

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

Appeal No. E/12425/2018-SM

[Arising out of OIA No. OIA-VAD-EXCUS-001-APP-098-2018-19 dated 27.06.2018 passed by
C(A) Vadodara-i]

M/s Columbia Machine Engineering India Pvt. Ltd. Appellant

Vs

C.C.E.& S.T. Vadodara-i Respondent

Represented by:

For Appellant: Shri. Saurabh Dixit (Advocate)

For Respondent: Smt. Nitina Nagori (A.R.)

CORAM:

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

Date of Hearing/Date of Decision: 11.12.2018

Final Order No. A/ 12863 /2018

Per: Ramesh Nair

The appellant is a manufacturer availing the Cenvat Credit. They have received services from abroad. The appellant did not pay the service tax at the time of receipt of service, however later on when audit has pointed out, they have discharged the service Tax on reverse charge basis for the period February 2012 and thereafter, they have taken the Cenvat Credit on the said Service Tax paid. The Revenue has issued a SCN dated 22 February 2017 wherein it was proposed to deny Cenvat Credit on the ground that the Service Tax was paid due to suppression of fact, willful mis-statement etc. and according to Rule 9(1)(bb) of Cenvat Credit Rules, 2004 the Cenvat Credit is not admissible, when the non-payment of Service Tax was paid by reason of fraud or collusion or willful mis-statement or suppression of fact. The adjudicating authority confirmed the demand. Being aggrieved by the Order In Original appellant filed appeal before Commissioner

(Appeals) rejected the appeal relying on the Commissioner (Appeals) order in the case of Shiv Lifters bearing Order In Appeal No. Vad-Excus-003-347-2016-17 dated 22.09.2016. The appellant being aggrieved by the said Order-in-Appeal filed the present appeal.

2. Shri. S.R. Dixit, Ld. Counsel appearing on behalf of the appellant submits that though the Commissioner (Appeals) has disallowed Cenvat in the case of Shiv Lifters but the said order of the Commissioner (Appeals) was decided by the Tribunal. This Tribunal in favour of assessee which is reported at Shiv Lifters Vs. C.C.E & S.T, Vadodara-II- 2017(12) TMI 93- CESTAT Ahmedabad. He further submits that in case of reverse charge payment of Service Tax, no malafide intention can be attributed to the assessee. In his support, he placed reliance on the judgments of this Tribunal in the case of JET AIRWAYS (I) LTD. Vs. C.S.T, Mumbai-2016 (44) S.T.R. 465 (Tri. Mumbai) which was upheld by the Hon'ble Supreme Court of JET AIRWAYS (I) LTD Vs. C.C-2017 (7) GSTL J 35(SC). He also placed reliance on the judgment of this Tribunal in the case of JOHN ENERGY LIMITED VS. C.C.E & S.T.- AHMEDABAD-III- 2018 (11) TMI 1389-CESTAT AHMEDABAD.

3. Ms. Nitina Nagori, Ld. Deputy Commissioner (AR) appearing on behalf of the Revenue reiterates the findings of the impugned order.

4. I have carefully considered the submissions made by both the sides and perused the records, I find that the dispute to be settled is whether the appellant is entitled for Cenvat Credit in respect of Service Tax paid belatedly on the services received from abroad under Reversel Charge Mechanism. The lower authority denied the credit

only by invoking Rule 9(1)(bb) of Cenvat Credit Rule, 2004, which reads as under:

“Rule 9(1) (bb) a supplementary invoice, bill or challan issued by a provider of output service, in terms of the provisions of Service Tax Rules, 1994 except where the additional amount of tax because recoverable from the provider of service on account of non-levy or non-payment or short-levy or short-payment by reason of fraud or collusion or wilful misstatement or suppression of facts or contravention of any of the provisions of the Finance Act or of the rules made thereunder with the intent to evade payment of service tax.”

5. From the plain reading of the above Rule 9(1)(bb) it is observed that the credit can be denied only if the short payment or non-payment for the reason of fraud or collusion or willful mis statement or suppression of fact or contravention of any of the provisions of the finance Act or Rules made there under with intent to evade payment of Service Tax. In the facts of the present case the appellant have paid the Service Tax along with 15% penalty and interest in terms of Section 73 (4A) it reads as under:

“In case where ingredients of fraud, collusion etc., as per section 73(4) exists, then the assessee can pay the service tax along with interest and penalty equal to 1 percent of the tax for each month for the period which default continues, up to maximum of 25 percent . In case the assessee have paid service tax, interest and penalty under section 73(4A) and if the assessee recover service tax amount from the service receiver by raising supplementary invoice, then the service receiver is not eligible to avail the cenvat credit of the same as per Rule 9 of the Cenvat Credit Rules, 2004.”

6. From reading of above Section 73 (4A) it is seen that it starts with the terms “not with-standing anything contained under 73 (4A) which deals with situation whether there is a fraud or collusion or willful mis-statement or suppression of fact etc, therefore, when the appellant have availed Section 73 (4A) and the case of non-payment of Service Tax stood concluded by making payment of Service Tax along with interest and 15% penalty, it cannot be said that there is suppression of fact on the part of the appellant. Moreover by availing

the provision of Section 73 (4A), no adjudication process is required to be carried out. When there is no adjudication, whether there is fraud or collusion or willful mis statement or suppression of fact the same is not established, therefore, after making the payment under Section 73 (4A), the case stand concluded, there cannot be charge of fraud or collusion or willful mis statement or suppression of fact etc. Accordingly, credit on that amount cannot be denied. The same issue has been stated of this Tribunal in the case of Shi Lifters (Supra) wherein the Tribunal held that when the payment under Section 73 (4A) of Finance Act, 1994 was made the provision of Rule 9(1)(bb) of Cenvat Credit Rule, 2004 shall not apply. The impugned order is also not sustainable on the ground that the impugned order relied upon the order of the Shiv Lifters case passed by the Commissioner (Appeals) which stand set aside as per the Tribunals decision cited (Supra).As per our above discussion the denial of Cenvat Credit by the lower authority is not legal and proper. Accordingly, the impugned order is set aside. The appeal is allowed.

(Dictated and Pronounced in the open court)

(Ramesh Nair)
Member (Judicial)

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