IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL KOLKATA
EAST ZONAL BENCH, KOLKATA

Date of Hearing/Order: 3.7.2018

Appeal No. ST/23/2009-DB

M.N. Dastur & Co. Pvt. Ltd. Appellant

Vs.

CST, Kolkata Respondent

Appeal No. ST/41/2009-DB

(Arising out of Order-in-Original No. 24-25/Commr/ST/Kol./2008-09 dated 18th November, 2008 passed by the Commissioner of Service Tax, Kolkata)

CST, Kolkata Appellant

Vs.

M/s M.N. Dastur & Co. Pvt. Ltd. Respondent

<u>Appearance</u>

Shri Amit Kr. Jain, C.A. - for the Assessee

Shri S.S. Chattopadhyay, AR - for the Revenue

CORAM: **Hon'ble Mr. P.K. Choudhary, Member (Judicial)**
Hon'ble Mr. Bijay Kumar, Member (Technical)

Final Order No.FO/A/76868-76869/2018

Per Bijay Kumar :

The present order disposes of the above two appeals. The appeals have emanated out of a common adjudication Order No. 24-25 dated 18.11.2008. The Revenue is in appeal against the impugned order regarding non-imposition of penalty under the provisions of Section 76 and 78 of Finance Act, 1994 (for short Act) and non-imposition of interest on the demand confirmed and appropriated, under Section 75 of the Act. While the assessee appellant is in appeal against the portion of the order which has been confirmed against them by confirming the duty amount and interest and imposition of penalty under the provisions of Act and Service Tax Rules, 1994 (for short, Rules).

2. The facts of the case for disposal of these appeals are narrated as under:

The appellant, is a provider of taxable service falling under the category of 'Consulting Engineering Service' and availing the Cenvat credit on the input service received by them for discharge of their output service tax liability. The appellant assessee was issued with two show cause notices proposing to deny Cenvat credit availed by them for the period April 2006 to Sept. 2006 on the ground that the input services on which Cenvat credits have availed do not qualify for the same, under Rule 2 of Cenvat Credit Rules. The show cause notice was issued on 1.8.2007 for the period October 2004 to March 2006. Another show cause notice was issued on 16.10.2007 proposing to recover the service tax amounting to Rs. 2,37,89,487/- and education cess amounting to Rs. 1,75,775/- on amounts received during 2002-2003 to 2005-2006 in contravention of the provisions of Section 68 of the Act read with Rule 6 of the Rules. The demand was proposed on the ground that the balance sheet of the appellant assessee for year 2002-2003 to 2005-2006, when compared with the relevant ST-3 returns found to have short payment of amount of Rs. 1,03,53,722/- and leviable interest under Section 75 of the Finance Act. Penalty was also proposed under Section 75 and 76 of the Act.

3. The appellant assessee has submitted as under:

(i) That, for the impugned period disallowing the credit of service tax, paid on the input service, eligibility of which has not been disputed by the Revenue on the ground that such credit was availed at the strength of invoices in the name of the branch/site are not eligible inasmuch as the appellant assessee was having the 'centralised registration' and was therefore, entitled to avail Cenvat credit on the basis of such documents;

(ii) That the ld. Adjudicating authority has erred by disallowing the Cenvat credit available to them on the ground that the assessee was not having the centralised registration and the same was obtained on 10th July 2007 and hence the availment of credit from various branch offices/site offices were not falling under the category of eligible Cenvat credit. It was submitted that the adjudicating authority has not considered the fact that they were having the centralised registration from the year 1997 itself. He relied on the various communications made to the department by them vide letter dated 6.4.1997 and 21st August 1997, wherein it was informed to the jurisdictional Assistant Commissioner regarding the intention of availing the centralised billing for all the branches and their site offices. The same was also confirmed by the Divisional Assistant Commissioner vide his letter dated 4.9.1997. The fact was about the availment of Cenvat credit after getting the permission from the Divisional Assistant Commissioner was known to the department and the same was also reflected in their ST-3 returns for the period of October 2005 to March 2006, and also in the subsequent Returns.

(iii) That the impugned order is not sustainable on the fact that the Cenvat Credit Rules was introduced in the year 2004 and does not in any way disentitled the appellant assessee having centralised registration prior to that date from availing Cenvat credit on the basis of documents addressed in the name of their branches, site offices.

(iv) That for the impugned order disallowing the Cenvat credit is also not sustainable inasmuch as since 1997 the appellant has been depositing service tax pertaining to all locations not under the cover of centralised registration in Kolkata jurisdiction and the department has accepted such deposit of service tax from the appellant assessee, without any objection.

(v) That the impugned order is bad on the ground that the adjudicating authority has held that the extended period of limitation is available to the department on account of having suppressed the fact about availment of their Cenvat credit from the branch offices and site offices. This observation by the ld. Adjudicating Authority is factually incorrect in view of the written permission granted to the appellant, from the Jurisdictional Assistant Commissioner, to raise, collect and deposit service tax on behalf of all branches and/site offices. Thus, the fact was known to the department and, therefore, in view of the various decisions, the extended period of time is not available to them under Section 73(1) of the Act.

(vi) That the demand itself is not sustainable, the question of payment of interest and imposition of penalty does not arises.

4. On the other hand, ld. DR supports the impugned order pertaining to the portion not confirmed by the adjudicating authority and non imposition of interest and penalties under the provisions of the Act and the Rules.

