IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.

Date of Hearing: 22.6.2017
Date of Pronouncement: 31.7.2017

Appeal No. ST/50085/2014- DB & ST/50521/2014

(Arising out of Order-in-Appeal No.119-120(VC)-ST/JPR-I/2013 dated 30.8.2013 and 172(VC)-ST/JPR-I/2013 dated 24.10.2013 passed by Commissioner of Central Excise (Appeals), Jaipur).

M/s R.G. Pigments Pvt. Ltd. — Appellant
M/s Mittal Pigments Pvt. Ltd.

Vs.

CCE, Jaipur — Respondent

Appearance

Shri Vijay Kumar, Advocate - for the appellant

Shri Amresh Jain, D.R. - for the respondent

CORAM: **Hon'ble Mr. Dr. D.M. Misra, Member (Judicial)**
Hon'ble Mr. Ashok K. Arya, Member (Technical)

Final Order No. 55591-55592/2017

Per Ashok K. Arya :

M/s Mittal Pigments Pvt. Ltd. and M/s R.G. Pigments are in appeal respectively against Order-in-Appeal No. 172/2013 dated 24.10.2013 and Order-in-Appeal No. 119-120/2013 dated 30.8.2013, whereunder inter alia Cenvat credit of Rs.28,32,009/- along with equivalent penalty has been confirmed against M/s Mittal Pigments Pvt. Ltd. and Cenvat credit of Rs.21,63,000/- along with equivalent penalty has been confirmed against M/s R.G. Pigments Pvt. Ltd.

1.1 In both these appeals, main issue(s) involved being common, these appeals are being decided by this common order.

2. All the parties represented by ld. Counsels, Shri Vijay Kumar for the appellants and Shri Amresh Jain for the Revenue, have been heard.

4. The issues involved are:

(i) Whether the Cenvat credit taken for the input/capital goods used for manufacturing excisable goods could be utilised for payment of service tax on the output services?

(ii) What is the rate applicable for levying service tax: - whether it should be the rate as applicable on the day, when the services were provided or it should be the rate applicable for the day when the debit notes were issued by the service recipient?

The above issues will be taken up for discussion and decisions sequentially in the following paras :

5. Issue No. (i) - Whether the Cenvat credit taken for the input/capital goods used for manufacturing excisable goods could be utilised for payment of service tax on the output services?

5.1 The impugned orders held that the assessee is not allowed to use Cenvat credit taken for input/capital goods for payment of service tax for the output services. The ld. Advocate for the appellants pleads that Cenvat Credit Rules, 2004 have no provisions to bar utilisation of admissible credit taken in respect of goods manufactured towards paying service tax on the output services. We find that this matter is covered by the Tribunal's decision in the case of ***S.S. Engineers Vs. CCE, Pune-I*** – 2015 (317) ELT 697 (Tri.-Mumbai) which has held that cross utilisation of credit of Excise and service tax is permissible, as a general proposition. The Tribunal in the said decision observes as under :

> "**5.** We have considered the rival submissions. We have gone through the Cenvat Credit Rules. We find that Rule 2 defines input, input services, capital goods etc. Before availing Cenvat credit, a manufacturer or service provider has to satisfy the definitions provided under the said Rules. Rule 3(1) of the Cenvat Credit Rules states that a manufacturer or producer of final products or provider of taxable service shall be allowed to take credit of various duties specified in various sub-clauses therein. The specified duties among various duties include duty of excise specified in the First Schedule to the Excise Tariff leviable under the Excise Act as also Service Tax leviable under different Sections of the Finance Act, 1994. Sub-rule (4) of Rule 3 provides that Cenvat credit may be utilized for payment of various liabilities and includes any duty of excise on any final product as also Service Tax on any output service (other situations also covered under the said sub-rule, which are not relevant in the present case). Thus, we find that Rule 3 of the Cenvat Credit Rules, 2004 does not stipulate maintaining separate account as a manufacturer and as a service provider. Third proviso to sub-rule (4) of Rule 3, provides that no credit of the additional duty leviable under sub-section (5) of Section 3 of the Customs Tariff Act, shall be utilized for payment of Service Tax on any output service. Similar restrictions are in other proviso. We also note that there are certain restrictions on the utilization of particular type of duties which are elaborated in sub-rule (b) of Rule 7 of the

Cenvat Credit Rules. These restrictions do not cover cross utilization of credit of Excise and Service Tax, as a general proposition.

