

**IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
SOUTH ZONAL BENCH, CHENNAI**

Appeal No. ST/302/2011

(Arising out of Order-in-Original No. 31/2010 dated 29.12.2010 passed by the Commissioner of Central Excise, Chennai – III)

M/s. Enmas Andritz Private Limited

Appellant

Vs.

Commissioner of GST & Central Excise
Chennai

Respondent

Appearance

Shri Raghavan Ramabhadran, Advocate for the Appellant
Shri A. Cletus, Addl. Commissioner (AR) for the Respondent

CORAM

Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of Hearing : **23.08.2018**
Date of Pronouncement: **31.08.2018**

Final Order No. **42328 / 2018**

Per Bench

The appellants are engaged in providing consulting engineer service, transport of goods by road service, renting of immovable property service and intellectual property right service. During the course of audit, it was noticed that appellant had engaged into contracts for designing, supplying

and supervising the erection and commissioning of Recovery Boilers. Such boilers are used for segregating and recycling the chemicals involved in paper pulp. The appellants received consideration for designing, supply and supervising the erection and commission of such boilers. The boilers consist of various components. The appellant get some of the components manufactured through job work. They procure the raw materials for the manufacture of such components and supply the same directly to the job worker. In the invoice of the raw materials, the job worker's name is mentioned as consignee and the job worker avails CENVAT credit on such raw materials. After completion of the manufacturing process, the job worker supplies the finished components directly to the customers of appellant by mentioning paper mills name as consignee so as to enable them to avail the credit involved on such finished components. They also procured other components from traders / first stage and second stage dealers and manufacturers. Such invoices are raised in the customers' name as consignee and accordingly the goods are supplied to the customers. The appellants were not paying excise duty on the goods supplied to Paper Mills and were acting as traders of goods.

2. During the course of audit of accounts, it was further noticed that they had availed CENVAT credit of service tax paid on input services such as:-

(i) Commission paid to agents for procuring the project orders for supply of Recovery boiler

(ii) Bank guarantee for advance of supply of materials / components – such advances were reduced proportionately from the invoices of the components and do not relate to rendering of registered taxable services

(iii) Clearing and forwarding charges for imported goods

(iv) Cargo handling charges

(v) Metal testing conducted on the raw materials meant for manufacture of components

(vi) Processing of components which does not amount to manufacture

(vii) Technical testing and inspecting of components supplied / to be supplied to the paper mills

(viii) Cargo contracts

(ix) Insurance paid on materials / components lying with sub-contractors

(x) Deputation of technical staff to job workers' premises to assist / supervise the manufacturing process

2.1 The department was of the view that the credit availed on the above input services is not eligible for the reason that the

said input services are not used for providing output services. It was also seen that the credit availed was purely related to trading activity. Since the appellant had not registered as a manufacturer and the input services were not used for providing output services, it appeared that they are not eligible for the credit to the tune of Rs.2,45,17,446/- relating to the period April 2007 to September 2008. Show cause notice was issued proposing to demand wrongly availed CENVAT credit along with interest and also for imposing penalties.

2.2 During the course of audit, it was also noticed that the appellant availed CENVAT credit on services such as:-

- (i) Corporate support service
- (ii) Courier services
- (iii) Chartered Accountants service
- (iv) Telephones / mobile phones
- (v) Rent
- (vi) Rent-a-cab service
- (vii) Deputation of staff for office and
- (viii) Advertisement charges

2.3 According to the department, the above input services were availed by the appellant during the course of trading activity and since trading activity is not a taxable service, the appellants are not eligible to avail credit on the above input services. It also appeared that they are not providing

exempted service to claim benefit under Rule 6 of CENVAT Credit Rules, 2004. Therefore, the appellants are not eligible for credit of service tax to the tune of Rs.76,90,088/- relating to the period April 2007 to March 2008.

2.4 Thus, it was observed that they have contravened the provisions of Rule 3 of CENVAT Credit Rules and had availed ineligible input credit to the tune of Rs.3,22,07,53/- for the period April 2007 – 2008.

2.5 During the said period, they had utilized credit of Rs.35,91,928/- towards discharging service tax liability and such utilization resulted in short-payment to the tune of Rs.35,91,928/-.

