

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

S.Tax Appeal No.78751 of 2018

Arising out of O/A No.462/S.Tax-II/Kol/2018 dated 27.06.2018 passed by
Commr. of CGST & Central Excise (Appeals I), Kolkata

M/s A. B.Composites Pvt. Ltd.

Vill-Jaypur,
P.O.-Hansuri,
P.S.-Magrahat,
Dist.-24 Parganas (South),
Pin No.743609,
West Bengal

APPELLANT

VERSUS

Commr. of CGST & Central Excise, Kolkata South

180, Shantipally,
Rajdanga Main Road,
Kolkata-700107.

RESPONDENT

APPEARANCE

Shri P. K. Bhattacharya, Authorized Representative for the Appellant
Shri K.Chowdhury, Authorized Representative for the Respondent

CORAM:

SHRI P. K. CHOUDHARY, HON'BLE JUDICIAL MEMBER

DATE OF HEARING/DATE OF DECISION : 27. 12. 2018

FINAL ORDER NO.77336/2018

Per Shri P. K. Choudhary :

The present appeal is listed for admission as also for final hearing
on merit.

2. After hearing both sides and notwithstanding the amount involved
in this case being below the threshold of Rs.2.00 lakhs, the appellant
intends to contest the issue on merits, which is admitted.

3. With the consent of both sides, the appeal itself is taken up for
hearing.

4. Briefly stated the facts of the case are that the appellant is engaged in manufacturing parts of railway coach by using various inputs and input services, on which cenvat credit was availed and which was utilized towards discharging Central Excise duties in respect of final product cleared from the factory and as also for paying service tax on Goods Transport Agency (GTA) and other taxable services. Show-cause notice dated 16.10.2008 was issued alleging contravention of the provisions of Sections 65, 66 and 68 of the Finance Act, 1994, inasmuch as, the appellants have utilized an amount of Rs.33,801/- from the cenvat credit account towards discharging their service tax liability on GTA Services under Reverse Charge Mechanism (RCM) being recipient of GTA Service during the period April, 2007 to March, 2008. It has also been alleged in the show-cause notice that under the above circumstances, the appellant assessee is not eligible to utilize the amounts accumulated in cenvat credit account as per Rule 2(1)(d)(v) of the Service Tax Rules, 2004, effective from 01.01.2005. It is the case of the Department that in accordance with Rule 3 (4)(e) of the Cenvat Credit Rules, 2004, cenvat credit could be utilized for payment of service tax on output service, but under Notification No.8/2006-CE (NT) dated 19.04.2006, the liability for paying service tax as receiver of GTA Service on Reverse Charge Mechanism (RCM), the service receiver cannot be considered as "provider of output service". It is, therefore, construed that the said service ceases to be considered as "deemed output service" w.e.f.19.04.2006 and the appellant was held as not eligible to

discharge service tax liability on GTA service by utilizing cenvat credit accumulated in their account. SCN also referred to the CBEC's Circular No.97/8/2007-Ex. dated 23rd August, 2007. Credit availed and utilized is, therefore, sought to be disallowed and recovered in terms of Section 73(I) with appropriate interest under Section 75 and penalty proposed to be imposed under Section 76 of the Act. The Adjudicating Authority confirmed the demand of Rs.33,801/- along with interest. However, penalty under Section 76 was waived under Section 80 of the Finance Act, 1994. Assessee preferred an appeal before the lower appellate authority. The Id.Commissioner of CGST & Excise (Appeal I), Kolkata, rejected their appeal by upholding the adjudication order. The appellant assessee is now in appeal before the Tribunal on the following grounds:

(i) In the earlier adjudication order, the adjudicating authority confirmed an amount of Rs.7409/- out of demanded amount of Rs.33,801/-. In the present adjudication order, the adjudicating authority has confirmed the entire amount of Rs.33,801/-.

(ii) As per Rule 3(4)(e) and definition under Rules 2(p) & 2 (r) of Cenvat Credit Rules, 2004 read with Notification No.10/2008-CE (NT) dated 01.03.2008 and in view of the various decisions of the Tribunal, they have claimed eligibility to pay service tax by utilizing cenvat credit on GTA service as recipient of service under Reverse Charge Mechanism up to 28.02.2008.

5. The Id.Authorized Representative appearing for the appellant assessee, reiterates the grounds of appeal.

6. The Id.D.R. for the Revenue, reiterates the order of the lower authorities.

7. Heard both sides and perused the appeal records.

8. A short issue involved in this case, where the appellant assessee being recipient of GTA service was eligible to utilize cenvat credit in discharging service tax liability on GTA service under Reverse Charge Mechanism basis during the period 2007-08. A show-cause notice was issued and demand was confirmed along with interest. Appeal was preferred before the Commissioner (Appeals), who upheld the adjudication.

9. I find that the facility of utilization of cenvat credit for payment of service tax on GTA service has been withdrawn by Notification No.10/2008-CE (NT) dated 01.03.2008. I find that the issue is no more *res-integra* in view of the following decisions of the Tribunal :

(i) India Cements Ltd. Vs. Commissioner : 2007 (7) STR 569 (Tribunal) ;

(ii) RRD Tex Pvt. Ltd. Vs. CCEx., Salem : 2007 (8) STR 186 (Tri.-Chennai).

I have gone through Notification No.10/2008-CE (NT) dated 01.03.2008 and the decisions cited (supra), which allowed the assessee to utilize their cenvat credit account for payment of service tax on GTA Service. Accordingly, I agree with the submissions of the Appellant's Representative. I have also found that this issue was before the Hon'ble High Court of Allahabad in the case of Oudh Sugar

Mills Ltd. Vs. CESTAT reported in 2017 (52) STR 353 (All.), wherein the following question of law was decided by the Hon'ble High Court :

"Whether the appellant can be said to be "Provider" of any "output services" and is entitled for utilization of Cenvat Credit in terms of Rule 3 (4) of Cenvat Credit Rules, 2004 prior to amendment dated 01.03.2008."

The Hon'ble High Court answered the question formulated above in favour of the assessee and against the Revenue. In this regard, the relevant Paragraph is reproduced below :

"19. In relation to service provided or agreed to be provided by GTA in respect of transportation of goods by road, where the person liable to pay freight is; any factory registered under or governed by the Factories Act, is such a category, any person who pays or is liable to pay freight either himself or through his agent for the transportation of such goods by road in a goods carriage is included within term 'person liable for paying service tax'. Even after exclusion the normal term 'liability' under Rule 2(p)(q) and (r) of Rules, 2004 read with Rule 2(i)(d) of Rules, 1994 is clearly applicable to such category of persons as are covered therein irrespective of explanation or deemed fiction therein."

10. By respectfully following the judgement of the Hon'ble High Court as cited above, I set aside the impugned order and allow the appeal with consequential benefit, if any.

(Operative part of the order was pronounced in the open Court)

Sd/

(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

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