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

REGIONAL BENCH – COURT NO.2

Service Tax Appeal No.320 of 2011

(Arising out of Order-in-Original No.06/Commr./CE/Kol.III/2011-12 dated 25.04.2011 passed by Commr. of Central Excise, Kolkata III)

Commr. of Service Tax, Kolkata
180, Santipally, Rajdanga Main Road, Kolkata-700107

Appellant

VERSUS

M/s Bharat Heavy Electricals Ltd.
Plot No.9/1, Block-D-J, Sector III, Salt Lake City, Kolkata-700091

Respondent

APPERANCE :

Shri S.S.Chattopadhyay, Authorized Representative for the Appellant
Dr.Samir Chakraborty, Sr.Advocate & Shri Abhijit Biswas, Advocate for the Respondent

CORAM:

HON'BLE MR. P.K.CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR.C. J. MATHEWS, MEMBER (TECHNICAL)

FINAL ORDER NO.77064/2019

DATE OF HEARING : 24.09.2019
DATE OF DECISION : 24.09.2019

PER P.K.CHOUDHARY :

1. The instant appeal has been preferred by the Revenue against an Order-in-Original No. 06/Commr/CE/Kol-III/2011-12 dated April 25, 2011 (hereinafter referred to as the "impugned order") whereby the Commissioner of Service Tax, Kolkata has dropped the proceedings initiated against the respondent by a show cause notice dated October 14, 2009, along with the demand of service tax contained therein.

2. The brief facts of the case are:

(a) The respondent, a public sector undertaking, is engaged in the business of setting up various power plants on turnkey/EPC contract basis in various parts of Eastern India. It is duly registered under the Finance Act, 1994 (in short, the "Act") and discharged service tax on the taxable services under categories of "industrial and commercial construction services" and "erection, commissioning and installation services" rendered by it during the period March 01, 2006 to June 31, 2009.

(b) A show cause notice dated October 14, 2009 was issued against the respondent assessee ("BHEL") alleging that it was not eligible to abatement of an amount of Rs. 226,73,32,737/- in terms of Notification No. 1/2006-ST dated March 01, 2006 (hereinafter referred to as the "said Notification"). Accordingly, the show cause notice required BHEL to show cause as to why an amount of service tax along with education cess and secondary and higher education cess amounting to Rs.27,37,52,502/- should not be recovered from it under the Proviso to Section 73(1) of the Act, along with interest under Section 75 of the Act and as to why penalty under Sections 77 and 78 of the Act should not be imposed upon BHEL for alleged contravention of the Act and the rules framed thereunder, as specified in the show cause notice.

(c) The projects involved in the instant case are (i) Bakreswar 4 & 5; (ii) Korba (East); (iii) Mejia 5 & 6; (iv) Santaldih 5 and (v) Chandrapura 7 & 8.

(d) In respect of "Erection, Commissioning and Installation Services" BHEL has discharged service tax on the full gross value of the services. There is no dispute in this respect.

(e) In respect of services rendered in the projects wherein in respect of Industrial Construction Services ("ICS") the assessee availed abatement of 67% of the value in terms of the said Notification, the show cause notice alleged that the assessee had availed credit on input services related to the projects to which they were not eligible to, as a condition for availing abatement under the said Notification and hence demand was made disallowing 67% abatement availed during the said period on ICS services relatable to the projects where the abatement had been availed.

3. It is however the contention of BHEL that in respect of ICS it had availed abatement in terms of the said Notification in respect of services rendered in (i) Bakreswar- 4 & 5, (ii) Santaldih 5, (iii) Korba (East) upto October, 2007 and (iv) Mejia 5 & 6 upto March 2006 projects. In respect of the services rendered in the three other projects, being Korba (East), Mejia 5 & 6 and Chandrapura 8 BHEL paid service tax on the full gross value of the services from November 2007, April 2006 and March 01, 2006 respectively and no benefit under the said Notification was availed and consequently the question of availing wrongfully benefit under the said Notification and/or there being short payment of any service tax payable in respect of ICS in case of these projects did not arise. The demand of tax has been made without taking these facts into account. In its reply to the show cause notice as well as during the personal hearing before the Commissioner BHEL further explained with reference to each of the cases set out in the show cause notice, along with supporting documents, that wherever they had inadvertently availed of cenvat credit the same were reversed along with interest thereon. However, as per the show cause notice, such subsequent reversal did not make good the alleged wrongful availment of benefit under the said Notification.

