CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH - COURT NO. 1

Service Tax Appeal No. 51887 of 2017

(Arising out of Order-in-Appeal No. BHO-EXCUS-001-APP-183-17-18 dated 30.08.2017 passed by the Commissioner (Appeals), Customs, Central Excise, Bhopal (MP))

M/s. Orient Paper & Industries Ltd .....Appellant

VERSUS

Commissioner (Appeals), GST,
Customs & Central Excise,
Bhopal, Madhya Pradesh .....Respondent

APPEARANCE:
Shri Ayush A. Mehrotra with Shri Upkar Aggarwal, Advocates for the Appellant
Shri Harshvardhan, Authorized Representative of the Department

CORAM :
HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P. V. SUBBA RAO, MEMBER (TECHNICAL)

DATE OF HEARING/DECISION: September 20, 2023

FINAL ORDER NO. 51368/2023

JUSTICE DILIP GUPTA

M/s. Orient Paper & Industries Ltd.[1] has filed this appeal to assail the order dated August 30, 2017 passed by the Commissioner (Appeals) that has upheld the order dated February 09, 2017 passed by the Joint Commissioner disallowing CENVAT credit and ordering its recovery with interest and penalty.

2. The appellant is engaged in the business of manufacture of paper and paper products. It has a manufacturing unit located in Amlai where paper is manufactured using bamboo and coal. In addition to coal and bamboo, water is also an essential raw material used in the manufacture of paper. The appellant, therefore, requires

1. the Appellant

a continuous water source throughout the year for manufacturing paper which is mostly drawn from River Sone. In order to ensure constant availability and supply of water, the appellant proposed construction of a reservoir at its factory premises for storage and conservation of water, which would be used a raw material in manufacturing of paper. Accordingly, the appellant entered into a contract dated 02 December 2009 with M/s Chandra Nirman Pvt. Ltd. for carrying out excavation work, RCC foundation work, construction of reservoir and other minor allied activities. A work order dated 31 December 2009 was issued to the Contractor detailing the activities to be undertaken. The total value of the Work Order was Rs.14,11,40,596.95/-. On conclusion of the work undertaken by the Contractor, a final invoice dated December 11, 2010 was issued to the appellant amounting to Rs.14,88,71,175/-. The amount was also paid. The reservoir constructed by Contractor, however, developed leakage issues and the appellant engaged the services of another contractor, for rectification of the same. A work order dated 06 November 2010 was issued by the appellant amounting to Rs.72,39,062/-. Thereafter, an invoice dated 17 December 2010 was issued to the appellant for Rs.86,33,993/- and the amount was paid. Thus, the entire project of constructing the reservoir, including the cost of repairing the leakage issue, amounted to Rs.15,75,05,168/- on which the appellant paid Rs.1,47,08,098/- as service tax.

3. According to the appellant, water being a raw material in the manufacture of paper and the construction of reservoir was a service received in relation to manufacture of paper and so it availed CENVAT credit on the service tax paid. The appellant

further states that since, it had deducted Rs.2,56,19,715/- on account of delay in providing the service, credit amounting to Rs.23,92,413/- was reversed.

4. However, a show cause notice dated November 30, 2015 was issued to the appellant alleging that the appellant had wrongly availed CENVAT credit with respect to inputs and inputs services used in construction of the reservoir. The appellant filed a reply to the show cause notice and denied the allegations made therein. However, the Joint Commissioner, by order dated February 09, 2017, confirmed the demand holding that CENVAT credit was not admissible to the appellant.

5. Feeling aggrieved, the appellant filed an appeal before the Commissioner (Appeals), who by order dated August 08, 2017 dismissed the appeal and upheld the demand. The operative part of the order passed by the Commissioner (Appeals) is reproduced below:

> "8. I have considered their submission. The definition of input service has been amended w.e.f.01.03.2011 and certain services were put in the excluded category. In other words, the credit of these specified services was not available to the assessee notwithstanding anything else contained elsewhere. The definition of input service excludes the following services,-
>
> > (A) specified in sub-clauses (p), (zn), (zzl), (zzm), (zzq), (zzzh) and (zzzza) of clause (105) of section 65 of the Finance Act (hereinafter referred as specified services), in so far as they are used for –
> >
> > (a) construction of a building or a civil structure or a part thereof, or
> >
> > (b) laying of foundation or making of structures for support of capital goods,
>
> 9. The services of construction of reservoir received by them falls under the excluded category. **Therefore, the credit is not admissible**.
>
> 10. The appellant have submitted that contract was executed prior to 2011, hence the amended definition would not apply. The submission is without any legal basis. In the instant case, the contract may have been entered into prior to 2011.

> However the work was executed and invoices were raised after 01.04.2011 and the credit was taken In the month of March 2012. Therefore the admissibility of the credit would be governed by the definition of input service as it existed on the date of receipt of invoice. The date of signing the agreement is not relevant."

6. Shri Ayush A. Mehrotra, learned counsel for the appellant assisted by Shri Upkar Aggarwal, submitted that the finding recorded by the Commissioner (Appeals) is perverse for the reason that the documents establish beyond record that not only the work order was issued prior to April 01, 2011 but even the construction work of reservoir and the repair work had been completed before the April 01, 2011, and even the payments were made prior to this date. He, therefore, submits that when the work was completed prior to April 01, 2011, which fact is evident from the documents on record, the Commissioner (Appeals) committed an error in recording a finding that the work was executed and the invoices were raised after April 01, 2011.

7. Shri Harshvardhan, learned authorized representative appearing for the department has, however, supported the impugned order and has submitted that since the CENVAT credit was availed in the ledger in March, 2012, the appellant would clearly not be entitled to avail CENVAT credit.

8. The submissions advanced by the learned counsel for the appellant and the learned authorized representative appearing for the department have been considered.

9. Rule 4 (7) of the CENVAT Credit Rules 2004, as it existed prior to April 01, 2011, is reproduced below:

> "(7) The CENVAT credit in respect of input service shall be allowed, on or after the day which payment is made of the value of

> input service and the service lax paid or payable as is indicated in invoice, bill or, as the case may be, challan referred to in rule 9."

10. In the present case, the documents on record clearly establish that not only was the construction of water storage reservoir and the repair work completed prior April 01, 2011, but even the invoices were issued prior to April 01, 2011 and the payments were made prior to April 01, 2011.

11. The finding recorded by Commissioner (Appeals) that the work was executed and the invoices were raised after April 01, 2011 is perverse as it is not borne out from the records. It is, however, correct that the entry was made in the ledger of the appellant in March, 2012, but this is not the material date.

12. Rule 4(7) of the CENVAT Credit Rules, as it existed prior to April 01, 2011, provides that the CENVAT credit in respect of input service shall be allowed on or after the date which the payment is made of the value of the input service and the service tax is paid. It is not in dispute that the payment was made prior to April 01, 2011 and service tax was also paid prior to April 01, 2011.

13. Such being the position, the impugned order dated August 30, 2017 passed by the Commissioner (Appeals) deserves to be set aside and is set aside. The appeal is, accordingly, allowed.

(JUSTICE DILIP GUPTA)
PRESIDENT

(P.V. SUBBA RAO)
MEMBER (TECHNICAL)

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