CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. 1

SERVICE TAX Appeal No. 51889 of 2015

(Arising out of Order–in-Original No. ALW-EXCUS-000-COM-021-14-15 dated 27.03.2015 passed by Commissioner of Central Excise- Alwar)

M/s. M G Motors **...Appellant**
Tijara Road, Leyland Circle,
Alwar

Versus

Commissioner of Central Excise, Alwar **....Respondent**
A Block, Surya Nagar,
Alwar, Rajasthan- 301001

APPEARANCE:
Mr. A.K. Prasad, Ms. Surbhi Sinha, Advocates for the Appellant
Mr. Vivek Pandey, Authorised Representative for the Respondent

CORAM : HON'BLE MR.JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. BIJAY KUMAR, MEMBER (TECHNICAL)

Date of Hearing/ Decision: **13.11.2019**

FINAL ORDER No.: 51578 / 2019

JUSTICE DILIP GUPTA

The order dated 27 March 2015 passed by the Commissioner of Central Goods and Service Tax, Alwar[1] has been assailed in this Appeal.

2. The Appellant holds a Service Tax registration under the category "Service of Motor Vehicles" and "Business Auxiliary Services". The Appellant also claims to be engaged in trading of vehicles. The Appellant had availed Cenvat Credit for the Service

1. the Commissioner

Tax paid on input services received and utilized this for payment of service tax for the services provided by the Appellant. The Appellant did not maintain separate records for the receipt and utilization of the input services credit availed by it, as according to the Appellant it was not engaged in providing any exempted service. According to the Appellant, the activity of trading is not a service and not an exempted service.

3. A show cause notice dated 15 October 2014 was issued to the Appellant mentioning therein that the Appellant appeared to have not paid an amount of Rs. 1,13,27,270/- during the period 2009-10 to 2012-13 in contravention of Rule 6 (3) (i) of the Cenvat Credit Rules 2004[2]. The Appellant filed a reply to the show cause notice. Thereafter, the order dated 27 March 2015 was issued by the Commissioner. The relevant portion of the order is reproduced below:

> " It has been alleged in the show cause notice that the noticee have evaded payment of service tax amounting Rs.1,13,27,270/- during the period of 2009-10 to 2012-13 by not paying and amount equivalent to 6% /5% on the value of exempted services, as no separate account for input services credit were maintained for exempted as well as taxable services.
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> xxxx xxxx xxxx

2. 2004 Rules

Now, I proceed to examine whether the noticee are required to pay an amount as per provisions of Rule 6 of Cenvat Credit Rules 2004 in respect of exempted services. The provisions of Rule 6 of Cenvat Credit Rules 2004 are applicable where both exempted goods and dutiableable goods are manufactured or exempted services and taxable services are provided.

xxxx xxxx xxxx

Now, I proceed to examine whether the noticee provided any services which is covered under the definition of exempted services which is defined in Rule 2 (e) of Cenvat Credit Rules 2004 for the relevant period.

Xxxx xxxx xxxx

Hence I find that, the scope of exempted services had been extended and the taxable services whose part of value is exempted on the condition that mo credit is taken shall also be included. With effect from 01.04.2011 the definition of exempted service has been clarified and the trading activity has been specifically included in explanation clause of the definition of exempted services for clarification.

I observe that since the trading activity has been clarified as exempted service, therefore, the provisions of Rule 6 the Cenvat Credit Rules 2004 will attract. Thus, in view of the facts/ provisions of law as discussed above trader was not entitled to take the Cenvat Credit on inputs/ input services meant for used in trading activity. The noticee was required to maintain separate records for receipt, consumption and inventory of input and input service meant for trading activity. Since the noticee failed to comply with this provision, they were either required to reverse the proportionate Cenvat Credit or required to pay an amount equal to 5% or 6% as applicable in the relevant period of the value of trading activity.

> xxxx xxxx xxxx
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> In view of above, I find that the audit had rightly raised the issue of non payment of amount equivalent to 5% or 6% (as applicable during the relevant period) of trading value as the noticee's case is clearly covered under the said rule 6 of the Cenvat Credit Rules 2004. Further regarding calculation of payable amount of 5% or 6% the value has taken as 10% of the cost of goods sold and accordingly amount not paid by the noticee has rightly been calculated in the SCN."

4. The contention of the Appellant that the extended period of limitation could not have been invoked was rejected. Penalty under Section 78 of the Finance Act 1994[3] was also imposed.