2.6 Show cause notice was therefore issued proposing recovery of wrongly availed CENVAT credit of Rs.3,22,07,534/- and the short-paid duty for the reason of wrong utilization of CENVAT credit to the tune of Rs.35,91,928/-. After due process of law, the adjudicating authority confirmed the demand along with interest and also imposed equal penalties. Hence this appeal.

3. The Id. counsel Shri Raghavan Ramabhadra made oral and written submissions which can be broadly summarized as under:-

3.1 The appellant undertakes activity which involves identifying the type of boiler suitable for a particular

manufacture, designing the same, arrange for manufacture and source of various parts and components and all related equipments along with supervision of erection and commissioning of the boilers. In this regard, they provide Consulting Engineer Service and have discharged the service tax liability on such services. They entered into contracts with their customers for design, supply and supervision of the erection and commissioning of Recovery Boilers. They further entered into sub-contracts with job workers for the manufacture of certain components to the Recovery Boilers. The appellant procures raw materials for manufacture of such components and sends the same directly to the job worker. The job worker avails input credit of the raw materials supplied. Upon completion of the manufacture of Recovery Boilers, the job workers directly clear these to the customer and raise invoices on the appellant for the job charges and the excise duty component. The appellant has availed input service credit on various input services. The department now disputes the credit availed on input services. The sole ground for disallowing CENVAT credit as alleged in the show cause notice is that the entire credit availed by the appellant is attributable to trading activity and is therefore ineligible in terms of Rule 3 of CENVAT Credit Rules, 2004. He submitted that the department has proceeded on the wrong basis that the activity

involved is trading. The ordinary meaning of the word 'trading' as given in 'The Concise Oxford Dictionary 10th Edition' gives the meaning of trade as "buying and selling of goods and services – A business of a particular kind". Similarly, the Black's Law Dictionary 8th Edition defines trade as "the business of buying and selling or bartering goods or services".

3.2 Thus, the essential element to call an activity 'trading' is that it should involve buying and selling of goods. In the present case, there is no purchase of Recovery Boiler by the appellant. In terms of the contract awarded to the appellant, the appellant is required to supply Recovery Boiler and also ensure its installation by providing adequate technical assistance. The appellant sub-contracts the entire activity of manufacture of Recovery Boiler by entrusting the said work to various job workers. The said job workers use the raw materials supplied by the appellant to manufacture Recovery Boiler and clear the same to the customers on behalf of and under the direction of the appellant. Thus, the entire activity entails only manufacture and supply of recovery boiler and at no point of time, the appellant purchases the boiler as such and sells it to call it a trading activity. That therefore the entire premise on which the department has issued the show cause notice fails and therefore the disallowance of credit on the

count that the appellant has used the input services for doing trading activity is without any basis.

3.3 It is also argued by him that trading is an exempted service with effect from 1.4.2011. The Hon'ble High Court of Madras in the case of Ruchika Global Interlinks Vs. Commissioner of Central Excise – 2017-VIL-323-MAD-ST has held that trading is an exempted service prior to 1.4.2011 as well and that therefore Rule 6 is applicable for reversing the proportionate credit availed on trading. In the present case, show cause notice is not issued invoking Rule 6 to deny the credit. Instead department has invoked only Rule 3 of CENVAT Credit Rules, 2004. He submitted that the disputed input services are used by the appellant for providing the output service of Consulting Engineer Service and therefore the appellant is eligible for credit on the input services. The appellant has entered into composite contract for supply, design and installation of boiler. In order to fulfill these obligations, the appellant has used the various input services. The definition of input services as it stood during the relevant period prior to 1.4.2011 was wide so as to include 'activities relating to business'. The appellant has procured the raw materials for manufacture of Recovery Boiler and has supplied these raw materials to the job workers. Hence the services of metal testing, technical testing and inspection, insurance

service etc. are used for providing Consulting Engineer Service. Further, cargo handling service, cargo contracts and clearing and forwarding charges for imported goods are also input services for procurement of raw materials to be used in the manufacture of Recovery Boilers. He relied upon the judgment of the Hon'ble Supreme Court in the case of Ramala Shahkari Chini Mills Vs. Commissioner of Central Excise, Meerut – 2016 (334) ELT 3 (SC) to argue that the word 'includes' used in the definition of input service cannot be interpreted in a restrictive manner.

