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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Jun-22-2012

Judge : The Honourable Mr. P.R. Chandrasekharan, Member (Technical)

Appeal No. : APPEAL NO: E/658/2012 [Arising out of Order-in-Appeal No: BC/273/M-III/2011-12 passed dated 2

Appellant : Nitco Tiles Ltd.

Respondent : Commissioner of Central Excise Mumbai

Advocate for Pet/Ap. : For the Appellant : Shri Bharat Raichandani, Advocate.
For the Respondent : Shri Navneet, Additional Commissioner (A. R.).

Judgement :

P.R. Chandrasekharan:

The appeal is directed against the Order-in-Appeal No: BC/273/M-III/2011-12 dated 24/01/2012 passed by the Commissioner of Central Excise (Appeals), Mumbai - III.

2. The appellant, M/s. Nitco Tiles Limited, are manufacturers of mosaic tiles falling under Chapter 68 of the Central Excise Tariff Act. During the period 2006-07 they availed credit of service tax paid on outward freight i.e., freight from the factory premises to the premises of the customers amounting to Rs. 63,366/-. They also availed CENVAT credit amounting to Rs. 3,076/- based on documents which were

not notified under Rule 9 of the CENVAT Credit Rules, 2004. Accordingly, a show cause notice dated 25/05/2010 issued to the appellant proposing to deny CENVAT credit. However, they reversed the credit taken before the issuance of the show cause notice. The said notice was adjudicated by order dated 30/06/2011 wherein CENVAT credit was denied on outward transportation and also the credit taken on the basis of ineligible documents along with imposition of equivalent amount of penalty.

2.1. The appellant preferred an appeal before the Commissioner (Appeals, who vide the impugned order upheld the order of the lower adjudicating authority and dismissed the appeal. Hence appellant is before me.

3. The learned advocate for the appellant submits that, as regards the availment of CENVAT credit on outward transportation, the issue has already been settled in their favour by the decision of the Larger Bench in the case of ABB Ltd. vs. Commissioner of Central Excise and Service Tax, Bangalore [2009 (15) STR 23] wherein the Larger Bench has held that outward freight is an eligible 'input service' under Rule 2(l) of the CENVAT Credit Rules, 2004 and the manufacturers can avail CENVAT credit of the service tax paid on outward freight. The said decision of the Larger Bench was upheld by the hon'ble High Court of Karnataka in the same case reported in 2011 (23) STR 97 (Kar.) for the period prior to 01/04/2008. The period involved in the instant case is 2006-07. Therefore, the appellant is rightly entitled for the CENVAT credit on outward freight amounting to R.s 63,366/- . As regards the CENVAT credit amounting to Rs. 3,076/- based on ineligible documents, the appellant submits that the demand is barred by limitation.

4. The learned AR appearing for the Revenue submits that the decision of the hon'ble Karnataka High Court has been challenged before the hon'ble apex Court in SLP No. 2587 of 2011 and the appeal has been admitted. However, no stay has been granted in the matter. Learned AR further submits that the honble High Court of Bombay in the case of Titanor Components Ltd. vs. Commissioner of Income Tax [2009 (238) ELT 596 (Bom.)] has held that when a question of law is pending before the High Court, the Tribunal should not decide the appeals on similar issues. In view of the above position, the learned AR submits that the decision of

the Larger Bench of the Tribunal and that of the High Court is in jeopardy and hence no reliance can be placed on them.

5. I have carefully considered the rival submissions.

5.1. The Larger Bench of this Tribunal in the case of ABB Ltd., cited supra, has clearly held that outward freight is an eligible input service under Rule 2(l) of the CENVAT Credit Rules, 2004 and the service tax paid on such outward freight can be taken by the manufacturers/ service providers. The said decision of the Larger Bench has also been upheld by the hon'ble High Court of Karnataka, cited supra. Though the department has filed an appeal before the hon'ble apex Court, the department has not obtained any stay against the said order. Therefore, the order of the hon'ble High Court of Karnataka still prevails and has to be followed by all the subordinate courts. In view of the above position, the demand for reversal of CENVAT credit of the service tax paid on outward freight is not sustainable in law and accordingly the same is set aside.

5.2. As regards the demand for service tax credit of Rs. 3,076/- based on ineligible documents, the assessee has not adduced any evidence before me to show that they are eligible for the said credit. Since it is the assessee who availed the credit, it is their responsibility to adduce evidence to prove that they are eligible for the credit. Since the appellant has not led any evidence in their favour they are not eligible for the credit of Rs. 3,076/- and the demand for the same is upheld along with interest thereon.

5.3. Inasmuch as the bulk of the service tax demand is set aside, the question of imposing penalty does not arise. Therefore, the same is set aside.

6. The appeal is disposed of in the above terms.

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