

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

Date of hearing: 23.05.2018
Date of pronouncement: 20.06.2018

Ex. Appeal Nos. 52566/2015 & 50412 of 2016

(Arising out of order in original No. 07/COMMR/CEX/SGR-II/2015 & 28/P. Commr/CEX/SGR-I/2015 dated 30.03.2015 & 28.12.2015 passed by the Commissioner /Pr. Commissioner of Customs, Central Excise and Service Tax, Bhopal).

M/s Bharat Oman Refineries Limited Appellant

Vs.

CCG&ST and Customs, Bhopal Respondent

Appearance:

Sh. B. L. Narasimhan, Sh. Anurag Kapur & Sh. Akhil Gupta, Advocates for the appellant

Sh. M. R. Sharma, AR for the Respondent

Coram:

Hon'ble Mr. V. Padmanabhan, Member (Technical)

Hon'ble Ms. Rachna Gupta, Member (Judicial)

Final Order Nos. 52258 – 52259/2018

Per: **Rachna Gupta**:

The present appeals are challenging the Order-in-Original No. 7/2015 dated 30.03.2015 for the period 2008 to April, 2013 and Order-in-Original No. 28/2015 dated 28.12.2015 covering the period 2008-09 to 2013-14. Both the appeals are being decided through this common order.

2. The appellant is a refinery for the manufacture of petroleum products. During the period in dispute, Crude Oil Refinery project in District Sagar, M.P. was being set up and as part of setting up, the appellant awarded a lumpsum contract to M/s Driplex Water Engineering Limited (Contractor), the contractor for setting up RO-DM Water Plant at the premises of the appellant. The dispute also involved the works contract awarded to M/s Bridge & Roof Co. Limited for supply of fired heat for M.H. block (contractor). The contractor discharged service tax under the category of "Works Contract Service" as defined under Section 65 (105) (zzzza) of the Finance Act, 1994. The contractor paid the service tax under the Works Contract Composition Scheme and the appellant availed cenvat credit of the service tax so paid. In terms of the Works Contract Composition Scheme, the contractor was not allowed to avail cenvat credit on inputs used by him in providing the service. The Department during the course of verification of the accounts of the appellant, noticed that the appellant had availed cenvat credit on certain inputs as well as various capital goods. In respect of these inputs and capital goods, the buyer was shown as the contractor but the consignee was shown as Bharat Oman Refineries Limited (BORL) (appellant). The Department was of the view that such cenvat credit on inputs and capital goods was not admissible to the appellant inasmuch as such credits would not have been admissible to the contractor, who has opted to pay the service tax in terms of the Works Contract Composition Scheme. Consequently, show cause notices were issued and vide the impugned order the cenvat credit on inputs and capital goods were denied and the adjudicating authority also imposed penalties. Aggrieved by the decisions, the present appeals have been filed by the appellant.

3. With the above background we heard Sh. B. L. Narasimhan & Sh. Akhil Gupta, Id. Advocates for the appellant as well as Sh. M. R. Sharma, Id. AR representing the Revenue.

4. On behalf of the appellant the main submissions are summarised below:-

(i) In respect of capital goods, it was submitted that the cenvat credit will be allowable in terms of Rule 2(a) of the Cenvat Credit Rules, 2004, in respect of all goods used in the factory of the manufacturer of the final products. All the capital goods for which credit has been availed are undoubtedly used by the appellant in his factory and hence the credit cannot be denied. He relied on the decision of the Tribunal in the case of ***Commissioner of Central Excise, Jalandhar vs. International Tractor Ltd. -2007 (220) ELT 155 (Tri. Del.)*** which was also affirmed by the Hon'ble High Court of Punjab & Haryana reported as ***2010 (255) ELT 196 (P&H)***. Ld. Advocate emphasised that the ownership of the capital goods is immaterial in availing the cenvat credit on capital goods. In this connection, he relied on the decision of the Tribunal in the case of ***Commissioner of Central Excise, Raigad vs. JSW Ispat Steel Ltd. -2015 (327) ELT 549 (Tri. Mum.)***.

ii) He also submitted that credit on capital goods for the appellant cannot be denied by considering the same as inputs for the contractors. In this connection, he referred to the definition of input in Rule 2(a) of the Cenvat Credit Rules, 2004 which specifically excludes capital goods from the purview of inputs.

iii) He however submitted that in respect of inputs, for which cenvat credit was taken by the appellant was in respect of a different service provider. The Tribunal in Final Order No. 52640/2017 dated 30.03.2017 in respect of the same assessee has held that such credit on inputs will not be admissible. The order is under challenge before the Hon'ble High Court.

iv) He also submitted that the demand in respect of inputs has been made by invoking the extended period of time limit under Section 11A but he asserted part of the demand will be time barred inasmuch as the show cause notice has been issued on 30.06.2016 covering the period September, 2008 to April, 2013.

v) In respect of the appellant Appeal No. E/50412/2016, the ld. Advocate adopted the arguments made by Sh. B. L. Narasimhan. However, he added that in respect of the demand confirmed against second appeal, a part of the demand on inputs after 01.07.2012 when the Works Contract Composition Scheme was no longer invoked. Consequently, he submitted that the demand for the period after 01.07.2012 cannot be sustained. He also reiterated the grounds of time bar.