6. We have also gone through the various case laws quoted by the learned Counsel for the appellant and we note that in the case of *CCE, Pune* v. *Lakshmi Technology and Engineering Industries Ltd.* (supra) in para 6 has observed as under :

> 6. I have carefully considered the submissions from both sides and perused the records. Rule 3(1) of the Cenvat Credit Rules permits credit to a manufacturer of final product or a service provider of taxable service. If a person manufactures only excisable goods, he is entitled to take credit of not only Excise Duties paid on capital goods and inputs but also additional duty of Customs paid under the Customs Tariff Act in respect of imported inputs and capital goods and also Service Tax paid on the input services utilized in or in relation to the manufacture of the excisable goods. In other words, a manufacturer of excisable goods is entitled to use the credit from a common pool to which different categories of specified Excise Duties, Customs Duty and Service Tax are allowed to be taken as credit. Similarly, a provider of taxable service is also entitled to take credit of specified Excise Duty, additional duty of Customs and Service Tax in respect of input services and utilize the credit from all these sources for the purpose of paying Service Tax. The objection by the Department is that the respondent who is both a service provider and a manufacturer should maintain two separate accounts one in respect of credit attributable to inputs, capital goods and services meant for excisable goods and credit attributable to capital goods, inputs and services attributable to the service provided by them. Common Cenvat Credit Rules have been framed in terms of powers conferred by Section 37 of the Central Excise Act, 1944 and Section 94 of the Finance Act, 1994. Rule 3(1) enables a 'manufacturer' or a 'provider of taxable service' to take credit of specified duties and utilize them to discharge duty liability under Rule 3(4) of the Cenvat Credit Rules. A credit can be utilized for payment of any duty of Excise on any final product or for payment of Service Tax on any output service. The respondent is undisputedly registered as a

> service provider for providing the services of renting of immovable property. The credit taken by them as manufacturer/service provider has been used both for paying Excise Duty and for paying Service Tax. The rules permit taking of credit under a common pool and permit use of the credit from the common pool for different purposes and there is no restriction placed to the effect that credit accounts should be maintained for use for manufacture of excisable goods and for use for providing services. Therefore, the view taken by the Commissioner (Appeals) cannot be faulted. The clarification sought to be relied upon by the Department that input credit service taken only if the output is a service liable to Service Tax has no relevance to the present case. Undisputedly, the respondents have registered themselves as service provider of service of renting of immovable property and paying Service Tax as provider of output service and therefore the utilization of credit taken by them is valid.
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> **7.** In addition to above, we have also gone through the format of ER-1 return and ST-3 return. Sr. No. 8 and the Table details the Cenvat credit taken and utilized. In ER-1 return, in Table at Sr. No. 8, in column (9), details about Service Tax are specifically listed. On careful analysis of the said format, the intention appears to be to permit cross utilization of the credit of Excise Duty and Service Tax."

5.2 In the light of above observations of the Tribunal and following the ratio of this decision [*S.S Engineers* (supra)], Cenvat credit taken for the input/capital goods used in the manufacture is allowed for payment of service tax on the output services. Therefore, the demands of Rs.28,32,009/- along with interest and equivalent penalty against the appellant M/s Mittal Pigments Pvt. Ltd. and of Rs.21,63,000/- along with interest and equivalent penalty against M/s R.G. Pigments Pvt. Ltd. are hereby dropped.

6. **Issue No. (ii)** - What is the rate applicable for levying service tax : - whether it should be the rate as applicable on the day, when the services were provided or it should be the rate applicable for the day when the debit notes were issued by the service recipient?

The appellant, M/s R.G. Pigments Pvt. Ltd. pleads that as per Rule 9 of Point of Taxation Rules, 2011, the point of taxation shall, at the option of the tax payer, be the date on which the payment is received; in this case the appellant, M/s R.G. Pigments Pvt. Ltd. received the payment on 6.3.2009 and 12.3.2009, therefore, as per Rule 9 of Point of Taxation Rules, 2011 rate of service tax as in force on 6.3.2009 and 12.3.2009 will be applicable; rate of service tax on this dates was 10.36%.

