

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

REGIONAL BENCH-COURT NO. 3

Service Tax Appeal No. 12141 of 2014- DB

Service Tax Mis. (CO) Application No. 15194 of 2014

(Arising out of OIO-RAJ-EXCUS-000-COM-182-13-14 dated 31/01/2014 passed by Commissioner of Central Excise, CUSTOMS (Adjudication)-RAJKOT)

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

.....Appellant

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

VERSUS

C J Shah & Co

.....Respondent

105, Bajaj Bhavan, 10th Floor,
Nariman Point,
Mumbai, Maharashtra

APPEARANCE:

Shri Tara Prakash, Deputy Commissioner(AR) the Appellant

Shri J. C.Patel & Shri Rahul Gajera, Advocate for the Respondent

**CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. C L MAHAR**

Final Order No. 11689/2023

DATE OF HEARING: 06.07.2023

DATE OF DECISION: 11.08.2023

RAMESH NAIR

The present appeal of department arises out of Order-In-Original dated 31-1-2014 whereby Learned Commissioner of Central Excise, Rajkot has interalia dropped on merits, the demand of Cenvat Credit of Rs. 2,11,04,002/-, being proportionate Cenvat Credit of service tax paid on common input services, attributable to trading activity. The Respondent has filed cross-objection opposing the department's appeal on the ground of limitation.

1.2 Fact in brief are that Respondents were engaged in providing Business Auxiliary Service as well as in trading activity - Sale of imported goods after

clearance from customs on payment of Sales Tax. A Show Cause Notice dated 18-4-2013 under the proviso to Section 73(1) of the Act was issued to the Respondents for the period October 2007 to March 2012 raising two demands on the following two counts:

- a) Demand for Service tax of Rs. 5,09,28,274/- under Business Auxiliary Service in respect of certain charges recovered by the Respondents under Debit Notes and;
- b) Denial of Cenvat Credit of Rs. 2,11,04,002/-, being proportionate Cenvat Credit on common input services, attributable to trading activity.

By Order-in-Original dated 31-1-2014, the Commissioner of Central Excise, Rajkot, confirmed the first demand of Rs.5,09,28,274/- by holding that the larger period of limitation is applicable and dropped the second demand of Rs.2,11,04,002/- on merits. In Respondent's Appeal against the said Order-in-Original dated 31-1-2014 confirming the first demand of Rs.5,09,28,274/-, being Appeal No. ST/11639/2014-DB, this Tribunal by Order No. A/11433/2014-WZB/AHD, dated 31-7-2014 (2015 (38) STR 152), held the Show Cause Notice is barred by time; larger period of limitation was not applicable. Against the dropping of demand of Cenvat Rs. 2,11,04,002/- on merit by the Commissioner, Revenue filed by the present appeal. The respondent also filed cross objection raising the ground that this demand of Rs. 2,11,04,002/- apart from merit, is not sustainable on time bar as the Tribunal already held the Shaw Cause notice as time bar in its order dated 31.07.2004 (Supra).

2. Shri Tara Prakash, Learned Deputy Commissioner appearing on behalf of the revenue submitted that the present appeal is filed by department against the portion of the Order-in-Original dated 31-1-2014, by which

Learned Commissioner has dropped the demand for Cenvat Credit of Rs. 2,11,04,002/-, being proportionate Cenvat Credit on common input services, attributable to trading activity. He submitted that Learned Commissioner has erred in dropping the demand of proportionate Cenvat Credit on common input services attributable to Trading activity which is not admissible to the Respondents as per the grounds set out in the grounds of appeal of the appellant.

3. On the other hand, Shri J.C. Patel & Shri Rahul Gajera learned Counsel for the Respondent submitted that the Show Cause Notice itself being barred by time, and this Tribunal has already held so in the Order No. A/11433/WZB/AHD dated 31-7-2014 which has not been appealed against by the department and has attained finality, consequently, the dropping of the demand, in any event has to be upheld in this case also on the ground of time bar.

4. We have carefully considered the submissions made by both the sides and perused the records. The only issue remains before this Tribunal is one of denial of proportionate Cenvat Credit on common input services attributable to Trading activity, by invocation of larger period of limitation.

