CUSTOMS EXCISE & SERVICE TAX APPLELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH, COURT NO. 1

SERVICE TAX APPEAL NO. 51541/2017

[Arising out of Order-in-Original No. 94/ST/KAM/DL-III/2016-17 dated 08/06/2017 passed by the Commissioner, Service Tax, New Delhi]

Air India Ltd.
Airlines House 113, Gurdwara Rakabganj Road
New Delhi 11001.
Appellant

versus

Commissioner of Service Tax
New Delhi
Respondent

APPEARANCE:

Shri B L Narasimhan and Shri Kunal Agarwal, Advocates for the Appellant.
Shri Manoj Kumar, Authorised Representative for the Respondent

CORAM: **HON'BLE Mr. JUSTICE DILIP GUPTA, PRESIDENT**
HON'BLE Ms. HEMAMBIKA R PRIYA, MEMBER (TECHNICAL)

Date of Hearing/Decision: 19.01.2024

Final Order No. 50245/2024

JUSTICE DILIP GUPTA:

The order dated 08.06.2017 passed by the Commissioner disallowing CENVAT Credit and ordering for its recovery and imposing penalties after invoking the extended period of limitation under the proviso to section 73 (1) of the Finance Act 1994[1] is sought to be assailed in this appeal that has been filed by Air India Ltd.

2. The main submission advanced by Shri B.L. Narasimhan, learned counsel for the appellant assisted by Shri Kunal Agarwal is that in the facts and circumstances of the case the invocation of the extended period of limitation in the show cause notice could not have been confirmed by the Commissioner in the absence of allegation

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1. **the Finance Act**

pointing specifically towards any act or omission or commission resulting in evasion of payment of service tax. In support of this contention, the learned counsel relied upon the judgement of Supreme Court in **Collector of Central Excise** vs. **H.M.M. Limited**[2]**,** which judgment was subsequently followed by the Supreme Court in **Raj Bahadur Narain Singh Sugar Mills Ltd**. vs **Union of India**[3] and **Kaur & Singh** vs**. Collector of Central Excise, New Delhi**[4].

3. Shri Manoj Kumar, learned authorised representative appearing for the department has, however, supported the impugned order and has contended that the Commissioner committed no illegality in confirming the invocation of the extended period of limitation.

4. The submission advanced by the learned counsel for the appellant and the learned authorised representative appearing for the department have been considered.

5. In order to appreciate the contention that has been advanced by the learned counsel for the appellant, it would be appropriate to reproduce the relevant portion of the show cause notice and it is as follows:

> "2. Whereas, the audit of M/s. National Aviation Company of India Limited, New Delhi was conducted by the CERA for the period 2007-08 to 2009-10 (RUD-I). During the scrutiny of ST-3 returns for the period 2007-08 to 2008-09 by the audit, it was noticed that the assessee has availed Cenvat credit of Rs. 10,50,31,271/- and cess of Rs. 25,46,174/- and utilized the same for the period 2007-09 on the basis of credit transferred from the regional offices. The supporting documents of Cenvat credit were not available with the assessee. This resulted in the wrong availment of the

2 1995 (76) ELT 497 (SC)
3 1996 (88) ELT 24 (SC)
4 1997 (94) ELT 289 (SC)

Cenvat credit. On being pointed out, the assessee made submissions before the CERA audit that the books of account, records and supporting documents including payment vouchers had to be kept at the branch/regional offices to meet the requirement of statutory and govt Audit.

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6. Whereas the assessee failed to submit supporting documents viz, copy of input invoice proofs of payment of service tax along with copy of ST 3 return to substantiate their claim. Thus it appears that the Cenvat credit amounting to Rs.10,75,77,445/- has been wrongly availed by the assessee during the period 2007-10 and is recoverable from them.

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9. Therefore, the assessee is required to maintain documents and records mentioned under Rule 9(1) (e) to avail cenvat credit on input services. As the assessee has not maintained the prescribed documents, therefore, it appears that the assessee has wrongly availed CENVAT Credit amounting to Rs. 10,75,77,445/- and the same appears to be recoverable from the assessee under Rule 14 of the CCR, 2004 ibid read with Section 73 (1) of the Act ibid.

10. **Whereas the assessee has failed to produce the supporting documents before the CERA audit team, and this office inspite of this office letters dated 02.05.2011, 01.03.2012, 29.05.2012 and 17.08.2012. Thus, it appears that the assessee availed the cenvat credit on input service without fullfilling the conditions prescribed in this regard under Rule 9 of the CCR, 2004 ibid. This fact would not have come to the notice of the Department if the audit of the assessee had not been conducted. Therefore, provision of proviso to Section 73 (1) of the Act ibid can be invoked against the assessee, and demand & recovery can be made for wrong availment of CENVAT Credit for the extended period of five years from the relevant date.”**

(emphasis supplied)

6. It clearly transpires from the allegations contained in the show cause notice dated 25.09.2012 that it refers to the audit conducted for period from 2007-08 to 2009-10 when during the scrutiny of ST-3 Returns filed by the appellant for the period 2007-08 to 2008-09 it was noticed that the appellant had availed CENVAT credit and utilized the same for the period 2007-09 on the basis of credit transferred from the Regional offices. The show cause notice also mentions that supporting documents namely, copy of the input invoice towards proofs of payment of service tax with ST-3 Returns were not enclosed by the appellant to substantiate its claim. It is for this reason that the show cause notice alleges that the appellant wrongly availed CENVAT Credit and it appears to be recoverable from the appellant under rule 14 of the CENVAT Credit Rules, 2004 read with section 73 (1) of the Finance Act. The show cause notice further mentions that this fact would not have come to the notice of the Department if the audit had not been conducted.

