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

Appeal No. ST/85691, 85689/2018

(Arising out of Order-in- Appeal No. PUN-EXCUS-001-APP-684 & 685/17-18 dated 15.11.2017 passed by the Commissioner (Appeals-I) of Central Tax, Pune)

Rohan Builders (India) Pvt. Ltd. Appellant

Vs.

CCE & ST, Pune I Respondent

Appearance:

Shri Sagar Shah, CA for the appellant
Shri Dilip Shinde, M. Suresh (AR) for the respondent

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

Date of hearing : 07.06.2018
Date of decision : 05.12.2018

O R D E R No: A/88048-88049/2018

Penalty imposed under Section 78(1) of the Finance Act, 1994 read with Rule 15(3) of the Cenvat Credit Rules 2004 for incorrectly availing cenvat credit of `9,22,313/- upon the appellant by the first appellate authority and the Commissioner (Appeals) has been challenged in these two appeals filed against the same vide Order-in-Appeal.

2. Factual backdrop of the case is that respondent department had conducted EA audit-2000 and observed availment of inadmissible credit on service tax paid for availing securities services, Vehicle repair services and mobile phone bills payment of the employees during the period between 2012-13 and 2014-15. Further observation during audit was that the appellant had not paid the entire invoice value and the service tax amount on services provided by various contractors but had retained an amount of `46,45,585/- from them against which it had availed cenvat credit of `5,74,194/- in respect of it tax component. Reverse charge service tax liability on security services was also not discharged by the appellant as the service recipient was another discrepancy found during audit. Appellant pro-actively reversed the entire cenvat credit and also discharged the service tax liability under reverse charge in cash along with payment of appropriate interest and informed the departmental authorities the detail of such reversal and payment. But vide show-cause notice dated 03.02.2017 appellant was called for show-cause as to why those payments were not appropriated and why penalty under Rule 15(3) read with Section 78 of the Act was not to be imposed. Appellant unsuccessfully contested and challenged the penalty before the adjudicating authority and first appellate authority and ultimately filed this appeal.

3. In its memo of appeal and during the course of hearing of appeal, ld. Counsel for the appellant Shri Sagar Shah, submitted that allegation of suppression of material fact labelled in the show-cause was wrong since it was done under the bonafide belief that credits availed by it were all eligible credits and being pointed out and made aware of ineligibility during the audit, the appellant accepted its liability and deposited the entire service tax liability with interest and reversed ineligible cenvat credit. It has also been pointed out by the appellant that it is one of the largest tax payers in the Commissionerate and prompt payer of service tax for which non-payment of meagre amount of `21,922/- towards mobile charge and `2,60,785/- towards vehicle repair services and security services should not be viewed as suppression and the only point of dispute regarding availment of cenvat credit against payment of value of contractors is of less significance since the same is not inadmissible credit but pertains to time gap between such payment vis-a-vis availment of such credits. In referring to judicial decision reported in 2014 (34) STR 440 (T-Del.) in the case of CCE vs. Hindustan Zinc where a clear finding was given that even the full payment from the service recipient has not been received and part payment has been due, he pointed out that Rule 4(7) of Cenvat Credit Rules would not be applicable to the appellant's case.

He pointed out that there was no fraud, collusion or mis-statement that could speak about guilty mind or mensrea on the part of the appellant as all of its transactions are reflected in the appellant's book of accounts and they were produced before the authority on the basis of which information, the present duty demand has been raised by the respondent department. He also placed reliance in case laws reported in *UOI vs. Rajasthan Spinning & Weaving Mills* 2009 (238) ELT 3 (SC), *Tamil Nadu Housing Board's 1994 (74) ELT 9 (SC)* and *Cosmic Dye Chemical 1995 (75) ELT 721(SC).* Further submissions of the ld. Counsel for the appellant is that even the penalty has been imposed, as per proviso to Section 78(1) it should not exceed 15% during the relevant time. He also pleaded for extension of benefit provided under Section 73(3) and Section 80 of the Finance Act, 1994 in view of the new penalty provisions referred under Section 78 (3). Further reliance was placed on case laws reported in *ETA Engineering Ltd. 2006 (3) STR 429, CST vs. Vinayaka Travels 2011 (23) STR 5 (Kar.)* while seeking for setting aside the order of Commissioner (Appeals) imposing penalty.

