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

Appeal No.ST/588/2011

[Arising out of Order-in-Appeal No.114/2011 (MST) dt. 20.07.2011 passed by Commissioner of Central Excise (Appeals), Chennai]

Commissioner of Service Tax,
Chennai — Appellant

Versus

Hathway Cable and Datacom Pvt. Ltd. — Respondent

Appearance :

Shri B. Balamurugan, AC (AR)
For the Appellant

Shri D. Santhagopalan, Advocate
For the Respondent

CORAM :

Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)
Hon'ble Shri P. Dinesha, Member (Judicial)

Date of hearing : 12.12.2018
Date of Pronouncement : 08.01.2019

FINAL ORDER No. 40022 / 2019

Per Shri Madhu Mohan Damodhar

The facts of the case are that respondent-assessee are registered providers of cable services directly to subscribers and also provide signals as Multi System Operator to Local Cable Operators in Chennai. The assessee had taken credit on input services such as telephone, courier services, supply of labour etc. The head office of the assessee imported Head End and Distribution

Equipments such as cable, nodes, amplifiers, splitters, set top boxes etc. on payment of appropriate CVD and SAD. The credit of CVD was transferred by the head office, registered as ISD, to the respondents through Material Receipt Order (M.R.O). Based on the M.R.O, the respondents availed cenvat credit of CVD amounting to Rs.8,52,777/- during the year 2004-05 and Rs.12,09,508/- during April 2007. Respondents had supplied the equipment to their customers / subscribers (either on sale or on rental basis) who opted to view the pay channels and raised invoices on the subscribers both for the renting the Set Top Boxes and for the subscription charges. While service tax was discharged on the subscription charges under the category of cable operator services, VAT was discharged on the rentals received from the customers towards renting of set top boxes since the same amounted to deemed sale, viz., transfer of right to use goods (TRUG). Department took the view that respondent is not eligible to avail cenvat credit of capital goods as it is violative of provisions under Rule 2 (m) read with Rules 7, 9 of Cenvat Credit Rules, 2004. Accordingly, a show cause notice dt. 30.09.2008 was issued to the assessee inter alia, proposing recovery of cenvat credit of R.20,62,285- relating to credit availed on equipments with interest and Cenvat credit amount of Rs.3,46,237/- being Special Additional Duty of Customs (SAD) with interest and Rs.6,84,484/- on the box rentals realized by them during September 2003 to January 2008 with interest, as also imposition of penalties under various provisions of law. In adjudication, the adjudicating authority vide an order dt. 24.12.2009 confirmed the demand of tax with interest and also imposed penalty under Section 78 ibid, however with reduced penalty of 25%, if the service tax with interest is paid within 30 days. In appeal, the Commissioner (Appeals) vide an impugned order dt. 20.07.2011 held that demand is partly hit by limitation hence the demand from 1.4.2007 alone survives. The LAA further held that assessee is liable to pay service tax along with interest on the rental charges collected from the subscribers. Penalty imposed under Section 78 of the Finance Act, 1994 was set aside. Aggrieved, the department has filed the appeal before his forum.

2. Today, when the matter came up for hearing, on behalf of the appellant-Revenue, Ld. A.R Shri B. Balamurugan reiterated the grounds of appeal. He also submitted that when suppression of fact is proved then penalty under Section 78 is mandatory.

3. Per contra, on behalf of the respondent-assessee, Ld. Consultant Shri D.Santhana Gopalan made oral and written submissions which can be broadly summarized as under :

i) The Respondent has rightly availed Cenvat credit on the capital goods transferred to them by their Head Office. The fact that the capital goods were imported on payment of appropriate duty, received by the Respondent and used by them in provision of output services were not disputed. The only ground for denial was that the provisions of Rule 7 of CCR does not allow distribution of credit on capital goods. The substantial benefit of Cenvat credit cannot be denied on procedural grounds. Reliance in this regard is placed in the case of Cosmos Casting India Ltd. v. CCE, Raipur, 2011 (23) STR 144 (Tri. –Del) and Commissioner of Central Excise, Chennai v. MRF Limited, 2009 (244) E.L.T. 601 (Tri.-Chennai)

ii) Alternatively, the Respondent could have availed the credit following other procedures, such as availing the credit based on the Bill of Entry (in the name of the Head Office in Mumbai) as clarified in CBEC Circular No.179/13/96-CX dated 29.02.1996.

iii) The Material Receipt Order based on which credit was availed by the Respondent contained all the particulars as in a Bill of Entry. This was already submitted by the Respondent in their reply to the Show Cause Notice, as recorded in para no.10 of the Order-in-Original.

iv) Availment of credit under an ISD mechanism was an inadvertent error on part of the Respondent and credit should not be declined on this ground alone.

