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

APPEAL NO. ST/86688/2018

(Arising out of Order-in-Appeal No. NSK-EXCUS-000-APPL-151-17-18 dated 09.02.2018 passed by the Commissioner of CGST AND Central Excise (Appeals), Nashik.)

M/s Graphite India Ltd. Appellant

Vs.

CCE & ST, Nasik Respondent

Appearance:

Shri T.C. Nair, Advocate for Appellant
Ms. Anuradha Parabh, Assistant Commissioner (AR) for Respondent

CORAM:

HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

Date of Hearing: 14.08.2018
Date of Decision: 07.02.2019

ORDER NO. A/85255/2019

Imposition of penalty for availment of entire CENVAT credit accumulated on nil duty payable products and exempted services rendered without maintaining separate records by the appellant is assailed in this appeal.

2. Appellant is a Public Limited Company which manufactures GRP pipes & fittings and clears final product on payment of appropriate Central Excise duty. It avails exemption under

Notification No. 6/2006-CE dated 01.03.2006 for such supplies made for setting up of water treatment plants for human or animal consumption. It also undertakes turnkey contracts mostly for municipal corporation for laying down of pipelines for which Service Tax payment was exempted. During internal audit made by Central Excise Officer, it was observed that appellant had not maintained separate accounts for both taxable as well as exempted manufacturing and services between 2008-09 and 2012-13 as per Rule 6(3) of the CENVAT Credit Rules, 2004. Appellant accepted the audit objection and paid the amount of Rs. 11,43,308/- @ 6% of the value of services and also paid interest of Rs. 7,18,120/- for delayed payment of said amount but was subsequently put to show-cause for equivalent amount of penalty that resulted in passing of adjudication order appropriating the duty, interest and imposing 50% of penalty to the tune of Rs. 5,71,654/-. Appellant had challenged the said order before the Commissioner (Appeals) that yielded no fruitful result. Hence, the appeal before this forum.

3. In the memo of appeal and during the course of hearing of the appeal, learned Counsel for the appellant Mr. T.C. Nair submitted that show-cause notice was issued on 17.10.2014 which was more than one year after information of payment of duty submitted under Section 11A(3) of the Central Excise Act, 1994 i.e. on 29.07.2013 and appellant was under the *bonafide* belief that they were required to reverse under Rule 6 of CENVAT Credit Rules, 2004 on output services. He further submitted demand based purely on audit

objection, without any important investigation is not sustainable and imposition of penalty is also not sustainable for non-reversal of amount under Rule 6 of CENVAT Credit Rules, 2004 when the issue in dispute was in relation to interpretation of law. He placed his reliance on the following decisions-

(i) *Ram Steel Rolling – 2006 (204) ELT 87 (T)*
(ii) *Kirloskar Pneumatic Co. Ltd. – 2010 (254) ELT 328 (T)*
(iii) *Sangrur Agro Ltd. - 2010 (254) ELT 25 (P & H)*
(iv) *WIPRO Ltd. - 2011 (24) STR 116 (Tri.-Mumbai)*
(v) *Shriram EPC Ltd. - 2014 (35) STR 564 (Tri.-Chennai)*
(vi) *BIO-MED. Health Care - 2005 (37) STR 381 (Tri.-Del.)*
(vii) *2006 (196) ELT 308 (T) – TELCO*
(viii) *2008 (232) ELT 621 (T) – Wipteh Peripherals*
(ix) *Aditya College of Competitive Exam Vs. CCE, Visakhapatnam – 2009 (16) STR 154 (Tri.-Bang.)*

Further, the learned Counsel for the appellant contended that there was no suppression of facts, mis-declaration of facts on the part of the appellant for which proviso to Section 78(1) of Finance Act, 1994 was to be invoked and as the duty is paid voluntarily under Section 11A(2), the proceeding initiated on the basis of show-cause notice erroneous, for which he prays for setting aside the order of Commissioner (Appeals).

4. In response to such submissions, Ms. Anuradha Parabh, learned Assistant Commissioner (AR) for the respondent-department has argued on the strength of reasoning and rationality of the order passed by the Commissioner (Appeals) and took this court through the observation of Commissioner (Appeals) that in ST-3 returns,

categorical fields for declaration of exemptions sought to be availed has been shown as “NO”. Therefore, not showing detail in ST-3 returns by the appellant is a clear suppression of fact for which extended period has been invoked and the same order needs no interference by this Tribunal.

5. Heard from both the sides at length and perused the case records. Categorical noting is found in the show-cause notice at para 8 that in ST-3 returns for the relevant period between 2008-12, under the column where assessee had to state if availed benefit of exemption notification, the appellant had filled up the same by declaring the same as ‘NO’. Similarly at entry 5AA, noticee was required to provide detail of amount under Rule 6(3) of CENVAT Credit Rules, 2004 where they have declared it as ‘zero’ amount payable. It may lead anyone to conclude that these kinds of mis-statement were deliberately done to suppress facts. It is also noted in the said paragraph of show-cause notice vide Order-in-Original No. 10/ST/2008 dated 30.02.2008, the appellant was made aware of the position that they were not liable to pay Service Tax for services provided to municipal corporation in respect of construction of pipeline or conduit but, they were paying such amount for later period, for which allegation was made in the show-cause notice that despite having the knowledge of obligation for payment of an amount under Rule 6(3), appellant did not pay the same till detected by the department and therefore suppression was established. However, wrong filling of appropriate column in ST-3 returns coupled with payment of Service Tax towards services

provided to municipal corporation would clearly indicate that appellant had mis-conceived the provision of law may be due to an erroneous interpreted and paid Service Tax in respect of services provided to municipal corporation which is exempted as well as availed CENVAT credit on that score. Therefore, it cannot be said that appellant had improperly filled up ST-3 returns as 'NO' for availment of exempted services but by no stretch of imagination it would constitute deliberate suppression of material facts for which extended period can be invoked . Further such irregularity was pointed out in the audit report during the course of audit on the strength of documents produced by the appellant.

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 some credit availed as inadmissible, suppression of fact is made out. It cannot also be established that appellant had any *malafide* intention to suppress its duty liability from the department. Hence the order.

ORDER

7. The appeal is allowed and the order passed by the Commissioner of CGST AND Central Excise (Appeals), Nashik on dated 09.02.2018 vide Order-in-Appeal No. NSK-EXCUS-000-APPL-151-17-18 is hereby set aside.

(Pronounced in court on 07.02.2019)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

Prasad