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

REGIONAL BENCH – COURT NO.2

Service Tax Appeal No. 75243 of 2016

(Arising out of Order-in-Original No. 18/Commr/ST-II/Kol/2015-16 dated 26.11.2015 passed by the Commissioner of Service Tax-II, Kolkata.)

M/s Macmet India Ltd.
(10B, O.C. Ganguly Sarani, Kolkata-700020)

Appellant

VERSUS

Commr. of Service Tax, Kol-II
(Kendriya Utpad Shulk Bhawan (3rd Floor),
180, Santipally, Rajdanga Main Road, Kolkata-700107)

R**espondent**

APPEARANCE :
Mr. Pulak Kr. Saha, FCA & Joydeb Bhattacharya, FCA for the Appellant
Mrs. K. Kalpana, Authorized Representative, for the Respondent

CORAM:
HON'BLE MR. R. MURALIDHAR, MEMBER (JUDICIAL)
HON'BLE MR. RAJEEV TANDON, MEMBER (TECHNICAL)

FINAL ORDER NO. 77059/2024

Date of Hearing : 18 September 2024
Date of Decision: : 18 September 2024

PER R. MURALIDHAR:

The appellant is engaged in providing turnkey projects services to their clients. In the course of their services, they entered into two agreements. First agreement is for the provision of service and the second agreement is towards supply of the goods required for the projects. In case of supply of goods for the project, in some cases they have procured the goods from other vendors and dispatched the same to the worksite and raised normal invoice on the buyers. Treating that buying and selling of goods within this project would amount to provision of exempted services (trading services), Department issued Show Cause Notice seeking reversal of Cenvat Credit on the value of exempted services charging the Service Tax @ 5%/6%/7%/8%. Apart from this, the Department also alleged that they have paid professional fees of Rs.71,59,300/- and other charges amounting to Rs.50,10,980/- to the foreign entities because of which Service Tax of Rs.13,26,436/- is required to be paid on Reverse Charge Basis. The Show Cause Notice was issued on 21/04/2014 by invoking extended period provisions. After due process, the Adjudicating Authority confirmed the demands. Being aggrieved, the appellant is before the Tribunal.

2. The Learned Consultant appearing on behalf of the appellant submits that the appellants have been supplying the goods in the course of undertaking the turnkey project. Therefore, it should be taken as part of supply towards the whole turnkey project and cannot be viewed separately as a trading activity. Without prejudice to these submission, he also makes a submits that the amendment towards making the trading activity as exempted activity come into effect from 1/4/2011 only in view of the Explanation added to rule 2 (e) of the Cenvat Credit Rules 2004. Therefore, prior to this the trading activity cannot be treated as 'exempted service'. Hence the demand made for the period October 2008 to March 2011 is required to be set aside on this ground itself.

3. In respect of the confirmed demand of Rs. 1,49,05,372/- which is based on @ 5/6/7/8% of the total value of the exempted services, he submits that the issue is no more *res-integra*.

4. The Tribunal and High Courts have been consistently holding that in respect of the Cenvat Credit taken commonly between taxable and exempted goods mere reversal of Cenvat Credit would suffice.

5. On this issue, he relies on the case law of **M/s. Texmaco Rail & Engineering Ltd. Vs. Commissioner of CGST & Excise, Kolkata North 2021 (11) TMI 425-CESTAT Kolkata & M/s. Tiara Advertising Vs. Union of India [2019 (10) TMI 27-Telangana and Andhra Pradesh high Court**. In view of above submissions, he

prays that the confirmed demand of Rs. 1,49,05,372/- may be set aside on merits.

6. In respect of confirmed demand of Rs. 13,26,436/-, towards the purported import of input services, he submits that in respect of the professional fee paid to the extent of Rs. 71,59,300/-, the appellant is not disputing that they are required to pay the Service Tax. He draws our attention to the fact that Rs. 7,23,681/- was paid even before the adjudication process was completed and balance 70,529/- has been paid along with interest of Rs. 38,992/- and penalty of Rs. 17,632/- was paid on 08/04/2014 and 14/07/2014 and the same has been recorded in the Order-in-Original. Thus, he submits that the entire amount towards professional fee paid has been discharged.

7. In respect of demand of Rs. 5,32,227/- on account of other expenses incurred by way of foreign exchange, he submits that they have submitted all the details to the range officials along with invoice copies. He submits that in the Show Cause Notice, they have not specified the service under which the demand is being made. The documentary evidence submitted by the appellant clarify that they have not in the nature of any service but on account of various miscellaneous expenses incurred by them towards capital expenditure and miscellaneous expenses incurred. Since the Department failed to specify the service while issuing the Show Cause Notice, he submits that the confirmed demand of Rs. 5,32,227/- is required to be set aside on this account alone.

8. Coming to the issue of Show Cause Notice being issued by invocation of extended period provisions, the Learned Consultant submits that it is an admitted fact that the appellant is registered with the Service Tax and has been making Service Tax and also filing the ST-3 Returns. It is also on record that they have declared all the details of payments made to the foreign entities in the Balance Sheet which is a relied upon document to issue the Show Cause Notice. This

shows that the appellant has not indulged in any suppression and he submits that the Adjudicating Authority is in error in confirming the demand pertaining to the extended period. He prays that the confirmed demand towards extended period may be set aside on account of time bar also.

