

CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD
Single Member Bench
Court - I

APPEAL No. E/30502/2018

*(Arising out of **Order-in-Appeal** No. HYD-EXCUS-MD-AP2-0228-17-18-CE, dated 25.01.2018 passed by Commissioner(Appeals-II), Hyderabad)*

SHAKTI HORMANN PVT. LTD., .. APPELLANT

Vs.

CCT, CE&ST, Medchal GST .. RESPONDENT

Appearance

Shri Karan Talwar, Advocate for the Appellant.

Shri Moin. Anwar, Asst. Commissioner/AR for the Respondent.

Coram:

Hon'ble Mr. M.V. Ravindran, MEMBER (JUDICIAL)

Date of Hearing: 04.12.2018

Date of Decision: 04.12.2018

FINAL ORDER No. A/31495/2018

[Order per: Mr. M.V. Ravindran]

1. This appeal is directed against Order-in-Appeal No. HYD-EXCUS-MD-AP2-0228-17-18-CE, dated 25.01.2018.

2. The relevant facts that arise for consideration are appellant herein is the manufacturer and sale of steel doors and also provides taxable services; is engaged in trading of hardware items. Appellant availed CENVAT credit of common input services as also input services and inputs;

had not availed CENVAT credit of service tax paid on services utilised for exempted services and reversed the CENVAT credit attributable to trade activity based upon the turnover as provided under Rule 6(2) of Cenvat Credit Rules, 2004. It is the case of Revenue that appellant having not maintained separate accounts for the input services used for taxable and non-taxable services, is required to pay an amount as provided under Rule 6(3A) of CCR 2004. Appellant in his reply to the show cause notice pointed out that they had in fact availed CENVAT credit of the common input services attributable to the taxable services and had not availed the CENVAT credit for the non taxable activity i.e. trading activity and explained the rationale as to that this has been done based upon the trading activity to the total turnover. Not satisfied with such an explanation, show cause notice was issued stating that the method adopted by appellant is incorrect and non-permissible and he should have reversed an amount as per provision of Rule 6(3A) of CCR 2004. Adjudicating authority, after following due process of law, confirmed the demands so raised along with interest and imposed penalties. The first appellate authority also disposed of the appeal upholding the view of the adjudicating authority.

3. Ld. Counsel after drawing my attention to the facts of the case submits that the issue is covered by the decisions of the Tribunal in the case of Sify Technologies Ltd. vs. CST, Chennai [2016-TIOL-911-CESTAT], Sanjay Automobile Engineering Pvt. Ltd. vs. CCE, Pune-III [2016-TIOL-1314-CESTAT-MUM] and Trans Asian Shipping Services Pvt. Ltd. [2018(9) TMI 922-CESTAT-Bangalore]. It is his submission that the

first appellate authority has tried to deviate/distinguish the judgment of the Tribunal in the case of Sify Technologies Ltd. only on the ground that the provisions of Rule 6(2) were worded differentially at that time and used differentially during the period in question in this appeal. He draws my attention to the provisions of Rule 6(2) which is to be interpreted in the case in hand. He would submit that they are covered by the provisions of Rule 6(2). Further, it is his submission that the demands are hit by limitation as the extended period is invoked for demanding ineligible CENVAT credit and that during the period in question, appellants filed returns with the authorities regularly and audit has taken place and the decision of the Tribunal in the case of Sanjay Automobile Engineering Pvt. Ltd. is on the same issue wherein the Tribunal took a view that if one audit is carried out then the extended period cannot be invoked. It is his further submission that the department has been conducting EA 2000 audits every year without break and in none of the audits this anomaly which is said to be pointed out, was indicated.

4. Ld. DR on the other hand submits that the provisions of Rule 6(2) is applicable for the period in question i.e. March 2012 to March 2015 indicates that appellant should maintain separate accounts for the goods and services used in relation to the provision of output services excluding exempted services.

5. On careful consideration of the submissions made by both sides, I find that there is no dispute as to the fact that appellant is eligible to avail

CENVAT credit of various input services; has maintained separate accounts for the services which are received exclusively for exempted services; that they are undertaking trading activity for which common services were received. Appellant during the period in question i.e. March 2012 to March 2015 had reversed the CENVAT credit, attributable to the trading activity (exempted services) on a mathematical formula which was followed by him which is the turnover of the trading activity of the total turnover multiplied by CENVAT credit availed on common input services, that every month they have been filing the returns with the authorities giving all the details of such reversals; that many audits have taken place in the factory premises and only in subsequent audit, had brought out this anomaly.

6. Relevant provisions of Rule 6 which is applicable for the period in question, needs to be reproduced which is as under:

“6(1) The CENVAT credit shall not be allowed on such quantity of input or input service which is used in the manufacture of exempted goods or for provision of exempted services, except in the circumstances mentioned in sub-rule(2).

Provided *that the CENVAT credit on inputs shall not be denied to job worker referred to in rule 12AA of the Central Excise Rules, 2002, on the ground that the said inputs are used in the manufacture of goods cleared without payment of duty under the provisions of that rule.*

6(2) Where a manufacturer or provider of output service avails of CENVAT credit in respect of any inputs or input services, and manufactures such final products or provides such output service which are chargeable to duty or tax as well as exempted goods or services, then, the manufacturer or provider of

output service shall maintain separate accounts for receipt, consumption and inventory of input and input service meant for use in the manufacture of dutiable final products or in providing output service and the quantity of input meant for use in the manufacture of exempted goods or services and take CENVAT credit only on that quantity of input or input service which is intended for use in the manufacture of dutiable goods or in providing output service on which service tax is payable.”

