CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. IV

SERVICE TAX APPEAL NO. 51481 OF 2018

(Arising out of Order in Appeal No. BHO-EXCUS-002-APP-451-17-18 dated 16.02.2016 passed by Commissioner (Appeals) Central Excise & Central Tax, Raipur)

M/s. MSP Steel & Power Ltd. **...Appellant**
Village Manuapali, Jamgaon, Raigarh (C.G)

Versus

Commissioner of Central Excise
& Service Tax, Raipur **....Respondent**
C.R. Building, Dhamtari Road, Tikrapara
Raipur, Chattisgarh-492001

APPEARANCE:
Mr. Jitin Singhal, Advocate for the appellant
Mr. Rakesh Kumar, Authorized Representative for the Respondent

Coram:
HON'BLE DR.RACHNA GUPTA, MEMBER (JUDICIAL)
HON'BLE MRS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

DATE OF HEARING: 05.02.2024

DATE OF DECISION: 15.02.2024

FINAL ORDER NO 50248/2024

DR. RACHNA GUPTA

The present is an appeal as filed to assail the order-in-appeal bearing No. BHO-EXCUS-002-APP-451-17-18 dated 16.02.2016.

2. The facts relevant for the present adjudication, in brief, are as follows:-

> The appellants are engaged in the manufacture of Sponge Iron, etc. and are availing the facility of Cenvat Credit Scheme in respect of invoices/capital goods/input services used in the aforesaid manufacture in terms of Cenvat Credit Rules, 2004 (CCR, 2004). The Department received an information from

Calcutta Service Tax Commissionerate vide their letter dated 28.07.2014 that the appellant has availed input service tax credit (ITC) on the strength of bogus invoices raised by M/s Spring Vincom Pvt. Ltd. Kolkata (M/s SVPL) during the months of January 2011 to March 2011 in contravention of Rule 2(l) and Rule 3 of CCR, 2004. Pursuant to said information that the factory premises of the appellant were visited on 07.10.2014, statement of Sr. DGM Commercial of the appellant was recorded and the documents/ledger got received in the factory. It was observed that the appellant has availed the cevnat credit of Rs. 1,82,61,900/- on the strength of invoices of M/s SVPL, however, the original bills were not readily available with the appellant except self attested copies of thirteen bills and the statement showing details of cenvat credit availment of the aforesaid amount.

The work orders, the original bills/invoices were not provided by the appellant, but the statement of Chief Operating Officer Shri P. K. Dey was recorded on 11.09.2015 corroborating the earlier statement of Sr. DGM Shri Sandeep Agarwal. Similar was the statement of Director Shri Saket Agarwal as was recorded on 13.11.2015 and the statement of Shri Prainay Kumar Sinha, Director of M/s Spring Vincom Pvt. Ltd. also of Shri Abhishek Sharad, the consultant was recorded. Based upon those statements and the documents available, it appeared to the Department that M/s SVPL did not execute any work nor provide any service whatsoever to the appellant except had accommodated for providing an entry for the same that the appellant was proposed to not to be eligible for availing cenvat credit of Rs. 1,82,61,900/- the same was proposed to be reversed vide show cause notice No. 20951 dated 22.12.2015 alongwith the interest and the appropriate penalties. The said proposal was initially confirmed vide Order-in-Original No. 38/JC/CE/RGH/2017 dated 29.05.2017. The Appeal against the said order has been rejected vide the Order-in-Appeal, the one which has been challenged in the present appeal.

3. We have heard Shri Jitin Singhal, Advocate for the appellant and Shri Rakesh Kumar, Authorized Representative for the Department.

4. Learned Counsel for the appellant has mentioned that the entire case of the Department is based on the statements recorded, however, the Department has failed to make compliance of Section 9D of Central Excise Act, 1944. The appellant not even was allowed to cross examine the said Sr. DGM Shri Sandeep Agarwal, Shri Saket Agarwal, Director and Shri P. K. Dey, Chief Operating Officer. It is impressed upon that the statements can are not admissible into evidence. Learned Counsel has relied upon the following decisions:-

(i) Hi-Tech Abrasives Ltd. vs. CCE & C, Raipur, 2018 (362) ELT 961 (Chattisgarh)

(ii) G-Tech Industries vs. UOI, 2016 (339) ELT 209 (P& H)

(iii) CCE, Delhi-I vs. Kuber Tobacco India Ltd. 2016 (338) ELT 113 (Tri.-Del.)

5. It is further submitted that the appellant had engaged M/s SVPL for providing various construction related services through thirteen work orders, the list whereof is very much recorded even in the Order-in-Original in Para 28 thereof. The perusal of said list reveals that the amount of Rs. 1,82,61,900/- (the amount of ITC in question)

is the total amount of service tax which has been paid by the appellant to M/s SVPL for receiving services of value amounting to Rs. 17,73,00,000/-. Chartered Engineer's Certificate was also produced before the Adjudicating Authorities below but has wrongly been ignored, the certificate is sufficient to prove that the work has been executed by the service provider M/s SVCL in case M/s SVCL has not deposited the service tax collected by him from the appellant, the entitlement of appellant to avail ITC on the amount of service tax paid alongwith the value of service, cannot be denied. The order under challenge, is therefore, prayed to be set-aside and appeal is prayed to be allowed.