v) The entire exercise is revenue neutral. It is settled legal position that no suppression can be alleged when the entire exercise is revenue neutral. Reliance is placed on the following decisions :

a. Nirlon Ltd v. CCE [2015 (320) ELT 22 (SC)]
b. CCE v. Tenneco RC India (P) Ltd [2015 (323) ELT 299 (Mad)]
c. CCE v. Gujarat Glass (P) Ltd [2013 (290) ELT 538 (Guj)]

vi) No penalty is imposable as the Respondent had availed credit under the bonafide belief regarding its eligibility. Further, the issue is one of interpretation of legal provisions and is also revenue neutral. Therefore, no penalty is imposable.

vii) The Respondent was under the bonafide belief that the impugned transaction of renting set-top boxes amounted to deemed sale and therefore, not subject to service tax. Further, the issue is one of interpretation and therefore, extended period is not invokable in this case.

4. Heard both sides and have gone through the facts.

5.1 The main plank for denial of input cenvat credit by the original authority is that an ISD can distribute only service tax paid on input service to its manufacturing units or units producing goods or for rendering taxable service; that equipments being in the nature of capital goods credit of duty paid on such equipments cannot be passed on by an ISD. The dispute in the appeal centers around the question as to whether the credit availed by Hathway in respect of the various equipments and materials imported by our head office and distributed to Hathway Chennai, as an input service distributor on the basis of MRO's is in accordance with law. It is also alleged that the MRO under which the head and equipments imported by the head office are distributed, inter alia, to the assessee does not fit into any of the documents prescribed in Rule 9 of the Cenvat Credit Rules, 2004. The assessee has conceded that the appropriate procedure would have been to register the head office as an "imported dealer" under Central Excise and passed on the CVD to various branches along with transfer of the said equipments by issuing excise invoices by their Mumbai Head office. However, the assessee has consistently contended that the error on their part is not fatal to the claim of cenvat credit.

5.2 We find merit in these assertions of the assessee. It is not the case as if the impugned equipment had not been imported at all and had not suffered CVD thereon. It is also not the case that the Head office have only transferred the credit to the assessee by way of M.R.O, without actually effecting the transfer of the said capital goods to the assessee end. In a very strict and narrow interpretation of the legal provisions as existed during the period of dispute, the Input Service Distributor (I.S.D) would have distributed the cenvat credit only in respect of service tax paid on the input service. It is also true that the provision enabling taking of credit of inputs and capital goods received from the I.S.D was given effect by introduction of Rule 7(a) in the said Rule by Notification No.10/2008-CE (NT) w.e.f 1.4.2008. All the same, in our view, credits on capital goods which are undisputedly going to be put to use directly or indirectly by the assessee for providing their output service, cannot be denied only on the grounds that the impugned equipments have been imported by their head office who in turn have distributed the cenvat credit emerging thereof by way of a M.R.O. It is also an undisputed fact that the assessee is a PAN India Service provider with their head office at Mumbai. Ostensibly, only for enabling the related accounting matters to be handled by the head office, the impugned equipment have been imported by the said head office only. There would have been no cause for complaint, if the assessee had themselves imported the said equipment and taken credit of the quantum of CVD suffered on such imports. There is also no allegation by the department that the goods though despatched to the assessee under cover of MROs have not suffered CVD thereon at the time of their import .

5.3 Viewed in this light, we are of the considered opinion that the distribution of capital goods credit by the head office prior to introduction of Rule7(a) of the CCR 2004, or, for that matter, the transfer of credit availed on the basis of a M.R.O which is not listed as an acceptable document for the purpose of Rule 9 of the CCR cannot be disallowed only on the basis of such procedural infractions. In this regard, the ratio laid down in *Cosmos Casting India Ltd.* (supra), M.R.F Ltd. (supra) relied upon by Ld. Advocate will apply on all fours in favour of the appellant. We therefore hold that the procedural inadequacies will not be enough to deny the availment of credit by assessee in respect of various equipments etc. imported by their head office and distributed to the former by way of M.R.Os. This being the case, the conclusions of the lower appellate authority that on merit, there is no bar under the CCR to send capital goods to other places under ISD invoices and denial of cenvat credit thereon. We also do not find any infirmity in the conclusion of LAA that alleging suppression of facts on an appellant who is filing returns and is paying service tax regularly is a weak argument. We therefore take note that the LAA has correctly held that the demands upto 1.4.2007 is hit by limitation.

6. In view of the foregoing, that portion of the order setting aside the demand in respect of credit availed on capital goods distributed by their head office both on merit as well as on limitation, does not call for any interference. Department appeal on this issue is therefore rejected.

(order pronounced in court on 8.1.2019)

(P. Dinesha)
Member (Judicial)

(Madhu Mohan Damodhar)
Member (Technical)

gs