4. Upon consideration in detail the allegations made in the show cause notice and the contentions of BHEL the Commissioner came to the conclusion that the allegations made in the show cause notice and the demand raised therein against the assessee is not sustainable. In coming to the said conclusion the Commissioner analysed in detail, with reference to the documents on record, each of the cases referred to in the show cause notice of alleged wrongful availment of the cenvat credit by BHEL.

5. We have heard Mr.S.S.Chattopadhyay, Ld. A.R. for the Revenue and Dr. Samir Chakraborty, Senior Advocate for BHEL and have perused the records of the instant proceedings.

6. It is the case of the Revenue that the Adjudicating Authority's dropping of the demand of Rs. 27,37,52,502/- of service tax made on the respondent by the show cause notice was not legal and proper.

6.1 The ground on which the Revenue has assailed the impugned order is that once credit is availed, abatement of 67% in terms of the said Notification is not available to an assessee who has become ineligible therefor and that subsequent reversal of credit is of no help. An exemption notification, according to the Revenue, has to be considered strictly and only when the credit was never utilised, on reversal of the same the benefit of the said notification can be extended. Reliance has been placed in support of this contention on the decision of the Constitution Bench of the Supreme Court of India in the case of <u>Commissioner of Customs (Import), Mumbai</u> Vs. <u>Dilip Kumar & Company</u> 2018 (361) ELT 577 (SC).

6.2 It is also the contention of the Revenue that BHEL could not furnish any record and particulars to confirm that they had not utilised credits for providing services for which they availed benefit of the said Notification and did not account for the input/input services segregating those used for ICS on which the service tax was paid on 33% of the gross value.

7. On behalf of the respondent BHEL it is contended that there can be no dispute with the principles laid down by the Apex Court in the Constitutional Bench decision of <u>Commissioner of Customs</u> Vs. <u>Dilip Kumar & Company</u> (supra) that burden of proof entitlement under exemption notification is on the assessee claiming such

exemption and if there is any ambiguity in the exemption notification benefit of such ambiguity cannot be claimed by the assessee and it must be interpreted in favour of the Revenue. However, this principle and consequently the relied upon decisions of the Apex Court and the Tribunal by the Revenue have no manner of application whatsoever to the instant case. The issue involved is also clearly distinguishable. There is no ambiguity in the said Notification. In the instant case the Commissioner had, on a detailed analysis of each of the cases alleged in the show cause notice, came to specific conclusions that wherever abatement under the said Notification had been availed by the assessee, the requirement of the said Notification stood duly satisfied. From the impugned order of the Commissioner it was also apparent that the assessee had duly discharged the burden of proof cast upon it for entitlement to the abatement allowed under the said Notification. All relevant documents and particulars on record were duly submitted in the reply to the show cause notice and before the Commissioner during adjudication proceedings and they were duly scrutinised by the Adjudicating Authority. There is, thus, no infirmity in the impugned order of the Commissioner.

7.1 Relying upon the following cases it has been further contended on behalf of BHEL that reversal of cenvat credit with interest attributable to inputs/input services, even if the same is done subsequently, amounted to non-availment of credit and legitimises the credit availed under the subject exemption notification:

(i) Commissioner of Central Excise and Customs Vs. Precot Meridian Limited, 2015 (325) ELT 234 (SC);

(ii) Commissioner of Central GST & CX Vs. Himmat Glazed Tiles, 2018 (15) GSTL 486 (Guj);

(iii) Shapoorji Pallonji & Company Ltd. Vs. Commissioner of C.Ex., 2016 (41) STR 532 (T);

(iv) Kony Labs IT Services Pvt. Ltd. Vs. CC,C.Ex., 2017 (3) GSTL 475 (T).

8. We have considered the submissions on behalf of the parties. The issue for decision in this case is whether subsequent reversal of credit makes BHEL ineligible to benefit under the said Notification. This issue is no more res integra.

