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

Appeal(s) Involved:

E/20151 - 20152/2018-SM

[Arising out of No. 445-446/2017-CT dated 17/11/2017 passed by Commissioner of Central Tax , BANGALORE-II (Appeals)]

M/s. Microlabs Ltd
No. 27 KCN Towers,
Race Course Road
BENGALURU - 560001
KARNATAKA

Appellant(s)

Versus

Commissioner Of Central Tax,
Bangalore North
No-59, HMT Bhawan
Ground Floor, Bellary Road
BANGALORE - 560032
KARNATAKA

Respondent(s)

Appearance:

Mr. Cheriyan Punnoose, Advocate
A.K.B. ASSOCIATES
#211, COMMERCE HOUSE, 9/1,
CUNNINGHAM HOUSE, 9/1,
CUNNINGHAM ROAD,
BANGALORE – 560 052.
KARNATAKA

For the Appellant

Mr. Parasivamurthy, AR

For the Respondent

Date of Hearing: 02/05/2018
Date of Decision: 04/05/2018

CORAM:

HON'BLE SHRI S.S GARG, JUDICIAL MEMBER

Final Order No. 20717 - 20718 /2018

Per : S.S GARG

These two appeals have been filed by the appellant are directed against the common impugned order dated 17.11.2017 passed by the Commissioner (A) whereby the Commissioner (A) has rejected one appeal against the Order-in-Original No.87/2015 dated 31.7.2015 and modified the Order-in-Original No.85/2015 dated 31.7.2015. Since the issue involved in both the appeals is identical, therefore, both the appeals are being disposed of by this common order.

2. Briefly the facts of the present case are that the appellants are engaged in the manufacture of pharmaceutical products falling under Chapter 30 of the First Schedule to the Central Excise Tariff Act, 1985 having factories in and around 11 locations in various parts of the country. They are registered as Input Service Distributor (ISD) and are availing service tax credits on common input servicers received by them on courier services, telecommunication services, cargo handling services, manpower recruitment services and clearing and forwarding services and distributing the service tax credit in the capacity of ISD to their manufacturing units at various locations. They have taken service tax registration for providing various output services such as Business Auxiliary Services, Legal Consultancy Services, Management or Business Consultancy Service, Online Information and Database Access Services, Renting of Immovable Property service, Sponsorship service, Technical Inspection and

Certification, Transport of Goods by Road, Manpower Recruitment and Supply Agency services, Rent-a-Cab service. In respect of most of the output services, they pay service tax under reverse charge mechanism, as a recipient of service, under Section 66A of the Finance Act, 1994.

2.1 During the course of audit on the records of the unit by the department, it was observed that the appellant had wrongly availed CENVAT credit on several input services for the period December 2008 to December 2011 and distributed the CENVAT credit to their manufacturing units situated at various locations. Thereafter, two show-cause notices were issued to the appellant for wrongly availing the CENVAT credit on various input services. After following the due process, the Additional Commissioner confirmed the demand along with interest and also appropriated the amount already paid and penalty was also imposed under Section 78(1)(d) and Section 78(1)(e) of the Finance Act, 1994 read with Rule 15(3) of the CENVAT Credit Rules (CCR), 2004. Aggrieved by the said order, the appellant filed two appeal before the Commissioner (A), who vide the impugned order disposed of both the appeals. Hence, the present appeals.

