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

Appeal(s) Involved:

E/20022 - 20025/2018-SM

[Arising out of No. 292-295/2017 dated 03/10/2017 passed by Commissioner of Central Tax, BANGALORE-II (Appeal).]

M/s. KDDL Ltd.
No.296/297
5th Main 4th Phase
Peenya Industrial Area
BANGALORE- 560 058.
KARNATAKA

Appellant(s)

Versus

C.C.,C.E.& S.T-Commissioner Of Central Tax, Bangalore North West Commissionerate
2nd Floor, South Wing,
BMTC Bus Stand Complex
Shivaji Nagar
Bengaluru - 560051
Karnataka

Respondent(s)

Appearance:

Ms. Neetu James, 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

Mrs. Kavitha Podwal,
Superintendent (AR)

For the Respondent

Date of Hearing: 27/12/2018
Date of Decision: 28/12/2018

CORAM:

HON'BLE SHRI S.S GARG, JUDICIAL MEMBER

Final Order No. 21943 - 21946/2018

PER: S.S. GARG,

The appellants have filed these four appeals against the common impugned order No. 292-295/2017 dated 03/10/2017 whereby the Commissioner (A) has denied the CENVAT credit of Rs.16,76,393/- and Rs.35,535/- under proviso to Section 11A of the Central Excise Act read with Rule 14 of CENVAT Credit Rules and also confirmed the payment of interest under Section 11AB and also imposed equal penalties under Section 11AC of the Central Excise Act by denying the CENVAT credit of service tax paid on Forwarding and Cargo Handling Service and Repair and Maintenance of ETP. Since the issue involved in all the four appeals is identical except in appeal No.E/20023/2018, there is an additional issue of denial of CENVAT credit of repair and maintenance of ETP amounting to Rs.35,535/-, therefore, all the appeals are taken together for the purpose of discussion and disposal.

2. The details of all the four appeals are given herein below:

Appeal No.	Period involved	SCN Date	OIO NO. & Date	CENVAT credit disallowed	Penalty imposed
E/20023/2018	June 2009 to Sep. 2013	27.06.2014	52-53/ADC/ JLH/BII/2015 dt. 29.05.2015	Rs.9,43,436/- & Rs.35,535/-	Rs.9,43,436/- & Rs.35,535/-
E/20024/2018	Oct. 2013 to August 2014	07.11.2014	52-3/ADC/JLH/ BII/2015 dt. 29.05.2015	Rs.2,30,574/-	Rs.2,30,574/-
E/20022/2018	Sep. 2014 to June 2015	10.08.2015	8-9/2016 dt.30.12.2016	Rs.2,68,848/-	Rs.2,68,848/-
E/20025/2018	July 2015 to June 2016	19.07.2016	8-9/2016 dt.30.12.2016	Rs.2,33,535/-	Rs.2,33,535/-

3. Briefly the facts of the present case are that the appellants are engaged in the manufacture of excisable goods i.e., watch hands falling under Chapter Heading 91149091 of the Central Excise Tariff Act and are availing the facility of CENVAT credit on input and input services under the CENVAT Credit Rules, 2004. The allegations against the appellants are that they have taken irregular CENVAT credit on Forwarding and Cargo Handling services and Repair and Maintenance of ETP. The first show-cause was issued invoking the extended period of limitation and other three show-cause notices were within the normal period of limitation. The appellant contested the proposal in the show-cause and submitted that the services on which they have availed CENVAT credit are appropriately covered under the definition of 'input service' as the said services are used by the appellant

directly or indirectly in or in relation to the manufacture and therefore, are eligible input service. The appellants have also contested the invocation of longer period of limitation and imposition of penalty on the ground that there was no suppression of facts with intent to evade payment of duty. Initially, the original authority confirmed the demand of various services but the Commissioner (A) vide the impugned order has only confirmed the demand of irregular CENVAT credit in respect of two services Forwarding and Cargo Handling service and Repair and Maintenance of ETP.