7. It is seen from the above reproduced provisions that the intention of the Legislature was that a manufacturer or a service provider should not avail the entire CENVAT credit of the service tax paid on common input services and should avail proportionate credit attributable to the taxable output service for which the CENVAT credit Rules provides for maintaining separate accounts. In my view, appellant herein has followed this rule by taking the credit of only an amount which is attributable to the taxable services provided by him and not availing the CENVAT credit of the input services which are attributable to the trading activity. By availing only the CENVAT credit of the service tax paid attributable to the taxable services, in my view, appellant had complied with the provisions of Rule 6(2). I do find that the judgment of the Tribunal in the case of Trans Asian Shipping Services Pvt. Ltd. (supra) is directly on the point and in para No. 6.1 it is held as under.

“6.1 As submitted by the learned counsel for the appellants, we find that the appellants have issued guidelines for their internal accounting purposes regarding the credit to be availed in respect of services rendered. They are taking the credit on services which are used wholly in taxable services as direct credit and the credit used in exempted services is being written off in the Profit and Loss Account. In case of input services which are used in taxable as well as exempted services, they are making the reversals at the end of the month. In view of the above, it is evident that appellants have

maintained separate records as required under CENVAT Credit Rules. They have produced Chartered Accountant certificates before the learned Commissioner, however, out of above five appeals, only in one case the Commissioner has caused a factual enquiry and has stopped the proceedings. It is not understood as to why such an enquiry was not conducted in respect of other show-cause ST/1252/2010; ST/1721/2011; ST/1700-3466/2012; & ST/21676/2014 12 notices. Understandably, the appellants are a big entity spread over different countries and different places in India as there is no prescribed manner for maintenance of records under CENVAT Credit Rules, the records maintained by the appellants have to be accepted as records for the purpose of observing the conditions of CENVAT Credit Rules. Moreover, we find that the Chartered Accountant has given a categorical certificate that the appellants are maintaining separate records and have been making reversals of the balance amounts at the end of every month.”

In the case of Sify Technologies Limited, the issue is more specific and in para No. 8, 9 & 10, the Bench held as under:

*“8. Factually, the appellant has made its case very clear that it had received input services for its departments tabulated in **Table-C**. The input tax suffered on such services were allocated substantially to the departments in **Table-A** which provided taxable service and a minor part thereof to the department in **Table-B**. To this extent, the facts remained undisputed. Reversal of cenvat credit of Rs.6,66,423/- taken by department in **Table-B** is also undisputed by Revenue. The only ground of denial of cenvat credit of Rs.1,11,07,075/- is that the department in **Table-B** of appellant availed part of the cenvat credit earned by the department in **Table-C**.*

*9. A bare reading of sub-rule (2) and sub-rule (3) of the CCR 2004 makes clear that sub-rule (3) contains overriding provision which is independent in its nature irrespective of anything stated in sub-rule (1) and sub-rule (2) of CCR 2004. When sub-rule (2) is read that throws light that appellant has chosen a way of maintaining its record which enabled it to substantially allocate the cenvat credit of service tax suffered by the departments in **Table-C** and partly to the department in **Table-B**. It has complied to the provisions of sub-rule (2) of Rule 6. Once the conduct of the appellant in the manner indicated by the material facts stated above is very clear because of the proportionality of the credits allocated, due to its division of the department and maintenance of records, there cannot be any presumption by Revenue that the appellant's*

case falls under Rule 6 (3) of CCR 2004. It is also apparent from record that the order passed by the Authority below is unreasonable for the reason that as against credit of Rs.6,66,423/- allocated to the department in **Table-B** which provided exempted service, disallowance of entire credit of **Rs.1,11,07,075/-** allocated to Departments in **Table-A** providing taxable service is contrary to the principal of proportionality. Therefore, entire disallowance does not call for any decision in favour of Revenue.

10. As an abundant caution, to make sure that the mathematical exercise is properly made by the appellant for allocation of credit rationally, the matter is remitted to the Adjudicating Authority to a limited extent to examine the allocation of the credit received by the appellant through departments in **Table-C** and allocable to departments in **Table-A** in the manner the appellant has carried out. Appellant's averment that the credit of Rs.6,66,423/- allocated to the department in **Table-B** is reversed needs to be examined.”

The above cited two decisions of the Tribunal are directly on the point of Rule 6(2) which, I find, are applicable in the case in hand and applying the ratio as reproduced herein above of the decisions of the Tribunal, I hold on merits the impugned order is unsustainable and liable to be set aside and I do so.

8. As regards the question of invoking the extended period in a situation wherein the records of the appellant were audited time and again by EA 2008 audit, I find that Ld. Counsel was correct in bringing to my knowledge that the Tribunal in the case of Sanjay Automobile Engineering Pvt. Ltd., following the judgment of Hon'ble High Court of Karnataka in the case of MTR Foods [2011-TIOL-695-HC-KAR-CX] held that there cannot be any allegation of mis-statement or suppression of facts when audits have been conducted at regular intervals. In the case in hand, I find that audits were

regularly conducted and this objection was never raised, in view of it, even on limitation also appellant succeeds.

9. In view of the foregoing, appeal of the appellant succeeds on merits as well as on limitation.

10. Impugned order is set aside and appeal is allowed.

(Operative portion of the order pronounced in open court on conclusion of hearing)

**(M.V. RAVINDRAN)
MEMBER (JUDICIAL)**

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