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

Division Bench - Court – I

SERVICE TAX APPEAL No. 1979 OF 2011

(Arising out of Order-in-Original No. 37/2011 (MP), dated 20.06.2011 passed by Commissioner of Central Excise, Customs & Service Tax, Visakhapatnam-I)

SRAVAN SHIPPING SERVICES .. **APPELLANT**
C-1, Sri Ramakrishna Arcade,
Daba Gardens,
VISAKHAPATNAM – 530 020.
Andhra Pradesh

Vs.

Commissioner of Central Excise, Customs .. **RESPONDENT**
& Service Tax, Visakhapatnam-I,
Central Excise Building,
Port Area,
VISAKHAPATNAM – 530 035.
Andhra Pradesh

APPEARANCE:
Shri D. Viswanathan, Consultant for the appellant.
Shri V.R. Pavan Kumar, Superintendent/AR for the respondent

CORAM: HON'BLE Mr. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE Mr. P.V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER No.A/30862/2020

DATE OF HEARING: 20.02.2020
DATE OF DECISION: 18.03.2020

[ORDER PER : Mr. P.V. Subba Rao)

1. This appeal is filed by the appellant against Order-in-Original No. 37/2011 (MP), dated 20.06.2011.

2. The facts of the case are that the appellant M/s Sravan Shipping Services are registered with the Service Tax Department for rendering services under the heads "Port Services", "Custom House Agency Service", "Cargo Handling Service", "Storage & Warehousing Service" and "Steamer Agency Service". During verification of the returns, the department found that they are providing both taxable and exempted services and had taken CENVAT credit on certain input services which were used both for taxable and exempted services. Letters were issued by the Superintendent and information was collected from the appellant to confirm the facts. In terms of Rule 6(2) of CENVAT Credit Rules, 2004 (CCR 2004) where a provider of output service avails CENVAT Credit in respect of any input service and provides output services which are chargeable to tax as well as the exempted services, then the provider of output service shall maintain separate accounts for receipt, consumption and inventory of input services meant for the two types of output services. The appellant had not maintained separate records. As per Rule 3(2) of Service Tax Credit Rules, 2002, if the provider of output service opts not to maintain separate accounts, he shall utilise credit only to the extent of 35% of service tax payable up to September 2004. After September 2004, in terms of Rule 6(3)(i) of CCR 2004, they could utilise CENVAT Credit to the extent of only 20% of the service tax payable up to 31.03.2008. After 01.04.2008, in terms of Rule 6(3)(c) of CCR, 2004, the assessee not maintaining separate account had to pay an amount equal to 8% of the value of exempted services. It appeared that the appellant was not maintaining separate records and have utilised CENVAT Credit in excess of 35% up to September 2004, 20% of service tax payable from September 2004 to 31.03.2008 and in excess of 8% of the value of exempted services from 01.04.2008. A show cause notice was issued demanding recovery of irregularly availed CENVAT Credit along with interest. Penalties were also proposed to be imposed under Rule 15(4) of CCR 2004 read with Section 78 of the Finance Act, 1994.

3. After following due process, the Ld. Commissioner, by the impugned order, confirmed an amount of Rs. 55,43,101/- as irregularly availed CENVAT Credit utilised by the assessee. She also confirmed the demand of interest on this amount and imposed penalty of equal amount under Rule 15 of CCR 2004, read with Section 78 of the Finance Act, 1994.

4. Aggrieved, the present appeal is filed.

5. Ld. Consultant for the appellant submits at the outset that during the relevant period i.e. upto 01.04.2008, the assessee was only prohibited from utilising CENVAT Credit and not from taking it. In fact the CENVAT Credit would have been lying in balance had they not utilised it during the relevant period. Subsequently, restrictions on utilisation of CENVAT Credit have been removed w.e.f. 01.04.2008 and therefore they could have utilised the CENVAT credit in their next financial year. He relies on the order of this Tribunal in the case of Duraflex Services & Construction Technologies vs. CCCE&ST, Visakhapatnam-I [2019(3)TMI 246 CESTAT-Hyderabad] in which it has been held that restriction on utilisation of CENVAT Credit up to 20% as applicable during that relevant period did not extend the availment of CENVAT Credit. The appellants were not barred on taking CENVAT Credit and subsequently utilised it. As far as the period after 01.04.2008 is concerned, there is no restriction on utilising the CENVAT Credit to 8% of the value of services as alleged and demanded in the show cause notice. After 01.04.2008, if separate records were not maintained, the assessee had to pay an amount equal to 8% of the value of exempted services in terms of amended Rule 6(3)(c) of CCR, 2004. There is no demand in terms of the amended Rule 6(3)(c) for the period after 01.04.2008. Therefore, the demand for this period cannot be confirmed.

6. Ld. DR supports the impugned order.

7. After hearing both sides and perusing the records, we are of the considered view that the Ld. Commissioner should be given an opportunity to examine the issue from the point of view of the appellant's eligibility to avail the CENVAT Credit and utilise it after 01.04.2008. If the appellant is so eligible, the only mistake of the appellant is utilising the CENVAT Credit well in advance of the date when he was not entitled to utilise it. Accordingly, interest for the differential period may have to be calculated and recovered. Ld. Commissioner should also examine the claim that there was no demand in terms of revised Rule 6(3)(c) of CCR, 2004.

8. With the above observations and without expressing any remarks on the merits of the case, we remand the matter to the adjudicating authority for denovo adjudication.

9. The appeal is allowed by way of remand to the original authority.

(***Pronounced in the Chamber on 18.03.2020***)

(S.K. MOHANTY)
(MEMBER (JUDICIAL)

(P. VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

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