CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
BANGALORE

Appeal(s) Involved:

ST/21224/2017-SM, ST/21231/2017-SM

[Arising out of Order-in-Appeal No. 94-2017 dated 11/05/2017 passed by Principal Commissioner LTU , BANGALORE-I(Appeal)]

[Arising out of Order-in-Appeal No. 93-2017 dated 11/05/2017 passed by Commissioner Of LTU , BANGALORE-I(Appeal)]

ABB Ltd
Maneja Works Maneja
VADODARA - 390013
VADODARA

Appellant(s)

ABB India Ltd
21st Floor World Trade Centre Dr Rajkumar
Road Malleswaram West
BANGALORE - 560055
karnataka

Appellant(s)

Versus

Commissioner of Central Excise, Customs and Service Tax Bangalore-ltu
100 FT RING ROAD JSS TOWERS,
BANASHANKARI-III STAGE,
BANGALORE, - 560085
KARNATAKA

Respondent(s)

Appearance:

Shri G. Shivadass, Advocate
LAKSHMI KUMARAN & SRIDHARAN
WORLD TRADE CENTRE NO.404-406, 4TH
FLOOR, SOUTH WING BRIGADE GATEWAY
CAMPUS NO.26/1, DR. RAJKUMAR ROAD,
BANGALORE - 560 055
KARNATAKA

For the Appellant

Ms.Kavitha Podwal, Supdt.(AR)

For the Respondent

Date of Hearing: 12/01/2018
Date of Decision: 12/01/2018

CORAM:

HON'BLE SHRI S.S GARG, JUDICIAL MEMBER

Final Order No. 20056-20057 / 2018

Per : S.S GARG

Appellant has filed these two appeals against the common impugned order dt. 11/05/2017 passed by the Commissioner(Appeals) whereby the Commissioner(Appeals) partly allowed the appeals of the appellant and confirmed the demands of Rs.6,56,679/- and Rs.42,63,707/- and also appropriated the said amount. The Commissioner(Appeals) has also imposed penalty of Rs.10,000/- each on the appellant's Vadodara Unit as well as Peenya Unit which are in dispute in these appeals. However the demand of interest under Rule 14 of the CENVAT Credit Rules is set aside by the Commissioner(Appeals) in both the appeals. Since the issue involved in both the appeals is identical, they are being disposed of by this common order.

2. The details of both the appeals are given herein below:-

	Peenya Unit	Vadodara Unit
SCN dt.	03/02/2014	08/01/2014
Period	April 2010 to March 2011	January 2011 to March 2011
Total demand	Rs.42,63,707/-	Rs.6,56,679/-
Penalty	Rs.10,000/-	Rs.10,000/-
Credit reversed	Rs.42,63,707/-	Rs.6,56,679/-
OIO No.	40/2015	No.39/2015 dt. 31/03/2015
OIA No.	No.93,2017 dt. 11/07/2017	No.94/2017 dt. 11/07/2017

3. Briefly the facts of the case are that the appellant's both units Peenya as well as Vadodara are engaged in the manufacture and clearance of excisable goods falling under chapter 85 of CETA 1985. They are engaged in providing various taxable output services as defined under

Section 65(105) of the Finance Act, 1994 such as intellectual property right service, management, maintenance and repair service, online information and data retrieval services, business auxiliary services, technical inspection & certification services, commercial training & coaching services, erection, commissioning & installation services. Both the units of the appellant, apart from the activity of manufacturing and providing taxable output services, are also engaged in trading activities. They availed CENVAT credit on certain common input services which were also used and utilized for their trading activity also. It appeared that the credit availed on common input services which were attributable to trading activity were ineligible as these services were used neither for providing taxable output service nor were used for manufacture of final product. Therefore such services used for trading activities were ineligible for availment of CENVAT credit and the proportionate credit availed in respect of traded goods are required to be reversed. On these allegations, respective show-cause notices were issued to the units proposing to recover the credit along with interest and penalty invoking the extended period. After following due process, the Additional Commissioner, LTU, Bangalore had passed two Orders-in-Original dt. 31/03/2013 confirming the demand along with interest and also imposed penalty. Aggrieved by the said order, appellant filed two appeals before the Commissioner(Appeals) and the Commissioner(Appeals) vide the impugned order disposed of both the appeals and confirmed the demands along with penalty but dropped the interest. Hence the present appeals.

4. Heard both the parties and perused records.

5. Learned counsel for the appellant submitted that the impugned orders are not sustainable in law as the same is contrary to the binding judicial precedent decided by the judicial fora. He further submitted that now the appellants have a very good case on merits but the entire demand confirmed is barred by limitation. He further submitted that on the same issue previously various show-cause notices to various units of the appellant were issued for the period 2005-2009 and against those show-cause notices appeals were filed before the Hon'ble CESTAT and he has given the details of those show-cause notice which are given herein below:-

SCN dt.	Unit	Demand	Period	Status
23/04/2010	Khaneja	Rs.5,68,00,000/-	2005-09	Appeal No.ST/2469/2011 pending before CESTAT, Bangalore
11/10/2010	Peenya	Rs.1,93,43,594/-	2005-09	Appeal No.ST/2862/2011 pending before CESTAT, Bangalore
13/10/2010	Maneja	Rs.3,64,94,977/-	2005-09	Appeal No.ST/2861/2011 pending before CESTAT, Bangalore
19/10/2010	Faridabad (Ins)	Rs.4,00,755/-	2005-09	Final Order No.21286-21293/2016 dt. 16/11/2016
	Taloja	Rs.2,59,266/-		
	Andheri	Rs.2,53,476/-		
	Robotics Unit	Rs.2,52,815/-		
	Analytical Unit	Rs.81,071/-		
	Faridabad (Mot)	Rs.46,673/-		