9. The Learned AR reiterates the findings of the Adjudicating Authority. She submits that it is on record that the appellant has spent Rs. 71,59,300/- towards professional fee and also spent Rs. 50,10,980/- by way of foreign exchange for the services which calls for payment of Service Tax on reverse charge basis. Hence, she justifies the confirmed Service Tax demand of Rs. 13,26,436/-

10. In respect of confirmed demand towards recovery of Cenvat Credit of Rs. 1,49,05,372/-, she submits that in terms of Rule 6(3), the appellant has not given their option to reverse the Cenvat Credit though they were aware that they were not eligible to take the Cenvat Credit in respect of exempted services provided by them. Therefore, she justifies the confirmation of this demand.

11. Heard both sides and perused the appeal papers and documentary evidence placed before us.

12. In respect of confirmed demand of Rs. 13,26,436/- towards the expenses incurred by the appellant in foreign exchange, we find that the appellant is not disputing that they are required to pay Rs. 7,94,209/-. From the documentary evidence placed before us, we find that the appellant has paid the entire amount along with interest and they have also paid one small portion of penalty. We find that this would meet requirement and set aside the demand towards Service Tax of Rs. 7,94,209/-, interest thereon and penalty imposed there on.

14. In respect of the balance demand of Rs.5,32,227/-, we find that the Revenue has not come out with any specific classification under

which this demand is being made, while issuing the Show Cause Notice.

15. It is on record that the appellant has submitted the complete details of Headings under which the expenses were incurred by them along with requisite invoice copies. From the OIO, it is seen that no verification activity has taken up and in fact the Adjudicating Authority has confirmed this demand under the category of 'works contract' which would not even part of the Show Cause Notice. Therefore, we set aside the confirmed demand of Rs. 5,32,227/- along with interest and penalty on this ground itself.

17. Coming to the Cenvat Credit recovery of Rs. 1,49,05,372/-, we find that the Tribunals and High Courts have been consistently holding that where the Cenvat Credit is availed commonly for the inputs for providing both the taxable and exempted services, mere reversal of Cenvat Credit would be sufficient. The Tribunals and Courts also have been consistently hold that there were no need to the assessee to pay the Service Tax @ 5/6/7/8% of the exempted value of the services provided.

18. On this issue, this Bench in the case of **Texmaco Rail & Engineering Ltd. Vs. Commissioner of CGST & Excise, Kolkata North-2021 (11) TMI 425-CESTAT** Kolkata has held as under:-

> *13. In view of the above factual matrix and the legal position laid down by the Hon'ble High Court, the Show Cause Notice demanding an amount equal to 5% or 10% of the value of the exempted products under Rule 14 is not supported by law. It is not possible to sustain the impugned demand based on such Show Cause Notice and therefore, the appeal filed by the assessee deserves to be allowed. Penalty imposed in the impugned order also needs to be set aside. In so far as the appeal filed by the Revenue is concerned, the ground taken with regard to the delayed filing of declaration after the amendments in the Credit Rules in 2010 has no bearing inasmuch as*

the assessee has duly paid back the proportionate credit amount which the Commissioner has also accepted. In any case, no further demand can be raised in view of the judgement of Hon'ble Telangana High Court as referred above and the Show Cause Notice itself was issued without the authority of law, the appeal filed by the Revenue is liable to be rejected.

19. The Hon'ble High Court in the case of M/s**. Tiara Advertising Vs. Union of India [2019 (10) TMI 27-Telangana and Andhra Pradesh High Court]** has held as under:-

20. We find that the ratio laid down in these decisions is squarely applicable. Accordingly we hold that there were no requirement to the appellant to pay the reversal cenvat credit @ 5/6/7/8% of the total value of the exempted service and reversal of Cenvat Credit would be sufficient.

21. We also find force in the appellant's argument that the show cause notice has been issued for October 2008 to March 2013 on 21/04/2014 after considerable delay. It is on record that the appellant is registered with the Service Tax department and has been paying the Service Tax and also filing their Returns. So far as the trading activity becoming exempted service, this fact got clarified only after amendment was carried out on 1/04/2011, by way of Explanation to Rule 2 (e) of the Cenvat Credit Rules 2004. Since the appellant was following the same system of filing the Returns, it can be said that they have entertained a bonafide belief that this activity would not amount to provision of exempted service. It is also being observed that as the traded goods were being sent to their own project, they would be having bonafide belief that no trading activity is taking place.

22. Giving due consideration for these aspects, we find that Revenue has not made out any case of suppression on the part of the

appellant. Hence, we hold that the confirmed demand for the extended period is required to be set aside on account of time bar. Accordingly, we do so and set aside the confirmed demand for extended period on account of limitation.

23. Now coming to the Cenvat Credit reversed by the appellant, we have already come to a conclusion that demand for the extended period does not survive.

24. The appellant is directed to calculate the Cenvat Credit which is required to be reversed for the normal period and pay the same along with interest. Since the issue is that of interpretation, no penalty is imposable on such reversal.

25. We direct the Adjudicating Authority to verify the details of Cenvat Credit reversed by the appellant for the normal period.

26. Thus, the appeal stands disposed of.

(Dictated and pronounced in the open court.)

Sd/

(R. Muralidhar)
Member (Judicial)

Sd/
(Rajeev Tandon)
Member (Technical)

Pooja