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

REGIONAL BENCH- COURT NO.3

Service Tax Appeal No.11460 of 2014

(Arising out of OIO-RAJ-EXCUS-000-COM-172-13-14 dated 28/01/2014 passed by Commissioner of Central Excise, CUSTOMS (Adjudication)-RAJKOT)

M/s. Gaurav Contract Co ....**Appellant**

Pooja B Complex,
Station Road, Bhuj,
Kutch, Gujarat

VERSUS

C.C.E. & S.T.-Rajkot ....**Respondent**

Central Excise Bhavan,
Race Course Ring Road...Income Tax Office,
Rajkot, Gujarat-360001

APPEARANCE:

Shri. Jigar Shah, Advocate for the Appellant
Shri H. K. Jain, Superintendent (AR) for the Respondent

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

Final Order No. A/ 11276 /2020

DATE OF HEARING: 14.10.2020
DATE OF DECISION:21.10.2020

RAMESH NAIR

The brief facts of the case are that the appellant M/s. Gaurav Contract Co. were engaged in providing mining service, supply of tangible goods for use services, GTA service, etc. to various customers, the appellants were registered with Service tax. The appellant discharged Service tax liability as may be applicable to them. The appellant also availed the benefit of Cenvat Credit of duties paid on input and capital goods and also service tax paid on input service. The appellant purchased Dumpers/trippers for use in providing the output taxable service i.e. mining service during the period May, 2008 to March, 2009.

2. During the course of audit of the appellant it was observed that the appellant have wrongly availed the Cenvat Credit on Dumpers/trippers as capital goods. The audit objection culminated into issuance of Show Cause Notice dated 07.05.2013 whereby, it was proposed to deny the Cenvat Credit under the provision of Rule 14 of the Cenvat Credit Rules, 2004 read with section 73(1) of the Finance Act, 1994. It was also proposed in the Show Cause Notice to impose penalty under Rule 15 of the Cenvat Credit Rules, 2004 read with Section 78 of the Finance Act, 1994 along with interest under Section 75 of the Finance Act, 1994. The Show Cause Notice alleged that for mining service, the Cenvat Credit on Dumpers/trippers was

allowed only with effect from 22.06.2010 through the Notification No. 25/2010-CE (NT). The Show Cause Notice was adjudicated by the Learned Commissioner vide its Order-In-Original No. RAJ-EXCUS-OOO-COM-172-13-14 dated 28.01.2014 whereby the demand was confirmed by denying the Cenvat Credit availed by the appellant on Dumpers/trippers. Being aggrieved by the said Order-In-Original the appellant filed the present appeal.

3. Shri Jigar Shah, Learned Counsel appearing on behalf of the appellant made detailed submission on merits as well as on limitation. He submits that even though the Dumpers/trippers were specifically included in the definition of Capital goods only with effect from 22.06.2010 the appellants are otherwise entitled for the Cenvat Credit on Dumpers/trippers as inputs. In this regard he placed reliance on the judgment in the case of ADITYA CEMENT reported in 2017 (346) ELT 300 (Tri.-Del). He submits that in the case of ADITYA CEMENT also the Cenvat Credit was denied on Dumpers/trippers on the ground that the said goods is not covered within the definition of capital goods as well as inputs. However, the Hon'ble Tribunal has allowed Cenvat Credit in respect of Dumpers and parts thereof. He also placed reliance on this tribunal's judgment in the case of IBC LTD. reported in 2016 (45) STR 414 (Tri.-Hyd). As per this judgement the tribunal has considered the Dumpers/trippers as inputs and credit was allowed. He also relied upon the judgment in the case of HINDUSTAN COPPER LTD. reported in 2016 (342) ELT 282 (Tri.-Del), INDIA CEMENT LTD. reported in 2009 (238) ELT 193 (Tri.-Chennai). He further submits that even as per the definition of inputs provided in Rule 2(k) of the Cenvat Credit Rules, 2004, since the definition is wide enough, it covers Dumpers/trippers etc. as inputs. He also submits that there is no statutory bar in availing the Cenvat Credit on Dumpers/trippers as inputs. He further submits that even if the appellant have wrongly taken the credit under the head of Capital Goods but if the goods are eligible as input it cannot be said that there is wrong availment of credit. In this regard he placed reliance in the case of MODI RUBBER LTD. reported in 2000 (119) ELT 197 (Tri.-LB), JSW STEEL COATED PRODUCTS reported in 2016 (43) STR 280 (Tri.-Mumbai).

