

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

REGIONAL BENCH - COURT NO.2

Excise Appeal No.80 of 2011

(Arising out of Order-in-Original No.37/Commissioner/10 dated 29.10.2010 passed by Commissioner, Central Excise & Service Tax, Jamshedpur.)

M/s. Usha Martin Limited

(Phase V, Adityapur Industrial Area, P.O. Gamharia-832108, Dist: Saraikella, Jharkhand.)

...Appellant

VERSUS

Commissioner of Central Excise & Service Tax, Jamshedpur

.....Respondent

(143, New Baradwari, Sakchi, Jamshedpur-831001.)

APPEARANCE

Shri Sanjay Dixit, Chartered Accountant for the Appellant (s)

Shri P.K.Ghosh, Authorized Representative for the Revenue

**CORAM: HON'BLE SHRI P.K. CHOUDHARY, MEMBER(JUDICIAL)
HON'BLE SHRI K. ANPAZHAKAN, MEMBER(TECHNICAL)**

FINAL ORDER NO. 75417/2023

DATE OF HEARING : 28 April 2023

DATE OF DECISION : 16 May 2023

Per : P.K. CHOUDHARY :

The present appeal has been filed by the M/s. Usha Martin Limited against the Order-in-Original No 37/Commissioner/10 dated 29.10.2010 passed by the Commissioner, Central Excise & Service Tax, Jamshedpur, wherein the CENVAT Credit has been disallowed on supplementary invoices. Apart from the duty demand, equivalent

Penalty has been imposed. The period in dispute involved is August 2008 and September 2008.

2. Briefly stated, the facts of the case are that the service provider, M/s Maa Engineering ('service provider'), was not registered with the Department during the period 2005-06 to 2007-08. It provided certain taxable services such as erection, commissioning, crushing of iron ores to the Appellant. Invoices were raised on the appellant without charging any service tax. Subsequently, an investigation was carried on at the premises of the service provider pursuant to which, it got itself registered and raised supplementary tax invoices dated 06.08.2008 charging service tax on earlier invoices with cross reference to the earlier invoices during the period when it was unregistered. The Appellant paid the service tax amount to the said service provider and availed Cenvat Credit.

The Ld. Commissioner disallowed the CENVAT credit on such invoices on the ground that the said invoices have been raised by the service provider much later than 14 days from the date of the completion of service/ receipt of amount in violation of Rule 4A(1) of the Service Tax Rules 1994 (STR 1994) and Rule 9(2) of the CENVAT Credit Rules 2004 (CCR, 2004). He also observed that Rule 9(1)(f) of CCR 2004 specifies only 'invoice' and not 'supplementary invoice' on which CENVAT credit can be availed. Further, the Ld. Commissioner also imposed penalty under Rule 15(3) read with Section 11AC of the Central Excise Act, 1944, on the ground that the credit has been availed with a willful intention to evade payment of excise duty on the manufactured goods on the removal from factory in collusion with Noticee No 2. The Ld. Commissioner has observed (in Para 12.2 of the Order) that the 14 days time period prescribed in Rule 4A(1) is mandatory and non-compliance thereof would render the document void. Hence, the present appeal before this Tribunal.

3. The Ld. Chartered Accountant appearing for the Appellant submitted that Rule 4A (1) of the STR 1994 is applicable to the service

provider and not the Appellant service recipient and the said Rule does not prescribe any consequences in case where the issuance of a bill is delayed by the service provider. He placed reliance on the judgment of Hon'ble Madras High Court in Commissioner of Central Excise, Salem vs. JSW Steels Ltd., 2018 (8) G.S.T.L. 153 (Mad.). He further submitted that there is no dispute regarding 'particulars' in the supplementary invoices as prescribed in Rule 9(2) of CCR 2004. The said Rule nowhere specifies the condition that credit of service tax would be available only if the said invoice is issued by the service provider within 14 days from the date of completion of service/receipt of payment.

The Ld. Chartered Accountant further submitted that credit is available in terms of the proviso to Rule 9(2) of CCR 2004 even if the document does not contain all particulars but contains the details of duty or service tax payable, description of goods or taxable services, registration number of the person issuing invoice, name and address of the premises of the recipient. He also submitted that Rule 9(1)(f) states that credit can be availed on 'invoice' and there is practically no distinction between an 'invoice' and a 'supplementary invoice'. He placed reliance on the following judgements:

- Delphi Automotive Systems (P) Ltd. vs. Commissioner of C.EX., Noida 2016 (46) S.T.R. 369 (Tri. Del.)
- C.D. Engineering Co. v CCE, Ghaziabad, Final Order No 70306/2018 dated 17. 01. 2018
- Commissioner of Central Excise, Salem v Sakthi Sugars Ltd 2014 (36) S.T.R. 1125 (Tri-Chennai).

