CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.I

Service Tax Appeal No.70709 of 2021

(Arising out of Order-in-Appeal No.162-ST-Alld-2021, dated -21/06/2021 passed by Commissioner (Appeals) CGST & Central Excise, Allahabad)

M/s Tornado Enterprises **.....Appellant**
(14/125, Imperial Cinema Building,
The Mall, Kanpur-208001)

VERSUS

Commissioner, CGST & Central Excise, Kanpur **....Respondent**
(Audit Circle-II, 117/7, Sarvodaya Nagar,
Kanpur-208005)

APPEARANCE:

Shri Dharmendra Srivastava, Chartered Accountant for the Appellant
Shri Manish Raj, Authorized Representative for the Respondent

CORAM: HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)

FINAL ORDER NO.-70700/2024

DATE OF HEARING : 29.10.2024
DATE OF DECISION : 29.10.2024

P. K. CHOUDHARY:

The present appeal has been filed by the Appellant assailing the Order-In-Appeal No.162-ST-Alld-2021, dated - 21/06/2021 passed by Commissioner (Appeals) CGST & Central Excise, Allahabad.

2. Briefly stated, the facts of the case are that the Appellant is a dealer of excisable goods and also registered under Service Tax for providing taxable services under the category of 'Business Auxiliary Service' and as service recipient of Transportation of Goods by Road. An Audit of the Appellant's records was conducted by the Departmental Officers for the

period from April 2014 to March 2017 (Central Excise Matters) and from April 2015 to March 2017 (For Service Tax Matters). During the audit of records, it was observed that there was wrong availment of credit of service tax of Rs.3,39,818/- (Rs.2,14,269/- + Rs.1,07,525/- + Rs.18,024/-) during the year 2015-16, 2016-17 & 2017-18 (upto June' 2017) respectively. Accordingly, Show Cause Notice[1] dated 25.02.2019 was issued proposing to deny the credit of Rs.3,39,818/- along with interest in terms of provisions of Rule 2(l) and 14 of the Cenvat Credit Rules, 2004 read with provisions of Section 73(1)(Proviso) and Section 75 of the Finance Act, 1994. Imposition of penalty was also proposed in the SCN in terms of provisions of Rule 15 of the Cenvat Credit Rules, 2004 read with Section 78 of the Finance Act, 1994.

3. The Adjudicating Authority confirmed the demand of Rs.3,39,818/- and ordered for its recovery alongwith interest and also imposed penalty of equal amount as proposed in the SCN. Being aggrieved, Appellant filed appeal before the First Appellate Authority. Learned Commissioner (Appeals) vide the impugned Order-In-Appeal passed the following order:-

> *"4.1 In the instant Case, it is matter of facts that the appellant had obtained Central Excise Registration, as dealer of excisable goods and also registered ander service tax law for the taxable services business auxiliary service as service provider and transportation of goods by road service as service recipient. Thus, the appellant had under taken two types of activities, firstly purchase and sale of excisable goods and passing on credit to the buyers of such goods, and secondly, causing & increasing the sale of goods manufactured by others, which fall in the category of business auxiliary service. As registered dealer of excisable goods the appellant is purchasing excisable goods from manufacturers or first stage dealer/importer and selling it to their customer and passing on proportionate duty to them. They were paying service tax under reverse charge mechanism on the amounts of freight paid to transporters against transportation of goods which wers purchased as dealer of excisable goods. They have availed input service credit on the service tax paid on the freight amount and*

[1] SCN

utilized the said credit for the payment of service tax under business auxiliary service which has no relationship with the said input service.

4.2 The appellant has contended that out of the total Credit of Rs. 3,39,818/-as disallowed by the adjudicating authority in the impugned order only Credit to the tune of Rs. 1,19,617/- was utilized by them, whereas the Credit to the tune of Rs. 2,20,201/- was never utilized and has got lapsed as the Trans-1 filed by the appellant to carry forward the credit from old regime to New GST Regime had brought forward the credit to the tune of Rs. 4,42,331/- which was the credit attributable to excise duty paid on the stock held by the appellant on the date of the transition and produced copy of Electronic Credit Ledger to substantiate their claim.

4.3 I have carefully considered the submissions from both sides and perused the records. I observe that w.e.f 01.03.2015 the Rule 14 of the CENVAT Credit Rules, 2004 substituted to segregate recovery of Cenvat credit wrongly availed but not utilized from the cases of Cenvat credit wrongly availed and utilized. Relevant Rules are as under:
Rule 14(1)(1): CENVAT credit availed wrongly but not utilized-

Where the CENVAT credit has been taken wrongly but not utilised, the same shall be recovered from the manufacturer or the provider of output service, as the case may be, and the provisions of section 11A of the Excise Act or section 73 of the

Finance Act, 1994 (32 of 1994), as the case may be, shall apply mutatis mutandis for effecting such recoveries;

Rule 14(1)(ii): CENVAT credit availed and utilized wrongly -

Where the CENVAT credit has been taken and utilized wrongly or has been erroneously refunded, the same shall be recovered along with interest from the manufacturer or the provider of output service, as the case may be, and the provisions of sections 11A and 11AA of the Excise Act or sections 73 and 75 of the Finance Act, 1994, as the case may be, shall apply mutatis mutandis for effecting such recoveries.