5. Heard the parties and considered the facts available on the appeal record.

6. The issue involved in this case is regarding availment of utilisation of the Cenvat credit for the period October 2004 to March 2006 to the extent of 19,40,220/-. It is seen from the record that the appellant assessee has applied for the centralised billing system vide their letter AC-224-13A dated 21.8.1997 and the same has been accepted by the jurisdictional Assistant Commissioner on 4.9.1997. In view of above, it is not correct on part of the ld. Adjudicating authority to hold that the assessee was not having the centralised registration. On the contrary, it is also seen that in the year 2007, which the ld. Adjudicating authority considered the date for filing of the centralised registration is only the extension of the earlier registration granted to them by the jurisdictional Assistant Commissioner. In this case, the appellant had been continuously informing the department about their intention of having centralised billing system and also paid the service tax for the various services

rendered by them through their branch offices and site offices. The Department has not disputed the payment of such service tax. The ST-3 returns of the relevant period were filed also which clearly mentioned about the availment of the Cenvat credit by the appellant assessee. So in such circumstances, it cannot be alleged that the appellant assessee had any time suppressed the material fact from the department with intention of committing any fraud or suppression of the fact, before the department. Thus, we are of the considered view that in this case there is no question of suppression of fact and the demand, if at all is required to be raised by Revenue, it was to be done within normal period. After going through the show cause notice it is evident that the demand is hopelessly time barred and this ground itself the impugned order is not sustainable. In the second show cause notice dated 16.10.2007 is about short payment of service tax. The ld. Adjudicating authority had held that the demand is raised merely on the basis of difference in the figures available in the balance sheet when compared n ST-3 returns filed by the appellant assessee. The ld. Adjudicating authority after going through the various submissions made by the appellant has concluded which is as under :

> ***"The said assessee have disputed the method of calculation adopted in the impugned notice. They have stated that the value of taxable service cannot be calculated, in their case, on the basis of above formula. Accordingly to them invoices are raised on the clients on the basis of payment schedule. Any amount received against the invoices raised during the year is credited to the "Advance received against***

job A/c". Any amount received against the invoices raised in earlier year is credited to "debtors A/c". The amount of total calculation during a period can be ascertained by adding the amount received as shown in the "Advance received against job A/c" for current year billing and amount received as shown in the "debtors A/c" for earlier years billing. The amount of 'income fee on jobs' as shown in the annual account does not reflect the billing during the period but represents the amount allocated out of the collections during the current year and earlier years.

In terms of Rule 6 of Service Tax Rules, 1994, Service Tax is payable on the value realised for the service provided. It is observed that the impugned notice does not contain a proper calculation for ascertaining the amount realised during a financial year. The method of calculation of value of taxable service by way of adding Debtors at the beginning of the year to the Sales as per balance Sheet and then subtracting Debtors at the end of the year is not applicable in the case of the said assessee. It has also not been explained as to how these amounts constitute the value of taxable service. On the other hand, I find sufficient logic in the assessee's argument that the value of taxable service is ascertainable by adding amounts under "Advance receive against Job A/c" to the amounts received as shown in the "debtors A/c". In this respect the said assessee submitted a reconciliation statement for the period 2002-03 to 2005-06 duly certified by Chartered Accounts, B.M. Chatrath & Co. I would accept the statement for the purpose of quantification of Service Tax liability, if therebe any. According to this statement, total amount received during the period 2002-03 to 2005-06 was Rs. 205,44,75,269/-. As per ST-3 Returns, the said assessee paid Service Tax on the value of Rs. 194,02,52,158/-. They did not pay Service Tax on an amount of Rs. 11,42,23,111/- on due date. They paid Service Tax amounting to Rs. 1,00,00,000/- (one crore) relatable to value of Rs. 11,20,97,681/- vide TR-6 challan dated 20.2.05 and disclosed in the return for the period March 2006. Balance amount of value on which Service Tax has not been paid was Rs. 21,25,430/-. In their written note submitted on 12.9.08, the said assessee admitted the liability of

> ***Service Tax amounting to Rs. 3,53,722/- and Education Cess amounting to Rs. 598/-.***
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> ***The said assessee vide their letter bearing No. AC-224/1-93A dated 3.10.2008 informed that they had admitted a liability of Service Tax and Education Cess amounting to Rs. 3,53,722/- and Rs. 598/- respectively arising out of bonafide computation error and head deposited the said amount.***
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> ***It is observed that the said assessee had paid Service Tax amounting to Rs. 1,00,00,000/- (one crore) vide TR-6 challan dated 20.2.2005 which was disclosed in the return for the period March'06. This amount was not paid on due date. The said assessee are liable to pay interest on the total amount of Service Tax and Education Cess Rs. 1,03,54,320/- for delayed payment in terms of Section 75 of the Finance Act, 1994."***

7. In this case, as the entire demand have been paid by the assessee along with interest as per their own calculation which has been accepted by the adjudicating authority. In this regard department in its appeal has stated that the adjudicating authority although has stated that the interest is not leviable on the amount of service tax of Rs. 1,14,23,111/- on due date and therefore interest is leviable to be paid by the appellant – Assessee under the provisions of the Act. In this case also the demand has been raised for the impugned period in year 2007 which is held to be time barred, as there was no suppression on the part of the appellant assessee. As the demand itself is not sustainable, there is no question of payment of interest and imposition of penalty.

8. In result, we dismiss the appeal filed by the Department and allow the appeal of the appellant assessee.

(Pronounced in Court)

Sd/	Sd/
(P.K. Choudhary)	(Bijay Kumar)
Member (Judicial)	Member (Technical)

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