IN THE CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI

Appeal No. ST/88138/17

(Arising out Order-in-Appeal No. PK/ST-I/MUM/203/16-17 dated 27.03.2017 passed by the Commissioner of Service tax(A), Mumbai I)

Percept H. Pvt. Ltd. — Appellant

Vs.

CCGST Mumbai — Respondent

Appearance:

Shri Keval Shah, Advocate for the appellant
Shri Vivek Dwivedi, AC (AR) for the respondent

CORAM:
Hon'ble Dr. Suvendu Kumar Pati, Member (Judicial)

Date of hearing : 14.06.2018
Date of decision : 21.06.2018

O R D E R No: **A / 86777 / 2018**

Refusal of cenvat credit already availed by appellant advertising company on the input services to the tune of `8,08,800/- after audit report indicated it as inadmissible credit is under challenge in this appeal consequent upon unsuccessful attempt before the Commissioner (Appeals) challenging the legality of the order of the first adjudicating authority demanding such tax along with interest and penalty.

2. The appellant is in the business of advertising and had availed input credits on same category and other category services during the period July 2013 to September 2013. Departmental audit conducted thereafter pointed out the same credits availed by the appellant as inadmissible. Annexing such allegedly wrong credit availed by the appellant vide Annexure A to the show-cause notice the appellant was asked to reply as to why such amount `8,17,561/- along with applicable interest and penalty shall not be imposed? The ground raised in the show-cause notice was that such credit was availed by the appellant on the input documents issued prior to 14.03.2003 which is violative of Service Tax Credit (Second Amendment) Rules, 2003 framed under Notification no 5/2003 dated 14.05.2003 vide sub-rule (1) of Rule 3. Reply to Show-cause notice was found not convincing in its totality and vide his order dated 30.10.2008 Jt. Commissioner of Service tax, Mumbai allowed cenvat credit of `9,911/- as he found some bills/ challans had fallen under “same category of taxable service” for which credit is admissible under Rule 3(1)(a) of Cenvat Credit Rules 2002 but confirmed the demand of `8,07,650/- holding availment of such cenvat credit as inadmissible along with interest at appropriate rate and penalty of same amount demanded.

3. In his memo of appeal and during course of hearing of appeal, the ld. Counsel for the appellant Shri Keval Shah submitted that the Ld. Commissioner has erred in not allowing cenvat credit and also erred in invoking the extended period of limitation without proper appreciation of the rules framed for the same and the position of law developed through judicial decisions reported in CCE vs. Data Infosys Ltd. 2006 (4) STR 34 (Tri-Del) and Gopal Zarda Udyog vs. CCE 2005 (188) ELT 251 (SC) for which the order of confirmation of demand along with interest and penalty passed by the first appellate authority is required to be set aside.

4. On the other hand, the respondent department has not filed any cross objection but during course of hearing of appeal has drawn the attention of this court to the amended Rule of 2002 referred above under which two categories of services are clearly distinguishable namely (i) input services falls in the same category of taxable service as that of output service and (ii) other service tax credit to be availed as input service. Referring to sub-rule (a) and (b) of Rule 3, ld. AR Shri Vivek Dwivedi, AC (AR) of the respondent department strongly argued that appellant’s case fall under sub-rule (2) in which case input service for which invoice/ challan issued after the 14th day of May 2003 would only be considered for service tax credit as found under annexure A

to the show-cause notice. All those bills are raised before the appointed day and therefore he justified the order passed by the Commissioner (Appeals) and first adjudicating authority and sought no interference by this Tribunal.

5. Heard both sides at length and perused the relevant amended rule of 2002 and the documents placed on record. Before going to the legality of availment of cenvat credit by the appellant, the issue to be considered by the court which also includes interpretation of cenvat credit in respect of input services used for providing of output services. Ld. Counsel for the appellant was appraised that such interpretation concerning the classification of services is not within the competency of this single bench jurisdiction to which he replied that he would accept the order of the adjudicating authority to the extent that services upheld by the appellant to the tune of amount involved in the appeal i.e. `8,17,561/- can fall under the category of other services and therefore covered under sub-rule (b) of Rule 3 of Cenvat Credit Rules 2002. This being the scenario it is imperative to have a look on the text of amended Rule to arrive at a just decision.

> "(ii) in rule 3 –
>
> (A) for sub-rule (1), the following sub-rule shall be substituted, namely –

> (1) An output service provider shall be allowed to take credit (herein referred to as service tax credit) of the service tax paid on such input services in the manner, namely :-
>
> (a) Where the input service falls in the same category of taxable service as that of output service, service tax credit shall be allowed to be taken on such input service for which invoice or bill of challan is issued on or after the sixteenth day of August 2002;
>
> (b) In any other case, service tax credit shall be allowed to be taken on such input services for which invoice or bill or challan is issued on or after the fourteenth day of May, 2003:
>
> Provided that the output service provider shall be allowed to take such credit, on or after the day on which he makes payment of the value of input service and the service tax paid or payable as indicated in invoice or bill or challan referred to in sub-rule (1) of rule 5."

6. As found from the orders passed by the first adjudicating authority and the Commissioner (Appeals) as well as referred in the show-cause notices, the grounds for upholding such availment of cenvat credit as inadmissible, only sub-rule (a) and (b) of Rule 3(1) has been referred and the proviso annexed thereof has been ignored by the respondent department and the adjudicating authority as well as appellate authority. In drawing the attention of this court to Annexure A of notice to show-cause which contains

a column as the date of payment, the ld. Counsel for the appellant indicated payment in respect of all bills/ invoices were made after 14.05.2003 and therefore his case would be squarely covered under this proviso.

7. I find force in the submission of ld. Counsel for the appellant. It is worthwhile to reiterate that the payment in respect of all bills were made after 14.05.2003 and the cenvat credit was availed by the appellant between July 2013 and September 2013, as found from the appeal memo, which covers the case under proviso annexed to Rule 3. This being the factual scenario, I have no hesitation to hold that appellant had not availed any cenvat credit in violation of Rule 3(1)(b) of Cenvat Credit Rules 2002 (second amendment). Hence the order —

8. Appeal is allowed and the order passed by the Commissioner (Appeals) vide Order-in-Appeal No. PK/ST-I/MUM/203/16-17 dated 27.03.2017 confirming the order of adjudicating authority is hereby set aside.

(Pronounced in Court on 21.06.2018)

Dr. Suvendu Kumar Pati
Member (Judicial)

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