4. He also disputed the allegations that the cenvat credit has been availed with a wilful intention to evade the payment of excise duty. He submitted that the Appellant is a manufacturer under the CENVAT credit chain and service tax if paid on the input services would be available as a credit. The Appellant would not have benefitted, in any manner whatsoever, and the situation would have been completely

revenue neutral. He relied on the decision of the Tribunal in M/s. Secure Meters Ltd. vs. CCE, 2010 (18) STR 490 (Tri. Del.). He made detailed submissions to distinguish the applicability of decisions cited by the Ld. Commissioner in the impugned order. He also submitted that Rule 15(3) of the CCR, during the impugned period, provided for denial of CENVAT credit on input services taken either wrongly or in contravention of any provisions of these rules in respect of any input service and the maximum penalty is Rs.2,000/- (Rupees Two thousand only). Further, sub-rule (3) no-where specifies the acts of fraud/suppression/wilful misstatement and therefore provisions of Section 11AC of the Central Excise, Act 1944 are not applicable. He relied on the judgment in the case of Davangere Sugar Company v Commissioner of C. Ex., Bangalore-II, 2011 (267) E.L.T. 384 (Tri-Bang).

5. Ld.Authorised Representative appearing for the Revenue reiterated the findings of the Learned Commissioner made in the impugned order and submitted that the appeal filed by the assessee be rejected since devoid of any merit. He also emphasized that denial of cenvat credit should be upheld as there was a collusion between the Appellant and the service provider.

6. Heard both sides and perused the appeal records. The submissions advanced from both sides have been duly considered.

7. On the first issue whether cenvat credit is admissible to a service recipient if an invoice has been issued by the service provider much later than 14 days after the date of completion of service/receipt of payment as prescribed in Rule 4A(1) of the ST Rules, we find that the issue in dispute is no longer *res integra* as it stands settled in favour of the Appellant by decision of the Hon'ble Madras High Court in Commissioner of Central Excise, Salem vs. JSW Steels Ltd., 2018 (8) G.S.T.L. 153 (Mad.). The Hon'ble High Court in Para 15.5 and 15.6 has observed that:

"15.5 Having said so, we notice that Rule 4A of the Service Tax Rules, 1994, inter alia, at the relevant time, required the provider of taxable service, to issue, not later than fourteen days from the date of provisioning of taxable service, an invoice, bill or challan. The details, which were to be provided in such an invoice, bill or challan, are also set out in the Rule.

15.6 A bare perusal of the Rule would show that the obligation, in that behalf, essentially rests on the service provider. The Rule does not advert to any consequences, in case issuance of invoice, bill or challan is delayed. The period provided appears to be directory and not mandatory. Nothing to the contrary has been articulated by the Revenue."

Respectfully following the above judgment, we hold that cenvat credit cannot be disallowed in the hands of the service recipient by invoking Rule 4A (1) of the ST Rules even if the service provider issues such invoice beyond the prescribed period of 14 days from the date of completion of service/receipt of payment. The obligation to issue the invoice timely has been cast on the service provider and not the service recipient. Moreover, the period prescribed in the said Rule is directory and not mandatory as has been held by the Hon'ble High Court.

Further, the issue as to whether the supplementary invoices are specified documents in terms of Rule 9(1)(f) of CCR 2004, we find that this issue is also no longer *res-integra* as it is settled by the decision of the co-ordinate Bench of this Tribunal in Delphi Automotive Systems (P) Ltd. vs. Commissioner of C.EX., Noida, 2016 (46) S.T.R. 369 (Tri. Del.). In Para 8 of the said decision, it has been observed that:

"8. Coming to the first question as to whether during the period of dispute, 'supplementary invoice' could be treated as a valid document, I find that a Division Bench of this Tribunal in the case of EBG India Pvt. Ltd. v. CCE, Nasik (supra) has held that supplementary invoice evidencing payment of additional duty amount is not to be treated on a different footing vis-a-vis the original invoice evidencing original

payment of duty as both these documents were issued under the same provisions of law. Moreover in the Service Tax Rules, 1994 there is provision only for issue of invoice by the service provider or input service distributor and, as such, the Service Tax Rules also do not mention the issue of supplementary invoices when additional service tax is required to be paid due to any reason. In view of this, the term 'invoice' mentioned in Clauses (f) and (g) of Rule 9(1) of Cenvat Credit Rules, 2004 has to be treated including supplementary invoice, as during the period of dispute, with regard to service tax payment, the Rule 9(1) did not make any distinction between 'invoice' and 'supplementary invoice'."

8. We also agree with the submission that during the period in dispute there was no restriction for availing cenvat credit and such credit would be admissible even assuming that the tax that has been paid by the service provider is due to deliberate evasion on his part for the period prior to 01.04.2011. The Tribunal in Para 9 of its decision in Delphi Automotive Systems (P) Ltd., (supra), has observed that :

"9. As regards the restriction that the Cenvat credit of the tax paid under supplementary invoice would not be admissible when the tax paid is additional service tax not paid or short paid due to deliberate evasion, this restriction during the period prior to 1-4-2011 was only in respect of supply of inputs and capital goods as provided in clause (b) of Rule 9(1) and such restriction in supply of services was introduced only w.e.f. 1-4-2011 by inserting clause (bb) to Rule 9(1). Since Rule 9(1)(bb) does not have retrospective effect, the provisions of the same cannot be applied during the period prior to 1- 4-2011....."

The above views have also been taken in Commissioner of Central Excise Salem v Sakthi Sugars Ltd, 2014 (36) S.T.R. 1125 (Tri-Chennai).

In view of the above discussions, the impugned order cannot be sustained and thus, the same is set aside. The demand for recovery of

CENVAT Credit, interest and penalty are set aside and the appeal is allowed with consequential relief as per law.

(Order pronounced in the open court on 16 May 2023.)

Sd/
(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

Sd/
(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

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