CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL REGIONAL BENCH AT HYDERABAD

Single Member Bench

Court – I

Appeal No. E/30254/2019
(Arising out of Order-in-Appeal No.TTD-EXCUS-000-APP-129-18-19 dt.31.12.2018 passed by CCT & C (Appeals), Guntur)

M/s Zuari Cement Ltd,
Krishna Nagar, Yarraguntla,
Kadapa District, Andhra Pradesh – 516 311 **......Appellant**

VERSUS

Commissioner of Central Tax, Tirupati -GST
West Church Compound, MR Palli Road,
Chitthoor, Andhra Pradesh – 517 507 **......Respondent**

Appearance
Shri Ch. Sumanth, Chartered Accountant for the Appellant.
Shri V.R. Pavan Kumar, Authorized Representative for the Respondent.

Coram:
HON'BLE MR. P. VENKATA SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER No. A/30673/2019

Date of Hearing: 04.07.2019
Date of Decision: 04.07.2019

[Order per: P.V. SUBBA RAO.]

1. This appeal is filed by the appellant against Order-in-Appeal No. TTD-EXCUS-000-APP-129-18-19 dated 31.12.2018.

2. The brief facts of the case are that the appellant herein is a manufacturer of Cement and Clinker falling under Chapter Heading 25 of the Central Excise Tariff Act, 1985. Their Head Office in Bangalore received certain services and paid for the services along with service tax. They have distributed credit of service tax so availed in their head office among their factories including the appellant herein through an ISD invoice. Along with ISD invoice issued by the appellant is a list of details of invoices on the basis of which ISD invoice has been issued and the corresponding services. A Show Cause Notice dated 28.04.2016 was issued covering the period April, 2011 to January, 2016 invoking extended period of limitation, seeking to deny credit of service tax paid on input services transferred to them by their

head office through ISD invoice in respect of (a) Air Travel services, (b) Repair and Maintenance services and (c) Annual Maintenance Charges (AMC). It is the allegation in the SCN that as far as the air travel services are concerned, the benefit of the air travel flows directly to individual employees and therefore, is excluded from the definition of input service. As far as the repair and maintenance services and AMC services are concerned, it is the allegation in the SCN that both of these services are in the nature of Works Contract services and are therefore, excluded from the definition of input service as per the exclusion clause in Rule 2(l) of the Cenvat Credit Rules (CCR), 2004. Accordingly, a credit of Rs.19,67,686/- was sought to be denied and recovered along with interest and it was also proposed to impose an equivalent amount of penalty upon the appellant for wrongly availing Cenvat credit.

3. After following due process, the original authority has disallowed the Cenvat credit as above and ordered it to be recovered under Rule 14 of CCR, 2004 read with Proviso to section 11A of Central Excise Act, 1944. He also confirmed recovery of interest under section 11AA read with Rule 14 of CCR, 2004. Further, he also imposed an equivalent amount of penalty under Rule 15(2) of CCR, 2004 read with section 11AC of Central Excise Act, 1944 for availing ineligible Cenvat credit distributed by their head office.

4. Aggrieved, the appellant appealed to the first appellate authority who rejected their appeal and upheld the order of the original authority. Hence, this appeal.

5. Learned Chartered Accountant (CA) appearing for the appellant submits that in the first place with respect to some period of the demand i.e., October, 2013 to September, 2014 an SCN has also been issued to their head office who were registered as input service distributor. This SCN has been dropped by their adjudicating authority. Therefore, the very basis on which SCN is raised is doubtful. Notwithstanding this assertion, he submits that the three disputed services are air travel services, repair and maintenance service and annual maintenance charges.

6. As far as air travel services are concerned, he submits that these pertain to services availed by them for official air travel of their employees, auditors, etc., in connection with their official work. Therefore, they are not

excluded by Rule 2(l) of CCR, 2004. He draws attention of the bench to this rule which is as follows.

> *"(l) "input service" means any service, -*
>
> *i. used by a provider of output service for providing an output service, or*
> *ii. used by a manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products from the place of removal,*
>
> *and includes services used in relation to setting up, modernization, renovation or repairs of a factory, premises of provider of output service or an office relating to such factory or premises, advertisement or sales promotion, market research, storage upto the place of removal, procurement of inputs, activities relating to business, such as accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry, and security, inward transportation of inputs or capital goods and outward transportation upto the place of removal;*
>
> *but excludes*
>
> *(A) service portion in the execution of a works contract and construction services including service listed under clause (b) of section 66E of the Finance Act (hereinafter referred as specified services) in so far as they are used for –*
>
> *a) construction or execution of works contract of a building or a civil structure or a part thereof; or*
> *b) laying of foundation of one or more of the specified services; or*
>
> *(B) service provided by way of renting of a motor vehicle, in so far as they relate to a motor vehicle which is not a capital goods; or*
>
> *(BA) service of general insurance business, servicing, repair and maintenance, in so far as they relate to a motor vehicle which is not a capital goods, except when used by –*
>
> *a) a manufacturer of a motor vehicle in respect of a motor vehicle manufactured by such person; or*
> *b) an insurance company in respect of a motor vehicle insured or reinsured by such person; or*
>
> *(C) such as those provided in relation to outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, membership of a club, health and fitness centre, like insurance, health insurance and travel benefit extended to employees on vacation such as Leave or Home Travel Concession, when such services are used primarily for personal use or consumption of any employee;"*

7. He would assert that clause (c) of the exclusion part of the definition excludes only such services which are primarily for personal use or consumption of any employee. When an employee or an advocate or an auditor travels for official work there is no personal use or consumption by such employee, auditor or advocate. Therefore, such travel is not excluded from the definition of input service. He demonstrates this argument with few invoices which indicate that the travel was on account of official work. Further, he argues that neither in the SCN nor in the impugned order, the

department has established that travel was for personal work. Therefore, they are entitled to Cenvat credit.

