CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL ALLAHABAD

REGIONAL BENCH - COURT No. I

Excise Appeal No.70001 of 2017-Division Bench

(Arising out of Order-in-Original No.21/Pr.Comm./Noida-I/2016-17 dated 29/09/2016 passed by Principal Commissioner of Central Excise, Noida-I)

M/s IMI Norgren Herion Pvt. Ltd. **.....Appellant**

(A-62, Sector-63, Noida-201301)

VERSUS

Principal Commissioner of

Central Excise, Noida-I **....Respondent**

(C-56/42, Renu Tower, Sector-62, Noida, U.P.)

APPEARANCE:

Shri Pulak Kumar Saha, Chartered Accountant & Ms. Anubha Aggarwal, Chartered Accountant for the Appellant
Shri Pawan Kumar Singh, Authorised Representative for the Respondent

CORAM:

HON'BLE SMT. ARCHANA WADHWA, MEMBER (JUDICIAL)
HON'BLE MR. ANIL G. SHAKKARWAR, MEMBER (TECHNICAL)

FINAL ORDER NO. - 71618 / 2019

Date of Hearing : 19 August, 2019
Date of Decision : 19 August, 2019

PER: ARCHANA WADHWA

After hearing both the sides duly represented by Shri Pulak Kumar Saha learned Chartered Accountant appearing for the appellant and Shri Pawan Kumar Singh learned A.R. appearing for the Revenue, we find that the appellant is engaged in manufacture of excisable goods viz. Pneumatic Valves, Actuators and systems falling under Chapter 84 & 85 of the Schedule to the Central Excise Tariff Act, 1985. It is seen that during the period April, 2008 December, 2012 they received various services from foreign associated company, which were taxable under the Management Consultancy Services. Inasmuch as the foreign based company was not having any office in India the tax liability fell upon the appellant, who were liable to pay the same on reverse charge basis. However, the tax liability was not discharged by the appellant during the relevant time.

2. However, subsequently in terms of VCES Scheme floated by the Government of India, they filed a declaration in respect of the said tax liability to the tune of around Rs.72,16,108/-. The said declarations were accepted by the proper officers and discharge certificate were issued by them in terms of the provisions of the said VCES Scheme.

3. Thereafter the appellant claimed the credit of the said duty paid by them under VCES Scheme. They were issued a show cause notice for denial of the said credit on the ground that the various services received by the appellant cannot be held to be Cenvatable input services inasmuch as they have no nexus with the activity of manufacture. The said show cause notice stands culminated into the present impugned order passed by the Commissioner of Central Excise, Noida vide which he denied the credit of Rs.72,16,108/- and confirmed the same in terms of the provisions of Rule 14 of Cenvat Credit Rule, 2004. He further demanded interest on the same and imposed penalty of Rs.10 lakhs under Rule 50(1) of the Cenvat Credit Rules, 2004.

4. Learned Chartered Accountant appearing for the appellant has contested the impugned order on the ground that all the services received by them from their foreign associates were utilized by them in their factory for the manufacture of their final product and as such the same are covered by the definition of inputs services. For the above proposition, he has referred to and relied upon various decisions of the Tribunal. On the other hand, the contention of the learned A.R. appearing for the Revenue is that inasmuch as the said payment was made under

VCES Scheme they were in any case, not entitled to the credit of the same.

5. In his rejoinder learned Chartered Accountant has drawn our attention to the Circular No.170/5/2013-ST [F.No.B1/19/2013-TRU(PT)] dated 08/08/2013 issued by the Central Board of Excise & Customs clarifying that the tax amounts deposited in terms of VCES Schemes are available as Cenvat credit to the assessee. For the above proposition, he has drawn our attention to Serial No.18 of the said Circular.

6. For better appreciation of the relevant part of the said Circular, we reproduce the same as under:-

Circular No.170/5/2013-ST [F.No.B1/19/2013-TRU(PT)]

Serial No.18

Issues	**Clarification**
(a)Whether the tax dues amount paid under VCES would be eligible as CENVAT credit to the recipient of service under a supplementary invoice? (b)Whether Cenvat credit would be admissible to the person who pays tax dues under VCES as service recipient under reverse charge mechanism?	Rule 6(2) of the Service Tax Voluntary Compliance Encouragement Rules, 2013, prescribes that CENVAT credit cannot be utilized for payment of "tax dues" under the Scheme. Except this condition, all issues relating to admissibility of CENVAT credit are to be determined in terms of the provisions of the Cenvat Credit Rules. As regards admissibility of CENVAT credit in situations covered under parts (a) and (b), attention is invited to rule 9(1)((bb) and 9(1)(e) respectively of the Cenvat Credit Rules.

7. We have carefully gone through the said Serial No.18 of the Circular. While clarifying the doubt referred to in the column "issues", it stand mentioned that all the issues relating to admissibility of Cenvat credit are to be determined in terms of the Cenvat Credit Rules within particular reference to the provisions of Rule 9.

We have gone through the provisions of Rule 9(1)(a) as also 9(1)(b). Rule 9(1)(a) describes invoices issued in the ordinary course of the business as eligible documents for the purpose of availment of credit. Further Rule 9(1)(b) refers to supplementary invoices, issued by the manufacturer or an importer as eligible invoice for the purpose of availment of credit **except where the additional amount of duty became recoverable from the manufacturer or importer on account of any non-levy or short-levy by reason of fraud, collusion or any willful misstatement or suppression of facts or contravention of any provisions or Rules with intent to evade payment of duty.**

Admittedly in the present case appellant is importer of services and was under legal obligation to pay service tax on reverse charge basis. The said service tax was not paid by the appellant in the ordinary course of the business by raising invoice thereto. The fact is that the said payment was made in terms of VCES Scheme which is special piece of legislation allowing assessee's to pay tax or duty, which has not been paid by them at the requisite point of time. The fact that the duty was not paid at the time of import of service is indicative of a situation that the short levy or non levy has occurred on account of suppression of facts. Had the scheme not been floated by the Government of India, proceedings would have been initiated against the assessee by way of issuance of a show cause notice raising the demand in question and confirming the same alongwith interest and penalty. In that scenario the suppression would have been established beyond doubt. The fact that the appellant got an opportunity in terms of the scheme floated by the Government to pay duty which were otherwise payable but not paid, will not convert the situation from suppression to non suppression. It is beyond doubt that the payment of duty on the invoices raised under VCES Scheme has to be held as payment by way of raising supplementary invoices, which was on account of misstatement or suppression with intent to evade payment of duty. In such a scenario, the Cenvat credit of service tax paid by the appellant would not be available to the appellant in terms of provisions of Rule 9(1)(b). The further fact of the service having no nexus with the manufacturing activity is not required to be adverted to, when the appellant is not entitled to credit in principle. Accordingly, we confirm the demand against the appellant alongwith interest.

8. As regards penalty, we find that the entire credit was availed by the appellant by reflecting the same in their Cenvat credit account which were intimated to the Revenue and otherwise also we note that the issue is a *bona fide* issue of interpretation of the provisions of law. As such, we find no justifiable reasons to impose penalty upon the appellant. The same is accordingly set aside and appeal is disposed of in above terms.

(Dictated and pronounced in open court)

Sd/-
(Archana Wadhwa)
Member (Judicial)

Sd/-
(Anil G. Shakkarwar)
Member (Technical)

Lks