IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

WEST BLOCK NO.2, R.K. PURAM, NEW DELHI-110066

BENCH-SM

COURT – IV

Excise Appeal No. E/52523/2018 [SM]

[Arising out of Order-in-Appeal BHO-EXCUS-001-APP-037-18-19 dated 20/04/2018 passed by the Commissioner of Central Excise & Central Goods and Service Tax, Bhopal]

Pappu Construction **...Appellant**

Vs.

CGST, C.C. & C.E., Jabalpur **...Respondent**

Present for the Appellant : Mr. Z.U. Alvi, Advocate
Present for the Respondent: Mr. K. Poddar, DR

Coram: HON'BLE MRS. RACHNA GUPTA, MEMBER (JUDICIAL)

Date of Hearing: 26.10.2018
Pronounced on : 04.12.2018

FINAL ORDER NO. 53351/2018

PER: RACHNA GUPTA

The Appeal in hand has been filed being aggrieved of Order of Commissioner(Appeals) No. 18-19 dated 20.04.2018. Relevant facts for the adjudication are that the appellants are registered for providing services in the category of mining of mineral, oil or gas services. On the basis of intelligence gathered, it was noticed that the appellant is providing the said services to Madhya Pradesh State Mining Corporation Ltd. (hereinafter called as Corporation), however is not discharging the whole tax liability. Notices were accordingly served to the appellant to provide the requisite documents. Despite repeated reminders, the documents were not provided by the appellants. It is in furtherance of notices to the Corporation that details of payment made to the noticee alongwith the

copies of bills issued by the noticee for the period of 2011-12 to 2015-16 alongwith the copies of work order between them were provided to the Department. On perusal thereof, the Department alleged as follows:

(i) Noticee/ appellant have short paid the service tax amounting to Rs. 11,43,240/- during financial year 2011-12 to 2015-16 and has suppressed the facts from the Department.

(ii) The appellant has wrongly availed the cenvat credit of Rs. 4,58,476/- on capital goods and utilised the same for payment of service tax for the period July-September 2012-13.

(iii) The appellant has filed ST-return for the period April-September 2011-12 on 22.04.2012 i.e. after a delay of 98 days but has not paid the late fee.

Resultantly, A Show Cause Notice No. 293 dated 24.01.2017 was served upon the appellant proposing the aforesaid demand and a late fee of Rs. 7,200/-. In addition, the interest at the appropriate rate and the penalty of the same amount was also proposed to be levied. The said Show Cause Notice was initially adjudicated vide Order No. 22-34 dated 12.01.2018 vide which the demand of alleged short amount of service tax of Rs. 11,43,240/- was dropped. However, all the remaining demands were confirmed. Being aggrieved, the Appeal was filed before Commissioner(Appeals) who vide the Order under challenge has upheld the initial Order. Still being aggrieved, the Appeal is before this Tribunal.

2. We have heard Mr. Z.U. Alvi, Ld. Advocate for the appellant and Mr. K. Poddar, Ld. DR for the Department.

3. It is submitted on behalf of appellant that during the relevant period of time, appellant were executing mining contracts at Hirapur, District Sagar as well as at Megh Nagar District Jhabua. For the purpose of excavation of rock phosphate and crushing the same, appellant ordered two machines for executing the contract at Megh Nagar site however by the time machines could arrive, the machines were diverted to appellant's Hirapur site where the credit was taken during quarter April-June 2011 and same was duly exhibited/ reported in appellants ST-3 return for the period April-June 2012. It is further submitted that ST-3 returns both for Megh Nagar for the period October 2011 to June 2012 and for Hirapur for the period April 2011 and June 2012 were duly enclosed on the record showing that the appellant has availed credit only at Hirapur site and not at Megh Nagar site. Resultantly, the cenvat credit availed has wrongly been denied to the appellant. The appellant had made a substantial compliance of Rule 9 of Cenvat Credit Rules, 2004 however with minor departure there from. The same cannot be a ground to deny a lawful right to the appellant. Ld. Advocate has relied upon **Crazy Candies and Sweets Pvt. Ltd. Vs. C.C.E., Allahabad 1998 (102) E.L.T. 161 (Tri. – Del.)**. He has also relied upon Circular No. 211/45/96-CX dated 14.05.1996 clarifying about the problem faced in availing modvat in the name of registered office/ head office but actually availed by the factory. The Order to the extent of denial of the availment of cenvat credit and imposition of late

fee alongwith the penalties is therefore prayed to be set aside, Appeal is prayed to be allowed.