6.1 We find that the period involved for the demand of Rs.2,06,000/- confirmed against the appellant involving issue (ii) is for the period prior to pronouncement of Point of Taxation Rules, 2011, which were notified by the Notification No. 18/2011-ST dated 1.3.2011. Thus, provisions of Point of Taxation Rules, 2011 cannot be considered as relevant and applicable to the facts relating to the issue no. (ii), which pertains to the appellant M/s R.G. Pigments Pvt. Ltd., Kota. Hon'ble Delhi High Court in the case of ***Vistar Construction (P) Ltd. Vs. Union of India*** - 2013 (31) STR 129 (Del.)

has held that service tax is chargeable at the rate which was effective on the date of rendering of service and not the rate on which payments were received. The Hon'ble Delhi High Court in the said case observes as under:

> "**8.** Therefore, the taxable event, in so far as service tax is concerned, is the rendition of the service. That being the position, the taxable events in the present writ petition had admittedly occurred prior to 1-3-2008. At that point of time the rate of service tax applicable in respect of the services in question was 2% and not 4%, which came into effect only on or after 1-3-2008. In both the writ petitions the date of receipt of payments was subsequent to 1-3-2008 but that would not make any difference because it is not receipt of payment which is the taxable event but the rendition of service. In WP (C) 5636/2010 the relevant period is March, 2008 and in WP (C) 3632/2012 the relevant period is April, May and July, 2008.
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> **9.** It should also be mentioned that at that point of time neither was Rule 5B of the Service Tax Rules, 1994 in effect nor was Section 67A of the Finance Act, 1994 inasmuch as the latter provision was inserted in 2012 which came in effect from 28-2-2012. Furthermore, even Rule 4(a)(i) of the Point of Taxation Rules, 2011 was not applicable to the facts of the present case inasmuch as those rules also came into effect much later in 2011. Recently, we had to consider a similar issue in *Commissioner of Service Tax* v. *Consulting Engineering Services (I) Pvt. Ltd.* in ST. Appl. 76/2012, decided on 14-1-2013 [2013 (30) S.T.R. 586 (Del.)] wherein we held that in the absence of any rules, we would have to examine as to what is the taxable event. In that context we had held that the taxable event as per the Finance Act, 1994 was the providing or rendition of the taxable services. This is exactly what the Supreme Court had held in *Association of Leasing & Financial Service Companies* (supra).

Further, the Tribunal in the case of ***CST Vs. Lea Associates South Asia P. Ltd.*** **–** 2014 (36) STR 909 (Tri.-Del.) has held that service tax is to be charged at the rate prevailing at the time of rendition of taxable service and not the rate in force on the date of receipt of payments for such services. In this regard, the Tribunal in the said case observes as under :

> "**5.** Revenue has preferred the appeal on the basis of a C.B.E. & C. letter dated 28-4-2008 which purports to state that the rate applicable to a taxable transaction shall be the rate in force at the time the service tax became chargeable, meaning the date on which the taxable payment is received. The relevant portion of the C.B.E. & C. letter is extracted in Paragraph G of the grounds of appeal and reads *"the rates applicable to a taxable transaction shall be the rate in force at the time the service tax became chargeable".* The grounds of appeal also refer to Rule 5B of Service Tax Rules, 1994, which enjoins that the rate of tax in case of services provided or to be provided, shall be the rate prevailing at the time when the service is deemed to have been provided under Rules made in this regard.
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> **6.** It is therefore clear that neither the C.B.E. & C. letter nor Rule 5B of Service Tax Rules, 1994 authorise levy of service tax, at a rate not in force on the date of rendition of the taxable service, which is the taxable event. However, the Review Commissioners appear to have fundamentally misguided themselves as to what is clearly a basic principle, that only the rate of tax prevailing at the time of rendition of the taxable service could be levied and collected. The Delhi High Court in *CST* v. *Consulting Engineering Services (I) Pvt. Ltd.* - 2013 (30) S.T.R. 586 (Del.) has reiterated this well established and axiomatic position in law."

6.2 In the light of above observations of the Hon'ble Delhi High Court and the Tribunal, the demand of service tax of Rs.2,06,000/- against the appellant M/s R.G. Pigments Pvt. Ltd. is sustained. However, as the facts do not indicate any wilful, misstatement or suppression of facts, fraud or collusion with intent to evade payment of service tax on the part of the appellant, the equivalent penalty of Rs.2,06,000/- imposed on the appellant M/s R.G. Pigments Pvt. Ltd. under Section 78 of the Finance Act, 1994 is hereby dropped.

7. In the result, the impugned order in the case of the appellant M/s Mittal Pigments Pvt. Ltd. is set aside and appeal of M/s Mittal Pigments Pvt. Ltd. is allowed and the impugned order in the case of the appellant M/s R.G. Pigments Pvt. Ltd. is modified to above effect and appeal partly allowed accordingly.

(Pronounced in Court on 31.7.2017)

(D.M. Misra)
Member (Judicial)

(Ashok K. Arya)
Member (Technical)

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