IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, CHENNAI

Service Tax Appeal No.106 of 2006

(Arising out of Order-in-Original No. 18/2005 dated 30.12.2005 passed by the Commissioner of Central Excise, Chennai – IV Commissionerate, Chennai)

M/s. Hyundai Motors India Ltd. **Appellant**
Plot No. H-1, SPCOT Industrial Park
Irugattukottai

Vs.

Commissioner of GST & Central Excise **Respondent**
Chennai South Commissionerate
MHU Complex, No. 692, Anna Salai
Nandanam, Chennai – 600 035.

AND

Service Tax Appeal No.136 of 2006

(Arising out of Order-in-Original No. 11/2006 dated 10.5.2006 passed by the Commissioner of Central Excise, Chennai)

M/s. Hyundai Motors India Ltd. **Appellant**
Plot No. H-1, SPCOT Industrial Park
Irugattukottai

Vs.

Commissioner of GST & Central Excise **Respondent**
Chennai South Commissionerate
MHU Complex, No. 692, Anna Salai
Nandanam, Chennai – 600 035.

APPEARANCE:

Shri S. Muthuvenkataraman, Advocate for the Appellant
Smt. K. Komathi, ADC (AR) for the Respondent

CORAM

Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)
Hon'ble Shri P. Venkata Subba Rao, Member (Technical)

Final Order Nos. **41756-41757 / 2021**

Date of Hearing: 17.08.2021
Date of Decision: 17.08.2021

Per Ms. Sulekha Beevi C.S.

The issue involved in both these appeals being the same were heard together and disposed by this common order.

2. These appeals were earlier disposed of by the Tribunal vide Final Order No. 40361 – 40632 /2015 dated 7.4.2015. The appeals were allowed in favour of the assessee against which the department preferred the appeals before the Hon'ble High Court. The matter was remanded by Hon'ble High Court vide judgment dated 28.1.2020 in CMA No. 450 – 451/2017. The matter has been remanded to the Tribunal for deciding the case of the assessee fresh and for passing a detailed speaking order.

3. The ld. Counsel Shri S. Muthuvenkataraman appeared and argued for the appellant. He submitted that the appellants are engaged in manufacture of motor cars, parts and accessories and are registered with the Central Excise Department. They had also registered with the service tax cell in respect of taxable services provided by non-resident service provider under the categories of consulting engineering service, advertising and scientific services. They were paying service tax on the input service received by them from foreign service providers under the reverse charge mechanism. On verification of ST 1 as well as ST3 returns, the department was of the view that the appellant is not eligible to avail credit of the service tax paid by them under reverse charge mechanism. So also the department was of the view that such credit availed by them cannot be utilized for payment of central excise duty. After due process of law, original authority confirmed the demand along with interest. The appellant preferred appeal before the Tribunal and vide the above final order, the matter was decided in favour of the assessee.

4. He submitted that the allegations against the appellants are as under:-

(a) The appellants have wrongly availed credit and utilized the credit in contravention of Service Tax Credit Rules, 2002 r/w CENVAT Credit Rules, 2004.

(b) The appellants do not provide any output service and for this reason credit is not admissible on the input services.

(c) The input service should be consumed by the service provider for providing output service.

(d) The appellants are liable to pay service tax under section 68(2) r/w Rule 2(1)(d)(iv) of Service Tax Rules, 1994 but cannot be construed as the person providing any taxable output service.

(e) That the appellants utilized the service tax credit to discharge their service tax liability as they cannot be construed as provider of output service.

(f) After CENVAT Credit Rules, 2004 came into force with effect from 10.9.2004, they wrongly transferred the ineligible service tax credit to the CENVAT account and wrongly utilized it to discharge central excise duty.

5. He adverted to section 68 of the Finance Act, 1994 and submitted that sub-clause (2) of the said section would make it clear that when the appellant is paying service tax on behalf of non-resident service provider, the appellants will be deemed to be a service provider. Sub-section (2) of section 68 states that if service tax is paid under reverse charge mechanism, all provisions of the said Chapter will apply to such person as if he is the person liable for paying the service tax in relation to such services. The appellant becomes eligible for credit as the service provider when the service