4. Heard both the parties and perused the records.

5. Learned counsel for the appellant submitted that the impugned orders are not sustainable in law as the same has been passed without properly appreciating the facts and the law. He further submitted that the appellants have availed the Forwarding and Cargo Handling services of M/s. DHL and M/s. Fedex only in respect of their export cargo and no credit is availed on the domestic clearances. She further submitted that the services rendered by M/s. DHL and M/s. Fedex are of composite nature and include cargo handling, forwarding and clearing services such as pick-up of the final products at the factory, managing the

export documentation, clearance services, etc., and a single bill is raised in respect of all the services rendered and the service tax is paid thereon on these services. She also submitted that these services are used for clearance of final product from the factory for the purpose of export and in these cases the place of removal is the customers' premises and not the factory gate. Further, the appellants have transported the finished goods to the customers on CIF sale basis pursuant to purchase orders issued by the customers. She also submitted that in these cases the sale has taken place at the destination point and transportation cost form part of the sale consideration and the ownership of the goods remain with the appellant till the delivery of the goods which takes place at customers premise. In support of this submission, she relied upon the decision rendered in the case of ***CCE, Faridabad vs. Imperial Auto Industries: 2017-TIOL-2446-CESTAT-CHD***. She also submitted that if the case of the department is upheld, then the appellant shall be entitled to refund of the amount of service tax paid in terms of Notification No.41/2012-ST dated 29.6.2012 and Notification No.41/2007-ST dated 6.10.2007 as amended vide Notification No.3/2008-ST dated 19.2.2008. it is her further submission that the entire issue is revenue neutral as if the appellant had not claimed credit, they

will be entitled to refund. For this submission, she relied upon the following decisions:

- ***Jotindra Steel & Tubes Ltd. vs. CCE, Delhi-IV: 2014 (36) STR 672 (Tri.-Del.)***
- ***Monarch Catalyst Pvt. LTd. vs. CCE, Thane-I: 2016 (41) STR 904 (Tri.-Mum.)***
- ***Cap & Seal (Indore) Pvt. Ltd. vs. CCE & ST: 2018 (15) GSTL 74 (Tri.-Del.)***
- ***CCE & Cus. Vadodara vs. Narmada Chematur Pharmaceuticals Ltd.: 2005 (179) ELT 276 (SC)***

5.1 With regard to the Repair and Maintenance of ET plant, she submitted that the Commissioner (A) has wrongly denied the CENVAT credit on the ground that no service tax has been charged in the bills produced by the appellant whereas the fact of the matter is that the invoices do not reflect the service tax amount because the appellants being a recipient of taxable service of works contract is to discharge service tax in respect of services provided or agreed to be provided in service portion in execution of works contract on reverse charge basis liable in terms of Notification No.30/2012-ST dated 20.6.2012. Accordingly, the appellants have discharged service tax in respect of the impugned invoices raised on them vide monthly challan and the relevant challans have been produced at page 107-112 of the paper book. As far as invoking the extended period of

limitation is concerned, the appellant submitted that they have not suppressed any facts from the department much less acted with an intent to evade payment of duty. She further submitted that the show-cause notice was issued to the appellant on 27.6.2014 to demand CENVAT credit availed during the period June 2009 to September 2013 and hence, the demand for the period June 2009 to May 2013 is barred by limitation. The appellant submitted that they have been filing ER1 returns regularly and disclosing the availment of credit and it is not the case of the department that the appellants have not disclosed the credit availment in their accounts or in ER-1 returns. She also submitted that it is a settled law that when the demand is based on audit objection, the extended period is not invokable and also that suppression cannot be alleged when the matter involves interpretation of legal provisions. For this submission, she relied upon the following decisions:

- ***CCE & ST, Tirupathi vs. Sri Sai Sindu Industries: 2017 (49) STR 84 (Tri.-Hyd.)***
- ***CCE vs. Dynamic Industries Ltd.: 2014 (307) ELT 15 (Guj.)***
- ***Ultratech Cement Ltd. vs. CCE: 2016 (339) ELT 127 (Tri.-Hyd.)***
- ***Ispat Industries Ltd. s. CCE: 2006 (199) ELT 509 (Tri.-Mum.)***
- ***Cambay Organics Pvt. Ltd. vs. CCE, Vadodara: 2007 (217) ELT 586 (Tri.)***

5.2 As far as demand of interest and penalty is concerned, the learned counsel submitted that there was no wrong utilization of CENVAT credit by the appellant as the appellant had sufficient balance in their CENVAT account till the date of reversal of the wrongly availed credit and the appellant have also submitted the extract of CENVAT account showing the closing balance of CENVAT credit of each month during the period of dispute and they have written letters to the department informing that they will not utilizing the disputed credit till the case is settled and those letters are also on record at page 113-160 of the paper book. She also submitted that the interest and penalty is not payable in cases where the CENVAT credit wrongly availed is reversed prior to its utilization and that the issue involved interpretation of CENVAT credit Rule. For this purpose, she relied upon the following decisions:

