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

Appeal(s) Involved:

E/20937/2018-SM

[Arising out of OIA No. BEL-EXCUS-000-APP-MSC-365-2017-18 dated 26/03/2018 passed by Commissioner of Central Tax , BELGAUM (APPEALS)]

Mukand Ltd.
Ginigera
KOPPAL DIST
KARNATAKA
583228

Appellant(s)

Versus

Commissioner Of Central Tax And Central Excise, Belgaum
N0.71, Club Road, Belgaum
Belgaum
Karnataka
590001

Respondent(s)

Appearance:

Shri M.S. NAGARAJA, ADV
#1010, 1st floor
(Above Corp.Bank) 26th Main,4th T Block,
Jayanagar,
Bangalore
Karnataka
560041

For the Appellant

Shri K. Murali, Superintendent(AR)

For the Respondent

Date of Hearing: 21/01/2019
Date of Decision:01/04/2019

CORAM:
HON'BLE SHRI S.S GARG, JUDICIAL MEMBER

Final Order No. 20313 /2019

Per : S.S GARG

The present appeal is directed against the impugned order dt. 26/03/2018 passed by the Commissioner(Appeals) whereby the Commissioner(Appeals) has rejected the appeal of the appellant.

2. Briefly the facts of the present case are that the appellants

are engaged in the manufacture of alloy and non-alloy steel and also engaged in providing 'Mining of Minerals' service to M/s. Mysore Minerals Ltd. at Subrayanahalli Mines at Sandur and paying service tax on the same. For the purpose of carrying out mining operations, appellant had taken on hire the excavators, wheel loaders and tippers. The service providers had paid service tax on the hiring of the said earth moving equipment. The audit party during the audit of the books of the appellant in January 2011 observed that the hiring of these earth moving equipments used for mining of minerals at the mines are not eligible for CENVAT credit and asked the appellant to reverse the entire CENVAT credit of Rs.10,41,958/- along with interest Rs.2,78,134/-. Subsequently, the Additional Commissioner of Central Excise issued show-cause notice dt. 7/11/2014 proposing to disallow and demand CENVAT credit of Rs.10,41,788/-, appropriate the amount already paid and to impose penalty. After following the due process, the Jt. Commissioner confirmed in Order-in-Original dt. 29/02/2016. Aggrieved by the said order, appellant filed appeal before the Commissioner(Appeals) on merits as well as on limitation. In the appeal before the Commissioner(Appeals), the appellant also submitted that while the show-cause notice and adjudication was on eligibility of hiring of excavators, tippers and wheel loaders, it was noticed that in annexure to the show-cause notice that an amount of Rs.1,75,339/- paid towards cargo handling service provided by M/s. Shri Shivayogeshwara Transport Co. which was indisputably eligible for credit was also included while quantifying the demand and confirmed. The appellant submitted that this disallowance of credit of Rs.1,75,339/- was patently erroneous. The Commissioner(Appeals) confirmed the entire demand by holding that CENVAT credit on excavator, wheel loaders and tippers were not eligible and has also rejected the CENVAT credit on cargo handling service by holding that the said issue cannot be raised at the appellate stage.

3. Heard both sides and perused records.

4.1. Learned counsel for the appellant submitted that the impugned order is not sustainable as the same has been passed without properly appreciating the facts and the law. He further submitted that the definition of input service relied upon in the show-cause notice is an amended definition of input service under Rule 2(l) of CCR, 2004 vide Notification No.28/2012-CE(NT) dt. 20/06/2012 applicable w.e.f. 01/07/2012 onwards. He further submitted that the dispute in the present case is for the period from May 2011 to May 2012. The eligibility of the input services for CENVAT credit is to be determined based on the definition of input service as applicable during the relevant period. Learned counsel took me through the input service definition under Rule 2(l) of CCR, 2004 as applicable for the period up to 31/03/2011 and thereafter the definition of input service as amended vide Notification No.3/2011-CE(NT) dt. 01/03/2011 and applicable w.e.f. 01/04/2011 to 31/03/2012 and also the definition of input service as amended vide Notification No.18/2012-CE(NT) dt. 17/03/2012 as applicable w.e.f. 01/04/2012 to 30/06/2012. It is his further submission that the definition of input service as amended during the relevant period excludes service as defined in Section 65(105)(zzzzj) (supply of tangible goods) in respect of motor vehicles **"except"** when the motor vehicle is used for the provision of taxable service for which the CENVAT credit on motor vehicles is eligible as capital goods. He further submitted that the perusal of impugned order passed by Commissioner(Appeals) would show that Clause (B) under Rule 2(l) of CCR has not been taken into consideration in full. The portion which carves out the exception in respect of motor vehicles used only a part of the said Clause B has been considered. The portion providing the exception to services used for providing taxable service has been omitted which shows that both the authorities below have relied on incomplete definition of input service omitting a portion of the definition during the substantial period covered by the present proceedings. The learned counsel also referred to the definition of capital goods as provided under Rule 2(a)(A) of the CCR during the relevant period and the same is reproduced as under:-

(a) "capital goods" means :-

(A) the following goods, namely:-
(i) All goods falling under Chapter 82, Chapter 84, Chapter 85, Chapter 90, heading 6805, grinding wheels and the like, and parts thereof falling under heading 6804 of the First Schedule to the Excise Tariff Act;

………..