4. Ld. DR has justified the Orders of adjudicating authorities below. It is impressed upon that the proposed demand has partially been dropped by the authorities below. The demand confirmed has sufficient reasoning in the Order under challenge. There is the apparent non compliance of Rules 9, 7 and 12 of Cenvat Credit Rules, 2002 on part of the appellant. There is no infirmity, as alleged, in the Order under challenge. Appeal is prayed to be dismissed.

5. After hearing both the parties and perusing the entire record, we are of the opinion that the demand of alleged short levy has already been dropped by the authorities below. No appeal has been filed by the Department against the same. There otherwise appears no infirmity in the findings based on the statement of services provided during the relevant year, as provided by the appellant alongwith the ledger accounts of the service recipients that the appellant have paid service tax in excess during the period in question and that the charge of short payment of service tax as alleged in Show Cause Notice is not based on any evidential proof. The findings are therefore upheld.

6. Now coming to the findings about confirming the recovery of the Cenvat credit of Rs. 4,58,476/- alleging the same to be wrongly availed. It is observed that the credit has

been availed on the purchase of two machines vide two invoices dated 06.06.2011 and 24.12.2011 which were to be used to execute the work order of mining between the Corporation and the appellant. The work orders were with respect to two sites namely Hirapur and Megh Nagar. The machines though were purchased for Megh Nagar site however were diverted to Hirapur site. The ST-3 returns for both the sites are not denied to be produced by the appellant on record. Perusal thereof makes it abundantly clear that the cenvat credit for both these machines has been availed only with respect to Hirapur site. There is no dispute about these machines to be the capital goods used for providing the output service. The only controversy remains is as to whether the invoices bearing different address of the service provider than the one for which the credit has been availed is the violation of Rule 9 of CCR, 2004. We are of the opinion that the service provider for both the sites is same and has been commonly registered for both the sites. In the given circumstances, the credit is rather permissible to be taken on both these machines by the appellants in another unit irrespective of the invoices showing the different address of the appellant. We draw our support from the decision of this Tribunal in the case **Tooltronic Vs. C.C.E. 2006(205) E.L.T. 946**. Even the CBEC Circular as relied upon by the appellant has clarified that where the goods are ordered by registered / head office of the assessee and the invoice does not bear the consignee address, the credit ought not to be denied.

7. Now coming to the alleged lapse on part of the appellant qua the alleged procedural compliance, we are of the opinion that irrespective the Rule 9 required the production of original documents with complete particulars but it is quite oblivious that if the documents is not produced in original or if lost, the claim will not to be defeated especially when the Department is not in dispute about receipt of goods, their use in providing the output service and about the duty paid character of inputs. The Hon'ble High Court of Madhya Pradesh in the case of **Union of India Vs. Kataria Wires Ltd. 2009 (241) E.L.T. 31 MP** has held that since the duty was paid for the inputs and inputs were used in captive consumption for manufacture of final product merely because original and duplicate copy as required by Rules were lost, the claim could not be defeated. The Larger Bench of this Tribunal in the case **Kamakhya Steel Vs. C.C.E. 2000 (121) E.L.T. 247** has consistently held that once duty paid character of goods, receipt at works and utilisation thereof stood established, credit ought not to be denied on procedural lapses/ minor deviations. Based thereupon we are of the opinion that findings of Commissioner(Appeals) that the invoices produced by appellant are not containing correct address of the appellants registered premises but are having address of their other premises has wrongly been considered as a ground to deny the availment of cenvat credit on the capital goods used by the appellants for providing the output service. Similarly, the findings about absence of all the particulars as prescribed

under Central Excise Rules, 2002 / Rule 9(2) of CCR, 2004 are not sustainable. These findings are therefore set aside.

8. Now coming to the allegation of payment of late fee, it is observed that details of amount received and service tax paid for the last 5 years of period in dispute were provided by the appellant to the Department. Based thereupon, it is the finding of the authorities below that the service tax was paid in excess by the appellant during the period in question. Confirming the demand of late fee is apparently a contradictory finding and resultantly is not sustainable.

9. Finally coming to the imposition of penalty, the onus was of the Department to prove the suppression of fact on part of the appellant to evade the payment of duty but the record of the matter and even the findings of the appellate authority are sufficient to prove that the appellant has been paying the excess duty for some of the financial years of the period in dispute and had been adjusting the same qua short payment is sufficient to hold that there is no intent to evade the duty. In absence thereof no question arises for imposition of penalty. The Order to that extent is also liable to be set aside. In view of entire above discussion, the Order under challenge is set aside. Resultantly, the Appeal in hand stands allowed.

[Pronounced in the open Court on 04.12.2018]

(RACHNA GUPTA)
MEMBER (JUDICIAL)

D.J.