CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

WEST ZONAL BENCH, MUMBAI

Service Tax Appeal No. 87711 of 2018

(Arising out of Order-in-Appeal No. V2(A)ST II/796/2016-17 dated 24.03.2018 passed by the Commissioner of CGST and Central Excise Commissionerate, Belapur, Navi Mumbai.)

M/s Ashutosh Marines ....Appellant
111, Sai Chambers, 1st Floor,
Opposite Railway Station, Santacruze (East)
Mumbai- 400 055

VERSUS

Commissioner of CGST & Central Excise ....Respondent
1st Floor, CGO Complex, CBD Belapur,
Navi Mumbai – 400 614

APPERANCE:

Shri V.M. Doiphode, Advocate for the Appellant

Shri O.M. Shivadikar, Asst. Commissioner, Authorised Representative for the Respondent

CORAM:

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

FINAL ORDER NO. A/85801/2019

Date of Hearing: 13.12.2018
Date of Decision: 26.04.2019

SUVENDU KUMAR PATI:

Payment of Service Tax on net amount received by the appellant in violation of Section 67(1) of the Finance Act, 1994 that contemplates payment of Service Tax on gross amount charged for the taxable service is the subject matter of this appeal.

2. Factual backdrop of the case is that appellant is engaged in Manpower Recruitment or Supply Agency services and during rate conducted by DGCEI on 22.07.2014 in another company named M/s ASMACS located in the same premises, it was found that appellant had paid Service Tax as per its ST-3 return which was invariance with Balance Sheet and it appeared that taking gross income of the appellant, on which Service Tax is chargeable, the appellant was due to make payment of Rs. 12,47,029/- as short paid duty. It was put to show-cause notice, matter was adjudicated upon, duty demand along with interest and penalty was confirmed by the Adjudicating Authority and by the Appellate Authority. The appeal assailed the order of Commissioner (Appeals) before this forum.

3. In the memo of appeal and during the course of hearing of appeal, learned Counsel for the appellant Mr. V.M. Doiphode submitted that during the period of 2010-11 to 2014-15, the appellant paid Service Tax on value less than the amount collected from candidate after deducting the amount paid to M/s ASMACS to whom appellant forwarded the selected candidates and M/s ASMACS also had paid Service Tax which was available to the appellant as CENVAT credit, which if taken into consideration and adjusted against duty demand, no tax liability is due on the appellant. He further submitted that learned Commissioner (Appeals) had dismissed the appeal on the ground that even if CENVAT credit amount is admissible to the appellant, there is no mechanism to avail

the same or to make any adjustment in the Service Tax demand. In citing case laws reported in *1995 (77) ELT 511 (SC), 2016 (334) ELT 491 (MAD), 2017 (357) ELT 1144 (Tri.-Mumbai), 2018 (11) GSTL 344 (Bom.), 2016 (341) ELT 604 (Guj.) etc,* learned Counsel for the appellant submitted that substantial benefit was denied for procedural laps. While admitting that net amount shown in ST-3 return was technical error, as the amount paid to M/s ASMACS for providing rest of service is also subjected to Service Tax and the same if combined with each other, there was no revenue loss, he submitted that such imposition of duty liability amounts to double taxation for which the entre exercise is to be recorded as revenue neutral as appellant is entitled to CENVAT credit on the Service Tax made by M/s ASMACS. He placed his reliance on the case laws reported in *2007 (216) ELT 177 (SC), 2005 (189) ELT 257 (SC) and 2016 (344) ELT 1132 (Tri.-Mumbai)* concerning revenue neutrality while pleading for setting aside the order passed by the Commissioner (Appeals).

3. Learned Authorised Representative for the respondent-department Shri O.M. Shivadikar, Asst. Commissioner, in response to such submission of appellant, contented that in view of Notification No. 21/2014-CE(NT) dated 11.07.2018 and its subsequent amendment w.e.f. 01.03.2015 vide Notification No. 06/2015-CE(NT) availment of CENVAT credit is possible within one year for which technical mistake that such CENVAT credit could have shown or taken through ST-3 returns would no more be available to the

appellant. He further submitted that in the Order-in-Original, a clear finding is available that in the absence of any contract to the contrary between the candidate and assessee *vis-a-vis* M/s ASMACS, the service cannot be considered as continuous service, for which both the services are to be treated as two separate services and appellant is liable for such duty and Commissioner (Appeals) had rightly concurred with such findings for which interference by this Tribunal is uncalled for.

4. Heard from both sides and perused the case records. It is observed that basing primarily on the statement of Shri Ashutosh Mohanty appellant had been booked by DGCEI and the case was transferred to the jurisdictional authority at Mumbai. As found from his statement, in response to M/s ASMACS's advertisement, appellant was making preliminary interview for candidates and forwarding the names of selected candidates to M/s ASMACS for completing legal formalities and mobilisation, for which activity, it was collecting charges which are accounted and Service Tax was paid by the appellant. Certain amount was paid to M/s ASMACS from such collection towards the service rendered by it and basing on the computer generated copies obtained from M/s ASMACS, appellant was asked to produce cash register, balance sheet etc. The said amount paid to M/s ASMACS also included component of Service Tax which M/s ASMACS paid and that had gone to the credit of appellant but due to erroneous filing of ST-3 return, they failed to put the CENVAT credit in the appropriate column for which demand was

raised where as duty was not payable as it was a technical error. On going by the Order-in-Original it can be seen from para 22.5 (v) as well as show-cause notice that no invoice/bill was raised against such collection from the candidates and therefore the amount shown in the balance sheet was taken by the respondent-department as the gross value. Therefore, there is no evidence on record to substantiate that the entire bill is raised by the appellant except figure mentioned in the balance sheet.

5. It is admitted by the adjudicating authority and found approval by the Commissioner (Appeals) that even if CENVAT credit from the amount recovered from M/s ASMACS is admissible, there is no mechanism to avail the same or to make any adjustment in the Service Tax demand on the appellant for which they had given their finding that the case laws cited by appellant in the grounds of appeal are found to be of no help to the appellant. Accepting that CENVAT credit towards input services could have been availed by the appellant, it cannot be said that preliminary scrutiny of documents and selection are different from making final engagement of manpower in the respective jobs. Therefore, though no written contract is available, still entire process of requirement till its conclusion was a continuous one and the same cannot be considered as two separate services. This being so, in view of decision of this Tribunal passed in *Hariprabha Chemicals P. Ltd. Vs. CCGST, Kolhapur dated 14.08.2018 in appeal No. E/86454/2018*, the effect of such notification limiting one year period for availment of CENVAT credit is

to be applicable to the invoices raised after such notification and cannot be made applicable to the CENVAT credit available before such notification of 2014 as amended in 2015. Therefore, in my considered view, Service Tax was paid by the appellant and M/s ASMACS separately on the gross amount collected and distributed between them and imposing duty liability on the appellant, on the ground that it had paid the same alone on the net amount would amount to double taxation, which no law of the land had ever approved of. Hence the order.

ORDER

6. The appeal is allowed and the order passed by the Commissioner of CGST and Central Excise Commissionerate, Belapur, Navi Mumbai vide Order-in-Appeal No. V2(A)ST II/796/2016-17 dated 24.03.2018 is hereby set aside.

(Order pronounced in the court on 26.04.2019)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

Prasad