

In the Customs, Excise & Service Tax Appellate Tribunal
West Block No.2, R.K. Puram, New Delhi-110066

Appeal No.ST/3383/2012

(Arising out of Order-in-Original No.130-131/ST/PKJ/CCE/2012 dated 30.07.2012 passed by Commissioner (Adj), CCE, New Delhi))

M/s Lally Automobiles Pvt Ltd

...Appellant

Vs

CST Delhi

...Respondent

Appearance:

Present for the Appellant : Shri M.P. Maheshwari, CA

Present for the Respondent : Shri Sanjay Jain, DR

Coram:

HON'BLE JUSTICE (DR) SATISH CHANDRA, PRESIDENT

HON'BLE MR B.RAVICHANDRAN, MEMBER (TECHNICAL)

Date of hearing: 09.10.2017

Date of decision: 31.10.2017

Final Order No.57481/2017

Per B. Ravichandran,

The appeal is against order dated 30.07.2012 of Commissioner (Adjudication), Central Excise, New Delhi. The brief facts of the case are that the appellants are engaged in sales and services of Honda cars as exclusive authorized dealers. They are registered with department for payment of Service Tax under the categories of "Authorized Service Station" and "Business Auxiliary Service". They have availed Cenvat credit of duty paid on various inputs and tax paid on better services in terms of Cenvat Credit Rules, 2004.

2. Upon scrutiny of the records maintained by the appellant, the officers noticed that the appellants availed Cenvat credit and used the same for payment of tax on output services. It was seen that the appellants were having trading activities which is not liable to Service Tax and accordingly credit taken on input services attributable to such trading activities was sought to be denied on proportionate basis. Proceedings were initiated which resulted in the impugned order. The original authority held as below:

“26. The rules clearly provides that the exempted services includes services on which no service tax is leviable under Section 66 of the Finance Act, 1944. Trading is a service liable to VAT/sales tax by States and outside the purview of Service Tax. Thus, no service tax is leviable to trading under Section 66 of the Finance Act. This position was clearly upheld by CESTAT in Metro-shoes case 2008 (10) STR 382 (Tri.-Mumbai) wherein it was held that No Cenvat is eligible for inputs/services used for trading as the trading is an exempted service. The explanation added to the Rule 2(e) vide Notification No.3/2011 – Central Excise (V.T.) makes it more than clear as it states that for removal of doubts, it is hereby clarified that “exempted services” includes trading. This explanation only clarify the existing position as held by Hon’ble CESTAT in Metro shoe case in 2008. Therefore, it cannot be said that it is effective only from 01.04.2011.

27. The assessee contention that no Cenvat Credit is recoverable from them as they have not availed any CENVAT credit on the inputs which were exclusively used in the exempted services under Rule 6(3) of the CENVAT credit Rules is also not sustainable as Rule 6(3) is applicable for the common inputs which are used for providing for taxable services and exempted services which is the case of the notices since they are providing both taxable services i.e. servicing of the cars and non taxable services of trading in cars. Explanation (ii) to the rule clarify that if any input or services are used for providing exclusively for exempted service the same cannot be availed as common input service.”

3. The original authority followed the procedure for calculating the value of exempted service (trading) as per the provisions introduced vide Notification No.3/2011 CE NT dated 01.03.2011 as amended by Notification No.13/2011 CE NT dated 31.03.2011. Applying such calculation, the original authority held that

credit amounts of Rs.24,84,530/- and Rs.31,74,799/- for the periods covered by two SCNs are recoverable from the appellant. He also imposed equal amount of penalties on the appellant in terms of Rule 15 of Cenvat Credit Rules, 2004. A further penalty of Rs.5000/- each in respect of two demands were also imposed under Section 77 of the Finance Act, 1994.

4. The Id Consultant for the appellant submitted that trading activity cannot be considered as exempted service prior to the introduction of explanation, in Rule 2 of Cenvat Credit Rules, 2004, w.e.f. 01.04.2011. Since trading cannot be considered as exempted service for the period prior to that date, there is no need for the appellant to restrict or to reverse Cenvat credit attributable to such trading activity. It was submitted that there is no provision in the credit rules for trading activities to be covered under Rule 6(3). The Id Consultant also contested the demand on the ground of limitation and also imposition of penalties. The issue involved is interpretation of law and no penalty can be imposed in such a situation.

5. The Id AR submitted that no credit can be allowed for trading activities. The appellants having failed to take credit on input and input services only with reference to taxable output services cannot plead that there is no provision in the Cenvat Credit Rules to cover a situation where the appellants are engaged in providing taxable services as well as in trading activity. When the trading is not a taxable activity, there is no question of availing any credit and the scheme of Cenvat Credit Rules itself has no application in such situation.

6. We have heard both the sides and perused appeal records. The admitted facts are that the appellants availed Cenvat credit on input services and they had considerable turnover and income in trading activities. It is also admitted that the services on which credit have been availed are partly relatable to trading activities also. We note that the appellants contested the reversal of credit, to a proportionate extent, on the ground that trading is not an exempted service prior to the insertion of explanation and as such the provisions of Rule 6(3) will not apply. One main aspect is missed by the appellant in such argument. The case of the appellant is that trading cannot be considered as exempted service. It is clear that trading is not a taxable service also. In other words, trading is an activity which is not covered under the scope of Cenvat Credit Rules, 2004. The appellants should not have availed any credit on input services when such services are attributable to an activity which is not at all taxable and hence not covered by the scope of Cenvat Credit Rules, 2004.

7. A deemed fiction is apparently created by naming 'trading' as an exempted service by way of explanation in Rule 2 of Cenvat Credit Rule w.e.f. 01.04.2011. We find prior to creation of such fiction, there is no scope at all even to consider the trading activity to be covered under the credit scheme. After the explanation, the position is more clear to the effect that the trading activity can be considered as an exempted service for the operation of scheme under Cenvat Credit Rules. In other words, prior to that clarification, in the absence of such explanation, trading is not at all covered by the credit scheme. Accordingly, we find the appellants should not have availed credit for common input services which are used for taxable output service as well as trading activity, as it is imperative to identify and

reverse that amount of credit attributable to the trading activity. We find no infirmity in the findings of the original authority on merit or on quantification.

8. Regarding the question of limitation and penalty, we know that the trading is not at all an activity or a service covered by the Cenvat scheme prior to the introduction of clarificatory explanation. The appellants have no reason to avail credit on services which they are fully aware were being used for trading activity also. It is not open to the appellant to claim that they were under bonafide belief that the provisions of Rule 6(3) will not apply to this situation. As already noted, we find there is no ground for such belief. Trading activity not being covered by the credit scheme itself during the material period, the appellants having availed the credit on such input services cannot contest the demand on limitation. We are in agreement with the findings of the original authority on this issue.

8. In view of the discussion and analysis, we find no justifiable reason to interfere with the findings recorded in the impugned order. Accordingly, the appeal is dismissed.

(Pronounced in Court on 31.10.2017)

(Justice (Dr) Satish Chandra)
President

(B. Ravichandran)
Member(Technical)

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