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

REGIONAL BENCH- COURT NO. 3

Excise Appeal No. 11083 of 2016
E/CO/10521/2016

(Arising out of OIO-VAD-EXCUS-002-COM-029-15-16 dated- 02/02/2016 passed by Commissioner of Central Excise, Customs and Service Tax-VADODARA-II)

C.C.E. & S.T.-Vadodara-ii **........Appellant**
1st Floor... Room No.101,
New Central Excise Building,
Vadodara, Gujarat - 390023

VERSUS

Alstom India Limited **......Respondent**
Po-Maneja,
Vadodara, Gujarat

Appearance:
Shri Vinod Lukose, Superintendent (AR) appeared for the Applicant
Shri Jigar Shah, Advocate for the Respondent

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

Final Order No. A / 11399 /2022

DATE OF HEARING: 29.07.2022
DATE OF DECISION: 18.11.2022

RAMESH NAIR

The present appeal is filed by the department against Order-in-Original No. VAD-EXCUS-002-COM-029-15-16 dated 02.02.2016 passed by the Commissioner of Central Excise &Service Tax.

1.2 Briefly stated the facts of the case are that from the audit of records of M/s Alstom Projects India Ltd. (now known as M/s Alstom India Ltd.) for the period January 2010 to June 2010, it appeared that the respondent had provided "Erection, Commissioning and Installation Services" to M/s National Hydroelectric Power Corporation Ltd., Uri, Jammu and Kashmir (i.e. M/s NHPC) without payment of any service tax, as the provisions of Chapter V of the Finance Act, 1994 were not applicable to the State of Jammu and Kashmir. However, it appears that such services to M/s NHPC were provided by the respondent by using Cenvated input-services that were also not covered under Rule 6(5) of Cenvat Credit Rules, 2004. It was further noticed that the Respondent was also not maintaining any separate account of input-services, used for exempted services and taxable services, as required under the provisions of Cenvat Credit Rules 2004 and therefore it appeared that respondent was liable to reverse the amount in terms of Rule 6(3) of CCR-2004, which they appeared to have failed to do. Accordingly show cause notice was issued to the respondent for recovery of an amount under Rule 6 of the Cenvat Credit Rules 2004 along with interest and penalty. On adjudication, the demands were dropped by the Ld. Commissioner. Hence, the revenue filed the present appeal

2. Shri Vinod Lukose, Learned Superintendent (AR) appearing for the Revenue reiterated the grounds of appeals and submits that from the Cenvat Credit Rules, 2004 it clearly emerges that which these rules relating to availment and utilization of Credit shall not apply to the state of Jammu and Kashmir, whereas in the present matter, though the output services of "Erection, Commissioning and Installation" have been admittedly provided to M/s NHPC in the state of J&K,, the incidence of availment and utilization of the Credit of disputed Service tax paid on input services, has occurred at the premises of the assessee situated at Maneja, Vadodara but not in the State of J & K. Therefore, the provisions of Cenvat Credit Rules, 2004 are clearly applicable to the facts of the present case. As per the definition of "exempted services" as provided under the Rule 2(e) of the CCR-2004, not only includes taxable services which are exempted, but also services on which no service tax is leviable under Section 66 of Chapter V of the Finance Act, 1994. In the present case since the services of "Erection, Commissioning and Installation" which are otherwise taxable, is admittedly not taxable for the simple reason that the same has been provided within the State of Jammu & Kashmir. However, that does not take away the character of the same being " a service on which no service tax is leviable" to be kept outside the definition of "exempted services" under Rule 2(e) of CCR-2004. Therefore the conclusion drawn by the adjudicating authority in impugned order to the effect that since the services provided in J&K are clearly excluded from the provisions of Chapter V of the Finance Act, 1994 also does not fall under the definition of "exempted services" as per Rule 2 (e) of Cenvat Credit Rules 2004 is not legal and proper.

2.1 He further submits that as evident the facts on records, the respondent were providing both, taxable and exempted output services, after availing Cenvat Credit on input-services that were used commonly for both, taxable and exempted output services. Under the circumstance, the case has to be dealt with in terms of Rule 6(3) of CCR-2004. He placed reliance on the following judgments:-

- CCE, Thane-I Vs. M/s Nicholas Piramal (I) Ltd. – 2009 (244) ELT 321 (Bom)
- Malaysian Airlines Vs. Union of India – 2010 (262)ELT 192 (Bom)
- Mangalore Chemicals & Fertilizers Ltd. Vs. Deputy Commissioner – 1991(55)ELT 437 (SC)
- Tata Steel Ltd. Vs. CCE, Jamshedpur 2014(33)STR 440 (Tri. Kol)
- State of Jharkhand Vs. Ambay Cements – 2004(178)ELT 55(SC)

3. On the other hand, Shri Jigar Shah, Learned Counsel appearing for the respondent submits that in the present matter Ld. Commissioner has rightly held that J&K is a non-taxable territory, therefore, services rendered in J&K would neither be taxable nor exempted service. Hence the turnover of J&K cannot be included in the total turnover. The service which are performed outside the taxable territory would not qualify under the definition of exempted services as defined in the Cenvat Credit Rules, 2004. Further the definition of exempted services has two portions. The main clause of the definition covers the taxable services which are exempt from the whole of the service tax leviable thereon. In the present matter, clearly the services rendered in J&K are not taxable service and there is no specific exemption issued under the Service tax provisions in this regard. Therefore, the said services would not fall in the main clause of the definition. Further, the inclusive clause of the definition covers all such services on which no service tax is leviable. In said leg of the definition of exempted service cannot cover the transaction which are performed outside the taxable territory. In can cover only those service transactions which are performed in the taxable territory. Therefore, the services performed in J&K would not be covered in the said clause of the definition of exempted service, meaning thereby, services provided in J&K would not fall under taxable service as well as exempted service. He placed reliance on the Judgment of M/s Ramboll Imisoft Pvt. Ltd. Vs. CCE, Hederabad – 2016-TIOL-1536-CESTAT-HYD.

