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

Appeal No.ST/175/2010

[Arising out of Order-in-Original No.31/2009 dt. 21.12.2009 passed by the Commissioner of Central Excise, Chennai-III]

Madras Cements Ltd. Appellant

Versus

Commissioner of Central Excise,
Chennai-III Respondent

Appearance:

Shri R.Parthasarathy, Consultant
For the Appellant

Shri K. Veerabhadra Reddy, JC (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 / decision : 25.10.2017

FINAL ORDER No. 42429/2017

Per Bench

Appellants are engaged in the manufacture of Ready-mix concrete attracting Nil rate of duty. They despatch the said goods to the construction sites by road and pay service tax on behalf of the

Customs, Excise & Service Tax Appellate Tribunal transporters. Appellants utilized cenvat credit of service tax paid on input services like GTA, insurance and security services, for discharge of tax liability in respect of GTA availed for outward transportation for the period January 2005 to September 2008. It appeared to the department that such utilization of cenvat credit was irregular since the service provided by the GTA for outward transportation does not become an output service for consignor or consignee in terms of Rule 2(p) and 2 (r) of the Cenvat Credit Rules, 2004. In the proceedings initiated against the appellant vide impugned order dt. 21.12.2009, the jurisdictional Commissioner confirmed demand of service tax of Rs.76,77,053/- with interest for the period January 2005 to September 2008 and also imposed penalty under Section 76 and 78 of the Finance Act, 1994. Hence this appeal.

2. Today, when the matter came up for hearing, on behalf of appellant, Ld. Consultant Shri R. Parthasarathy submits that in view of definition of "person liable to pay service tax" in Rule (q) and "provider of taxable service" in Rule (r) of the Rules upto 28.02.2008, appellant should have been construed to be the output service providers and accordingly credit availed for various input services was correctly utilized in terms of Rule 3 (4) of the Rules. He further

Customs, Excise & Service Tax Appellate Tribunal concedes that Rule 2(q) was amended on 01.03.2008 wherein specific exclusion for taxable service covered by Section 65 (105) (zzp) of the Finance Act, 1994 was brought in Rule 2 (p) of the CCR 2004. Hence from 1.3.2008, they would not be entitled to utilize such cenvat credit for discharge of tax liability on GTA for outward transportation, which liability they concede.

3. Ld. consultant relies upon the Larger Bench ruling of the CESTAT in *Panchmahal Steel Ltd. Vs CCE Vadodara* - 2014 (34) STR 351 (Tri.-LB) wherein it was held that for the period prior to 1.3.2008, there was no bar for utilization of cenvat credit for payment of service tax on outward transportation, following the decisions of various High Courts. He also placed reliance on judgment of Hon'ble High Court of Madras in the case of *CCE Vs Cheran Spinners Ltd.* - 2014 (33) STR 148 (Mad.) wherein also it was held that appellants herein was entitled to utilize cenvat credit for payment of service tax on outward transportation.

4. On the matter of penalty, Ld. Consultant submits that they were under bonafide belief that the credit availed could be utilized for discharging duty liability in the manner that they did for the entire period even after 1.3.2008 and hence there was no case for imposition of penalties on the appellant.

5. On the other hand, Ld. A.R Shri K. Veerabhadra Reddy takes us to para -14 of the impugned order to emphasis that the Explanation to Rule 2 (p) of the Rules which clarified that *'even if a person liable for paying service tax does not provide taxable service or does not manufacture final products, the service for which he is liable to pay service tax shall be deemed to be the output service'*, was omitted by Notification No.8/2006-CE (NT) dt. 19.4.2006. Ld. A.R further placed reliance on the ratio of the Tribunal's decision in *Gimatax Industries Pvt. Ltd. Vs CCE Nagpur* - 2012 (25) STR 456 (Tri.-Mumbai) which laid down that for the period beyond 18.04.2006, the appellant therein was not entitled to utilize cenvat credit for payment of service tax on GTA service. Ld. A.R also draws attention to Tribunal's decision in the case of *Iswari Spinning Mills and Others* in Final Order No.226-275/2011 dt. 04.02.2011 which has held that assessees therein were not entitled to utilize cenvat credit for payment of service tax on GTA service beyond 18.04.2006. Ld. A.R further submits that the decision in the case of *Iswari Spinning Mills* (supra) was confirmed by Hon'ble High Court of Madras on 11.12.2013 as reported in 2014 (35) STR J134 (Mad.).

6. Heard both sides and have gone through the facts. The case laws relied upon by Ld. A.R, in the first place, are Single Member

decisions. Further, these have been rendered much before the Larger Bench decision in *Panchmahal Steel Ltd.* (supra). The issue that was under consideration before the Larger Bench of the Tribunal was *'whether a person who is not a actual service provider but discharges the Service Tax liability on the Taxable Services under Section 68 (2) of the Finance Act, 1994, as a deemed service provider, is entitled by virtue of legal fiction to utilize the Cenvat credit inputs/input services/capital goods for payment of Goods Transport Agency Service Tax, even if he is not using such inputs/input services/capital gods for providing taxable services by virtue of deeming legal fiction*?". The Larger Bench of the Tribunal relying upon the High Court judgements of Punjab & Haryana, Himachal Pradesh and Delhi High Court referred to in para-3 of that decision, has held that there is no bar for such utilization prior to 1.3.2008. We further find that said Larger Bench decision has been upheld by the Hon'ble Gujarat High Court as reported in 2015 (37) STR 965 (Guj.). We find that affirmation of Larger Bench decision has been done on 18.12.2014 after the Madras High Court judgement of 11-12-2013 in *Iswari Spinning Mills* case and hence we intend to follow the ratio laid down in the later High Court judgement.

7. Viewed in this factual matrix, we hold that prior to 1.3.2008, there is no bar on the appellants for utilization of cenvat credit for discharging, as a consignor, the tax liability on GTA services availed for outward transportation.

8. However, for the period 1.3.2008 to September 2008, i.e., the remaining part of the disputed period, by virtue of the amendment brought in Rule 2 (p) of the Rules vide Cenvat Credit (Amendment) Rules, 2008 w.e.f. 1.3.2008 appellant cannot utilize cenvat credit for discharging tax liability on the said GTA service for outward transportation. Cenvat credit so availed will then will have to be paid back along with appropriate interest liability thereof. For this limited purpose, we remand the matter to the adjudicating authority, only for the purpose of calculating the amount required to be paid back and the interest liability thereon for the period 1.3.2008 to September 2008.

9. Coming to the matter of penalty, we find that the issue *per se* was mired in confusion during the disputed period. The very fact that the matter had to be referred to Larger Bench by itself indicates that there was insufficient clarity on the issue even amongst various Bench of the Tribunal. When this being so, we find that there was reasonable cause on the part of appellant for his failure to discharge

tax liability from 1.3.2008. This being so, we hold that no penalty shall be imposable in this case and accordingly penalty under Section 76 & 78 are required to be set aside, which we hereby do.

Appeal is disposed of in the above terms.

(dictated and pronounced in court)

(Madhu Mohan Damodhar)
Member (Technical)

(Sulekha Beevi C.S)
Member (Judicial)

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