IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
EAST REGIONAL BENCH : KOLKATA

Ex.Appeal No.74/09

(Arising out of Order-in-Original No.57/Commr./CE/Kol.II/Adjn./2008-09 dt.01.12.2008 passed by Commissioner of Central Excise, Kolkata, II)

M/s Berger Paints India Ltd.
Applicant (s)/Appellant (s)

Vs.

Commr. of Central Excise, Kolkata II
Respondent (s)

Appearance:

Shri Ravi Raghavan, Adv. and Shri D. Sen, Adv. for the Appellant (s)
Shri D. Halder, Asstt.Commr. (A.R.) for the Revenue

CORAM:

HON'BLE SHRI P. K. CHOUDHARY, JUDICIAL MEMBER
HON'BLE SHRI BIJAY KUMAR, TECHNICAL MEMBER

Date of Hearing : 15.06.2018
Date of Decision : 15.06.2018

Final Order No.FO/76614/2018

Per Shri P. K. Choudhary :

The present appeal is filed by the Appellant against the Order-in-Original No.57/Commr./CE/Kol.II/Adjn./2008-09 dt.01.12.2008 passed by Commissioner of Central Excise, Kolkata, II.

2. Briefly stated the facts of the case are that the appellant is engaged in the manufacture of paints and varnishes falling under Chapter 32 of the Central Excise Tariff Act, 1985 and is having manufacturing units at Howrah, Goa, Sikanderabad, Jammu, Pondichery and Rishra. The Head Office of the appellant is situated at 129, Park Street, Kolkata 700017. The appellant also gets its goods manufactured by job workers and all such goods are sold through the

depots situated all over the country. In addition, the appellant is also engaged in the trading of the said goods manufactured by others. The appellant is availing Cenvat Credit on inputs and on input services. The Head Office of the appellant is dealing with the goods manufactured by all the manufacturing units and paying service tax on common services which are for goods manufactured by all manufacturing units as well as for goods manufactured by the job workers and goods purchased for trading purposes. The Head Office received invoices for availing input services. The case relates to denial of Cenvat Credit on the ground that the same has been distributed by "Input Service Distributor" (ISD) prior to registration for the period from 30th September, 2004 to 29th August, 2005. The Adjudicating Authority disallowed Cenvat Credit and ordered recovery of the same along with interest and also imposed equal amount of penalty under Section 11AC of the Central Excise Act,1944. Hence the present appeal before the Tribunal.

3. Heard both sides and perused the appeal records.

4. We find that the issue relating to whether invoices prior to registration by an ISD are valid duty paying document is no longer *res-integra* . It has been consistently held that non-registration by an ISD is merely procedural in nature and hence credit cannot be denied. The present issue is settled in favour of the assessee by the decision of the Hon'ble High Court of Gujarat in the case of CCEx., Vs. Dashion Ltd. : 2016 (41) STR 884 (Guj.). For better appreciation, the relevant Paragraphs are reproduced below :

*"**4.** It is undisputed that the Rules of 2004 provide for a scheme for distribution of credit by input service distributor. Term "input service distributor" has been defined in in Rule 2(m) of the Rules of 2004 as to mean an office of the manufacturer or producer of final products or provider of output service, which receives invoices issued under Rule 4A of the Service Tax Rules, 1994 towards purchases of input services and issues invoice, bill or, as the case may be, challan for the purposes of distributing the credit of service tax paid on the said services to such manufacturer or producer or provider, as the case may be.*

***5.** Rule 7 pertains to manner of distribution of credit by input service distributor. At the relevant time, this Rule 7 permitted input service distributor to distribute Cenvat credit in respect of service tax paid on the input service to its manufacturing units or units providing output service, subject to the two conditions, viz. :-*

"(a) the credit distributed against a document referred to in rule 9 does not exceed the amount of service tax paid thereon;

(b) credit of service tax attributable to service [used by one or more units] exclusively engaged in manufacture of exempted goods or providing of exempted service shall not be distributed;"

***5.1** It was only later on that additional condition by way of Clause (d) to Rule 7 was added, which reads as under : -*

"credit of service tax attributable to service used by more than one unit shall be distributed pro rata on the basis of the turnover of such units during the relevant period to the total turnover of all its units, which are operational in the current year, during the said relevant period."