3.4 The Id. counsel relied upon the decision rendered in their own case reported in 2017 (48) STR 261 (Tri. Chennai) wherein on similar set of facts, the input credit disallowed on Chartered Accountancy Service, Courier Agency Service, Manpower Supply Service, Telecom Service, Business Support Service,, Banking and Other Financial Service, Testing and Inspection Service were held to be eligible.

3.5 It is also argued by him that the demand to recover Rs.35,91,928/- as short-paid duty on the ground that ineligible credit was utilized to pay service tax is a duplication of demand and hence unsustainable. In any case, the appellant has reversed the CENVAT credit of Rs.3,22,07,534/- without utilization (as they had sufficient input balance during the relevant period) under protest after passing of the impugned

order and has intimated the same to the department vide letter dated 12.1.2012. He therefore prayed that the demands may be set aside.

4. On the other hand, Id. AR Shri A. Cletus takes us to para 4.1 of the show cause notice wherein Rule 2(I) of the CENVAT Credit Rules, 2004 has been quoted to mean 'any service used by a provider of taxable service for providing output service'. It has been brought out in the notice that trading activity undertaken by the appellant is not a taxable service and hence they are not eligible to avail the credit on the above input services. It is also clearly brought out that appellants are not providing any exempted services in order to claim benefit under Rule 6 of the CENVAT Credit Rules, 2004. For this reason, para 5.0 has alleged that appellant have wrongly availed CENVAT credit in contravention of provisions of Rule 3 of the CENVAT Credit Rules, 2004 and in para 6, the amount of such wrong credit has been proposed to be recovered under Rule 14 of the CENVAT Credit Rules, 2004. He explained that the services viz. commission paid to agents for procuring project order, Bank guarantee for advance, clearing and forwarding charges for goods, cargo handling services, technical testing etc. are services related to procurement of raw materials etc. But the appellant is not registered as a manufacturer and is not paying excise duty on the Recovery

Boilers. So the appellant cannot avail credit as a manufacturer. They are registered as output service provider for Consulting Engineer Service. He adverted to the definition of Consulting Engineer and stated that it involves giving technical advice and has nothing to do with procurement of goods. So these input services cannot be said to be used for providing output service of Consulting Engineer Service. Instead, they are purchasing raw materials and selling it to job workers. These activities are nothing but trading. As per Rule 3 of CENVAT Credit Rules, 2004, the credit availed on trading is not eligible. They are registered as output service provider only. The purchase and sale of goods and services related to goods cannot be said to be input services used for providing output services. Hence the claim of the Id. counsel that the show cause notice has been issued only on the grounds that no credit can be availed on trading is incorrect.

5. Heard both sides.

6. The show cause notice has proposed demand of CENVAT credit of service tax paid on input services availed on CENVAT credit purely related to trading activity amounting to Rs.2,45,17,446/- for the period from April 2007 to September 2008 and also CENVAT credit on input services availed by the appellant during course of trading activity relating to April 2007 to March 2008 amounting to Rs.76,90,088/-. The total tax

demand proposed is Rs.3,22,07,534/- with interest thereon. In addition, a sum of Rs.35,91,928/- has been utilized during the period April 2007 to September 2008 towards discharge of service tax liability which has also been sought to be demanded.

6.1 Ld. counsel has been at pains to convince us that these issues pertain to period prior to 1.4.2011 from which date trading was made a deemed exempted service. That nonetheless, even for the period of dispute the trading activity is required to be considered as an exempted service. To support this, he has relied upon the judgment of the Hon'ble High Court of Madras in Ruchika Global Interlinks (supra) to contend that the trading activity can be categorized as exempted service even prior to 1.4.2011. From the perusal of the said judgment, we however find that the Hon'ble High Court had only addressed the issue of apportionment as provided under Rule 6(3)(c) of the CENVAT Credit Rules, 2004. The Hon'ble High Court had therefore found that before and after the amendment of Rule 2(e) of the Rules, 'exempted services' meant those 'taxable services which were exempt from the whole of service tax and included those service on which service tax was not leviable under section 66 of the Act'. Based on this conclusion, the Hon'ble High Court held as under:-

"11. Having regard to the rule position and given the admitted fact that no separate accounts were maintained by the appellant, with regard to the taxable and non-taxable services, clause (c) of sub-rule 3 of Rules 6 of 2004 Rules would apply".

