IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH : KOLKATA

REGIONAL BENCH - COURT NO.2

Excise Appeal No.75938 of 2018

(Arising out of Order-in-Appeal No.28/JSR/2018 dated 18 January 2018 passed by Principal Commr. (Appeals), CGST & Central Excise, Ranchi.)

M/s. Suraj Logistics Private Limited (SLPL)
(Plot No.A-16, A-20 P, Plot No.16 & A-29 (P) to A-33,
Large Sector Area, Adityapur Industrial Area,
Saraikela, Jharkhand-832108)

...Appellant

VERSUS

Commissioner of Central Excise & Service Tax, Jamshedpur
.....Respondent
(Outer Circle Road, Bistupur
Jamshedpur)

WITH

Excise Appeal No.75939 of 2018

(Arising out of Order-in-Appeal No.28/JSR/2018 dated 18 January 2018 passed by Principal Commr. (Appeals), CGST & Central Excise, Ranchi.)

Shri Prakash Khemani, Director
M/s.Suraj Logistics Private Limited (SLPL)
(Adityapur Industrial Area,
Saraikela, Jharkhand-832108)

...Appellant

VERSUS

Commissioner of Central Excise & Service Tax, Jamshedpur
.....Respondent
(Outer Circle Road, Bistupur
Jamshedpur)

APPEARANCE

Shri A.K.Raha (Advocate) & Shri A. Dutta (Advocate) for the Appellant (s)
Shri A.Roy, Authorized Representative for the Respondent

CORAM: HON'BLE SHRI P.K.CHOUDHARY, MEMBER(JUDICIAL)
HON'BLE SHRI P. VENKATA SUBBA RAO, MEMBER(TECHNICAL)

FINAL ORDER NO. 76186-76187/2019

DATE OF HEARING : 25 June 2019
DATE OF DECISION : 25 June 2019

P.K.CHOUDHARY :

The assessee, M/s.Suraj Logistics Pvt.Ltd., alongwith its Director, Sri Prakash Khemani, are in appeal before us against the common impugned Order-in-Appeal dated 18.01.2018 passed by the Ld.Commissioner(Appeals), Ranchi, in the appeal filed by the Revenue. At this stage of the original adjudication, the Ld.Addl.Commissioner of Central Excise, Jamshedpur, vide Order-in-Original dated 30.03.2017 had dropped the proceedings against which the Revenue preferred appeals before the Ld.Commissioner(Appeals) whereby duty demand proposed in the Show Cause Notice was confirmed alongwith penalty and interest for the period 2011-12 and 2012-13.

2. Briefly stated the facts of the case are that the appellant assessee M/s.Suraj Logistics Pvt Ltd, are engaged in the manufacture of PVC pipes and fittings, FDPE pipes, etc. on which central excise duty is being paid. The appellant company engaged M/s.Suryamukhi Projects Pvt.Ltd.(SPPL) to promote and market its manufactured product on commission basis. The services provided by the said SPPL attracted service tax in the category of Business Auxiliary Services which was being claimed as CENVAT credit by the appellant. The case of the Revenue is that the appellant in collusion with SPPL availed irregular credit of Rs.79,93,222/- inasmuch as no service has been rendered by the said SPPL. Proceeding was initiated by way of Show Cause Notice dated 31.03.2016. Sri Prakash Khemani, Director of the appellant company was also made co-noticee to propose penalty under Rule 26(2) of the Central Excise Rules, 2002 (Excise Rules), with the allegation that he played a central role in fabricating the documents to avail wrong credit on the basis of invoices issued by SPPL. SPPL was also made a co-noticee in the aforesaid Show Cause Notice to propose penalty under Rule 26(2) of the Excise Rules.

3. In the course of adjudication, based on the submissions made by the assessee, the Ld.Addl.Commissioner was satisfied that there was no

case of irregular credit and he accordingly dropped the entire proceedings giving immunity to all the parties to the said Show Cause Notice (SCN). While dealing with the allegations in the SCN, the Ld.Addl.Commissioner observed that the allegation of amount of 8% paid towards commission whereas the profit earned by the assessee was merely 1.29% did not hold good inasmuch as the assessee was required to sell the manufactured goods first and the question of earning profit becomes far-fetched reality. He observed that the assessee as entrepreneur was well within his right to pay the rate of commission he considered appropriate. He also observed that the appellant assessee maintained all the necessary records and the credit was validly availed on the strength of proper service tax invoices issued by SPPL.

He further observed that the whole basis of issuance of the SCN was to deny the credit in view of the investigation initiated at the end of Sri Ranjit Gupta, Director of SPPL wherein his statement was obtained as part of follow up investigation against SPPL in pursuance of investigation against one M/s.Akshay Steel Works Pvt.Ltd. as was evident from the letter dated 09.10.2014 from the Office of the Commissioner of Service Tax, Kolkata to the Asst.Commissioner, Service Tax, Jamshedpur. From the content of the aforesaid letter, it appears that the statement of Sri Gupta was only in respect of SPPL's transactions with M/s.Akshay Steel Works Pvt.Ltd. and no reference was made to the appellant assessee (Suraj Logistics Pvt.Ltd. as a beneficiary of any transaction. The Ld.Addl.Commissioner also observed that the Central Excise & Service Tax authorities need to give specific and independent findings before denying the credit specifically when all documents are in place and that credit cannot be denied merely based on the income tax assessment orders.

