CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
West Block No.2, R.K.Puram, New Delhi

COURT-I

Date of hearing: 30.06.2017
Date of Decision: 06.07.2017

Appeal No. ST/59454/2013 (DB)
[Arising out of the Order-in-Original No.64/GB/2013 dated 31/03/2013, passed by the Commissioner (Adjudication),Service Tax New Delhi]

CST Delhi … Appellant

Vs.

Machine Tools (i) Pvt Ltd … Respondent

Appearance:

Present Shri Sanjay Jain, DR for the appellant
Present Shri Varun Gaba Advocate for the respondent

Coram: Hon'ble Justice Dr. Satish Chandra (President)
Hon'ble Mr. V. Padmanabhan Member (Technical)

FINAL ORDER No.54773/2017

Per: V. Padmanabhan

1. The present appeal is filed by appellant against the Order in Original No. 64/2013 dated 24/03/2013. The respondent is registered with the Service Tax Commissionerate for providing various services. In the dispute which came to be decided with the impugned order, service tax demand was confirmed on various grounds. However,

the adjudicating authority dropped the demand proposed in the show cause notice for reversal of Cenvat credit attributable to trading activity on proportionate basis, as alleged in the show cause notice, amounting to Rs. 1,33,05,840/-. The Revenue has filed the present appeal by taking the view that the respondent has engaged in the activities of manufacturing, trading and services. Since, the activity of trading is not liable to payment of service tax, it falls within the category of exempted services, as per Rule 2 (e) of the Cenvat Credit Rules, 2004. Hence, this attracts the mischief of Rule 6 (3) of CCR, 2004. Consequently, the respondent is liable to reverse Cenvat credit attributable to trading activity on proportionate basis. In the present appeal the revenue has sought to modify the findings of the adjudicating authority only to the above extent.

2. With the above background we heard Shri Sanjay Jain, Ld. DR as well as Shri Varun Gaba, Ld. Advocate for the respondent.

3. Shri Sanjay Jain, DR submitted that the show cause notice has raised demand for reversal of Cenvat credit under Rule 6(3) of CCR, 2004 for the period prior to 01/04/2011. The explanation was inserted under Rule 2(e) to the effect that exempted service includes trading. The adjudicating authority has taken the view that trading cannot be considered as exempted service for the period prior to 01/04/2011. However, he argued that the Hon'ble Bombay High Court in the case of **Mercedes Benz India Pvt Ltd V/s Commissioner of C.EX., Pune-I**

reported in 2016 (41) STR 577 (Bom.) and **CST, New Delhi V/s M/s AVL India Pvt. Ltd**. vide Final Order No 52425/2017 dated 17/03/2017 has held that the same will be applicable even for the period prior to 01/04/2011. Accordingly, he prayed that the demand may be upheld.

4. The Ld. Counsel for the respondent submitted that for the period prior 01/04/2011, the Tribunal vide several decisions have held that the explanation inserted in Rule 2 (e) is applicable only for the period on or after 01/04/2011. Accordingly, he argued that the Adjudicating Authority was right in dropping the demand. He also relied upon the following decisions :

i. Tricity Auto V/s Commr. Of C.EX., Chandigarh-II 2016 (44) STR 601 (Tri.- Chan.)

ii. Franke Faber India Ltd. Vs CCE, Aurangabad 2017-TIOL-353-CESTAT-Mum.

iii. Kundan Cars Pvt. Ltd V/s CCE, Pune 2016-TIOL-1088-CESTAT-MUM

iv. Marudhan Motors V/s Commissioner of Central Excise and Service Tax, Jaipur-II 2016-TIOL-2576-CESTAT-Del.

5. We have heard both sides and perused the appeal records.

6. We find that the Cenvat Credit Scheme is available only in respect of an assessee, who is either manufacturing dutiable final products or providing taxable output service. Admittedly, during the relevant time, trading is not categorized as service at all. It is only in 2011, the

explanation was inserted under Rule 2 (e) of CCR, 2004 to the effect that “exempted service” includes “trading”. Prior to that date, trading is not even considered as “exempted service”. Going by this fact, it is clear that no credit is available on any “input service” attributable to “trading” during the material time. When no such credit is eligible, the respondent cannot avail the benefit of cenvat credit scheme. Having availed the credit on common input services, without maintaining separate accounts, it is not open to the respondent to claim that there is no need for reversal of proportionate credit attributable to their activity of trading. If trading is not to be considered as an “exempted service” (or service at all) then the cenvat credit scheme itself is not available to a trader. The respondent, being a trader as well as output service provider, has availed credit on common input services. Their failure to maintain separate accounts cannot give them an advantage of taking full credit on all common input services. This will have effect of nullifying the very principle that no credit is available when there is no taxable output service. In other words, it is very clear that the respondent is eligible to take credit on only such input services, which are attributable to taxable output services. If there are common input services, without separate accounts, it is necessary for the respondent to avail so much of credit only, which are attributable to the taxable output service. This can be enforced by way of reversal of credit attributable to trading activities. We find that the legal position has been examined and decided by the Tribunal in **Mercedes Benz India Pvt. Ltd. – 2014 (36) STR 704 (Tribunal-Mumbai).** The said decision was affirmed by the Hon'ble Bombay High Court reported in **2016 (41) STR 577 (Bombay) and SKF India Ltd. (ISD) – 2016 (44) STR 61 (Bombay).**

9. As such, we hold that the findings of the Original Authority that the demand for reversal is made in vacuum without support of provisions of law, is legally unsustainable. As noted above, input service credit available is only when output service is taxable. If there is no output service, no credit can be taken. Since trading, during the material time, is not even considered as an "exempted service" , it necessarily follows that no credit on input services used for trading activities can be availed at all. If there are common input services, it necessarily follows that, in the absence of separate accounts, the services attributable to taxable output service can only be held eligible to the respondent. In view of this legal position, we find that the respondent is liable to reverse the credit attributable to the trading activities. Considering the issue is of legal interpretation and there are different decisions on the matter, we find that the demand is to be restricted to normal period and no penalty is imposable on the respondent.

10. In view of the above discussion, we hold that the Revenue's appeal will succeed to an extent of reversal of cenvat credit for normal period along with applicable interest. The appeal is allowed partly to that extent.

[Order Pronounced in the open court on_06/07/2017_]

(Justice Dr. Satish Chandra)
President

(V. Padmanabhan)
Member (Technical)

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