CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, SOUTH ZONAL BENCH, AT BANGALORE.

M/s GE India Industrial Pvt. Ltd.

Versus
The Commissioner of Service Tax, Bangalore

Appellant Respondent

Appearance:

Mr. S. Ramasubramanian, Consultant for appellant

Mr. A. K. Nigam, Additional Commissioner (AR) for respondent

CORAM :

Hon'ble Mr. P.G. Chacko, Member (Judicial)

ORDER No. dated 23.1.2013

This appeal filed by the assessee is directed mainly against demand of service tax and education cesses totaling to Rs. 3,36,083/- for the period from April 2007 to March 2008. A penalty of Rs. 3,26,477/- imposed on them under Section 78 of the Finance Act, 1994 is also under challenge.

2. On a perusal of the records, I find that, during the material period, the appellant was engaged in the manufacture of electrical goods and that, for bringing raw materials into their factory and transportation of the finished goods from the factory, they used GTA service provided by various transporters. Various other input services were also used by the assessee in, or in relation to, the manufacture and clearance of final products during the said period. CENVAT credit of the service tax paid on these input services was taken by the assessee and utilised for payment of service tax on GTA service in the reverse charge mechanism. This was objected to by the department on the ground that the GTA service was not an output service for the appellant. This objection made its way into a show-cause notice dated 23.9.2008 wherein service tax and education cesses totaling to Rs. 3,36,083/- was demanded under Section 73 of the Act on the GTA service received by the assessee from April 2007 to March 2008, interest thereon was demanded under Section 75 of the Act and penalties were proposed under Sections 76 to 78 of the Act. The demands/proposals were contested by the party. In adjudication of the dispute, the original authority confirmed the demand of service tax and education cesses and of interest thereon against the assessee and imposed on them a penalty of Rs. 3,26,477/- under Section 78 of the Act. The order of adjudication was upheld by the Commissioner (Appeals). Hence the present appeal of the assessee.

3. After hearing both sides and considering their submissions, I have found

(a) that, during the period of dispute, the appellant was admittedly liable to pay service tax on the GTA service received by them and used for inward transportation of raw materials and outward transportation of final products vide Rule 2(1)(d) of the Service Tax Rules, 1994;

(b) that, during the period of dispute, output service meant any taxable service provided by the provider of taxable service to a customer, client, subscriber, policy holder or any other person, as the case may be, vide Rule 2(p) of the CENVAT Credit Rules, 2004;

(c) that the appellant, during the period of dispute, was engaged in the manufacture of excisable products and not engaged in the business of providing any output service as defined under Rule 2(p) of the CCR 2004;

(d) that the show-cause notice in question proposed to deny CENVAT credit on input services vis-`-vis GTA service solely on the ground that the latter was not an output service for the appellant;

(e) that such denial of CENVAT credit on input services has resulted in the impugned demand of service tax (with education cesses) on the GTA service inasmuch as such CENVAT credit was found have been utilised towards payment of service tax on the GTA service;

(f) that the show-cause notice was issued within the normal period of limitation prescribed under Section 73 of the Finance Act, 1994 and hence did not have to invoke the proviso to sub-section (1) of Section 73;

(g) that the show-cause notice invoked Section 78 of the Act on the ground of suppression of taxable value of GTA service, without attributing mens rea to the party;

(h) that, on the merits of the case, the appellant heavily relies on Commissioner vs. Nahar Industrial Enterprises Ltd. [2012 (25) S.T.R. 129 (P & H)] wherein the assessee, who was engaged in the manufacture of excisable goods and used to avail GTA service in connection with such manufacture as

also to pay service tax on such service in the reverse charge mechanism, was deemed to be the provider of "output service" (GTA service) and, accordingly, held to be entitled to utilise CENVAT credit on inputs/input services/capital goods towards payment of service tax on the GTA service;

(i) that the appellant has also contested the Section 78 penalty on the ground that none of the ingredients for such a penalty was alleged in the show-cause notice and on the further ground that there were certain decisions of this Tribunal which enabled the appellant to claim CENVAT credit on input services and utilise it for payment of service tax on GTA service;

(j) that the respondent through the learned Additional Commissioner (AR) refers to Panchmahal Steel Ltd. vs. Commissioner of C. Ex. & Cus., Vadodara-II [2008 (12) S.T.R. 447 (Tri.-Ahmd.)] whereby a similar question was referred to Larger Bench;

(k) that the respondent has also claimed support from Alstom Projects India Ltd. vs. Commissioner of C. Ex., Coimbatore [2008 (12) S.T.R. 23 (Tri.-Chennai)];

(l) that, apart from the submissions made with regard to the demand of service tax and the imposition of penalty, another grievance has also been raised by the appellant, which is to the effect that an amount of Rs. 41,772/- paid in cash towards service tax on GTA service was ignored by the lower authorities while quantifying the demand.

4. On a perusal of the Hon'ble High Court's judgement, I have found that the period of dispute involved in that case was prior to April 2006. The Hon'ble High Court, on a set of facts similar to the facts of the instant case, framed the following question of law :-

- Whether a person who is not a actual service provider, but discharges the service tax liability on the Taxable Services, under Section 68(2) of Finance Act, 1994, as a deemed service provider, is entitled to avail the CENVAT credit on inputs/input services/capital goods for payment of GTA service tax, even if he is not using such inputs/input services/capital goods for providing taxable services by virtue of deeming legal fiction?

In view of paragraph 2.4.2 of CBEC's Excise Manual of Supplementary Instructions, the Hon'ble High Court answered the above question in the affirmative in favour of the assessee. The decision was rendered on 06.5.2010, i.e. long after a similar question was referred by a regular Bench of this Tribunal

to Larger Bench in the case of Panchmahal Steel Ltd. (supra). Obviously, the referring Bench did not have the advantage of considering the High Court's decision. At the present stage, one has to follow the view taken by the Hon'ble High Court, in the absence of any binding judicial precedent to the contra. Accordingly, it is held that the appellant was, during the material period, entitled to take CENVAT credit on input services and utilise the same for payment of service tax on the GTA service. Consequently, the impugned demands are liable to be set aside. In the result, the impugned order is set aside and this appeal is allowed.

(Pronounced and dictated in open court)

(P.G. Chacko) Member (Judicial)

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