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

APPEAL NO. E/86756/2018

(Arising out of Order-in-Appeal No. NSK/EXCUS/000/APPL/160/17-18 dated 08.02.2018 passed by the Commissioner of GST & Central Excise (Appeals), Nashik.)

M/s Bedmutha Industries Ltd. Appellant

Vs.

CCE & ST, Nashik Respondent

Appearance:

Shri T.C. Nair, Advocate for Appellant
Shri Sanjay Hasija, Superintendent (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/85256/2019

Inadmissibility of CENVAT credit of Service Tax paid on various inputs like pipeline fabrication work, EOU crane, electrical installation, earthing connection, insulation of acid plant etc. is assailed in this appeal along with interest and penalty imposed after reversal of credits.

2. Brief facts of the appellant's case, as revealed from the appeal memo and written note of submission, is that appellant is a manufacturer of galvanized wire, HTGS wire, G.S. earth/GI stay wire

and is registered under Central Excise Act. It has been availing credit of CENVAT on inputs, input services and capital goods in conformity to CENVAT Credit Rules, 2004. E.A. Audit observed Rs. 30,34,534/- as inadmissible credit on various input services. Appellant reversed credit of Rs. 21,95,531/- without utilisation and without challenging its admissibility. It disputed admissibility of credit of Rs. 8,39,003/- availed on the above referred services and invocation of extended period made through show-cause notice that was adjudicated and finally reached the Tribunal stage.

3. In the memo of appeal and during the course of hearing of appeal, the learned Counsel for the appellant Shri T.C. Nair has submitted that pipeline fabrication work, EOU crane, electrical installation, earthling connection, insulation of acid plant etc. were done in relation to the manufacture of final products and those are eligible for CENVAT credit in terms of Rule 2(l) of CENVAT Credit Rules, 2004. In placing reliance on the judicial decision reported in *2009 (16) STR 154 (T)* in the case of *Aditya College of Competitive Exam that was* upheld by Hon'ble Andhra Pradesh High Court as reported in *2016 (45) STR J57 (AP),* he further argued that invocation of extended period, without any conscious or deliberate suppression of facts or mis-statement, is not sustainable when the same was based on audit objection and since there is possibility of difference of opinion among the assessee and the department relating to interpretation of the provisions of Rule, extended period cannot be invoked in view of decisions reported in *2007 (5) ELT 308 (T), 2009*

(13) STR J96 (Bom), 2013 (29) STR 240 (T), 2014 (36) STR 1268 (T). He also challenged the imposition of penalty and interest stating that when unutilised credit balance was much more than the credit reversed, such interest and penalty are not sustainable for which he placed reliance on the decisions reported in *2016 (331) ELT 182 (A.P.), 2014 (310) ELT 509 (Mad.), 2012 (281) ELT 192 (Kar.), 2017 (52) STR 346 (T), 2017 (49) STR 351 (T), 2017 (49) STR 193 (T).*

4. Learned AR Shri Sanjay Hasija for the department, though not filed any cross objection, has vehemently argued with reference of case laws reported in *2009 (238) ELT 3 (SC)* in the case of *Union of India Vs. Rajasthan Spinning & Weaving Mills, 2011 (264) ELT 481 (SC)* that penalty is imposable when conditions for penal liability spelt out in Section 11AC of the Central Excise Act is met and duty paid before issue of show-cause notice would not alter the situation. He further supported the reasoning and rationality found in the order of the Commissioner (Appeals) and sought no interference by this Tribunal.

5. Heard from both the sides at length and perused the case records *vis a vis* relied upon judicial decisions placed by the adversaries. As found from the show-cause, notice out of 49 items on which credit was denied, appellant had challenged legality of such denial in respect of six services. Taking Exit Interview contended by the Auditor on 27.06.2015 wherein it has been allegedly admitted by the appellant that they had utilised those services in relation to civil

works and fabrication of support to capital goods and hence credit was not admissible to them. Paragraph no. 5 of the show-cause notice indicates that the said services had been utilised in laying of foundation or making structures for support of capital goods as appears from the work undertaken. Basing on these two points, finding have been made in the Order-in-Original and Order-in-Appeal that appellant had admitted about its knowledge concerning inadmissibility of CENVAT credit and without the same being unearthed in audit, appellant would have evaded tax. The very use of word "appears" indicates that those Departmental Authorities have suspected the conduct of appellant and taken the words of appellant, if at all done at Exit Interview, as extra judicial confession to reach at such a finding apparently because of the fact that appellant had accepted the audit objection and reversed credit to the tune of Rs. 21,95,531/-, but going by the entire case record, it is very much clear that on pipeline fabrication work, EOU crane, electrical installation, earthing connection, insulation of acid plant etc. it had challenged the audit objection and the legality of inadmissibility of those credits. This being the factual position and having record to the fact that CESTAT Larger Bench decision reported in *2018 (360) ELT 737 (Tri.-LB) in the case of Manglam Cement Ltd. Vs. Commissioner of Central Excise, Jaipur* has given a finding that steel items used for fabrication of support structure for smooth erection of machine including cement had to be considered as "assessories of capital goods" and those items are inputs and eligible to get benefit of CENVAT credit as they fall within the scope and ambit of both Rules 2(a)(A) as well as 2(K) of

CENVAT Credit Rules, 2004, it can't be said that those credits are inadmissible. Further as found from the nature of services electric installation, preparation of earthing system for electricity and insulation of acid container should be regard as "safety measure" for protection of factory and its workers who are engaged in or in relation to the manufacturing process, the same cannot be consider as civil construction or support structure.

6. So far as audit is concern 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. Further it is not 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 (Appeals) in appeal No. NSK/EXCUS/000/APPL/160/ 17-18 dated 08.02.2018 is here by set aside.

(Pronounced in court on 07.02.2019)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

Prasad