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

REGIONAL BENCH- COURT NO.3

Excise Appeal No. 12839 of 2018

(Arising out of OIA-CCESA-SRT-APPEALS-PS-289-2018-19 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-SURAT-I)

M/s. Modison Metals Ltd **......Appellant**
Plot No. 85/a,b,d & E, E-road, Phase-i, Gidc, Vapi,
VALSAD, GUJARAT

VERSUS

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

APPEARANCE:
Sh. S.J. Vyas, Advocate for the Appellant
Sh. G. Jha, Authorised representative for the Respondent

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

Final Order No. A/ 11432 /2019

DATE OF HEARING: 29.07.2019
DATE OF DECISION:29.07.2019

RAMESH NAIR

The brief facts of the present case are that the appellant have availed the cenvat credit on the strength of invoices issued by two service providers. On inquiry of the service provider it came to notice that they have not discharged the service tax on the invoices issued to the appellant. Subsequently on persuasion by the appellant the service provider have paid the service tax. The appellant was issued a SCN proposing denial of cenvat credit invoking Rule 9(1)(bb) of Cenvat credit Rules, 2004 on the ground that the service provider has not paid the service tax by suppressing the facts. In case of non-payment of service tax by the suppression of facts the service recipient is not eligible to avail the cenvat credit in terms of Rule 9(1)(bb). Accordingly, the adjudicating authority denied the cenvat cenvat and the same was upheld by the Commissioner (Appeals), therefore, the present appeal.

2. Sh. S.J. Vyas, Ld. Counsel appearing on behalf of the appellant submits that the suppression of facts on the part of the service provider is not established, for the reason that neither any SCN was issued to the service provider. In connection the non-payment of service nor any adjudication order was passed by invoking the extended period, therefore, without any proceeding against the service provider, it cannot be said that the non-payment of service tax was committed by way of suppression of facts. Accordingly, Rule 9(1)(bb) is not applicable. He placed reliance on the following judgments:-

- Columbia Machine Engg India-2018 12 TMI 1098
- Sri Warana Sharakari Dudh Utpadak-2017 2 TMI 314 TRI BOM
- Century Rayon-2004 12 TMI 599 TRI BOM
- Hawkins Cookers Ltd-2007 6 TMI 434 TRIO Bom
- Saurashtra Chemicals-2019 2 TMI 571 HC GIJ

3. Sh. G. Jha, Ld. Superintendent (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 cenvat credit to the appellant was denied by applying the provision of Rule 9(1)(bb) of the Cenvat Credit Rules, 2004 alleging that there is a suppression of facts on the part of the service provider in non-payment of service tax. I find that undisputed facts is that though the service provider at the time of issuing of invoices did not pay the service tax but subsequently they discharged the service tax and no proceeding was initiated against the service provider, the entire matter was closed. Since, there is no SCN issued to the service provider nor any adjudication order was passed, it cannot be said that there is suppression of facts on the part of the service provider. The suppression of facts needs to be established only by way of issuing the SCN invoking proviso to Section 73 (1) and thereafter, by the adjudication if the suppression of facts is established. In the present case no such exercise was carried out, it is clear that the department has accepted that there is no suppression of facts. To establish suppression of fact, there is no option for the department except to issue a SCN and adjudicate the matter, therefore, at the appellants end on availment of cenvat credit and the suppression of facts on the service provider can neither be alleged nor can be decided, therefore, Rule 9(1)(bb) is not applicable.

5. As per my above discussion the appellant is clearly entitled for the cenvat credit as the case is not covered under Rule 9(1)(bb). The impugned order is set aside and appeal is allowed.

(Dictated & Pronounced in the open court)

(RAMESH NAIR)
MEMBER (JUDICIAL)

Prachi