6. *The first objection of the Department therefore that the credit from one unit was utilized for the purpose of duty liability of other unit without pro rata distribution by the input service distributor therefore would not survive in view of no previous restriction of this nature flowing from Rule 7 of the Rules of 2004. In fact, the Tribunal has seen entire situation as a Revenue neutral, since as pointed out by the assessee, it had availed only 20% of the credit for payment of service tax and the balance was paid in cash.*

7. *The second objection of the Revenue as noted was with respect of non-registration of the unit as input service distributor. It is true that the Government had framed Rules of 2005 for registration of input service distributors, who would have to make application to the jurisdictional Superintendent of Central Excise in terms of Rule 3 thereof. Sub-rule (2) of Rule 3 further required any provider of taxable service whose aggregate value of taxable service exceeds certain limit to make an application for registration within the time prescribed. However, there is nothing in the said Rules of 2005 or in the Rules of 2004 which would automatically and without any additional reasons disentitle an input service distributor from availing Cenvat credit unless and until such registration was applied and granted. It was in this background that the Tribunal viewed the requirement as curable. Particularly when it was found that full records were maintained and the irregularity, if at all, was procedural and when it was further found that the records were available for the Revenue to verify the correctness, the Tribunal, in our opinion, rightly did not disentitle the assessee from the entire Cenvat credit availed for payment of duty. Question No. 1 therefore shall have to be answered in favour of the respondent and against the assessee.*

8. *Coming to the question of penalty, right from the show cause notice stage till the final disposal of the show cause notice proceedings, we find little evidence to support the allegations of wilful misstatement, suppression, fraud or collusion on the part of the assessee. In fact, perusal of the show cause notice would show that the entire basis of the Revenue was wrongfully availment of the credit. Mere wrongfully availment without element of mens rea and that too for the purpose of evading payment of duty would not be sufficient to impose penalty. The adjudicating authority, without any basis or evidence, merely mechanically recorded that the assessee had, by reason of wilful misstatement, suppression of fact or in contravention of the provisions of the Rules, evaded payment of central excise duty. He was not even sure whether this was a case of wilful misstatement or suppression of fact or contravention of provisions of the Rules."*

5. We also find that the CBEC vide its Circular No.1063/2/2018-CX dated 16.02.2018 has accepted the decision of the Hon'ble High Court of Gujarat in the case of CCEx., Vs. Dashion Ltd. (supra). The relevant paras are reproduced below :

"2.1 Department has accepted the judgments where the Hon'ble High Courts dismissed the Department's appeal inter alia holding that substantial benefit cannot be denied because of procedural irregularity.

2.2 In the case of Dashion Ltd. the assessee was engaged in manufacture of water treatment plant and other connected items and was availing benefit of CENVAT credit on the duty paid on inputs, capital goods and input services as permissible under CENVAT Credit Rules, 2004. The assessee had five manufacturing units and had its registered office at Vatva, *Ahmadabad. The assessee was also providing several taxable services such as erection and commissioning, repairing and maintenance of water treatment plant, etc.*

2.3 The revenue authorities, during scrutiny of the records of the asseessee, noticed that it was availing the credit of service tax paid for various services by one unit for the purpose of clearance of other unit. After gathering details from the assessee, the adjudicating authority issued show cause notice calling upon the assessee as to why the CENVAT Credit o service tax on input service should not be recovered with interest and penalties. In the show cause notice itself, the adjudicating authority had referred to sub-rule (3) of Rule 15 of the Rules of 2004 as basis for such proposal. Two primary objections of the Department were that the assessee had not registered itself under the Service Tax (Registration of Special Category of Persons), Rules, 2005 and that the tax credit from one unit was utilized for discharging tax liability of another unit instead of pro rata distribution amongst different units. The adjudicating authority confirmed the duty demands with interest and penalties.

2.4 Therefore, the points of law examined were that the assessee had utilized credit from one unit for the purpose of duty liability of its other unit without pro rata distribution by the input service distributor and further the assessee had not registered itself under the Service Tax (Registration of Special Category of Persons), Rules, 2005.

2.5 Hon'ble High Court dismissed the department's appeal holding that such view was not sustainable as there was not previous restriction of this nature under Rule 7 of the CENVAT Credit Rules, 2004. Further non-registration of ISD is only a procedural irregularity for which substantial benefit of CENVAT

Credit cannot be denied when all the necessary records have been maintained by the respondent."

6. In view of the above discussions, the impugned order is set aside and the appeal filed by the appellant is allowed.

(Operative part of the Order was pronounced in the open Court.)

Sd/	Sd/
(BIJAY KUMAR)	**(P. K. CHOWDHARY)**
MEMBER (TECHNICAL)	**MEMBER (JUDICIAL)**

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