3. Heard both the parties and perused the records.

4. Learned counsel for the appellant submitted that the impugned order is not sustainable in law as the same has been passed without appreciating the facts and the law. He further submitted that the impugned order is contrary to the binding judicial precedent and the entire demand is barred by limitation. He further submitted that the input services on which credit has been denied falls in the definition of 'input service' as provided in Rule 2(l) of CCR, 2004 prior to its amendment dated 1.4.2011. He further submitted that the Event Management/Outdoor Catering/Hotel/Mandap Keeper Services have been availed by the appellant in respect of their product launches, seminars and medical conferences organized by the appellant and this fact has been admitted in the Order-in-Original as well as Order-in-Appeal. He further submits that the arrangement for product launch events, seminars and conferences have a direct nexus with their manufacturing activity as it has a direct bearing on the sales of their final product manufactured and therefore, these services are covered by the 'means' part of the definition of 'input services'. He further submitted that the 'input service' has been widely interpreted by various Courts as it existed prior to its amendment dated 1.4.2011 and all the services which are in relation to the business have been allowed as 'input service'. He

also submitted that the CENVAT credit has been denied by relying upon the Notification dated 10.12.2009 issued by the Medical Council of India and also on the basis of Circular No.5/2012 dated 1.8.2012 issued by CBDT. It is his further submission that the said Circular issued by CBDT has been considered by the ITAT, Mumbai in the case of *Sycom Formulations (I) Ltd. vs. DCIT-8(3) Mumbai as reported in 2016 (2) TMI 263*, wherein it has been held that the said Circular was introduced w.e.f 1.8.2012 and is not applicable with regard to the earlier period. Learned counsel further submitted that the eligibility of credit has to be decided as per the CENVAT Credit Rules and cannot be denied on the basis of a Notification issued by the Medical Council of India which has no legal basis. In support of this submission, he relied upon the following decisions:

- *Toyota Kirloskar Motor Pvt. Ltd. vs. CCE: 2011 (24) STR 645 (Kar.)*
- *CCE vs. Millipore India Pvt. Ltd.: 2012 (26) STR 514 (Kar.)*
- *CCE vs. Maruti Suzuki India Ltd.: 2017 (49) STR 261 (P&H)*
- *Racold Thermo Ltd. vs. CCE: 2016 (42) STR 332 (Tri.-Mum.)*
- *Delhi Automotive System P. Ltd. vs. CCE: 2014 (36) STR 1089 (Tri.-Del.)*
- *Gateway Terminals (I) Pvt. Ltd. vs. CCE: 2015 (39) STR 1027 (Tri.-Mum.)*
- *IBM India Pvt. Ltd. vs. CCE: 2014 (35) STR 384 (Tri.-Bang.)*
- *Castrol India Ltd. vs. CCE: 2013 (30) STR 214 (Tri.-Ahmd.)*

- *Palmtech Institutions India Pvt. Ltd. vs. CCE: 2015 (38) STR 54 (Tri.-Del.)*
- *Heubach Colour Pvt. Ltd. vs. CCE: 2013 (32) STR 225 (Tri.-Ahmd.)*

4.1 The second submission of the learned counsel for the appellant was that CENVAT credit cannot be recovered from an ISD and in the present case, the appellant is an ISD and is the Head Office of manufacturing units. He further submitted that as per Rule 14 of the CCR recovery of CENVAT credit wrongly taken or erroneously refunded can be made from the manufacturer or the provider of the output service and cannot be recovered from the ISD. In support of this submission, he relied upon the following decisions:

- *Mahindra and Mahindra vs. CST, Mumbai-II: 2018-TIOL-1235-CESTAT-MUM.*
- *Mahindra and Mahindra vs. CST, Mumbai: 2017-TIOL-2364-CESTAT-MUM.*
- *India Oil Corporation Ltd. vs. CCE, Delhi: 2014 (35) STR 411 (Tri.-Del.)*

4.2 The third submission of the learned counsel for the appellant is that the demand has been confirmed by the original authority by invoking the wrong provisions and the Commissioner (A) has also upheld the same. Both the authorities have confirmed the demand by invoking Section 73 of the Finance Act, whereas the entire CENVAT credit which is under dispute pertains to manufacturing activity of the appellant and Section 73 of the Finance At, 1994 cannot be made applicable to effect the recovery.

