IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA

EASTERN ZONAL BENCH: KOLKATA

Service Tax Appeal No. 140/2009, C.O. -66/2009

(Arising out of Order-in-Original No. 47/Commr./ST/Kol/2008-09 dated-30.01.2009 passed by the Commissioner of Service Tax, Kolkata)

Commr. of Service Tax, Kolkata

Applicant (s)/Appellant (s)

Vs.

M/s. BPCL

Respondent (s)

Appearance:

Shri S.S. Chattopadhyay, Supdt. (A.R.) for the Appellant (s)

Sri Sarvesh Saraogi, C.A. &
Sri H. Shukla, C.A. for the Respondent (s)

CORAM:

Hon'ble Shri P.K.Choudhary, Member (Judicial)
Hon'ble Shri Bijay Kumar, Member (Technical)

Date of Hearing/Decision:- 06.06.2018

ORDER NO. : F/O 76227/2018

Per Shri Bijay Kumar

Being aggrieved by the impugned order the Revenue has filed this appeal.

2. Brief fact of the case are that the Respondent has wrongly availed 75% abatement on the gross amount charged by the GTA as per Notification No. 32/2004-ST dated-3.12.2004 which is not admissible to them. Notification No. 35/2004-ST dated-3.12.2004 for the period 01/05 to 09/05 resulting in short levy of Rs.4,18,25,298/-. Also, there was nothing in record to show that the Respondent assessee has fulfilled the mandatory condition by proviso (i) & (ii) of Notification No.32/2004-ST,

while availing the above benefit. The Show Cause Notice was thus issued to the appellant Respondent which was adjudicated vide impugned order dropping the demand as a whole consequently no imposition of Interest and Penalty.

3. Ld. C.A. on behalf of the noticee submit that the issue is no longer res integra in view of decision of this Hon'ble Tribunal in the case of Indian Oil Corpn. Ltd. Vs. Commr. of Central Excise, Patna [2013 (29) S.T.R. 524 (Tri.-Kolkata)] wherein it is held that in absence of any particular format, declaration under subject notification, the Department cannot insist for declaration on each consignment note for allowing the abatement. The declaration in letter head and payment bill would be sufficient enough for availing the benefit of Notification as held at para 5 of the order:

> ***"…….5.****Heard both sides and perused the records. We find that the present appeal revolves around a limited issue of eligibility of abatement of 75% from the gross taxable value of service rendered by a goods transport agency (GTA) as allowed under Notification No. 32/2004-S.T., dated 3-12-2004 or Notification No. l/2006-S.T., dated 1-3-2006. The point of dispute between the appellant and the Revenue was that the declaration required to be filed by the respective goods transport agency as prescribed by the Board in its earlier Circular No. B1/6/2005-TRU, dated 27-7-2005 had not been complied with. In the said Circular, it was clarified that a declaration by a goods transport agency in the consignment note issued to the effect that neither credit on inputs or capital goods used for provision of service had been taken nor the benefit of Notification No. 12/2003-S.T. had been taken by them would suffice for the purpose of availment of abatement by the person liable to pay the Service Tax. It is the allegation of the Revenue that the appellant had failed to produce declaration from the respective transport agency in each consignment note to the effect that they had neither availed credit on inputs or capital goods nor benefit of Notification No. 12/2003. On the other hand, the appellant had claimed that the declarations were furnished by the respective goods transport agencies in their letter-head declaring that they had not availed the credit of duty paid on inputs or capital goods nor benefit of Notification No. 12/2003 had been availed. Besides, in the statement of Bills paid towards transport charges to the respective transport agencies, the said declaration was also made. We find that the ld. Commissioner has denied the benefit of said Notification on the ground that the procedure for availing the benefit of said Notification laid down by the C.B.E. & C. in its Circular dated 27-7-2005 and Section 37B Order No. 5/01/2007/S.T., dated 12-3-2007 had not been complied with. We find that taking note of the difficulties experienced by the department as well as the assesses the Board has issued further clarification on 21-8-2008. It is clarified as follows :-*
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> *"04. The matter has been examined. Considering the facts and circumstances of the case in partial modification of the instructions contained in Circular No. B1/6/2005-TRU, dated 27-7-2005 it is*

> *clarified that the benefit of availment of abatement may also be extended in past cases if the taxpayers produce a general declaration from the GTA to the effect that neither credit on input or capital goods used for the provision of service has been taken nor the benefit of notification No. 12/2003-S.T. has been taken by them."*

The ratio laid down in this case has subsequently been followed in the case of M/s. Eastern Coalfields Ltd. Vs. Commr. of Central Excise & Service Tax, Bolpur reported in 2013 (29) S.T.R. 314 (Tri.-Kolkata) and Paliwal Home Furnishing Vs. Commr. of Service Tax, Delhi reported in 2011 (22) S.T.R. 531 (Tri.-Del.) . Further, he submits that while issuing the Certificate, the Respondent has copied the wordings of the notification, on the letter head. But facts remain that they have not availed the benefit of Cenvat Credit on inputs or capital goods also the benefit under notification No. 12/2003 (ST).

4. Ld. D.R. appearing on behalf of the Revenue states that the adjudication order is legally not correct as the Respondent has not fulfilled the condition (i) & (ii) of the Notification No.32/2004-ST in as much as they have not produced the requisite certificate in required format. As per the Notification, the benefit is available only to those who has not availed the Cenvat Credit on duty paid inputs or capital goods for providing taxable service and also the benefit of Notification No. 12/2003 (ST) dated-20/6/2003. He has drawn attention to the certificate which reads as under:

> "Certified that (1) We have not availed the credit of duty paid on inputs Or capital goods used for providing the taxable service as per the invoice/bill, under the provisions of the Cenvat Credit rules, 2004
>
> OR
>
> (2) we have not availed the benefit under the notification of the government of India in the Ministry of Finance (Department of Revenue) No. 12/2003-service tax dated-20th June, 2003 (G.S.R. 503(E), dated the 20th Jun, 2003).
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> And this Certificate is provided to the consignee in terms of Notification No.32/2004-ST dated-3rd December, 2004.

5. We have heard the rival submission and perused the case records. We agree with the submission of the Ld. Advocate that the issue is finally settled in favour of the Respondent assessee and accordingly we dismiss Revenue's appeal. C.O. disposed off.

(Dictated and Pronounced in the Open Court)

Sd/- 8/6/2018 Sd/- 8/6/18

(P.K.Choudhary)
MEMBER(JUDICIAL)

(Bijay Kumar)
MEMBER(TECHNICAL)

k.b/-