tax is discharged under reverse charge mechanism on behalf of foreign entity. The view taken by the department that the deemed fiction created under section 68(2) will not be applicable for Service Tax Credit Rules, 2002 is untenable. He relied upon the decision of the Hon'ble High Court of Karnataka in the case of Commissioner of Service Tax, Bangalore Vs. Aravind Fashions Ltd. – 2011-TIOL-748-HC-KAR-ST and argued that the Hon'ble High Court upheld the order passed by the Tribunal holding that credit would be admissible and such credit can be utilized for discharging the liability of tax / duty. He also relied upon the decision of the Tribunal in the case of Asmitha Microfin Ltd. Vs. CCE & ST reported in 2020 (33) GSTL 250 and also the decision of the Hon'ble High Court of Bombay in the case of Indian National Ship Owners Association Vs. UOI reported in 2009 (13) STR 235 (Bom.). The ld. Counsel also submitted that the period is much before the introduction of Section 66A in the Finance Act, 1994 and the appellants have discharged the duty liability under reverse charge mechanism under Rule 2(1)(d)(iv) of Service Tax Rules, 1994. The Hon'ble High Court of Bombay in the case of Indian National Ship Owners Association has categorically held that the liability to pay service tax under reverse charge mechanism for the services received from the foreign entity would be applicable after introduction of Section 66A with effect from 18.4.2006 only. Thus, the appellants ought not to have paid service tax before introduction of section 66A. On such score even if the appellant has availed credit, the situation would be a revenue neutral situation. He prayed that the appeals may be allowed.

6. The ld. AR Smt. K. Komathi appeared on behalf of the department, She supported the findings in the impugned order.

7. Heard both sides.

8. The appellants were issued Show Cause Notice No. 66/2005 dated 6.10.2005 for the period 14.5.2003 to 30.9.2004 and Show Cause Notice No. 80/2005 dated 28.11.2005 for the period 14.5.2004 to 30.11.2004. Another Show Cause Notice No. 14/2005 dated 21.10.2005 was issued for the period 14.5.2003 to 30.9.2004. The appellants availed the credit of service tax paid by them under reverse charge as an input service recipient and utilized the same for payment of service tax. During the relevant period, the credit availed on service tax was governed by the Service Tax Rules, 1994 and credit availed on inputs and capital goods was governed by CENVAT Credit Rules, 2002. CENVAT Credit Rules, 2004 came into force with effect from 10.9.2004 and then the appellants transferred the unutilized credit to CENVAT account and utilized it for payment of central excise duty also.

9. In the Show Cause Notice, the department alleges that the appellant cannot be considered as a provider of service as they have only received the service from the foreign entity and discharged the liability as per section 66 r/w Rule 2(1)(d)(iv) of Service Tax Rules, 1994. The appellant not being a service provider is not eligible to take credit of the service tax under Service Tax Rules, 1994 and that such credit cannot be used to discharge their service tax liability. When the credit was not eligible, appellant's ought not to have transferred the unutilized service tax credit to CENVAT account and utilized it to discharge their tax / duty liability.

10. Section 68 of the Finance Act reads as under:-

> "Section 68. Payment of service tax - (1) Every person providing taxable service to any person shall pay service tax

> at the rate specified in section 66 in such manner and within such period as may be prescribed.
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> (2) Notwithstanding anything contained in sub-section (1), in respect of any taxable services notified by the Central Government in the Official Gazette, the service tax thereon shall be paid by such person and in such manner as may be prescribed at the rate specified in section 66 and all the provisions of this Chapter shall apply to such person as if he is the person liable for paying the service tax in relation to such service.

11. On bare perusal of sub-section (2) of section 68, it can be seen that when service tax is paid under reverse charge mechanism as specified under section 66, the provisions of the said Chapter shall apply to such person as if he is the person liable to pay service tax. It is indeed clear that the Service Tax Rules, 1994 have to be read along with the Finance Act, 1994 and the contention of the department that the said provision does not have any application to Service Tax Credit Rules or CENVAT Credit Rules, 2004 is without any substance.

12. In reply to the Show Cause Notice, the appellants have referred to the Circular issued by the Ministry in F. No. 59/8/2003 dated 20.6.2003 wherein it is clearly indicated in clause 2.9.2 that "as there is no power under Service Tax law on the service tax payer to take the same amount back as credit, the service receiver after having paid the service tax on behalf of non-resident service provider can take credit of the same on the basis of document / bill / invoices under which he paid service tax". The above circular clarifies that the appellant would be eligible to take credit of the service tax paid by them under reverse charge mechanism. Sub-clause (2) of section 68 of the Finance Act, 1994 would also make it clear that such credit can be used for discharging duty / tax liability. Further, after introduction

of CENVAT Credit Rules, 2004, the appellants have rightly transferred their eligible service tax credit to CENVAT credit account. The CENVAT credit is a common pool of the credit of capital goods, inputs and input services. As per Rule 3(4) of CENVAT Credit Rules, 2004, there is no restriction in utilizing this credit for discharging tax / duty liability.

