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

ST/38, 39, 77 and 78 /2009

(Arising out of Order-in-Appeal No. 155 &156/2008-(SLM) ST dated 29.10.2008 passed by the Commissioner of Central Excise (Appeals), Salem)

CCE & ST, Salem : Appellant/Respondent

Vs.

M/s. Veejay Lakshmi Textile Ltd. : Respondent/Appellant

Appearance

Shri R. Subramaniyam, AC (AR)
for the appellants

Shri J. Shankarraman, Advocate
for the Respondent.

CORAM :

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

Date of Hearing/Decision: **28.08.2017**

FINAL ORDER No. 41923-41926/**2017**

Per Bench

The brief facts of the case are that the respondent/assessee are engaged in the manufacture of excisable goods and are registered under Service Tax department for rendering "Transport of Goods by Road" (GTA). They discharged their liability to pay service tax through Cenvat account and also claimed abatement of 75% of freight amount in terms of Notification No. 32/2004-ST

Customs, Excise & Service Tax Appellate Tribunal dated 03.12.2004 for determining their liability under this category. The department was of the view that they are not eligible for abatement and also that Cenvat credit cannot be utilized for discharging service tax liability under reverse charge mechanism. SCN was issued raising above allegations and proposing demand, interest and for imposing penalties. After adjudication, original authority confirmed the demand along with interest and imposed penalty. On appeal, the Commissioner (Appeals) set aside the demand raised on account of wrongful utilisation of Cenvat credit, but however upheld the denial of exemption under Notification No. 32/2004-ST. Aggrieved by the denial of abatement assessee has filed appeal No. ST/77/2009 and ST/78/2009. Aggrieved by the order allowing to utilize Cenvat credit to discharge service tax liability under GTA services, the department has filed appeal Nos. ST/38/2009 and ST/39/2009.

4. Ld. AR, Shri R. Subramaniyam, AC, appearing on behalf of the Revenue reiterated the findings of the order-in-original. He submitted that the adjudicating authority was right in disallowing the utilisation of Cenvat credit.

5. Ld. Counsel, Shri J. Shankarraman, appearing on behalf of the respondent-assessee submitted that appellants had claimed abatement as per the Notification No. 32/2004-ST. Since the transporters were individual transporters they had not registered with the service tax department. Once they are not registered with the service tax department, the question of availing Cenvat credit on inputs or capital goods or input services does not arise. The

benefit under Notification No. 12/2003-ST dated 20.06.2003 cannot be therefore denied. That the issue has already been settled by the Tribunal in the case of SNI industries Vs. CCE – 2016 (41) STR 563 (Tri.-Chen.) wherein the Tribunal had held in favour of assessee.

6. Heard both sides.

7. The short issue to be decided is whether appellants are eligible to utilize Cenvat credit to pay the service tax under GTA services. There is no provision in the Cenvat Credit Rules which prohibit the utilization of Cenvat credit to discharge service tax liability under GTA services. Therefore we find the Commissioner (Appeals) has rightly held this issue in favour of the appellants. The appeal filed by the department is devoid of merits hence requires to be dismissed, which we hereby do. The second issue is settled by the decision the case of SNI industries and the relevant portion of the said decision is reproduced as under:-

> **6.** Heard both sides. We have carefully considered the submissions and also perused the records. The short issue in these appeals is denial of abatement of 75% availed under Notification 32/2004-S.T., dated 3-12-2004. On perusal of the SCN, OIO and the impugned orders-in-appeal, we find that the assessees engaged individual truck operator/owner for transport of granite blocks from quarry to the factory and from factory to the port of destination and paid service tax on the GTA by availing Notification 32/2004-S.T. Department denied the abatement and demanded differencial duty on the ground that the assessees not fulfilled the condition of the notification. It is pertinent to see the relevant Notification 32/2004 which is reproduced as under :-
>
> *"Service tax payable on 25% of the gross amount charged by Goods Transport Agency (w.e.f. 1-1-2005)*
>
> In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the taxable service provided by a goods transport agency to a

customer, in relation to transport of goods by road in a goods carriage, from so much of the service tax leviable thereon under section 66 of the said Act, as is in excess of the service tax calculated on a value which is equivalent to twenty five per cent, of the gross amount charged from the customer by such goods transport agency for providing the said taxable service :

Provided that this exemption shall not apply in such cases where -

(i) the credit of duty paid on inputs or capital goods used for providing such taxable service has been taken under the provisions of the Cenvat Credit Rules, 2004; or

(ii) the goods transport agency has availed the benefit under the notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 12/2003-Service Tax, dated the 20th June, 2003 [G.S.R. 503 (E), dated the 20th June, 2003].

2. This notification shall come into force on the first day of January, 2005.

[Notification No. 32/2004-S.T., dated 3-12-2004]"

The proviso to notification stipulates that this exemption is not applicable if the service provider has availed input and capital goods credit for providing GTA service and they should not have availed Notification 12/2003. We find that in the present case the service providers are the transport operators. On perusal of payment vouchers dated 25-4-2005, 3-6-2005 and 26-8-2006 issued by the appellants to various individual truck owners, we find there is no document or any consignment note by the assessee. It is pertinent to state that as per GTA rules, the GTA should issue consignment notes and not the individual truck owners. In the present case, since the individual truck operator is not registered with service tax, the question of availing input credit or capital goods credit does not arise. The Board's circular dated 27-7-2005 and 23-8-2007 are applicable to consignment agents who issue consignment notes to, transporters and they have to declare in the invoice that they have not availed any credit. In this case, transport operators who rendered GTA service to assessee are not registered with central excise or service tax. Therefore, it is evident that once the service provider is not registered with service tax, the fulfilment of condition of Notification No. 32/2004 does not arise. However, we do not agree with appellant's contention that they are not liable to pay service tax as the Hon'ble High Court in the case of *CCE Salem* v. *Suibramania Siva Co-op Sugar Mills Ltd.* (supra) clearly held that any person who avails GTA Service from any person including individual truck operators are liable to pay service tax under Section 65(105) of the Finance Act. Therefore, the appellant is eligible to pay service tax as a recipient and they are eligible for abatement and the appellants have rightly paid 25% service tax on the freight paid. It is pertinent to *state that w.e.f. 1-1-2010* both the conditions (i) and (ii) stipulated under the proviso to the said notification were deleted and the abatement is applicable without any conditions. In view of foregoing discussion, we hold that appellants are eligible for the benefit of exemption Notification No. 32/2004. Therefore, question of demanding differential service tax and imposition of penalty does not arise. Accordingly the impugned orders in respect of assessee's appeals are set aside and the appeals are allowed. As regards Revenue's appeals, having held that the appellants are eligible for the notification benefit and consequently eligible for 75% abatement the question of payment of penalty does not arise and the Revenue's appeals are liable to be rejected. Accordingly assessee's appeals are allowed and Revenue's appeals are rejected.

Following the said decision of Tribunal in the case of SNI industries, we hold that the assessees appeals are to be allowed.

8. In the result, appeals ST/38-39/2009 are dismissed. Appeals ST/77 – 78/2009 are allowed with consequential reliefs, if any.

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

(MADHU MOHAN DAMODHAR)
MEMBER (TECHNICAL)

(SULEKHA BEEVI C.S.)
MEMBER (JUDICIAL)

BB

Customs, Excise & Service Tax Appellate Tribunal

प्रमाणित प्रति / Certified True Copy

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