4. In the appeal filed by the Revenue, the Ld.Commissioner (Appeals), has categorically observed in para 7.3 of the impugned order and admitted that the statement of Sri Rajjit Gupta has not been made a Relied Upon Document and also not been made available to the assessee and that the said statements should have been relied upon

and made available to the assessee. However, the Ld.Commissioner (Appeals), gave more credence to the Income Tax assessment order passed in case of SPPL. He also observed that though the investigation pertained to transactions of SPPL with M/s.Akshay Steels, the same would be made applicable and extended to the assessee, Suraj Logistics also. On the basis of said findings, the Ld.Commissioner(Appeals) confirmed the demand of CENVAT credit of Rs.79,93,222/- with applicable interest and equivalent penalty on the assessee and also imposed penalties under Rule 26(2) of the Excise Rules on Sri Prakash Khemani, Director of Suraj Logistics, and SPPL by allowing the appeals filed by Revenue.

5. Shri A.K.Raha and Shri A Dutta, Advocates appeared for the appellants and Sri A Roy, Supdt. (A.R.) appeared for the Revenue.

6. The Ld.Advocates appearing on behalf of the appellants submitted that no case could be built against them merely on the basis of statement of Sri Ranjit Gupta, Director of SPPL, which is neither relied upon in the SCN nor a copy of the same has been provided to the assessee in the course of adjudication as admitted by the Ld.Commissioner(Appeals). He also submitted that the case pertained to transactions with M/s.Akshay Steel with SPPL wherein the appellant assessee was not involved. Moreover, in the entire proceedings before the Income Tax authorities, Suraj Logistics (the appellant herein) was not a party and therefore, the availment of credit in the hands of appellant is not proper. They relied upon the decision of this Tribunal in the case of Supreme Cylinders Ltd. v. CCE Jaipur 2016 (332) ELT 373(Tri-Del) as well as in the case of CCE Raipur vs. Saini Industries Ltd. 2014 (304) ELT 282 (Tri-Del) wherein it has been held that the Income tax assessment order is not relevant without corroborative and independent evidence. He also submitted that the statement of Sri Rajjit Gupta of SPPL is not a relied upon document in this case and hence not examined under Section 9D of the Central Excise Act and therefore no credence can be given to said statements. They relied on the decision in the case of G.Tech Industries vs. UOI 2016 (339) ELT 209 (P & H), S.K.Garg & Sons vs. CCE Chandigarh 2017 (348) ELT 508

(Tri-Chandigarh) and Flemingo (DFS) Pvt.LTd. vs. CC, Visakhapatnam 2018 (363) ELT 450 (Tri-Hyd). They also contested the demand on time bar and imposition of penalty on the company as well as the Director.

7. The Ld.Departmental Representative (DR) supported the findings made by the Ld.Commissioner(Appeals) and stated that since the service provider, SPPL, was issuing bogus invoices as per the investigation undertaken by the Income Tax Deptt. wherein the Director of SPPL, Sri Gupta, has made confession of having issued bogus invoices for incentive of 0.1% with cash pay back to the clients. He also stated that even though the proceedings initiated against SPPL pertained to its transactions with Akshay Steels, the same could be extended to Suraj Logistics and accordingly the credit is rightly denied. He prayed that the appeals of the assessee be accordingly rejected.

8. Heard both sides and perused the appeal records.

9. We find that the dispute pertaining to disallowance of credit in the hands of the appellant assessee, Suraj Ligistics, is mainly based on the assessment orders passedby the Income Tax Department on SPPL and the statement of Sri Gupta, Director of SPPL, which provided the subject sales promotion service.

We find that no independent investigation has been carried out by the department to produce any evidence whatsoever to show that the appellant has not received any service. The statement of Sri Gupta, on which the department has placed heavy reliance to deny CENVAT credit has not even been relied in the SCN and hence cannot be entered into evidence as required under Section 9D of the Central Excise Act and therefore no credence can be given to the said statement to decide the case against the appellant. It is a settled legal position that onus to prove the allegations is on the department with corroborative evidence which has not been done in the present case. The Tribunal in CCE vs. Dhawan Steel Industries 2015 (324) ELT 169 (Tri-Del) has held when no investigation was conducted at the end of the manufacturer-supplier as well as transporter of the goods and the case has been made against the assessee merely on the presumption that the supplier is non-existent and credit was taken only on paper invoices could not be legally accepted for want of proper and independent investigations as per the law. The said decision has been further followed in Jain Steel Tubes vs. CCE Delhi 2016 –TIOL-936-CESTAT-CHD and Addi Alloys (P) Ltd. vs. CCE Ludhiayana 2017 (346) ELT 113 (Tri-Chan).

We also agree with the contentions made by the appellant that the Income tax assessment order issued in SPPL is not relevant without corroborative and independent evidence, as supported by the Tribunal relying on the case of Supreme Cylinders Ltd. (Supra) and Saini Industries (Supra). Having not done an independent examination as required in law, the benefits of CENVAT credit cannot be denied in the hands of the appellant assessee in the absence of positive evidence to prove contrary.

Moreover, from the records, it is amply clear that the statements made by Sri Gupta of SPPL specifically pertained to the invoices issued by them to one M/s.Akhsay Steel which in any case, cannot deprive the appellant assessee herein of their legal entitlement of CENVAT credit.

In view of the findings and discussions above, we uphold the original order dated 30.03.2017 passed by the Ld.Addl.Commissioner and set aside the appellate order dated 18.01.2018 passed by the Ld.Commissioner(Appeals). Demand of CENVAT credit, interest and penalty imposed on both the appellants herein are thus set aside and the appeals are allowed with consequential relief as per law.

(Pronounced in the open Court.)

SD/

(P.K.CHOUDHARY)
MEMBER (JUDICIAL)

SD/

(P.VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

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