5. Ld. AR appearing for the Revenue justified the impugned orders. He drew our attention to the Works Contract Composition Scheme and referred to the Explanation under Rule 3(i) in which it has been specified that the gross amount charged for the works contract shall be the sum including the value of

all goods used in or in relation to the execution of works contract, whether supplied in other contract for consideration or otherwise.

Accordingly, he submitted that the value of not only inputs but also capital goods are required to be included for payment of service tax under WCS Composition scheme and no cenvat credit on such goods can be allowed to the contractor. Consequently, he justified the impugned order by stating that the credit which cannot be directly allowed cannot be indirectly disallowed.

6. After hearing both the parties at length our considered observations and findings are as follows:

It is the case of the appellant that for setting up crude oil refinery project and plant and machinery, the appellant awarded several contracts for supply, installation and commissioning thereof on lumpsum turnkey basis. On such contract was awarded to M/s Driplex Water Engineering Ltd. for setting up RO-DM water plant at the premises of the appellant. Though M/s Driplex Water has paid the duty under Rule 3(2) of Composition Scheme but the appellant was still entitled to avail cenvat credit on the capital goods of the ownership thereof being lying with the appellant itself. It is submitted on their behalf that as per Service Tax (Determination of Value) Rules, 2006, the value of work contract service is the gross amount charged by the service provider less the value of the transfer of property in goods involved in the execution of works contract which is leviable to VAT / Sales Tax and therefore in no case M/s Driplex Water would avail cenvat credit on the capital goods in the execution of work contract. On the contrary, the Department has putforth that once the gross value of work contract service including the value of inputs used in the sale is already considered for the payment of service tax on the service the value of the goods

used in or in relation to the execution of work contract get subsumed in the gross value of the work contract itself. The goods on which the appellant has taken cenvat credit were very much of the part of the said work contract, hence, once the contractor i.e. M/s Driplex Water was not entitled to avail cenvat credit in terms of sub-rule 3(2), the appellant is not entitled to avail the cenvat credit.

7. From the documents on record, it is apparent that goods on which the appellant has availed cenvat credit have been used by M/s Driplex Water for providing the works contract service. It was M/s Driplex Water who has issued purchase order and procured the goods from manufacturer/ dealer. Thus, it was M/s Driplex Water only who could avail the cenvat credit of the duty paid on inputs/ capital goods used by them in providing the works contract service to the appellant in view of the definition of works contract service under clause (zzzza) of Section 65(105) of the Finance Act, 1994. The inputs/ capital goods used by M/s Driplex Water in the present case cannot be distinguished to be out of the scope of being the work contract service. Thus, the cenvat credit of duty paid on inputs used in providing of the said work contract service was admissible to M/s Driplex Water and not to the recipient thereof i.e. the appellant. It is a fact on record that M/s Driplex Water has availed the benefit of composition scheme under Rule 3(2) by paying the service tax @ 4% of the gross amount including the value of the inputs used in providing the service and as such is barred from availing the facility of cenvat credit on the inputs in furtherance of the provider of the said rule.

8. When the Cenvat credit is not available to the contractor, the said cenvat credit cannot be passed on to the appellant namely M/s Bharat Oman Refineries

Ltd. The CESTAT in the case of M/s ***Gauri Plasticulture Pvt. Ltd.*** (supra) has held that what cannot be done directly is not to be allowed to be done indirectly. In this case when CENVAT credit on the input goods is not to be allowed to the contractor, who is service provider, the same cannot be passed on directly to the appellant, M/s Bharat Oman Refineries Ltd. The case laws cited by the appellant are not applicable to the present facts. The contract has paid service tax under the Composite Scheme, where they have paid service tax at the reduced rate of 4% instead of payment of standard rate of service tax @ 10%, when contractors in both the appeals have exercised this option, they cannot directly or indirectly pass on the CENVAT credit of any input goods to the recipient of their services. Under the CENVAT scheme the CENVAT credit is passed on by using the invoice documents, which are to be transferred to the buyer of the goods only. Here buyer of the goods is the contractor and not the appellant M/s Bharat Oman Refineries Ltd. The fact that invoice mentions the appellants as consignee and the goods were delivered directly at appellants premises is also not relevant for the purpose for the reasons as discussed above. Now coming to the plea of show cause notice being barred by limitation, we are of the considered view that appellants themselves entered into the contract. They were very much aware of terms and conditions thereof and even the legal implications thereof. Ignorance of law about work contracts and respective consequences also the respective liabilities cannot be a ground to extend any benefit to the appellants. This is apparent that the fact of availing the benefit of comparison scheme by the contractors was very much in knowledge of the appellants. Again the ignorance to the legal consequences thereof cannot be the excuse rather we opine it to be the positive act on part of the appellants

committing suppression of facts thereby entitling the department to invoke the extended period of limitation.

9. In view of above discussions, the order under challenge is held to have no infirmity and is accordingly ordered to be sustained. As a result, the appeals are hereby dismissed.

(Pronounced on 20.06.2018).

(V. Padmanabhan)
Member (Technical)

(Rachna Gupta)
Member (Judicial)

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