5. Shri A.K. Prasad learned Counsel appearing for the Appellant states that he is not contesting the issue on merits for the period prior to 1 July 2012, but the extended period of limitation could not have been invoked and for this submission reliance has been placed upon a Division Bench decision of the Tribunal rendered on 17 July 2019 in **Excise Appeal No. 50924 of 2018 and Excise Appeal No. 50925 of 2018**[4]. Learned Counsel also submits that trading activity is not a 'service' after 1 July 2012 in view of the definition of service contained in Section

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3. the Act

4. M/s Shri Balaji Industrial Products Ltd Vs Commissioner Of Customs, Central Excise, Jaipur

66B (44) of the Act inserted by Finance Act 2012 w.e.f 1 July 2012 and so the Appellant is entitled for reversal of proportionate credit.

6. Learned Authorised Representative of the Department, however, submitted that trading of goods is contained in Section 66D (e) of the Negative List of Service and, therefore, the provisions of Rule 6(3) of the 2004 Rules would be applicable. Learned Authorised Representative also submitted that mens rea is not a pre-condition for imposing penalty as has been held by the Supreme Court in **Gujarat Travancore Agency Vs. Commissioner of Income Tax**[5].

7. We have considered the submissions advanced by the learned Counsels for the parties.

8. It is not necessary for us to examine the merits of the tax liability prior to 1 July 2012 as it has not been pressed by the learned Counsel for the Appellant. What has, however, been contended by the learned Counsel for the Appellant is that the extended period of limitation could not have been invoked for this period for the reason that an audit had been carried out and the amount had been reflected in the Books of Account and the balance sheet.

9. This issue regarding invocation of extended period of limitation was examined by a Division Bench of the Tribunal in

5. 1989 (42) ELT 350 (SC)

M/s Balaji Industrial Products Ltd. The relevant portion of the order is as follows:

> "**However, we find that admittedly the Appellant was recording the entire activity in their balance sheet which is a proper document. As such according to the settled law, it cannot be said that the Appellant suppressed anything with a malafide intention.** Apart from that, we also agree with the learned advocate that there was confusion in the field and as per various decisions, trading activity was not considered to be an exempted service prior to April 2011. After 2012, with the introduction of negative list regime, the law was not very clear and in the absence of any specific evidence attributing to the malafide intent of the Appellant, it has to be held that there can be a bonafide belief on the part of the assessee, especially when the entire activities are being reflected in the Books of accounts. **As such we hold that the demand for period beyond the normal period of limitation would be barred**. Accordingly, we set aside the impugned order and remand the matter to the original Adjudicating Authority for re-quantification of the demand falling within the period of limitation. As regards the normal period, Appellant is entitled to contest the same before the authorities below upon the dates when the normal period was changed as also on the basis of precedent decision."
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> **[emphasis suppliled]**

10. The Appellant had contended that audit had been done and the amount was reflected in the Books of Account and the Balance Sheet. Thus, in view of the aforesaid decision of the Tribunal, it has to be held that the extended period of limitation could not have been invoked. The matter would have to be

remanded to the Adjudicating Authority to re-determine the amount of Service Tax for the normal period.

11. In regard to the submission of the learned Counsel for the Appellant that the Appellant would be entitled to reversal of proportionate credit, the Division Bench observed that it will be reconsidered by the Commissioner. The imposition of penalty was also set aside as there was no malafide on the part of the Appellant. We see no good reason to take a different view.

12. Reliance placed by the Authorised Representative of the Department on the decision of the Supreme Court in **Gujrat Travancore Agency** is misplaced in view of the provision of the Section 78 of the Act. The Supreme Court in **Gujrat Travancore Agency** observed that the language of the statute has to be examined and unless there is something in the language indicating the need to establish the element of mens rea, a default in complying with the statute would have occurred.

13. The submissions of learned Counsel for the Appellant that trading activity would not be a service after 1 July 2012 is an issue which can also be examined by the Commissioner.

14. Thus, the matter needs to be remanded to the Commissioner for determining the issue in the light of the observations made above. The impugned order stands modified

to the extent indicated above and the appeal is, accordingly, disposed off.

(Dictated and pronounced in the open Court)

(JUSTICE DILIP GUPTA)
PRESIDENT

(BIJAY KUMAR)
MEMBER (TECHNICAL)

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