CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH - COURT NO. 1

Appeal(s) Involved:

ST/20586/2019-SM

[Arising out of Order-in-Appeal No. MLR-EXCUS-000-APP-MSC-211-2018-19 dated 26/02/2019 passed by Commissioner of Central Tax , BELGAUM (APPEALS)]

J Krishna Palemar
Prop Of M/s Land Links 5-7-708/1 No 09 City Point Building Koialbail
MANGALORE - 575003
KARNATAKA

Appellant(s)

VERSUS

Commissioner Of Central Excise & Central Tax, Mangalore Commissionerate
7th Floor, Trade Center, Bunts Hostel Road
Mangalore - 575003
Karnataka

Respondent(s)

Appearance:

Shri Rajesh Kumar, CA
HIRAGANGE & ASSOCIATES
#1010, 1st floor
(Above Corp.Bank) 26th Main,4th T Block,
Jayanagar,
Bangalore - 560041
Karnataka

For the Appellant

Shri K.B. Nanaiah, Asst. Commissioner(AR) — For the Respondent

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

Final Order No. 20713 / 2019

Date of Hearing: 11/09/2019
Date of Decision: 11/09/2019

Per : S.S GARG

The present appeal is directed against the impugned order dt. 26/02/2019 passed by the Commissioner(Appeals) whereby the

Commissioner(Appeals) partly allowed the appeal but confirmed the demand of Rs.21,11,755/- under Section 73(3) of the Finance Act and also demanded interest under Section 75 and also imposed penalty under Section 77(2) amounting to Rs.10,000/- and equal penalty under Section 78 of the Finance Act, 1994.

2. Briefly the facts of the present case are that the appellant has been rendering construction of residential complex service, constructing service including commercial buildings and renting of immovable property w.e.f. 01/07/2012. During the course of audit of the records of the appellant, it was noticed that the appellant had availed wrong input service CENVAT credit to the extent not used in construction of unsold flats on which completion certificate was already issued, input service CENVAT credit contained input service for which payment of service tax was not made within the stipulated time period and in the case of flats for which completion certificate was issued delayed / short payment of service tax was noticed. Based on the audit observations made during the audit, a show-cause notice dt. 30/05/2017 was issued to the appellant with proposal for (i) recovery of input service CENVAT credit of Rs.21,11,755/- should not be recovered inasmuch as the same was not used for provision of taxable output service; (ii) demand of service tax of Rs.7,17,338/- towards service value received before receipt of completion certificate of residential flats and (iii) CENVAT credit of Rs.57,733/- should not be recovered inasmuch as payment towards receipt of such service was not made by the appellant. it was also proposed to demand applicable interest and imposition of penalty. After following the due process, the Asst. Commissioner denied the CENVAT credit of Rs.21,11,755/- availed by them and also confirmed the demand of service tax of Rs.7,17,338/- along with applicable interest on the value received before receipt of completion certificate of residential flat. Further the demand of proportionate CENVAT credit of Rs.57,733/- was dropped. The interest of Rs.870/- on delayed payment of service tax of

Rs.19,189/- was confirmed. Further the demand of interest as well as penalty was also confirmed. Aggrieved by the said order, appellant filed appeal before the Commissioner(Appeals) who partly allowed the appeal. hence the present appeal.

3. Heard both sides and perused records.

4.1. The learned consultant for the appellant submitted that the impugned order is not sustainable in law as the same has been passed without properly appreciating the facts and the law. He further submitted that the appellant had undertaken the construction work from the month of September 2012 and completed on 24/02/2016 (Pinnacle Block A) and on 06/08/2015 (Pinnacle Block B). He further submitted that during the course of construction, they had availed the services of sub-contractors, architects and other services providers, and availed the CENVAT credit on the basis of bills given by the service providers, which are duly eligible under Rule 2(l) of the CENVAT Credit Rules, 2004 (CCR, for short) as directly in relation to provision of service. He further submitted that during the relevant period, there was no provision under Rule 6 of CCR for reversal of proportionate amount of CENVAT credit. Subsequently Notification No.13/2016-CE(NT) dt. 01/03/2016 was issued, inter alia, amending Rule 6(1) of CCR and through this amendment explanation (3) was inserted in this rule which is as follows:-

"For the purpose of this rule, exempted services as defined in clause (e) of Rule 2 shall include an activity, which is not a service as defined in Section 65B (44) of the Finance Act, 1994.

4.2. He further submitted that the relevant period in the present case is prior to the introduction of this explanation in the Rule and therefore they are not covered by the same. He also submitted that this issue is no more res integra and has been settled by the CESTAT in number of cases wherein it is clearly held that no reversal is required in respect of flats unsold on the date of completion. He relied upon the following decisions:-

i. CESTAT Final Order No.A/30227/2016 dt. 14/02/2019 w.r.t. M/s. Prajapati Developers.
ii. Alembic Ltd. Vs. CCE&ST, Vadodara [2018-VIL-708-CESTAT-AHM-ST]
iii. TPL Developer Vs. CCT, Bangalore [2019(3) TMI CESTAT, Bangalore]

4.3. He also argued that CENVAT Credit once rightly availed becomes an indefeasible right and cannot be reversed as held by the Hon'ble Supreme Court in the case of CCE, Pune Vs. Dai Ichi Karkaria Ltd. [1999(112) ELT 353 (SC)]. He also submitted that CENVAT credit once rightly availed cannot be reversed because of some subsequent events and for this submission, he relied upon the following decisions:-

i. CCE Vs. TAFE Ltd. (Tractor Division) [2011(268) ELT 49 (Kar.)]
ii. CCE Vs. TAFE Ltd. (Tractor Division) [2015(322) ELT 864 (Kar.)]

4.4. It is his further submission that stock of unsold flats / sale of completed flats is not an 'exempted service' as defined under Rule 2(e) of CCR. Sale of completed flats is specifically excluded from the scope of term 'service' under Section 65B(44) of the Act and hence it cannot fall under the definition of term 'exempted service'. He also submitted that the appellant has declared the CENVAT credit in the ST-3 returns filed during the period from September 2012 onwards and Department has not at all objected regarding the availment of CENVAT credit and hence penalty under Section 77(2) is not tenable. He also submitted that there is no allegation of fraud, collusion, willful mis-statement, suppression of facts or contravention of any of the provisions of the Finance Act, 1994 and hence imposition of penalty under Section 78 does not arise.

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

6. After considering the submissions of both sides and perusal of the material on record, I find that the issue involved in the present case is no more res integra and has been settled by various decisions of the Tribunal cited supra wherein it has been consistently held that during the relevant period, Rule 6 was not applicable. Further I find that in this case, the period involved is prior to the amendment in the Rule 6(1) of CCR, 2004. Further this Tribunal in the case of TPL Developer cited supra has held that the assessee was not legally required to reverse any credit which was availed by them during the period 2010 till obtaining completion certificate i.e. during the period when output service was wholly taxable in their hand, merely because later on, some portion of the property was converted into immovable property on account of receipt of completion certificate and on which no service tax would be paid in future. Since the issue is squarely covered by the decision of the Tribunal cited supra, by following the ratio of the said decisions, I am of the considered view that the impugned order is not sustainable in law and the same is set aside by allowing the appeal of the appellant with consequential relief, if any.

(Operative portion of the Order was pronounced
in Open Court on **11/09/2019**)

S.S GARG
JUDICIAL MEMBER

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