

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

REGIONAL BENCH – COURT NO.2

Service Tax Appeal No.78305 of 2018

(Arising out of Order-in-Appeal No.79/ST/RKL-GST/2018 dated 24.05.2018 passed by Commissioner (Appeals), of CGST & Excise, Bhubaneswar)

M/s Rathi Steel & Power Ltd.

A-3, South Side of GT Road, Industrial Area, Ghaziabad-201009 (UP)

Appellant

VERSUS

Commissioner of CGST & Excise, Bhubaneswar

C.R.Building, Rajaswa Vihar, Bhubaneswar-7, Odisha

Respondent

WITH

Service Tax Appeal No.78306 of 2018

(Arising out of Order-in-Appeal No.78/ST/RKL-GST/2018 dated 24.05.2018 passed by Commissioner (Appeals), of CGST & Excise, Bhubaneswar)

M/s Rathi Steel & Power Ltd.

A-3, South Side of GT Road, Industrial Area, Ghaziabad-201009 (UP)

Appellant

VERSUS

Commissioner of CGST & Excise, Rourkela

KK-42, Civil Township, Rourkela-769004

Respondent

APPEARANCE :

Shri Rajesh Chhibber, Advocate for the appellant

Shri S.Mukhopadhyay, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. P.K.CHOUDHARY, MEMBER (JUDICIAL)

FINAL ORDER NO.75392-75393/2022

DATE OF HEARING : 04.07.2022

DATE OF PRONOUNCEMENT : 19 JULY 2022

PER P.K.CHOUDHARY :

These two appeals have been filed by the appellant against the orders of Commissioner (Appeals), Bhubaneswar who has upheld the orders of the Adjudicating authority confirming demand on account of service tax on Goods Transport Agency ('GTA') services and Manpower Services in respective orders. In both the appeals, demand relates to liability of service received under reverse charge mechanism ('RCM').

2. The Appellant has its manufacturing facilities in the State of Odisha and during the period 2012-13 had central excise registration as a manufacturer of excisable goods. During the course of EA-2000 audit, the auditors pointed out that the Appellant did not pay service tax under RCM in respect of GTA services (Appeal No.ST/78305/2018) and for manpower security services (Appeal No.ST/78306/2018) respectively. On such basis, two Show Cause Notices, both dated 26.04.2016 were issued demanding service tax along with interest and penalty. Both the lower authorities did not agree with the submissions of the Appellant. Hence the present appeals before the Tribunal.

3.1 The Learned Counsel submits that since they had received services of GTA for sale of goods and Man Power Services for the manufacturing activity, they were otherwise entitled for claiming credit of the tax paid under RCM and hence there was no revenue loss so as to invoke extended period of limitation.

3.2 The learned Counsel also drew the attention of the Bench towards the judgment of Hon'ble Supreme Court in the case of CCE vs. Ultratech Cement Ltd. reported in 2018 (9) GSTL 337 (SC) wherein the controversy on the admissibility of credit was settled. However, it has been contended by the learned Counsel that prior to the same, there were contrary views on the admissibility of credit and it is settled law that when there are contrary decisions, extended period of limitation cannot be invoked. He submits that the period involved herein is 2012-13 whereas the judgment of the Hon'ble Supreme Court was rendered in February,2018 only, therefore, the occasion to invoke the extended period of limitation does not arise.

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3.3 The Appellant contended that they are not contesting the leviability of service tax on GTA, Security Service and Man Power Service and, therefore, they are not making any submission in respect thereof. The learned Counsel submits that in both the appeals, the Appellant has challenged the orders of the Commissioner (Appeals) demanding tax for the extended period.

3.4 The show cause notice invoked and original authority upheld the invocation of extended period on the sole basis that neither tax was paid nor returns were filed. However, there was no contrary finding on the issue that when the credit was admissible to the person paying tax under RCM, there could be no case for evasion of tax.

3.5 The learned Counsel has drawn the attention of the Bench towards para 3.5 of the impugned orders wherein the Appellate authority has referred to the submission of the Appellant placing reliance upon the larger bench decision of this Tribunal in the case of Jay Ushin as reported in 2001 (119) ELT 18 (Tri.LB) and the Tribunal's decision in the case of Jet Airways as reported in 2016 (44) STR 465 (Tri. Mum.). However no finding has been given by the First Appellate authority on the said submission. The learned counsel also submits that the decision of the Tribunal in the case of Jet Airways has been upheld by Hon'ble Supreme Court as reported in 2017(7) GSTL-J35 (SC). Therefore, when the issue on limitation was no more res integra, the invocation of extended period was not proper.

3.6 As regard the admissibility of credit on GTA services, it would be pertinent to note that though the said issue is directly not involved in the instant case but for deciding the issue of limitation, the admissibility of credit would have to be ascertained. It is an admitted fact that until the judgment of the Hon'ble Supreme Court in the case of Ultratech Cement Ltd. (supra) was rendered, there were contrary decisions and hence the extended period cannot be invoked by any means.

3.7 The learned Counsel has further argued that even otherwise the demand is barred by limitation as the demand was raised after more than two years from the date of audit which had raised objection solely

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on the basis of information found in the statutory books of the Appellant and the case of any clandestine activity was never made out. The Appellant relied upon the judgment of Hon'ble Allahabad High Court in the case of CCE vs. Triveni Engineering & Ind. Ltd. reported in 2015 (317) ELT 408 (All.) wherein the demand raised on the basis of audit after two years of audit was held to be barred by limitation.

4. The learned A.R. for the Revenue has submitted that the Appellant neither paid tax nor filed service tax returns and the said evasion of tax was detected only during the course of audit. Therefore, extended period was rightly invoked.

5. Heard both sides and perused the appeal records and submissions of both sides.

6. Both sides agree that the Appellant was otherwise liable to pay tax under RCM and, therefore, I am not going into this aspect while disposing the present appeals.

7. As regards invocation of extended period, I find that the Appellant had made categorical submissions in this regard which finds mention in the order in appeal but there is no finding on the same. In any case, when the issue is no more res integra that where the assessee is entitled to claim cenvat credit of the tax paid under RCM, there cannot be any question of invocation of extended period. It is also a settled legal position that where there were divergent views on the issue and even if it is ultimately settled against the assessee, extended period cannot be invoked. It is also an admitted fact that the entire case was made out on the basis of information available in statutory books of account. I find that the very basis of the show cause notice is the audit objection meaning thereby that the entire demand was raised on the basis of information found available in statutory books of the Appellant and hence even otherwise, there cannot be any scope for invocation of extended period. In this regard, the judgment of Hon'ble Allahabad High Court in the case of Triveni Engineering & Ind (supra) is squarely applicable to the facts of the present case.

8. Hence both the appeals succeed on the ground of limitation. Accordingly, the demands for the period beyond the normal period of

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limitation as applicable during the relevant period are set aside with consequential relief to the Appellant.

(Pronounced in the open court on **19.07.2022**)

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

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