4. Ld. AR for the appellant department justified the reasoning and rationality of the order passed by the Commissioner (Appeals) and stated that it was rightly held

in the order-in-original that appellant had not brought to the knowledge of the department nor it showed in their report filed about such tax liability and in the era of self assessment it is the responsibility of the appellant to counter check the admissibility of cenvat credit availed which it had not done and that would speak about its ill intention for which no interference by the Tribunal is called for in the order passed by the Commissioner (Appeals). He placed reliance on the judgement of *JSW Ltd.* in Civil Appeal no. 8738-8739/2013 of the Hon'ble Supreme Court on whose observation Commissioner (Appeals) had confirmed the order-in-original.

5. Heard from both the sides at length and perused the case records with reference to judicial decisions on which reliance has been placed. Admittedly there is no mechanism available for determination of admissibility of cenvat credit in the self assessment era for which EA audit 2000 procedure has assumed its importance.

6. Now coming to the statutory audit procedure, the purpose of audit, as available in the Manual published by the Institute of Chartered Accountants of India in respect of EA audit and CERA audit under Chapter 17 is that the idea behind such conduct of verification is to reasonably ensure that no amount, which under the central excise law is

chargeable as duty, escapes taxation and the process of verification is always carried out in the presence of assessee and in the process, the auditor is required to discuss the matter with the assessee and advice him to follow correct procedure in future. It is also referred in the said manual that after such submission of audit report, in cases where the disputed amount have not already been paid by the assessee at the spot, demand notices are issued by the department for their recoveries. EA 2000 audit was therefore held to be participative audit. Likewise CERA audit is conducted by the Comptroller and Auditor General of India in respect of receipt and expenditure of the Government of India. It also discharges revenue audit which covers central excise, service tax and customs laws during which time the assesses were examined by CERA audit party to point out the deficiencies, leakage of revenue and non recoveries of dues by the Central Excise Department. Therefore, it cannot be said that only because audit party had found non-observance of partial reverse charge mechanism procedure in respect of certain services, without any reference to the categorising of service provider, appellant is to be tested for suppression etc.

7. It may further be noted that audit is a process which is carried on upwards from the last financial year audited till

the last completed financial year preceding the date of audit which is contrary to the provision of Section 73(1) whereby if any fraud collusion, misstatement or suppression is noticed by the department, while processing a return or investigating a firm, the respondent department can go up to five years and serve show-cause to justify tax liability. In the instant case, show-cause was issued on 03.02.2017 calling for imposition of penalty under Section 78 for irregularity found in the financial year 2012-15. It is not understood as to what irregularity was noticed by the respondent department between 01.04.2015 to 03.02.2017, comprising of a period of 23 months to invoke extended period jurisdiction and go back to financial year starting from March 2015 to April 2012.

8. As observed above, the basic purpose of audit is to find out irregularity which might not have gone to the notice of the assessee and advice them for prompt discharge of tax liability and the same is a participatory process. In such a situation, it cannot be said that there was any intention to suppress tax liability by the appellant since it has subjected its accounts statement to the scrutiny of the audit party. It has been held by the Hon'ble Apex Court in the case of Uniworth Textiles Ltd. (2013) TIOL 13, though pronounced in

reference to Section 28 of the Customs Act. It was held in the said judgment –

> "The conclusion that mere non-payment of duties is equivalent to collusion or wilful misstatement or suppression of facts is, in our opinion, untenable. If that were to be true, we fail to understand which form of non-payment would amount to ordinary default? Construing mere non-payment as any of the three categories contemplated by the proviso would leave no situation for which, a limitation period of six months may apply. In our opinion, the main body of the Section, in fact, contemplates ordinary default in payment of duties and leaves cases of collusion or wilful misstatement or suppression of facts, a smaller, specific and more serious niche, to the proviso. Therefore, something more must be shown to construe the acts of the appellant as fit for the applicability of the proviso."

9. In view of the above observation of the Hon'ble Supreme Court and having regard to the fact that such irregularity was found in EA audit vis a vis prompt payment of service tax and subsequent payment of penalty in conformity to Section 78 (B), I am of the considered view that confirmation of penalty under Section 78 is uncalled for. Hence the order.

10. The Appeal is allowed and order passed by the Commissioner (Appeals) vide Order-in- Appeal No. PUN-EXCUS-001-APP-684 & 685/17-18 dated 15.11.2017 is hereby set aside.

(Pronounced in Court on ....)

Dr. Suvendu Kumar Pati
Member (Judicial)

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