(C) dumpers or tippers, falling under Chapter 87 of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), registered in the name of provider of output service for providing taxable services as specified in sub-clauses (zzza) and (zzzy) of clause (105) of Section 65 of the said Finance Act;

4.2. Learned counsel also submitted that the excavator falling under Chapter 8429 and Loader falling under CHH 8428 are capital goods falling under Chapter 84 of the CETA, 1985 and covered by the definition of capital goods under Rule 2(a)(A)(i) of the CCR and they are used for providing the output service of mining of minerals classified under Section 65(105)(zzzy) of Finance Act, 1994 from 01/06/2007 onwards. It is his further submission that hiring of said capital goods which is a taxable service is eligible for CENVAT credit in terms of Rule 2(l)(B) of CCR, 2004 during the relevant period. He further submitted that eligibility of dumpers and tippers for CENVAT credit as capital goods stands settled in favour of the assessee. Hon'ble Supreme Court in the case of Belani Ores Ltd. etc. Vs. State of Orissa [1975 AIR 17] has held that tippers and excavators are not motor vehicles. This decision has been subsequently followed in the following decisions of the Tribunal:-

i. Soumya Mining Ltd. Vs. CCE, Raipur [2017-TIOL-2432-

CESTAT-DEL]

ii. CCE, CCG&ST, Delhi Vs. Brahmaputra Infrastructure Ltd. [2018-TIOL-3834-CESTAT-DEL]

4.3. Learned counsel also submitted that the entire demand is barred by limitation because the show-cause notice was issued on 07/11/2014 for the period from May 2011 to May 2012. He further submitted that the show-cause notice was based on the audit report dt. 17/05/2012. He also submitted that the Department had the complete knowledge of the case from the very beginning and there was no reason to allege suppression of facts or mala fide intention of the assessee; more so, when the details of the CENVAT credit taken and the invoices are recorded in the Books of Accounts and had been verified by the audit party. For this submission he relied upon the following decisions:-

i. Hindalco Industries Ltd. Vs. CCE, Allahabad [2003(161) ELT 346 (Tri. Del.)]

ii. Calderys India Refractories Ltd. Vs. CCE, Aurangabad [2014(36) STR 102 (Tri. Mum.)]

iii. Kamal Auto Finance Ltd. Vs. CST, Jaipur [2012(26) STR 46 (Tri. Del.)]

iv. Jindal Vijayanagar Steel Ltd. Vs. CCE, Belgaum [2005(192) ELT 415 (Tri. Bang.)] [affirmed by Commissioner Vs. JSW Steel Ltd. -2015(323) ELT A73(SC)].

5. On the other hand, the learned AR reiterated the findings of the impugned order and submitted that the appellant has taken irregular cenvat credit which is detected during the audit and therefore the appellant has suppressed the material fact from the Department with intent to evade payment of duty.

6. After considering the submissions both sides and perusal of

the material on record, I find that the appellants are engaged in providing mining of minerals service to M/s. Mysore Minerals Ltd. and for that purpose they have hired excavators, wheel loaders and tippers and have paid service tax to the service provider and has taken the credit which according to the audit party, the appellant is not eligible and at the instance of audit, th appellant was directed to reverse CENVAT credit of Rs.10,41,788/- along with interest of Rs.2,78,134/-. The CENVAT credit amount of Rs.10,41,788/- also includes an amount of Rs.1,75,339/- which was paid towards cargo handling service provided by M/s. Shri Shivayogeshwara Transport Co. which was very much eligible for credit as 'cargo handling service' but the same was also denied. Further I find that both the authorities below have not considered the full definition of input service under Rule 2(l) during the relevant period which has resulted in the present proceedings. Further I find that in view of the various decisions cited supra, the excavators, loaders and tippers used for providing taxable service of mining of minerals are capital goods as defined in Rule 2(l) of CCR 2004 and hiring of the said capital goods which is a taxable service, is eligible for CENVAT credit in terms of Rule 2(l)(B) of CCR, 2004 during the relevant period and the decision of the Tribunal in the case of Soumya Mining Ltd. cited supra clearly held the same. Further with regard to limitation, I find that the show-cause notice which was issued on 07/11/2014 was for the period from May 2011 to May 2012 and the Department has not brought any evidence on record to show that the appellant has suppressed any material fact with intent to evade payment of duty. Moreover, audit was conducted and report was made available on 07/05/2012 and all the transactions have been recorded in the books of accounts and are verified by the audit party. In such circumstances, in view of the various decisions cited supra, there cannot be any allegation of suppression with intent to evade payment of duty and therefore invocation of extended period of limitation is not sustainable in law. Therefore I hold that the entire demand is barred by limitation also.

7. In view of my findings above, I am of the considered view that the impugned order is not sustainable on merits as well as on limitation. Therefore I set aside the impugned order and allow the appeal of the appellant, with consequential relief, if any.

(Order was pronounced
in Open Court on 01/04/2019)

S.S GARG
JUDICIAL MEMBER

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