4.3 The next submission of the learned counsel is that the entire demand in the present case is barred by limitation. The demand was confirmed for the period December 2008 to December 2011 and the show-cause notice dated 16.1.2014 which is beyond the normal period of one year. The Commissioner (A) has justified the invocation of longer period of limitation on the ground that the case was under Section 73(4) of the Finance Act, since they have suppressed the facts with intend to evade payment of duty. The learned counsel submitted that both the authorities have wrongly invoked the extended period of limitation as the appellant have not suppressed any material fact from the department and there is a bona fide dispute regarding the interpretation of law and it is a settled law that longer period of limitation cannot be invoked in cases involving interpretation of law. It is also his submission that mere non-disclosure of information to the Department would not amount to suppression, fraud but some positive act has to be done so as to attract the penal consequences. In support of this submission, he relied upon the following decisions:

- *Pushpam Pharmaceuticals Co. vs. CCE: 1995 (78) ELT 401 (SC)*
- *Steelcast Ltd. vs. CCE: 2009 (14) STR 129 (Tri.-Ahmd.)*

5. On the other hand, the learned AR defended the impugned order.

6. After considering the submissions of both the parties and perusal of the material on record and the various decisions relied upon by the appellant, I find that in the present case, show-cause notice has been issued to the appellant who is registered as an ISD and whose only function is to distribute the credit between various manufacturing units. The demand has been confirmed against the ISD and as per the settled position of law, recovery can only be effected from the manufacturing units or the output service provider and cannot be made from the Input Service Distributor. Further, I find that the Division Bench of the Tribunal in the case of *Mahindra and Mahindra Ltd.* cited supra has considered this issue and has held that the demand raised on the ISD is not sustainable in law. In the present appeals, the demand was confirmed under Rule 14 of CCR, which reads as under:

> *"**14. Recovery of CENVAT credit wrongly taken or erroneously refunded.** –*
>
> *(1)(i) Where the CENVAT credit has been taken wrongly but not utilized, 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;

(ii) 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 Section 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 recover."

Further, the Division Bench in the case of *Indian Oil Corporation Ltd.* cited supra has held as under:

"2. Identical proceedings were earlier initiated by way of two show cause notices, dated 21-9-2010 covering the period 2005-2006 to 2009-2010. These proceedings were however dropped by the Commissioner by the order dated 27-8-2012 on the ground that the demand for recovery of Cenvat credit cannot be raised against the Input Service Distributor under Rule 14 of the Cenvat Credit Rules, 2004; and where Cenvat credit is wrongly availed and utilized, the same should be recovered from the manufacturer or provider of output services. The wholly contrary conclusion and reasoning is adopted in the impugned order vis-a-vis the earlier order referred to.

3. For the aforesaid reasons and on a prima facie construction of the provisions of Rule 14 of the Cenvat Credit Rules, 2004, we are of the view that the impugned order is unsustainable.

4. Consequently, we set aside the impugned adjudication order and allow the appeal. We do so after waiving pre-deposit and hearing ld. Counsel, Ms. Tuhina Sinha for the appellant and Shri Govind Dixit, ld. DR for Revenue."

Therefore, in view of the Division Bench decision cited supra, I am of the considered view that the CENVAT credit cannot recovered from the appellant who is an Input Service Distributor.

6.1 As far as limitation is concerned, I find that the appellants have not suppressed any material fact from the Department with intention to evade the duty. The period involved in the present case is from December 2008 to December 2011 and the show-cause notice was issued on 16.1.2014 and by relying upon the ratios of the various decisions cited supra, I am of the considered opinion that the entire demand in the present case is also barred by limitation.

6.2 Since on these two issues, I am allowing the appeals of the appellant, therefore, it is not necessary for me to go into the question of eligibility of CENVAT credit on various input services involved in the present case. Consequently, I allow both the appeals of the appellant by setting aside the impugned order with consequential relief, if any.

(Order was pronounced in Open Court on **04.05.2018**.)

S.S GARG
JUDICIAL MEMBER

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