CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
CHENNAI

Appeal No.E/42246 to E/42248/2016

[Arising out of Order-in-Appeal No.274/2016 (CXA-II) dt.29.07.2016 passed by the Commissioner of Central Excise (Appeals-II) Chennai]

Lotte India Corporation Ltd — Appellant

Versus

Commissioner of Central Excise,
Puducherry Commissionerate — Respondent

Appeal No.E/40853/2017

[Arising out of Order-in-Appeal No.70/2017 (CXA-II) dt.14.02.2017 passed by the Commissioner of Central Excise (Appeals-II) Chennai]

Lotte India Corporation Ltd — Appellant

Versus

Commissioner of Central Excise,
Puducherry Commissionerate — Respondent

Appearance:

Sh.R.Hari Radhakrishnan, Advocate
For the Appellant

Shri K.Veerabhadra Reddy, ADC (AR)
For the Respondent

Per : Hon’ble Ms. Sulekha Beevi C.S., Member (Judicial)

Date of hearing / decision : 4.12.2018

FINAL ORDER No. 42991-42994/2018

The issue involved in all these appeals being the same, they are heard together and disposed by this common order.

2. On behalf of the appellant, the Ld. Counsel, Sh.Hari Radhakrishnan appeared and argued the matter. He submitted that the appellant is the principal manufacturer and engages job worker for the manufacture of sugar confectionery items. The appellant provides raw materials, and the machinery to the job worker. The appellant pays the job work charges. Thus the job worker manufactures on behalf of appellant. The central excise duty paid by job worker is reimbursed by appellant. The job worker is actually the agent of the appellant and there is no principal to principal relationship. The appellant thus availed the credit of the service tax paid on transportation of raw material to the job worker premises and also on services of transportation of finished goods from the premises of job worker to the appellant depot. The department has denied the credit alleging that the appellant is not the manufacturer of the goods and therefore not eligible for credit. He contended that the job worker is a manufacturer on behalf of the appellant as per Section 2 (f) of the Central Excise Act, 1944, the appellants would be eligible to avail credit on the said services. The details of the period involved, the demand, given by the appellant are as under :-

<table>
<tr><th>SL.NO.</th><th>Appeal No.</th><th>Period</th><th>Demand</th><th>Penalty</th></tr>
<tr><td>1</td><td>E/42246/2016</td><td>August 2013 to October 2013</td><td>Rs.2,94,070/-</td><td rowspan="3">Penalty of Rs.1,00,000/- under rule 15 (1) of the Cenvat Credit Rules</td></tr>
<tr><td>2</td><td>E/42247/2016</td><td>November 2013</td><td>Rs.4,55,755/-</td></tr>
<tr><td>3</td><td>E/42248/2016</td><td>December 2013 to February 2014</td><td>Rs.4,69,015/-</td></tr>
<tr><td>4</td><td>E/40853/2017</td><td>March 2014 to November 2014</td><td>Rs.15,09,232/-</td><td>Penalty of Rs.1,50,923/- under Rule 15 (1) read with Section 11 AC (1)(a) of the Central Excise Act, 1944.</td></tr>
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3. The Ld.Counsel was fair enough to concede that the issue stands covered against the appellant in the appellant's own case vide F.O.No.40051/2014 dt.24/1/2014. The appeal filed by the appellant is pending before the Hon'ble High Court.

4. The Ld.AR, Sh.K.Veerabadra Reddy supported the findings in the impugned order. He argued that the job worker is a manufacturer and the appellant is not eligible for credit.

5. Heard both sides.

6. The issue is whether the appellant is eligible for credit of service tax paid on GTA Services availed for transport of inputs from the supplier to factory of job worker and also on GTA Services for

transport of finished goods from the factory of job worker to the appellant's depot. The issue stands covered in the appellants own case, wherein the Tribunal has disallowed the credit. The discussions made by the Tribunal is as under :-

14. I have considered submissions on both sides. This is a case where the appellant did not do the manufacturing activity in respect of the goods for which Cenvat credit of input services was taken. Neither did the appellant pay excise duty on such goods. Both manufacturing and duty payment were done by job-workers. In such a situation there is no justification to consider the appellant has manufacturer for the purpose of taking Cenvat credit in respect service tax paid on transportation of inputs and final products. In the various decisions relied upon by the appellant the assessee has done either a part of the manufacturing activity or at least paid duty on the final product manufactured by job-worker by following various rules enabling such payment as distinct from facts of this case. Therefore I do not find any reason to allow Cenvat credit in such circumstances.

15. The argument that the credit on such transportation service can be taken by considering such activity as service in relation to business has been negative by the Hon Karnataka High Court in the case of CST Vs. ABB Ltd- 2011 (23) S.T.R. 97 (Kar.)

16. From the facts of the case, I am of the view that the job-worker or the appellant could have taken credit if service tax incidence was borne by the person paying duty on final product and appropriate procedure was followed. However, procedures laid down for taking credit cannot be by-passed based on argument of revenue neutrality or the argument that if not appellant someone else could have taken credit. Because such interpretation can be raised in most of the disputes involving value added tax and the entire rules and procedures enabling proper verifications of credits and duty payments can be circumvented. Such an interpretation cannot be supported through decisions of the Tribunal.

17. However, in the facts of the case, I see some merit in the argument of the appellant that taking credit was not an action with intention to evade payment of duty as

far as the first component is concerned. So I order that the demand in respect of this component may be restricted to the normal period of one year.

18. The case credit taken for transportation from depots to their dealers also, I find that during the relevant time there was considerable confusion about the scope of the expression service used for "clearance of final products from the place of removal" which was used in definition at Rule 2 (I) (ii) of the definition of "input service". In fact the decision of the Hon. Karnataka High Court in the case of ABB Ltd is to the effect that such credit was could be allowed upto 01-04-08. However, I follow the decision of the jurisdictional High Court in the case of India Japan Lighting Pvt. Ltd. (supra) in this matter. But since this issue was one of legal interpretation of rules wherein two views were possible, I order that the demand may be restricted to normal period of limitation.

19. In the facts and circumstances of the case, I set aside the penalty of Rs. 5000 imposed.

7. Following the said decision, I am of the view that credit is not admissible. The Ld.Counsel has also argued to waive the penalties. Taking into consideration that the issue is interpretational one and also taking note of the fact that the appellant has filed the appeal before the Hon'ble High Court on the bonafide belief that the credit is eligible, I am of the view that the penalty imposed are unjustified and requires to be set aside. From the above discussions, I hold that the impugned orders to the extent of penalties imposed only is set aside, without disturbing the demand or interest thereon. The appeals are partly allowed with consequential relief, if any in the above manner.

(Operative part of the order pronounced in open court)

(Sulekha Beevi C.S)
Member (Judicial)

vsr