7. The contention of the learned counsel appearing for the appellant is that the show cause notice does not make out a case for invocation of the extended period of limitation. Learned counsel also pointed out that not only was there no requirement of enclosing the supporting documents with the ST-3 Returns and that the show cause notice does not mention the specific ingredient of proviso to section 73 (1) of Finance Act that was being invoked.

8. The submission advanced by the learned counsel of the appellant has force. The Supreme Court in **H.M.M. Ltd.** examined almost similar allegations made in the show cause notice and observed:

"2. ……….. Now in order to attract the proviso it must be shown that the excise duty escaped payment by reason of fraud, collusion or wilful mis-statement or suppression of fact or contravention of any provision of the Act or of the Rules made thereunder with intent to evade payment of duty. In that case the period of six months would stand extended to 5 years as provided by the said proviso. Therefore, in order to attract the proviso to Section 11A(1) it must be alleged in the show cause notice that the duty of excise had not been levied or paid by reason of fraud, collusion or wilful mis-statement or suppression of fact on the part of the assessee or by reason of contravention of any of the provisions of the Act or of the Rules made thereunder with intent to evade payment of duties by such person or his agent. **There is no such averment to be found in the show cause notice. There is no averment that the duty of excise had been intentionally evaded or that fraud or collusion had been noticed or that the assessee was guilty of wilful mis-statement or suppression of fact. In the absence of such averments in the show cause notice it is difficult to understand how the Revenue could sustain the notice under the proviso to Section 11A(1) of the Act. The Additional Collector while conceding that the notice had been issued after the period of six months prescribed in Section 11A(1) of the Act had proceeded to observe that there was wilful action of withholding of vital information apparently for evasion of excise duty due on this waste/by-product but counsel for the assessee contended that in the absence of any such allegation in the show cause notice the assessee was not put to notice regarding the specific allegation under the proviso to that sub-section. The mere non-declaration of the waste/by-product in their classification list cannot establish any wilful withholding of vital information for the purpose of evasion of excise duty due on the said product.** There could be, counsel contended, *bona fide* belief on the part of the assessee that the said waste or by-product did not attract excise duty and hence it may not have been included in their classification list. But

> that *per se* cannot go to prove that there was the intention to evade payment of duty or that the assessee was guilty of fraud, collusion, mis-conduct or suppression to attract the proviso to Section 11A(1) of the Act. There is considerable force in this contention. **If the Department proposes to invoke the proviso to Section 11A(1), the show cause notice must put the assessee to notice which of the various commissions or omissions stated in the proviso is committed to extend the period from six months to 5 years. Unless the assessee is put to notice, the assessee would have no opportunity to meet the case of the department. The defaults enumerated in the proviso to the said sub-section are more than one and if the excise department places reliance on the proviso it must be specifically stated in the show cause notice which is the allegation against the assessee falling within the four corners of the said proviso**. In the instant case that having not been specifically stated the Additional Collector was not justified in inferring (merely because the assessee had failed to make a declaration in regard to waste or by-product) an intention to evade the payment of duty. The Additional Collector did not specifically deal with this contention of the assessee but merely drew the inference that since the classification list did not make any mention in regard to this waste product it could be inferred that the assessee had apparently tried to evade the payment of excise duty."
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> **(emphasis supplied)**

9. The aforesaid decision of the Supreme Court was followed by Supreme Court in **Raj Bhadur Narain Singh Sugar Mills Ltd.** and **Kaur & Singh**.

10. It would be seen from the aforesaid judgment of the Supreme Court that in order to attract the proviso to section 11A of Central Excises and Salt Act 1944, which is pari materia to section 73 (1) of the Finance Act, it must be alleged in the show cause notice that the duty of excise had not been paid by reason of fraud, collusion or

willful mis-statement or suppression of facts on the part of the assessee with intent to evade payment of duty and if there is no averment that duty of excise had been intentionally evaded or that fraud or collusion had been noticed, it would not be possible to sustain the notice seeking to invoke the extended period of limitation.

11. The facts of the present case are also almost identical. Here also the show cause notice merely refers to the proviso to section 73(1) of the Finance Act and fails to make reference to any specific ingredient of the proviso.

12. In such circumstances, in view of the aforesaid decisions of the Supreme Court, it would not be possible to sustain the order passed by the Commissioner confirming the demand by invoking the extended period of limitation under the proviso to section 73(1) of the Finance Act.

13. The impugned order dated 08.06.2017 passed by the Commissioner is, accordingly, set aside and appeal is allowed.

(JUSTICE DILIP GUPTA)
PRESIDENT

(HEMAMBIKA R PRIYA)
MEMBER(TECHNICAL)

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