4. Without prejudice to the above submission, he also submits that the entire demand in the present case is time barred. The period in dispute in the present case is May, 2008 to March, 2009. The appellants have disclosed the facts of availing the Cenvat Credit of excise duty paid on Dumpers/trippers as capital goods in their periodical ST-3 Returns. He submits that after filing the periodical ST-3 returns, the concerned

Superintendent of Central Excise, Rajkot vide his letter dated 09.02.2010. asked the appellant to provide the details of Cenvat Credit availed by them. In response, the appellant vide their letter dated 02.03.2010 provided all the details and explanation to the concerned Superintendent of Central Excise, Rajkot. In the said letter the appellant provided the detail invoice wherein, the Cenvat Credit is availed by them thereafter no objection was raised by the departments. However, the audit of the appellant was carried out on 28.11.2010 wherein, the observations regarding availment of Cenvat Credit on Dumpers/trippers was pointed out and pursuant to audit report the show cause notice dated 07.05.2013 was issued. He submits that in the above events of the facts there is no suppression of fact on the part of the appellant, all the informations verified by the Audit Officers were available before the jurisdictional range officers therefore, there was no suppression or wilful misstatement on their part. Accordingly, the entire demand is time barred. He further submits that since issue involved the interpretation of Cenvat Rules, for this reason also extended period could not have been invoked for demand.

5. On the other hand, Shri H.K.Jain, Learned Assistant Commissioner (Authorized Representative) appearing on behalf of the revenue reiterates the finding of the impugned order. He also filed detailed written submission dated 13th October, 2020 and additional written submission on 14th October, 2020 which was taken on record. During the arguments he reiterates his submission and relied upon the following judgments:-

- 2018 (16) GSLT 462 (Chhattisgarh)- Vandana Global Ltd Vs. CCE, Raipur
- 2010 (18) STR 10 (Tri- Bang) – Ganta Ramanaiah Naidu Vs. CCE, Guntur
- 2016 (46) STR 764 (Tri- Ahmd) – Gaurav Contract Co Vs. CCE, Rajkot
- 2019 (370) ELT 819 (Tri-Hyd) – B Girijapathi Reddy & Company Vs. CCE, Guntur
- 2017 (349) ELT 349 (Tri-Ahmd) – Adani Gas Ltd Vs. CCE, Ahmedabad
- 2019 (26) GSLT 457 (Bom)- Responsive Industries Ltd Vs. CGST, Palghar
- 2019 (25) GSTL J34 (SC) – UPS Jetair Express P Ltd Vs. Commissioner
- 2001 (130) ELT A89 (SC) – A S Impex Ltd Vs. Commissioner

- 2019 (31) GSLT 433 (MP) – Star Automobile Vs. Commissioner
- 2019 (22) GSLT 282 (Tri-Kol) – Timken India Ltd Vs. CCE, Jamshedpur
- 2019 (26) GSLT J37 (SC)- Commissioner Vs. 3i Infotech Ltd
- 2010 (251) ELT 264 (Tri-Chennai) – Chemfab Alkalis Ltd Vs. CCE, Pondicherry
- 2010 (256) ELT 369 (Guj) – CCE, Surat – I Vs. Neminath Fabrics P Ltd
- 2004 (167) ELT A134 (SC) – Fortune Impex Vs. Commissioner
- 2009 (238) ELT 455 (Tri-Ahmd) – Geedeelon Texo-Twist P Ltd Vs. CCE, Surat-II

6. We have heard both the sides and perused the records, the issue to be decided by us in the present case is that whether the appellant have rightly taken the Cenvat Credit in respect of Dumpers/trippers either as a capital goods or as an input. After giving careful observation we find that the present case can be disposed off on limitation itself without going into the merit of the case. We find that the appellant have bonafidely availed the Cenvat Credit in respect of Dumpers/trippers and the details of the credit was declared in their ST-3 Returns. Moreover, on the query from the Range Officer, the appellant have submitted invoice wise details of credit which contained the Cenvat Credit taken on invoices of Dumpers/trippers also. Therefore, we find that there is no suppression or wilful suppression of facts to take the undue benefit of Cenvat Credit on the part of the appellant. It is also observed that the issue involves interpretation of Cenvat Credit Rules. On the same issue number of judgments were passed wherein the tribunal has allowed the credit considering the same goods i.e. Dumpers/trippers as inputs. Though, we are not endorsing the judgments given by the tribunal on merit however, since there were multiple litigation on the issue involving the interpretation of law, We find that in such a situation it cannot be alleged that the appellant have wilfully suppressed the fact to evade the Service tax. This tribunal considering the identical facts in various judgments held that in such a situation the demand for extending period will not sustain. Some of the judgments are as follows:-

- **2019 (370) ELT 819 (Tri-Hyd)- B Girijapathi Reddy & Company Vs. CCE, Guntur**

"11. As regards the penalty imposed under Rule 15, we find that during the relevant period in question, there could be a bona fide impression that any inputs or input services or capital goods used for providing output services were eligible for Cenvat credit, which was an industry norm and had to be decided by the Tribunal in the

case of Ganta Ramanaiah Naidu (supra) and it was held that Cenvat credit on tippers was not eligible. We also find strong force in the contentions raised that in the case of Ganta Ramanaiah Naidu also the Bench set aside the penalties imposed. Following the said decision, we set aside the penalties imposed in these appeals under Rule 15 of the Cenvat Credit Rules. To that extent, the impugned order is set aside."