- ***CCE vs. Bill Forge Pvt. Ltd.: 2012 (279) ELT 209 (Kar.)***
- ***CCE vs. Strategic Engineering (P) Ltd.: 2014 (310) ELT 509 (Mad.)***
- ***J.K. Tyre & Industries Ltd. vs. CCE, Mysore: 2016 (340) ELT 193 (Tri.-LB)***
- ***Mastech Technologies Pvt. Ltd. vs. CCE: 2013 (293) ELT 311 (Tri.)***
- ***Basti Sugar Ltd. vs. CCE, Allahabad: 2015 (328) ELT 683 (Tri.-Del.)***

6. On the other hand, the learned AR defended the impugned order and submitted that the Commissioner (A) has rightly rejected the CENVAT credit of service tax paid on Forwarding and Cargo Handling service. She further submitted that these charges were for freight for transit of goods from the port of loading to port of discharge i.e., from Indian Port/ICD to the destination Port abroad. She also submitted that in the case of exports, the place of removal is the port of shipment and the CENVAT credit is admissible up to the place of removal as per the definition of input services and the credit of freight and insurance charges beyond the place of removal is not admissible. She also submitted that as far as repair and maintenance of ETP plant is concerned, the appellants have not produced the bills wherein service tax has been charged. She further submitted that it is a settled law that in case of export, the place of removal of goods is the port of shipment as held by the Larger Bench in the case of ***Honest Bio-vet Pvt. Ltd. vs. CCE: 2014 (310) ELT 526 (Tri.-LB)***. She also relied upon the following decisions:

- ***Maini Precision Products Pvt. Ltd. vs. CCE: 2018 (9) GSTL 203 (Tri.-Bang.)***
- ***Kuntal Granites Ltd. vs. CCE, Bangalore: 2007 (215) ELT 515 (Tri.-Bang.)***

In order to support her argument that in the case of export, place of removal is the port and CENVAT credit of service tax is admissible up to the port of export.

7. After considering the submissions of both the parties and perusal of the material on record, I find that the CENVAT credit in the present case has been claimed for the service tax paid to M/s. DHL and M/s. Fedex in respect of the export cargo. The services rendered by M/s. DHL and M/s. Fedex are of composite nature and a single bill is raised for the services performed by them. Further, I find that in the case of export, it is settled law as held by the Larger Bench in the case cited supra, that the place of removal is the port of export and not the customers' premises as claimed by the appellant. No doubt as per the purchase order issued by the customers, the property in the goods will transfer at the customers' premises when the goods are delivered to the buyer. Therefore, in view of the Larger Bench decision, I am of the considered view that place of removal is the port not the customers' premises as claimed by the appellant and the Commissioner (A) has rightly held and demanded the service tax. As far as invoking the extended period of limitation in appeal No. E/20023/2018 is concerned since the appellant has not

concealed any facts from the department with an intent to evade payment of duty and they have regularly filed the ER-1 returns disclosing the availment of credit and the demand was raised on the basis of audit objection. In my view the extended period cannot be invoked in such circumstances and therefore, in appeal No.E/20023/2018, the demand is confirmed for the normal period of limitation of one year and the demand for the period June 2009 to May 2013 is barred by limitation.

7.1 Further, with regard to other appeals, the CENVAT credit disallowed is confirmed but the penalty imposed are set aside because for the subsequent period, extended period cannot be invoked and penalty cannot be imposed. As far as denial of CENVAT credit on Repair and Maintenance is concerned, in view of the explanation given by the appellant that the said credit has been availed on reverse charge basis and they have shown the payment vide monthly challan produced on record, therefore, denial of CENVAT credit of Rs.35,535/- is set aside. As far as interest is concerned, since the appellants have proved that they have availed the credit but have not utilized the same and they had sufficient balance in their CENVAT account till the date of reversal of the wrongly availed credit, therefore, in view of the

judgment of the Karnataka High Court in the case of ***Bill Forge*** cited supra, the appellants are not liable to pay interest and penalty.

8. In view of my discussions above, I partly allow the appeal of the appellant and remand the case back for proper computation of demand of CENVAT credit of service tax for the normal period and interest and penalties are set aside. Appeals are accordingly disposed of in above terms.

(Order was pronounced in Open Court on **28/12/2018.)**

S.S GARG
JUDICIAL MEMBER

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