4.1 At the outset, it is observed that this Tribunal in the Respondent's Appeal against the portion of the Order-in-Original confirming the demand, has already held in its order A/11433/2014-WZB/AHD dated 31.07.2014 that the Show Cause Notice is barred by time mentioned in Para 11 of the said decision, this Tribunal held as follows:

- a) That the Respondents' records had been subjected to scrutiny by the department from time to time;

- b) It is not in dispute that as many as four audits had been conducted by the department covering the period 1-10-2007 to 5-1-2012;
- c) Apart from such audits, the Director General of Central Excise Intelligence (DGCEI) had in November, 2009 called upon the Respondents to submit copies of their commercial invoices for the period October, 2005 to September, 2009 and Cenvat documents, on an inquiry to ascertain facts regarding Service Tax, was initiated against the Respondents;
- d) Further in June, 2010 the DGCEI also called upon the Respondents to submit invoice details, party-wise ledger accounts and balance sheets and profit and loss accounts for the period April, 2005 to March, 2010;
- e) All such documents were submitted to DGCEI who after examining the same, by letter dated 31-8-2010 informed the Respondents that the Additional Director General had ordered closure of the inquiries and the Respondents were accordingly asked to collect from the office of the DGCEI all the records and documents submitted for the inquiry;
- f) In these circumstances, there is no scope for invoking the larger period of limitation. The DGCEI having examined the documents and ascertained the facts and having ordered closure of the inquiry in the year 2010, it cannot be held that there was cause for invoking the larger period of limitation by issuing a notice in the year 2013.

4.2 In these circumstances, this Tribunal had held that there was no scope for invoking the larger period of limitation. The said Order of this Tribunal

has been accepted by the department and department has not appealed against the same and has therefore attained finality.

4.3 As regard issue of demand of Cenvat Credit also all the facts narrated above is applicable in as much as declaration of Cenvat Credit in appellant's ST-3 returns on the common input service used for providing taxable service as well as trading activity which as per department is exempted service and periodical audits were conducted. Hence, there is no suppression of facts or mis-declaration on the part of the assessee. Hence the ratio of this Tribunal's order dated 31.07.2014 is squarely applicable to this case of demand of Cenvat credit so far the demand under extended period.

4.4 It is further observed that even otherwise, it is settled law that since the issue whether Cenvat Credit on common input services attributable to trading activity is liable to be denied was debatable issue, the larger period of limitation cannot apply; there have been conflicting decisions on whether Cenvat Credit of service tax paid on common input services attributable to trading activity is liable to be denied. The following decisions held that the same cannot be denied:

- a) Franke Faber India Ltd v CCE- 2017 (52) STR 155
- b) Kundan Cars P. Ltd v CCE – 2016 (43) STR 630
- c) Marudhan Motors v CCE – 2017 (47) STR 261.

Further, Reliance is placed in the following decisions wherein it is held that since there were conflicting judicial views on the issue, the larger period of limitation cannot apply:

- a) Assistant Commissioner v Shriram Value Services P. Ltd – 2019 (368) ELT 928 (Mad)
- b) CST v AVL India P. Ltd- 2017 (4) GSTL 59

- c) Shri Balaji Industrial Products v CCE -2019 (370) ELT 280
- d) Mahindra and Mahindra Ltd v CCE – 2018 (364) ELT 1006.

4.5 It is settled law that where the lower authority's order is in favour of the assessee dropping the demand on merits, in revenue's appeal against the same, assessee can support the order on the plea of limitation. Reliance is placed in this behalf on the decision of the Hon'ble Supreme Court in the case of CCE v U.P. Lamination – 1997 (89) ELT 440 (SC).

4.6 In view of foregoing discussion, since the Show Cause Notice itself is barred by time, the dropping of the demand for Cenvat Credit by the Commissioner, has to be upheld for the extended period and we hold so.

4.7 Accordingly, the Appeal of the department is liable to be dismissed with consequential relief of refund of amounts, if any deposited with applicable interest in accordance with law, except the demand of tax falling within normal period of limitation.

5. The impugned order is modified to the above extent. Appeal is allowed in the above terms. CO also stands disposed of.

(Pronounced in the open court on 11.08.2023)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(C L MAHAR)
MEMBER (TECHNICAL)