- **2017 (349) ELT 349 (Tri.-Ahmd)-Adani Gas Ltd .Vs. CCE. Ahmedabad**

"24. We find from the records that correspondences between the Department and the appellant had been continuing on the issue of centralised registration since Oct., 2005. Therefore, there is merit in the contention of the appellant that necessary information had been furnished from time to time about their business of compression of natural gas and distribution/sale of CNG from daughter stations through their various letters enclosed with the appeal paper book. Besides, the appellant had informed the department about their intention to avail Cenvat credit on 27-2-2007. Thus, extended period of limitation cannot be applicable in the facts of the first show cause." notice.

"25. The second demand notice which was issued in May, 2009 is clearly barred by limitation inasmuch as during the course of furnishing statement Shri Ketan Vyas, Assistant Manager, categorically stated that all informations had been submitted to the Range Supdt. on 7-9-2007. We find that even though the same has been mentioned at Paragraph 4.1 of the show cause notice, no contrary evidence indicating non-receipt of the relevant invoices had been brought on record by the Revenue. On going through the said letter dated 7-9-2007 (page 479 of appeal paper book) we find that the appellant had furnished detailed statement of Cenvat credit availed along with copies of invoices. Hence, no facts was suppressed from the department in availing the credit. Therefore, in our view, the demand is barred by limitation."

- **2011 (263) ELT 707- ASIAN TUBES LTD**. **Vs. COMMISSIONER OF CENTRAL EXCISE AHMEDABAD**

"5. However, it is seen that the show cause notice for denial of credit of duty amounting to Rs. 2,04,000/- availed on 1-6-06 was issued on 11-9-07 i.e. after normal period of limitation of one year. While dealing with the appellant's above plea of demand being barred by limitation, the Commissioner (Appeals) has observed that though the appellants had regularly submitted the monthly returns, he has not clearly disclosed that he had availed credit of service tax paid on the textile (sic) services rendered for the wind mills situated away from his factory. I find no merits in the above observation and finding of the Commissioner (Appeals). Having accepted that the appellants had filed monthly returns showing availment of credit of Rs. 2,04,000/-, no suppression or mis-statement with an intent to evade duty, can be attributed to them. In any case, the same Commissioner (Appeals) has set aside the penalty imposed upon the appellants by following the Tribunal's decision in the case of M/s. Rajhans Metals Pvt. Ltd, which has observed that the disputed issue is a issue of interpretation and there is no justification for imposition of penalty. If that be so i.e. the issue is as regards interpretation of law, the appellant cannot be held to have any mala fide intention for availing the credit. As such, it has to be held that the demand of credit having been raised after the normal period of limitation is hit by limitation and is time

barred. For the said reasons, demand of duty of Rs. 2,04,000/- is set aside. However, the demand of duty of Rs. 59,328/- is upheld."

- **2015 (38) S.T.R. 867 (Tri. - Ahmd.) OIL & NATURAL GAS CORPORATION LTD. V.s COMMR. OF C. EX. & S.T., SURAT**

"6. So far as time-bar nature of the demand is concerned, the view expressed by learned Adjudicating authority that time-bar is not applicable to the demand of Section 75 interest, is not correct in view of the views expressed by various judicial pronouncements mentioned in Para 3.1 above. As per Para 4 of the OIO dated 31-12-2013 passed by the Adjudicating authority ST-3 returns were filed from 23-4-2010 to 23-4-2013 and the show cause notice was issued on 13-4-2013. The period of issuing show cause notice was one year from the date of filing of return under Section 73(1) of the Finance Act, 1994 before its amendment under Finance Act, 2012 with effect from 28-5-2012. Demands for the ST-3 returns filed after 19-4-2013 will not be time-barred. However, this aspect of time-bar is of academic nature in the present proceedings as on merits the issue has been held to be in favour of the appellant."

7. In view of the facts and circumstances in the present case as discussed above and with the support of the above judgments it is clear that there is no suppression of facts on the part of the appellant in availing the Cenvat Credit on Dumpers/trippers therefore, the entire demand raised beyond the normal period is time barred.

8. Accordingly, the impugned order is set aside on the ground of limitation without going into the merit of the case. The appeal is allowed.

(Pronounced in the open court on 21.10.2020)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Mehul