[2016] 68 taxmann.com 164 (Karnataka)

HIGH COURT OF KARNATAKA

Commissioner of Service Tax

v.

Kyocera Wireless (India) (P.) Ltd.

JAYANT PATEL AND MRS. B.V. NAGARATHNA, JJ.
C.E.A. NO. 33 OF 2015
MARCH 8, 2016

CASE REVIEW

Final Order No. 20618/2015, dated 9-3-2015 passed by the CESTAT, Bangalore *affirmed in part.*

mPortal India Wireless Solutions (P.) Ltd. v. *CST* [2011] 16 taxmann.com 353/[2012] 34 STT 322 (Kar.) (para 8) *relied on.*

CASES REFERRED TO

mPortal India Wireless Solutions (P.) Ltd. v. *CST* [2011] 16 taxmann.com 353/[2012] 34 STT 322 (Kar.) (para 5).

C. Shashikantha, Advocate *for the Appellant.* **G. Shivadass**, Advocate *for the Respondent.*

JUDGMENT

1. Admit.

2. Mr. G. Shivadass, learned counsel appearing for respondent waives notice of admission.

3. With the consent of learned counsel appearing on both sides, appeal is finally heard.

4. The present appeal is directed against order dated 9/3/2015 passed by the Customs, Excise & Service Tax Appellate Tribunal (hereinafter referred to as "the Tribunal"), whereby the Tribunal has set aside the impugned order and has further granted consequential relief to the appellant therein.

5. As such, the facts of the case appears to be that as per the respondent, it is a STPI unit engaged in the business of providing software engineering and support services, including development of application software for accessories for commercial models, evaluation installment of software drivers, texts on mobile hand sets manufactured by KWC, USA and KWC, Japan. The respondent filed a refund claim on 9/2/2009 for the period from April 2008 to September 2008 seeking refund of unutilized

CENVAT credit of Rs.41,49,327/-. The Assistant Commissioner of Service Tax, vide order dated 15/4/2009 rejected the claim for refund on two grounds. One was that, the respondent was not holding the service tax certificate since it was not registered and another ground was that, the credit could not be availed if conditions of input service or output service were not fulfilled as per CENVAT Credit Rules, 2004 (hereinafter referred to as "the Rules"), viz., Rule 9(6) and Rule 9(9) of the Rules. The matter was carried in appeal before the Commissioner of Central Excise (Appeals-II) and vide order dated 12/11/2010, the Commissioner (Appeals) concurred with the view of first appellate on the point of registration as well as on the point of availability of CENVAT Credit based on the documents for input services as well as output services and vide order dated 12/11/2010, the appeal was dismissed. The matter was further carried in appeal before the Tribunal and the Tribunal found that on the point of registration, the objection could not be sustained in view of the decision of *mPortal India Wireless Solutions (P.) Ltd.* v. *CST* [2011] 16 taxmann.com 353/[2012] 34 STT 322 (Kar.). However, the Tribunal further found that when the documents were produced by the appellant, the original authority had nothing to say about the availability of CENVAT Credit on the point of input services and output services, for which the refund claim has been made. Ultimately, the Tribunal allowed the appeal with consequential relief. Under the circumstances, the present appeal is before this Court.

6. We have heard Mr. C. Shashikantha, learned counsel for the appellant and Mr. G. Shivadass, learned counsel for the respondent.

7. As such, learned counsel for the respondent submitted that the order passed by all the lower authorities could be bifurcated into two parts. One, regarding denial of refund on the ground of non-registration and the other, is denial of refund for not producing sufficient proof before the authority for input service and output service for which the refund claim was made.

8. On the first aspect, the denial of refund on account of non-registration by the respondent, we do not find that the Tribunal has committed any error since the issue is no more res integra and is covered by a decision of this Court in the case of *mPortal India Wireless Solutions (P.) Ltd.* (*supra*).

9. However, on the aspect of there being no sufficient proof produced for the input services used for the purpose of output services, it appears to us that the Tribunal did not give a clear finding as to which documents were lacking or as to whether the documents were sufficient or not. As such, the Tribunal has proceeded on the basis that the original authority had nothing to say about the sufficiency of the documents or otherwise. In our view, the said finding of the Tribunal is contrary to the record of the original authority as well as the appellate authority as both have found that the conditions of input services and output services are not fulfilled and therefore, the said finding of the Tribunal, in our view cannot be sustained.

10. Mr. Shivadass, learned counsel appearing for the respondent contended that all the documents were produced and instead of dealing with the documents produced or instead of giving a finding that the link was not proved for the relatable input services and output services, a mere ipse dixit that the requisite documents are not produced, could not be said as appropriate consideration by the original authority as well as by the appellate authority. He submitted that as per the respondent, all

documentary proofs were produced and therefore, if the ground of registration and non-registration is taken away, the respondent could be entitled for the refund of the amount as CENVAT Credit.

11. Whereas, Mr. Shashikantha, learned counsel for the appellant contended that if this Court is inclined to remand the matter to the original authority for consideration of each document produced by the respondent for claiming refund after verifying input service and output service, the appellant cannot have any objection.

12. Considering the facts and circumstances of the case, we find that the conclusion recorded by the original authority as well as by the first appellate authority and further by the Tribunal on the point of verification of the record of input services and output services and the relation thereto, there is no appropriate consideration. Hence, it would be just and proper to direct the original authority to verify the records produced by the respondent and if ultimately, it is found that the input services for which CENVAT Credit is claimed by way of refund is relatable to the output services, the refund should be allowed and if not proved, the further consequential order may be passed. As the matter is pertaining to the refund of the claim of 2009, it would be just and proper to direct the original authority to undertake the aforesaid exercise within stipulated time limit.

13. In view of the aforesaid observation and discussion, the impugned orders passed by the Tribunal is set aside with the further direction that the matter shall stand restored for refund of claim to the original authority.

The original authority shall not deny the refund on the ground of non-registration of the respondent unit under service tax.

The original authority shall examine the record produced by the respondent for input services and output services and if found that the input services are relatable to the output services, the refund shall be made admissible in accordance with law after giving an opportunity of hearing to the respondent.

The aforesaid exercise shall be completed within a period of three months from the date of receipt of the judgment of this court.

Petition allowed to the aforesaid extent. Considering the facts and circumstances of the case there is no order as to costs.