8.1 In the case of Commissioner of Central Excise and Customs Vs. Precot Meridian Limited (supra) the benefit of exemption Notification No. 5/99-CE dated February 28, 1999 was available to the assessee therein subject to certain conditions being satisfied, one of which was that the assessee had not taken any modvat credit under Rule 57A or Rule 57B or Rule 57Q of the erstwhile Central Excise Rules, 1944 in the process of dyeing, printing, bleaching or mercerising in the manufacture of dyed, printed, bleached or mercerised yarn. The assessee had utilised the modvat credit in the previous two years prior to February 28, 1999 and while not availing or utilising any modvat credit after the issuance of the Notification, the assessee returned or paid back in January, 2005 even the earlier modvat credit it had taken and utilised. In this scenario, the question that arose before the Hon'ble Supreme Court was as to whether the assessee fulfilled the pre-condition in the notification in order to become eligible to get the benefit of the exemption thereunder. Dealing with this issue the Hon'ble Supreme Court observed and held as under:-.

> "*3. We note that five-Member Bench of the Tribunal in the case of Franco Italian Co. Pvt. Ltd. Vs. Commissioner [2000 (120) ELT 792 (T-LB)] had taken the view that even if the MODVAT credit was utilised but, thereafter, refunded, it would amount to not utilising the said MODVAT credit. Same view has been taken by the High Court of Allahabad in Hello Minerals Water (P) Ltd. Vs. Union of India [2004 (174) ELT 422 (All)].*
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> *4. On a specific query put by the Court, we were informed that as far as the aforesaid two judgments are concerned, they were accepted by the Department and no*

appeal was filed there against. In the impugned judgment, the Tribunal has decided the issue in favour of the assessee relying upon the aforesaid two decisions.

5. We, thus, do not find any reason to interfere with this order. The appeal is dismissed accordingly."

8.2 Similarly, in Commissioner of Central GST & CX Vs. Himmat Glazed Tiles (supra), the Division Bench of the Gujarat High Court held as under:

"*2. Briefly stated the facts are that the assessee is a manufacturer of ceramic products. These are by-products and is called body clay powder which envisages nil rate of duty. The assessee did not maintain separate accounts and initially availed cenvat credit on the exempt product also. However, subsequently, it appears that such credit so availed was reversed with interest. The department however still objected to such procedure.*

3. The appellate authority and the Tribunal held that since the assessee had reversed the cenvat credit with interest, no further adverse consequence should follow. We notice that this Court in case of Commissioner V. Ashima Dyecot Ltd. reported in 2008 (232) ELT 580 has observed that reversal of credit amounts to non-availment.

4. We do not find any error in the view of the Tribunal. Tax appeals are dismissed."

8.3 The same has also been held by the Coordinate Benches of the Tribunal in Shapoorji Pallonji & Co. Ltd. Vs. CCE, (supra) and Kony Labs IT Services Pvt. Ltd. Vs. CC,CEx &ST (supra).

8.4 We have considered the decision of the Hon'ble Supreme Court in Dilip Kumar's case (supra) and find that the same is clearly distinguishable and is inapplicable, the issue herein being different.

8.5 The aforesaid decisions of the Hon'ble Supreme Court, the Gujarat High Court and the Tribunal fully covers the instant case and on respectful application thereof it is conclusive that the impugned order of the Commissioner is legal, valid and proper and that the instant appeal of the Revenue is without any merit or substance. We hold accordingly.

8.6 The other contention of the Revenue that BHEL could not furnish relevant records and particulars is also incorrect. The impugned order of the Commissioner and the findings contained therein clearly shows that the relevant records and particulars were before the Commissioner, which is perused and scrutinised to arrive at findings against each project as stated in the show cause notice. No material has also been disclosed by the Revenue in support of this contention. As such, this contention is unsustainable.

9. In the premises, the appeal of the Revenue is rejected and the impugned order of the Commissioner is upheld.

(Operative part of order pronounced in Open Court)

Sd/
(P. K. Choudhary)
Member (Judicial)

Sd/
(C.J.Mathews)
Member (Technical)

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