6.2 It is therefore obvious that the Hon'ble High Court was only addressing the aspect of whether by invoking Rule 6(3) trading would be exempted services even prior to 1.4.2011. However, in the instant case, what is alleged in the show cause notice is that as per Rule 2(I) of the CENVAT Credit Rules, 2004, input service means 'any service used for providing output service'. As trading activity undertaken by the appellant is not taxable service, hence the appellant is not eligible to avail credit on the alleged / impugned input service. This being so, the appellants have clearly fallen foul of Rule 3 of the CENVAT Credit Rules, 2004 since that is the particular provision which lays down the types of duties or taxes or cesses suffered on input, input services etc. which alone can be availed as CENVAT credit. From the facts brought out in the show cause notice, it is evident that the impugned input services listed out in para 3.0 and 4.0 have all been availed in spite of the appellant having been involved in trading activity. Thus, there cannot be any credit that could be availed by the appellant *ab initio* and hence there is no need to examine the applicability of Rule 6 of the CENVAT Credit Rules, 2004 to their case. In any case, trading activity has been made

deemed exempted service only with effect from 1.4.2011 and therefore we are not able to appreciate the argument of the Id. counsel that as per the decision of Hon'ble High Court in Ruchika Global (supra) trading is held to be exempted service even prior to 1.4.2011 and therefore credit availed on trading is admissible. In Ruchika Global, Rule 6 of CENVAT Credit Rules, 2004 was invoked to demand the proportionate credit availed on trading. In the present case, only Rule 3 and Rule 6 has not been invoked. When credit is not admissible under Rule 3, the appellant cannot content that Rule 6 ought to have invoked and that trading is held by the Hon'ble High Court to be exempted service prior to 1.4.2011. The appellant cannot blow both hot and cold.

6.3 The Id. counsel has referred to the decision of coordinate Bench of the Tribunal namely L.G. Electronics India Pvt. Ltd. Vs. Commissioner of Central Excise, Noida – 2017 (3) GSTL 249 (Tri. All.) in support of his contention. However, we find that the facts there in are not *pari materia* and hence the ratio therein will not help the appellant. So also in the Single Member decision of the Tribunal in the appellant's own case reported in 2017 (40) STR 261 (Tri. Chennai), there is nothing forthcoming from the facts brought out in the order as to whether the input service was used exclusively for trading. There is no discussion in the said order as to disallowance of

credit on account of credit availed on trading. On the other hand, the said decision has taken the view that the input services were essential to provide output service of consulting engineer and thus allowed the credit. Hence this case law is also of no help to the appellant.

6.4 In the event, we do not find any infirmity in that portion of the impugned order upholding the demand of wrongly availed credit to the tune of Rs.3,22,07,534/- along with interest thereon. So ordered.

6.5 Coming to the demand of Rs.35,91,928/- with interest in respect of alleged wrong utilization of CENVAT credit, since this being only a part of the total credit amount of Rs.3,22,07,534/-, the demand of which has already been upheld supra, we find that it would cause double jeopardy, hence demand of Rs.35,91,928/-, along with interest, in our view will become a unjustifiable demand and therefore set aside.

6.6 Coming to the penalties imposed under section 78 of the Finance Act, 1994, we find that this issue involves interpretation whether the availment of impugned credits are in order or otherwise. The Ld. counsel has submitted that appellant has reversed the entire credit. Further, the Hon'ble High Court in Commissioner of Central Excise Vs. Strategic Engineering (P) Ltd. – 2014 (310) ELT 509 (Mad.) has

unequivocally held that mere taking of credit wrongly would not compel the assessee to pay penalty. Following the said decision, the penalties imposed under section 78 is set aside.

7. In the result, the impugned order is modified to the extent of setting aside the demand of Rs.35,91,928/- and the penalty imposed under section 78 of the Finance Act, 1994 without disturbing the remaining part of the impugned order except penalty. The appeal is partly allowed in the above terms.

(Pronounced in court on 31.8.2018)

(Madhu Mohan Damodhar)
Member (Technical)

(Sulekha Beevi C.S.)
Member (Judicial)

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