RULE 15.Confiscation and penalty.

(3) In a case, where the CENVAT credit in respect of input or capital goods or input services has been taken or utilized wrongly by reason of fraud, collusion or any willful, mis-

statement or suppression of facts, or contravention of any of the provisions of these rules or of the Finance Act or of the rules made thereunder with intent to evade payment of service tax, then, the provider of output service shall also be liable to pay penalty in terms of the provisions of sub-section (1) of section 78 of the Finance Act.

4.4 In the instant case, it is admitted fact that appellant has availed & utilized cenvat credit amounting to Rs. 1,19,617/ only. Therefore, the same shall be recovered along with interest from the appellant in terms of the provisions of Sections 73 and 75 (Interest on delayed payment of service tax) of the Finance Act. However, since the appellant has only availed remaining cenvat credit amounting to Rs.2,20,201/ but not utilized the same, therefore, the same shall be recovered from the appellant under Section 73 of the Finance Act without charging interest under Section 75 of the Act.

4.5 It is also observed that under the self-assessment procedure prescribed under the statute, the appellant was required to availed/utilized input service credit correctly, whereas the appellant has availed/utilized inadmissible input service tax credit to discharge their service tax liability on output services provided by them and said irregularities could be detected only during auditing of the records of the appellant. Thus, I find that there was suppression of facts with the intent to evade payment of Service Tax, on the part of the appellant and as such imposition of penalty equal to inadmissible cenvat credit availed by them ie Rs. 3,39,818/ under Rule 15(3) of the CENVAT Credit Rules, 2004 read with sub- section (1) of section 78 of the Finance Act is justified."

4. Being aggrieved, the Appellant has filed the present appeal before the Tribunal.

5. The learned Chartered Accountant appearing on behalf of the Appellant submits that there is no dispute to the extent of Rs.1,19,617/- which was utilized by them and they have deposited this amount vide Challan dated 17/08/2020, CIN No.20200817180155646629. Regarding the balance amount of Rs.2,20,201/- , it is his submission that this amount was never utilized and has got lapsed as the Tran-1 filed by the Appellant to carry forward the credit from old regime to new GST regime had brought forward the credit to the tune of Rs.4,42,331/-

which was the credit attributable to excise duty paid on the stock held by the Appellant on the transition and produced copy of Electronic Credit Ledger to substantiate the same. The copy of Electronic Credit Ledger is at Page No.33, 34 & 35 of the Appeal Paper Book. On going through these documents, it is observed that the amount of Rs.2,20,201/- has not been included in the amount of Rs. 4,42,331/- while filing the Tran-1.

6. Heard both the sides and perused the appeal records.

7. I find that since the amount of Rs.2,20,201/- has not been deposited by the Appellant so far, but if at all, had they deposited this amount, they would be entitled to Cenvat Credit but the Appellant would not be in a position to utilize the same. Had it not been the onset of GST laws, the Appellant could have availed Cenvat Credit on the service tax paid as per Rule 6 (3) of the Service Tax Rules. However, such cenvat credit could have been subsequently transitioned to the GST regime under the transitional provisions of GST Act, 2017. However, since the aforesaid option was not available to the Appellant, it is not prudent to ask them to deposit the amount of Rs.2,20,201/-.

8. In view of the fact that this amount cannot be availed in the new regime and ultimately the Appellant would have to file a refund claim. I find that the facts of the present case are squarely covered by the judgment of the Hon'ble Allahabad High Court in the case of **Hello Mineral Water (P) Ltd. V/s Union of India [2004 (174) E.L.T. 422 (All.)]** whereby the Hon'ble High Court has held as under:-

> ***"30.*** *In these circumstances the order of the Tribunal dated 1-10-2003 in so far as it relates to denial of the benefit of Notification No. 15/1994-CE is liable to be, and is hereby, set aside. The petitioner is thus entitled to the benefit of the said Notification No. 15/1994-CE, dated 1-3-2004 and reversal of Modvat credit on the inputs namely PVC granules used in the manufacture of PVC/PP bottles, which have been admittedly reversed by the petitioner, even though after clearance of the final product.*
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> ***31.*** *In view of the above decision the writ petition is allowed and the demand of duty and penalty created by order dated 30-10-2001 and confirmed by the Tribunal is set aside. Any amount already deposited by the petitioner shall be refunded to the petitioner forthwith with interest at 10% per annum from the date of deposit to the date of refund, and this refund must be made*

> *within two months from today. The petitioner is also entitled for any consequential benefits."*

9. Further, the learned Chartered Accountant undertakes to deposit the applicable interest on the amount of Rs.1,19,617/- which was deposited by them on 17.08.2020. As stated above and under the circumstances of the case, I do not find any ingredient of fraud, collusion, or any willful misstatement or suppression of facts with an intent to evade payment of service tax and accordingly penalty under Rule 15 of the Cenvat Credit Rules read with Section 78 of the Finance Act is set aside.

10. The appeal filed by the Appellant is allowed in the above terms.

(Dictated and pronounced in open court)

(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

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