13. On similar set of facts, the issue was analyzed by the Hon'ble High Court of Karnataka in the case of M/s. Arvind Fashions Ltd. (supra). The relevant paragraphs reads as under:-

> *"2. The assessee is a company incorporated in the manufacture and sale of readymade garments bearing the brand names like 'Wrangler' and 'Lee' which belong to foreign companies. The foreign companies provided Intellectual Property Service (IPS) with effect from 10.9.2011 to the assessee and the assessee company being the service provider was made liable to pay service tax in terms of section 68(2) of the Finance Act 2(1)(d)(iv) of the Service Tax Rules, 1994. The service tax liability was discharged by the assessee using cenvat credit availed on 'Intellectual Property Service' which was objected to by the department. The assessee filed a revised returned and used credit relating to other input services such as advertisement, freight, manpower recruitment, courier services, maintenance, repair and construction services for discharging service tax under the category of "intellectual Property Service' in the capacity of the service receiver. The Revenue proceeded against the assessee on the ground that cenvat was wrongly used for paying service tax on 'Intellectual Property Service' purported service when he is not a service provider but the receiver of service. Therefore, overruling the objections of the assessee the demand was confirmed. Aggrieved by the said order, the assessee preferred an appeal to the Tribunal. The Tribunal held that though the assessee is a recipient of services in law as the service provider is outside the country, he is deemed to be the service provider and tax is levied on him. But to discharge that liability he can use the cenvat credit which is to his credit and therefore they set aside the order passed by the Commissioner. Aggrieved by the said order the Revenue is in appeal.*
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> *3. Heard counsels.*
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> *4. In the instant case, though he is the recipient of service tax, the service provider is outside the country. In*

law, he is treated as a service provider and is levied tax. In other words, the liability to pay tax on the service which he has received is foisted on him under law. It is to discharge the liability he is entitled to use the cenvat credit which was available with him and therefore the Tribunal was justified in interfering with the order passed by the Commissioner. In that view of the matter, we do not see any merit in these appeals. As there is no liability to pay tax the question of imposing penalty would not arise."

14. Be that as it may, it also needs to be stated that appellants were not liable to pay service tax under reverse charge mechanism prior to introduction of Section 66A in the Finance Act, 1994. The Hon'ble High Court of Bombay held that tax cannot be levied or collected on the basis of Rules only. The decision in the case of Indian National Ship Owners Association as reported in 2009 (13) STR 235 (Bom.) by the Hon'ble High Court of Bombay was upheld by Hon'ble Supreme Court vide judgment reported in 2010 (17) STR J57 (SC). The relevant para of the Hon'ble High Court of Bombay reads as under:-

"17. Reliance is placed on the provisions of Rule 2(1)(d)(iv) quoted above for justifying the levy of service tax for the period from 16-8-2002. Perusal of the above quoted Rule 2(d)(iv) shows that by that provision a person liable for paying the service tax was defined to mean in relation to any taxable service provided by a person who is non-resident or is from outside India to a person receiving taxable service in India. Apart from the fact that this rule is contrary to the provisions of Section 68 and other provisions of the Act, under this provision the recipient of the service became liable for paying the service tax provided the service was received in India. The entire case of the Petitioners is in relation to the service received by the vessels and ships owned by the members of the Petitioner-association outside India. <u>Therefore, it cannot be said that on the basis of Rule 2(1)(d)(iv), service tax can be levied on the members of the Petitioners-association</u>. It is further to be seen here that Section 64 gives powers to the Central Government to make rules for carrying out the provisions of the Chapter. The chapter relates to taxing the services which are provided, the taxing on the value of the service and it is only the person who is providing the service can be regarded as an assessee. The rules therefore, cannot be so framed as not to carry the purpose

of the Chapter and cannot be conflicted with the provisions in Chapter V of the Act. In other words, as the Act makes the person who is providing the service liable, the provisions in the Rules cannot be made which makes the recipient of the service liable. It is, thus, clear that the provisions of Rule 2(1)(d)(iv) are clearly invalid."

15. Although, there was no liability to pay the tax as per law laid in the above decision, the appellants have discharged the tax liability as a service recipient and availed credit. So the situation is revenue neutral also.

16. From the above, after appreciating the facts as well as following the decisions, we are of the view that the demand cannot sustain. The impugned orders are set aside and the appeals are allowed with consequential relief, if any.

(Operative portion of the order was pronounced in open court)

(**SULEKHA BEEVI C.S.**)
Member (Judicial)

(**P. VENKATA SUBBA RAO**)
Member (Technical)

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