CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No.2, R. K. Puram, New Delhi, Court No. 1

Date of hearing: 10.10. 2017
Date of decision: 16.10. 2017

**Excise Appeal No. 1462 of 2011**
(Arising out of order-in-original No. 26/2011 (CE) dated 07.03.2011 passed by the Commissioner, Central Excise, Jaipur).

M/s Aksh Optifibre Limited Appellant

Vs.

CCE, Jaipur-I Respondent

Appearance:

Sh. Bipin Garg, Advocate for the assessee
Sh. R. K. Mishra, AR for the Revenue

Coram:

Hon'ble Mr. Justice (Dr.) Satish Chandra, President
Hon'ble Mr. B. Ravichandran, Member (Technical)

Final Order No.57141/2017

Per: **B. Ravichandran**:

The appeal is against order dated 7.3.2010 of Commissioner of Central Excise, Jaipur. The appellants are engaged in the manufacture of Optical Fibre & Optical Fibre Cable. They were also engaged in trading of goods. They were availing cenvat credit of service tax paid on input services like security service, banking, auditing, etc. Proceedings were initiated against the appellants as they have availed and utilised cenvat credit on input services in violation of the provisions of Rule 3 and Rule 9(6) of Cenvat Credit Rules, 2004 inasmuch as the said credits were not available when used in relation to the trading activities. The proceedings were concluded in the impugned order. The Original Authority confirmed a demand of Rs.51,66,116/- along with penalty of Rs.10,000/- under Rule 15(3) of the CCR 2004.

2. Contesting the above order, the ld. Counsel for the appellants submitted that Rule 6 of CCR of 2004 has no application to the present case. Trading activity is not a declared exempted service prior to 01.04.2011. As such, there is no need to maintain separate accounts. The show cause notice is barred by limitation as the appellants did not suppress any facts from the Department. The issue involved is one of the interpretation of the Cenvat Credit Rules and no extended period can be invoked in such situation. Ld. Counsel also relied on the various decided cases in support of his contentions.

3. Ld. AR reiterated the findings of the Original Authority. He submitted that the appellants cannot take cenvat credit of input service when the same is not used in or in relation to the manufacture of excisable final products or taxable output service. From the provisions of CCR 2004, it is apparent and clear that trading is never considered either as a service or as an exempted service. The amendment carried out by Notification No.3/2011 dated 1.3.2011 is only by way of clarification. The appellants cannot avail and utilise any credit on input services, which are used for trading activities. The ld. AR also supported the demand for extended period stating that there is no question of any bonafide belief or interpretation with reference to credit eligibility on services utilised for trading. The appellants cannot claim that Cenvat Credit Rules will apply to trading activity also.

4. We have heard both the sides and perused the appeal records.

5. Admittedly, the appellants availed credit on various input services like security, banking and audit and they did not submit any records to show as the manner of usage of such common input services in taxable activity as well as non-taxable activity. Their contention is that trading cannot be considered as an exempted service prior to 1.4.2011 [(before issue of notification no.3/2011-CE (NT)] and as such, there is no application of Rule 6 of CCR for maintenance of

separate records etc. We are not in agreement with such proposition. Admittedly, it is the responsibility of the assessee to follow the provisions of Cenvat Credit Rules, 2004. Rule 9(6) of the CCR Rules states as below:-

> *"Rule 9 (6) The manufacturer of final products or the provider of output service shall maintain proper records for the receipt and consumption of the input services in which the relevant information regarding the value, tax paid, CENVAT credit taken and utilized, the person from whom the input service has been procured is recorded and the burden of proof regarding the admissibility of the CENVAT credit shall lie upon the manufacturer or provider of output service taking such credit."*

6. The appellants claimed that there is no application of Rule 6 as the trading cannot be considered as an exempted service prior to 1.4.2011. We note that legal fiction given in the Explanation in order to remove doubts was introduced on 1.4.2011. Even if it is considered that trading is not an exempted service, it is also a fact that it cannot be considered as a service within the scope of Finance Act, 1994 during the material time. Even in such situation, the appellants cannot take credit on input services, which are utilised for trading activity. As trading is neither a service nor an exempted service during the material time, the appellants are not covered by the Cenvat Credit Scheme with reference to such activity. In such situation, their arguments that there is no application of Rule 6 for account maintenance is not tenable. As it is clear that Cenvat Credit Scheme itself is applicable to the excisable finished goods and output services, the question of taking credit on services, which are utilised either wholly or partly to an activity, which is not covered under service, is not tenable.

7. The appellants contested the demand on the ground of limitation also. The ld. Counsel submitted that it is a bonafide interpretation error and as such, the extended period is not justifiable. We note that till the fiction was introduced stating trading is an exempted service, by "Explanation" introduced w.e.f. 1.4.2011 in the Cenvat Credit Rules, 2004, trading, which is a sale of goods, could not have

been considered as a taxable service or an exempted service. The input services, on which credit was availed by the appellant, were consumed for trading activities and such credit could not have been availed or taken for discharging service tax on the services provided by the assessee. As held by the Tribunal in the case of **HCL Infosystem Limited reported in 2014 (4) ECS (160) (Tribunal-Delhi)**, there is no scope for any interpretational misconceptional on this aspect. Invocation of extended period is, therefore, without any error.

8. In view of the above discussions and findings, we hold that there is no merit in the present appeal filed by the appellant. Accordingly, the same is dismissed.

(Pronounced on 16.10.2017).

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| (Justice (Dr.) Satish Chandra)<br>President | (B. Ravichandran)<br>Member (Technical) |

Ckp.