Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad

REGIONAL BENCH- COURT NO.3

Excise Appeal No. 12833 of 2018

(Arising out of OIA-CCESA-SRT-APPEAL-PS-125-2018-19 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-SURAT-I)

M/s. Apar Industries Ltd **......Appellant**
A-201/202, Bezzola Complex, Sion-trombay Road, Chembur,
Mumbai, Maharashtra-400071.

VERSUS

C.C.E. & S.T.-Surat-i **....Respondent**
New Building...Opp. Gandhi Baug,
Chowk Bazar, Surat, Gujarat-395001

APPEARANCE:
Sh. Amal Dave, Advocate for the Appellant
Sh. L. Patra, Authorised representative for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR

Final Order No. A/ 11430 /2019

DATE OF HEARING: 29.07.2019
DATE OF DECISION:29.07.2019

RAMESH NAIR

The brief facts of the case are that on certain services the appellant did not discharge the service tax, subsequently the Preventive Officer pointed out on the visit of the factory that the appellant have not paid the service tax on reverse charge basis in respect of services such as man power service, security service, GTA service etc,. On pointing out by the Preventive Officer the appellant have paid the service tax. Subsequently, department has asked to pay the interest and penalty under Section 76. The appellant have also paid the same. Thereafter the case was closed as no show cause notice was issued. The appellant, in respect of the service tax paid on persuasion by the Preventive Officer, availed the cenvat credit and the intimation thereof was given to the Jurisdictional Assistant Commissioner. On this availment of cenvat credit, a show cause notice was issued wherein it was proposed to deny cenvat credit on the ground that there was suppression of facts for non-payment of service tax under reverse charge basis, therefore, as per Rule 9(1)(bb) of Cenvat Credit Rules, 2004 the cenvat credit of the service tax paid involving the suppression of fact, is not admissible. The adjudicating authority denied the cenvat credit and the same was upheld by the Commissioner (Appeal), therefore the present appeal.

2. Sh. Amal Dave, Ld. Counsel appearing on behalf of the appellant submits that there is no suppression of facts for the reason that after the inquiry from the Preventive Officer, the appellant admittedly paid the service tax and subsequently interest and penalty under section 76 was also paid. Thereafter the proceeding was closed as no SCN was issued. From this very fact it is clear that for charge of suppression of facts neither any SCN was issued nor any order was passed. Therefore, the appellant was entitled for the cenvat credit and Rule 9(1)(bb) is not applicable in their case. He also argued that since the credit was taken under intimation to the department vide letter dated 28.10.2013 and the SCN was issued on 08.02.2016, the demand is clearly time bar. He placed reliance on the following judgments:-

- Ajit India Pvt. Ltd-2018 (19) GSTL 659 (Tri.-Mumbai)
- Auto Window-2016 (41) STR 518 (Tri.-Mumbai)
- Virtusa India P. Ltd.-2017 (3) GSTL 359 (Tri.-Hyd.)
- Hindalco Industries Ltd.-2015 (40) STR 155 (Tri.-Del.)

3. Sh. L. Parta Ld. Assistant Commissioner (AR) appearing on behalf of the Revenue reiterates the finding of the impugned order.

4. Heard both the sides and perused the records. I find that the only reason for denial of the credit invokation of Rule 9(1)(bb). I find that though the matter was investigated by the Preventive Officer but after pointing out the non- payment of service tax, the appellant have admittedly paid the amount along with the interest and penalty under Section 76, thereafter, neither any SCN was issued nor any adjudication order was passed on the issue of non-payment of service tax. Consequently the proceeding, as regard the demand of service tax came to an end. This closer itself shows that there is no suppression of facts involved. If the department is of the view that there is a suppression of facts, there is no option to except to issue of SCN and order invoking the proviso under Section 73(1). Since, there is no case being covered under proviso under Section 73(1), there is no suppression Moreover, the department itself in writing asked the appellant to pay the penalty under Section 76, otherwise in case of suppression of facts the provision of Section 78 is invokable which was neither invoked nor asked to pay the penalty under Section 78. These undisputed facts clearly show that

there is no suppression of facts on the part of the appellant for non-payment of Service Tax. Consequently, Rule 9(1)(bb) cannot be invoked, accordingly, the denial of cenvat credit is not tenable.

5. The impugned order is set aside. Appeal is allowed.

(Dictated & Pronounced in the open court)

(RAMESH NAIR)
MEMBER (JUDICIAL)

Prachi