8. As far as the repair and maintenance services and AMC services are concerned, he would assert that undisputedly in both these cases, the contracts are for both supply of materials and rendition of services. Therefore, these can be considered as Works Contract services. However, the tax has been paid as indicated under repair and maintenance services and AMC services. The classification of service at the service provider's end cannot be altered at the recipient's end. Notwithstanding this argument, he would assert that all works contracts are not excluded from the definition of input service under Rule 2(l) of CCR, 2004. He would assert that as per clause (A) of the exclusion portion of the definition, only service portion in the execution of services of construction are excluded in so far as they are used for "construction or execution of works contract of a building or a civil structure or a part thereof or laying of foundation or making of structures for support of capital goods". He would assert that in their particular case both repair and maintenance services and AMC services are towards maintenance of office equipment and carpets etc., in their head office. The services used in office relating to the factory or premises are specifically included in the inclusive part of the definition of input services. The exclusion part only excludes works contract services if they are meant for building civil structure or making foundation for capital goods. He demonstrates through a sample invoice that the services in question are not meant for either construction or execution of works contract services or for laying foundations. Therefore, they are entitled to the Cenvat credit. Accordingly, they may be allowed Cenvat credit and the entire demand including interest and penalties may be set aside. As far as air travel services are concerned, he relies on the following case laws.

i. Xilinx India Tech Services Pvt Ltd Vs CCE & ST, Hyderabad–IV [2017 (1) TMI 658 – CESTAT Hyderabad]

ii. John Deere India Pvt Ltd Vs CCE, Pune-III [2016 (41) STR 990 (Tri-Mumbai)]

iii. Roha Dyechem Pvt Ltd Vs CCE, Raigad [2018-TIOL-323-CESTAT-Mum]

iv. Robert Bosch Engg & Business Solutions Ltd Vs CCE, Bangalore-LTU [2017 (51) STR 329 (Tri-Bangalore)]

v. Telco Construction Equipment Co. Ltd Vs. CCE, Belgaun [2011 (1) TMI 685-CESTAT Bangalore]

As far as Repair and Maintenance services and AMC are concerned, he relies on the following case laws.

i. CST, Mumbai-II Vs MMS Maritime (India) Pvt Ltd [2016 (41) STR 869 (Tri-Mumbai)]

ii. Bharat Oman Refineries Ltd Vs CGST CCE, Bhopal [2019-TIOL-839-CESTAT-Delhi]

9. Learned departmental representative reiterates the findings of the appellate authority. He asserts that the burden of proving that they are entitled to Cenvat credit rests upon the assessee. It is up to him to ensure that Cenvat credit is properly taken. As far as air travel services are concerned, the appellant has not demonstrated, as recorded by the first appellate authority in Para 6 of the impugned order, that they did not produce any evidence to establish that air travel was meant for official work. Further, he argues that exclusion part of the input services definition specifically covers works contract services and it is undisputed that nature of the services in this case with respect to disputed invoices included both provision of material and rendition of services. Therefore, it falls under the definition of works contract. The impugned order may therefore by upheld and the appeal may be rejected.

10. I have considered the arguments on both sides and perused the records. The SCN seeks to deny Cenvat credit on (a) air travel services (b) repair and maintenance services and (c) annual maintenance charges.

11. As far as air travel services are concerned, it is sought to be denied on the ground that the travel was for personal benefit of employees. The SCN did not adduce any evidence to show that the travel was only on personal account and the benefit of the travel went to individual employees. On the other hand, learned CA has produced some invoices showing that the travel was for the purpose of official work. Learned first appellate authority had in his order sought to deny credit on this head on the ground that appellant

was not able to establish that it was not for personal work. I do not agree with the first appellate authority. When the SCN was issued, some evidence must be produced along with it to show why it is proposed to deny the credit. Otherwise the presumption is that the credit has been properly taken. In this case, it is not in dispute that air travel services are not entirely excluded from the benefit of Cenvat credit. They get excluded only if they are meant for personal use of officers. This fact has not been established by the revenue in the SCN or in the OIO or OIA. From the sample invoices which have been produced before me, I am convinced that travel in question was for official work. Accordingly, I allow credit of service tax paid on air travel services.

12. As far as repair and maintenance services and AMC services are concerned, undisputedly both these pertain to contracts which involved both supply of material and rendition of services and therefore, can be considered as works contract services. However, the input invoices paid the amounts under different heads. They have not paid it under works contract services. The classification of any goods or services at the input invoice stage cannot be altered while deciding eligibility of credit to the recipient. Therefore, the classification cannot be altered in this case as well. Further, I find that the works contract services entered into only with respect to construction of buildings or part thereof or laying the foundation for setting up capital goods is excluded. All works contract services are not excluded from the definition of input services. In this case, the works contract services pertain to, as was seen by me from the sample invoices, either maintenance of office equipment or cleaning of carpets, etc., which were used at the head office. Accordingly, I find that the appellant is entitled to Cenvat credit on these services as well.

13. In view of the above, the impugned order is set aside and the appeal is allowed with consequential relief.

(Order dictated and pronounced in open court)

(P.VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

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