3.1 He also submits that Rule 6 of the Cenvat Credit Rules, 2004 provides three options for reversal of cenvat credit taken on input services used for exempted goods and exempted services. When the law has provided option to the assessee to reverse the proportionate credit under any of the option which is beneficial to them, then in such a case, the department cannot compel the respondents to choose any particular option for reversal. In the present matter respondent already reversed the Credit, hence demand of amount under Rule 6(3)(i) by the department is legally not correct. He placed reliance on the following judgments:

- Mercedes Benz India (P) Ltd. Vs. CCE 2015-TIOL-1550-CESTAT-MUM
- Tata Technologies Ltd. Vs. CCE 2016-TIOL-272-CESTAT-MUM.
- Biochem Pharmaceutical Industries Ltd. Vs. CCE, Daman Final Order A/12456/2021 dtd. 25.10.2021
- CCE Vs. Himmat Glazed Tiles – 2018(15)GSTL486 (Guj)
- CCE Vs. Ashima Dyecot Ltd. 2008 (232)ELT 580 (Guj)
- Welspum Corp Ltd. Vs. CCE, 2019(368)ELT 179
- Bombay Minerals Ltd. Vs. CCE- 2019(29)GSTL 361 (T)
- CCE Vs. Larsen & Toubro Ltd. – 2015(39)STR 913 (SC)

4. We have heard both sides carefully and perused the appeal papers. The first issue is whether appellants are liable to reverse the credit availed on common input services used for rendering services in Jammu & Kashmir. Undisputedly the appellants have used common input services for providing services in State of Jammu & Kashmir and other parts of India. The proviso to sub-clause (2) of Rule 1 of Cenvat Credit Rules states that 'nothing contained in these rules relating to availment and utilization of credit of service tax shall apply to the State of Jammu and Kashmir'. Again, as per Section 64 of the Finance Act, 1994, the Act extends to the whole of India except the State of Jammu & Kashmir. Thus, there is no levy of service tax on the services provided in Jammu & Kashmir. The Department has construed or rather confused the services rendered in Jammu & Kashmir to be exempted services.

4.1 It is the case of Department that as the appellant availed credit on common input services for providing services to the State of Jammu & Kashmir and rest of the country, the appellant ought to have maintained separate accounts as the services provided in Jammu & Kashmir is exempted and services provided to rest of the country is taxable services. On failure to maintain separate accounts, the appellant is liable to pay amount @5% / 6% under the provisions of Cenvat Credit Rules 2004.

4.2 We find that as per the definition of input service given in Rule 2(l), Input service means any service used by a provider of taxable service for providing an output service. Undisputedly, the services provided in the State of Jammu & Kashmir are not taxable services. Further the Sub-clause (2) of Rule 6 of Cenvat Credit Rules, 2004 reads as under:-

> *"Where a manufacturer or provider of output service avails CENVAT credit in respect of any inputs or input services and manufactures such final products or provides such output services, then the manufacturer or provider of output service shall maintain separate accounts for -*
> *(a) ……..*
> *(b) ……..*

The above provision speaks about the situation when the service provider is rendering output services which are chargeable to tax as well as exempted services. The services rendered in Jammu & Kashmir are not chargeable to service tax and therefore, are not taxable services. But this does not make them exempted services also. A service becomes an exempted service when by notification or law, the service tax payable on such service is exempted. Rule 6(2) does not apply to a situation where the service provider renders both taxable services and services which are not subject to service tax. The law is silent in this regard. The Department cannot construe the services provided to Jammu & Kashmir as exempted services and press into application, in such situations, Rule 6 of Cenvat Credit Rules, 2004. As the services provided to Jammu & Kashmir are not subject to levy of service tax, whether such services would fall into the definition of 'output service' during the relevant period is itself doubtful. As per the definition of input service, only if the service provider uses for providing output service will the service be qualified as input service. In any case, the services rendered to Jammu & Kashmir do not fall in the category of exempted services.Therefore, on this point, we don't agree with the arguments of revenue.

4.3 We also find that in the present matter appellant already reversed the proportionate Cenvat Credit attributable to the said disputed service. Therefore in our view, the appellant have complied with the condition prescribed under Rule 6(3)(ii) read with sub-rule (3A) of Rule 6 of Cenvat Credit Rules, therefore demand @ 5% / 6%/ 7% cannot be demanded. The main objective of the Rule 6 is to ensure that the assessee should not avail the Cenvat Credit in respect of input or input services which are used in or in relation to the manufacture of the exempted goods or for exempted services.On this objective at the most amount which is to be recovered shall not be in any case more than Cenvat Credit attributed to the input or input services used in the exempted goods or exempted services. It is also observed that in either of the three options given in sub-rule (3) of Rule 6, there is no provisions that if the assessee does not opt any of the option at a particular time, then option of payment of 5%/ 6% will automatically be applied.

4.4 Therefore, we hold that the Learned Commissioner had rightly dropped the demand and granted the relief to the respondent. Hence, the Revenue has not made out any grounds before us to interfere with the impugned order.

5. Accordingly, the revenue appeal is dismissed. CO also stands disposed of.

(Pronounced in the open court on 18.11.2022)

RAMESH NAIR
MEMBER (JUDICIAL)

RAJU
MEMBER (TECHNICAL)

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