6. While rebutting the submissions, the Learned Authorized Representative has relied upon the findings in the order under challenge. It is mentioned that all the grounds of defense taken by the appellant have specifically been dealt with by Commissioner (Appeals) with the respective individual findings in Para 7 of the order under challenge, there is no infirmity in those findings, appeal is accordingly prayed to be dismissed.

7. Having heard the rival contentions and perusing the record, we observe and hold as follows:-

(i) For most, we deal with the objection about non-compliance of Section 9D of Central Excise Act, 1944, the Section 9D reads as follows:-

> **"Section 9D Relevancy of statements under certain circumstances.** (1) A statement made and signed by a person before any Central Excise Officer of a gazetted rank during the course of any inquiry or proceeding under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains, -

> (a) When the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable; or
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> (b) when the person who made the statement is examined as a witness in the case before the Court and the Court is of the opinion that having regard to the circumstances of the case, the statement should be admitted in evidence in the interest of justice.
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> (2) The provisions of sub-section (1) shall, so far as may be, apply in relation to any proceeding under this Act, other than a proceeding before a Court, as they apply in relation to a proceeding before the Court."

(ii) The perusal makes it abundantly that the statement made and signed by a person before any Central Excise Officer of a gazetted rank during the course of inquiry or proceeding under the Act shall be relevant for the purposes of proving truth of the facts which it contains only when it fulfills the conditions prescribed in clause (a) or as the case may be, under clause (b) of the said section. While clause (a) deals with certain contingencies enumerated therein, clause (b) provides that statement made and signed would be relevant for the purposes of proving the truth of the facts contained in that statement only when the person whom made the statement is examined as witness before the Court. A conjoint reading of the provisions therefore reveals that a statement made and signed by a person before the Investigation Officer during the course of any inquiry or proceedings under the Act shall be relevant for the purposes of proving the truth of the facts which it contains in case other than those covered in clause (a), only when the person who made the statement is examined as witness in the case before the court (in the present case, Adjudicating Authority).

8. The legislative scheme, therefore, is to ensure that the statement of any person which has been recorded during search and seizure operations would become relevant only when such person is examined by the adjudicating authority followed by the opinion of the adjudicating authority then the statement should be admitted. The said provision in the statute book seems to have been made to serve the statutory purpose of ensuring that the assessee are not subjected to demand, penalty interest on the basis of certain admissions recorded during investigation which may have been obtained under the police power of the Investigating authorities by coercion or undue influence. The CBEC master Circular No. 1053/2/2017 dated 10.03.2017 on adjudication also makes it incumbent on adjudicating authorities to allow cross examination.

9. In the light of the above discussion and that the proceedings in question are quasi criminal in nature as there is not only the demand of the reversal of cenvat credit, but also the imposition of penalties in question, we hold that Section 9D is to be construed strictly. It is already observed to be mandatory provisions, resultantly, we hold that the statements as were recorded during investigation are not admissible into evidence.

10. Coming to the remaining evidence on record, we observe that to prove its case, the appellant has provided thirteen work orders as were issued to M/s SVPL to seek to receive such services from M/s SVPL as are mentioned in those work orders. The rate of consideration for receiving said services is also mentioned against each work order, a tabulated description of these work orders is also recorded in the Order-in-Original. It is appellant's case that

M/s SVPL has executed the aforesaid work orders during the period from December 2010 to March 2011 and there upon has raised thirteen invoices on the appellant on different dates for a total value of Rs. 19,55,61,900/- including the service tax of Rs. 1,82,61,900/- (the amount in question), the appellant has submitted the Chartered Engineer's Certificate certifying the aforesaid contention of the appellant, there is no evidence on record other than the statements which have already been held in admissible, to falsify the said Chartered Engineer's Certificate, we hold that the Adjudicating Authority below has wrongly discarded the said certificate. No other expert opinion has been obtained by the department. The said documentary evidence is held to have wrongly been rejected while giving precedents to the oral evidence. The said Act is held to be against the principles of evidence as it is a well settled law that the documentary evidence has to get precedence over the oral evidence, we draw our support from the decision of the Tribunal Bangalore Bench in the case of **AL-Futtaim Engineering vs. Commissioner of Customs, Chennai 2007 (219) ELT 490 (Tri.-Bang.).** There is no other evidence produced by the department except the statements recorded during investigation apparently and admittedly none of the deponents were allowed to be cross examined by the appellants, there deposition is highly insufficient to preceed over the documentary evidence produced by the appellants. We draw our support from the decision of the Hon'ble Apex Court in the case of **Andaman Timber Industries vs. Commissioner of Central Excise, Kolkata-II reported in 2015 (324) ELT 641 (S.C.).**

11. The documentary evidence produced by the appellant is sufficiently proving the element of service tax alongwith on value of services received from M/s SVPL, no question arises to deny him the credit of the said element paid. The findings in the order under challenge, are therefore, not sustainable, not even those in Para 7 of the impugned orders. Resultantly, the order is hereby set-aside and the appeal stands allowed.

[Pronounced in the open Court on 15.02.2024]

(DR. RACHNA GUPTA)
MEMBER (JUDICIAL)

(HEMAMBIKA R. PRIYA)
MEMBER (TECHNICAL)

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