CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD
Division Bench
Court – I

Appeal No. E/777/2011

(Arising out of Order-in-Original No. 26/2010 (S. Tax.) dated 30.11.2010 passed by Commissioner of Customs, Central Excise & Service Tax, Tirupati)

M/s India Cement Ltd., …..Appellant(s)

Vs.

Commissioner of Central Excise, Customs and Service Tax, Tirupati …..Respondent(s)

Appearance
Shri G. Prahlad, Advocate for the Appellant.
Shri Dora Reddy, (AR) for the Respondent.

Coram:
Hon'ble Mr. M.V. RAVINDRAN, MEMBER (JUDICIAL)
Hon'ble Mr. C.J. MATHEW, MEMBER (TECHNICAL)

Date of Hearing: 20/02/2018
Date of Decision: 20/02/2018

FINAL ORDER No. A/30468/2018

[Order per: M.V. Ravindran]

This appeal is directed against Order-in-Original No. 26/2010 (S. Tax.) dated 30.11.2010.

2. Heard both sides and perused the records.

3. On perusal of records, it transpires that the issue is regarding denial of CENVAT credit of the service tax paid on inward freight during period April, 2005 to February, 2009, on the ground that appellant has availed CENVAT credit before the payment of service tax to the Government of India. During the relevant period in question, appellant is required to discharge the service tax liability on the freight charges incurred by them under reverse charge mechanism; they were discharging the service tax liability and are eligible to avail CENVAT credit of such service tax. It was noticed during the scrutiny of records, that service tax liability for the month of April, 2005 on GTA Services was discharged by the appellant on 4th May, 2005 while they availed the CENVAT credit of such service tax credit on 30th April, 2005 itself and followed the same practice. Show cause notice was issued for reversal of such CENVAT credit availed along with interest and also imposition of penalty. Appellant contested the show cause notice on merits as also on limitation. The Adjudicating Authority after following due process of law, did not agree with the contentions raised by appellant and confirmed the demands so raised along interest and imposed penalties under Rule, 15(2) of the CENVAT Credit Rules, 2004 and under Rule 25 of the Central Excise Rules, 2002.

4. Learned Counsel brings to our notice, from the records appellant had discharged the service tax liability as per the provisions of Central Excise Rules, 2002 and that they are eligible to avail

CENVAT credit of such service tax paid. It is his submission that there is no dispute as to eligibility to avail CENVAT credit, the impugned order confirming the demand for reversal is incorrect and needs to be set aside as held by the Tribunal in the case of *Emerson Innovation Center, Pune Vs. CCE, Pune* [2016-TIOL-3217-CESTAT-Mum]. It is his further submission that interest is not payable as they have not used to CENVAT credit availed as the credit lying in the balance was far in excess of the credit availed by them. On limitation he would submit that the judgment of Hon'ble High Court of Allahabad in the case of *CCE, Noida Vs. Accurate Chemical Industries* [2014 (310) ELT 441 (All.)] would apply in the said case, Hon'ble High Court was held that extended period cannot be invoked if assessee is filing regular returns and disclosing the credit so availed. It is also his submission that issue is Revenue Neutral as even if the credit is availed subsequent to the payment made by appellant, there is no loss to the Government.

5. Learned Departmental Representative reiterates the findings of the lower authorities.

6. On careful consideration of the submissions made, we find that the service tax liability on the GTA Services under reverse charge mechanism for the period in question is not disputed by both sides; as also the discharge of such service tax liability by the

appellant. It seems that the appellant has availed such service tax credit before discharging the same to the Government of India. We find that the absence of any dispute that appellant has discharged the tax liability as per the provisions of service tax rules and there also being no dispute as to eligibility to avail CENVAT credit of the said service tax payable by them under reverse charge mechanism, we find that availing CENVAT credit before few days in advance is only a procedural lapse. This ratio has been laid down by the Tribunal in the case of Emerson Innovation Center, Pune (supra) wherein it was held as under:

> ***4.*** *We have carefully considered the submissions made by both the sides and perused the records. We find that the rejection of refund to the extent of Rs. 17,57,529/- was upheld by the Ld. Commissioner on the admitted fact that at the time of taking credit the service charges and service tax thereon was not paid but it is also accepted that the same has been paid subsequently. In our view at the time of sanction of refund when the service charges and service tax stood paid to the service provider the refund cannot be denied for the reason that the appellant was not entitled for the CENVAT credit initially. But after payment of service charges and service tax to the service provider they became entitled for the CENVAT credit and the sanction of refund claim thereafter cannot be disputed. The decision of this Tribunal in the case of Gujarat Pipavav Port Ltd., (supra) squarely applies in the facts of the present case wherein it was held as under:*
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> > *"2. Learned Advocate appearing for the appellants submits that this was a procedural lapse on the part of the appellant in availing advance service tax credit prior to the payment of service tax of input service availed by them but ultimate credit is available to them in the next month. They are ready to pay interest for the intervening period. I agree with the above contention of the learned Advocate. The entire credit cannot be denied to them. Admittedly, the same stands availed premature and in any case was available during the subsequent period. In as much, as, the same is utilized by the appellant, interest in accordance with law is required to be paid. Taking a lenient view, I do not find it a fit case for imposition of penalty.*
> > *3. In view of the above, denial of credit and imposition of penalty is set aside. Interest as per law is confirmed."*
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> *From the above decision it can be seen that only credit availed at premature stage cannot be reason for denial of credit. In the above decision, it was held that at the most interest can be charged. In the present case, the fact is that the CENVAT credit was availed only for claiming the refund under*

> *Rule 5 and there was no utilization of the credit of payment of service tax. Therefore, even the interest is not applicable in the facts of the present case. As per our above discussion and taking support of the case of Gujarat Pipavav Port Ltd., (supra), the impugned order is modified and the appeal is allowed.*

Respectfully following the same, we hold the demand of CENVAT credit as availed wrongly cannot be sustain on merits and on limitation also. We find that the show cause notice was issued to the appellant by invoking the extended period while it is on record that appellant had regularly filed the monthly returns with the authorities indicating there on the availment of CENVAT credit for particular month. In our view, the ratio of the Hon'ble High Court of Allahabad in the case of *Accurate Chemical Industries* (supra) would directly apply and it has to be held that show cause notice dated 01.04.2010, in the case in hand seeking the demand an amount for which credit was availed in April, 2005 to February, 2009 is blatantly time barred. Since we set aside the demands on merits as well as on limitation, we find question of penalty does not arise.

7. The impugned order is set aside and the appeal is disposed of as indicated herein above.

(Operative part of this order was pronounced in open court
on conclusion of hearing)

C.J. MATHEW
MEMBER (TECHNICAL)

M.V. RAVINDRAN
MEMBER (JUDICIAL)

Lakshmi….