	Nelamangala Unit	Rs.1,21,975/-		
	Nashik	Rs.12,74,632/-		

6. He further submitted that longer period of limitation is not invocable as the appellant has been issued show-cause notices on similar grounds for the earlier periods as is shown in the above table. In support of this submission, he relied upon the following decisions:-

i. Caprihans India Ltd. Vs. CCE [2015(324) ELT 8 (SC)]
ii. ECE Industries Ltd. Vs. CCE [2004(164) ELT 236 (SC)]
iii. Nizam Sugar Factory [2006(197) ELT 465 (SC)]

7. He also submitted that longer period of limitation is not invokcabe in the present case as the issue relates to interpretation of law. For this submission , he relied upon the following decisions:-

i. TFL Quinn India Pvt. Ltd. Vs. CCE [2016-TIOL-856-CESTAT-HYD]
ii. Krishna Auto Sales Vs. CCE [2015(40) STR 1121 (Tri. Del.)]
iii. CCE Vs. Elder Pharmaceuticals Ltd. [2015(37) STR 241 (Tri. Mum.)]

8. He also submitted that longer period of limitation is not invocable as the details of trading was available in the balance sheet of the appellant during the relevant period on the basis which demand has been raised. He also submitted that the appellant has not suppressed any facts with intent to evade payment of duty and for this submission, he relied upon the following decisions:-

i. Apollo Tyres Vs. CCE [2014(36) STR 835 (Tri. Bang.)]
ii. CCE Vs. Hindustan Motors Ltd. [2012(25) STR 292 (Tri. Del.)]

9. He further submitted that penalty is not sustainable as the issue relates to interpretation of law and relied upon the following decisions:-

i. Wonder Cars Pvt. Ltd. Vs. CCE [2016-TIOL-1972-CESTAT-BANG]
ii. Kundan Cars pvt. Ltd. Vs. CCE [2016-TIOL-1088-CESTAT-BANG]

10. On the other hand, the learned AR reiterated the findings of the impugned order.

11. After considering the submissions of both the parties and perusal of the material on record and various judgments relied upon by the appellant in support of his submission, mainly on limitation, I find that in the present case invoking the longer period is not sustainable because on the same issue earlier show-cause notices are pending decision before the Tribunal. Further I find that this issue is squarely covered in favour of the appellant by various judgments of the hon'ble Supreme Court. I find that in the case of ECE Industries ltd. (supra), on an identical issue, the Hon'ble Supreme Court set aside the demand on limitation. It is relevant to reproduce the relevant findings of the Hon'ble Apex Court.

> ***4.****In the case of M/s. P & B Pharmaceuticals (P) Ltd. v. Collector of Central Excise reported in [2003 (2) SCALE 390], the question was whether the extended period of limitation could be invoked where the Department has earlier issued show cause notices in respect of the same subject-matter. It has been held that in such circumstances, it could not be said that there was any wilful suppression or mis-statement and that therefore, the extended period under Section 11A could not be invoked.*
>
> ***5.****In our view, the principles laid down in above case fully apply here. As earlier proceedings in respect of same subject matter were pending adjudication it could not be said that there was any suppression and the extended period under Section 11A was not available.*
>
> ***6.****To this extent the impugned judgment requires to be and is set aside. Ordered accordingly.*
>
> ***7.****It must also be mentioned that as there is no suppression, penalty cannot be imposed.*

12. Further the Hon'ble Apex Court in the case of Nizam Sugar Factory (supra), on an identical issue, has observed in para 9 as under:-

> ***9.****Allegation of suppression of facts against the appellant cannot be sustained. When the first SCN was issued all the relevant facts were in the knowledge of the authorities. Later on, while issuing the second and third show cause notices the same/similar facts could not be taken as suppression of facts on the part of the assessee as these facts were already in the knowledge of the authorities. We agree with the view taken in the aforesaid judgments and respectfully following the same, hold that there was no suppression of facts on the part of the assessee/appellant.*

13. Further in the case of Caprihans India Ltd. cited supra, the Hon'ble Supreme Court has held as under:-

> ***3.*** *We are of the opinion that the present appeal warrants to be allowed only on the ground that the impugned show cause notice was time barred and it was not a case where the Revenue could invoke the provisions of proviso to Section 11A of the Central Excise Act and take benefit of the extended period of limitation. From the facts noted above, it becomes clear that the Department had issued Show Cause Notice way back on 18-2-1994 asking the appellant to reclassify the goods under Chapter Heading 3920. Therefore, all relevant facts were within the knowledge/notice of the Department. Not only this, after the appellant had filed the reply to the said Show Cause Notice and was heard in the matter, the proposed move in the said Show Cause Notice was even dropped.*
> ***4.*** *Therefore, under the aforesaid circumstances, by no stretch of imagination, the appellant can be treated as a person who had misled the authorities or made any misstatement/misdeclaration. The appeal is allowed on this ground itself without going into the issue of classification setting aside the impugned order. As a result, the impugned orders passed by the authorities below are set aside.*

14. In view of the various decisions of the Supreme Court holding that longer period of limitation is not invocable as the as the appellant was issued show cause notices for the earlier period, I hold that the entire demand in the present case is barred by limitation by following the ratios of the decisions cited supra. Once the entire demand is barred by limitation and is set aside, I am not required to give findings on the merits of the case as the counsel for the appellant has argued on limitation only.

Accordingly, both the appeals are allowed on limitation by setting aside the impugned order.

(Operative portion of the Order was pronounced
in Open Court on **12/01/2018**)

S.S GARG
JUDICIAL MEMBER

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