb of the definition of input service can be considered as an independent benefit or concession exemption. If an assessee can satisfy any one of the limbs of the above benefit, exemption or concession, then credit of the input service would be available. This would be so even if the assessee does not satisfy other limb/limbs of the above definition. To illustrate, input services used in relation to setting up, modernization, renovation or repairs of a factory will be allowed as credit, even if they are assumed as not an activity relating to business as long as they are associated directly or indirectly in relation to manufacture of final products and transportation of final products upto the place of removal. This would follow from the observation of the Supreme Court in Kerala State Cooperative Marketing Federation Ltd. and Ors. Vs. Commissioner of Income-tax 1998 (5) SCC 48, which is as under:
>
> > 7. We may notice that the provision is introduced with a view to encouraging and promoting growth of co-operative sector in the economic life of the country and in pursuance of the declared policy of the Government. The correct way of reading the different heads of exemption enumerated in the section would be to treat each as a separate and distinct head of exemption. Whenever a question arises as to

> whether any particular category of an income of a co-operative society is exempt from tax what has to be seen is whether income fell within any of the several heads of exemption. If it fell within any one head of exemption, it would be free from tax notwithstanding that the conditions of another head of exemption are not satisfied and such income is not free from tax under that head of exemption."

We are in respectful agreement with the judgment of the Bombay High Court.

13. We approve the findings of the Tribunal as well as the basis on which they have been arrived at. The Tribunal rightly did not agree with the Commissioner's findings that the services in question had been used for brining into existence an immovable property and not for the manufacture of the final product. The said services cannot be said to be remotely connected to the final product as observed by the Commissioner.

14. In the circumstances, the questions of law are answered against the appellant and in favour of the assessees/respondents. The appeal is dismissed.

(S.J. VAZIFDAR)
ACTING CHIEF JUSTICE

16.07.2015
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(G.S. SANDHAWALIA)
JUDGE

Note: Whether reportable: YES