CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
<u>MUMBAI</u>

WEST ZONAL BENCH, MUMBAI

Excise Appeal No. <u>86839 of 2018</u>
E/CO/86650/2018

(Arising out of Order-in-Appeal No. GOA-EXCUS-000-APP-127-2017-18 dated 24.01.2018 passed by the Commissioner of Central GST & Customs (Appeals), Goa.)

Commissioner of Central Excise & Service Tax, Goa ....Appellant
ICE House, EDC Complex,
Panaji, North Goa,
Goa-403 001

VERSUS

M/s IFB Industries Ltd. ....Respondent
Plot No. L-1, Verna Industrial Estate,
Verna, Goa – 403 722

<u>APPERANCE:</u>

Shri Anil Choudhary, Assistant Commissioner, Authorised Representative for the Appellant

Shri Pulak Kumar Saha, C.A. with
Shri Manish Jalan, C.A. for the Respondent

CORAM:

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

FINAL ORDER NO. A/85905/2019

Date of Hearing: 20.12.2018
Date of Decision15.05.2019

Appellant-department assailed the order of the Commissioner (Appeals) setting aside the invocation of extended period imposing duty liability of Rs.40,93,642/- along with interest and the equivalent penalty imposed under Section 11AC of the Central Excise Act 1944.

2. Factual backdrop of the case is that respondent M/s IFB Industries Ltd. has been engaged in manufacturing of excisable goods like washing machine, industrial dishwasher as well as trading of those goods. It had availed CENVAT credit by way of maintenance of separate account for common input services used in respect of dutiable goods and exempted services under Rule 6(3A) of CENVAT Credit Rules, 2004 but allegedly adopted wrong formula which is not in conformity to 6(3)(iii)(3) of the pre-amended CENVAT Credit Rules, 2004 prevailing at the relevant period pertaining to respondent's transaction period from 2012-13 to 2014-15. EA-2000 Audit pointed out the same and for the financial year 2011-12, appellant re-calculated as well as deposited differential amount along with interest amounting to Rs. 11,67,012/- but despite such corrections made, it continued to follow the old practice for post 2012 financial year for which it was put to show-cause notice on the basis of audit report, matter was adjudicated upon and duty demand along with interest and penalty were confirmed. In the appeal filed before the Commissioner (Appeals), the Order-in-Original was set aside. Appellant challenges the order passed by the Commissioner (Appeals) while respondent filed cross objection seeking confirmation of the said order.

3. In the memo of appeal and during the course of hearing of appeal, learned Authorised Representative Shri Anil Choudhary,

Assistant Commissioner for the department submitted that the grounds taken by the Commissioner (Appeals) in rejection of appeal, revolves on the point that the procedure followed by the respondent regarding reversal of CENVAT credit used for exempted goods was well as dutiable goods was within the knowledge of the department after EA-2000 audit conducted for the period April, 2009 to June, 2012, for which no suppression of fact can be attributed to the respondent but appellant contended that it was deliberate contravention of Rule 6(3) of CENVAT Credit Rules 2004, as incorrect application of the said rule was made even after Respondent responded to the audit made for the period 2011-12 and credited as well as paid the differential duty amount. It has reflected respondent's *malafide* intention for which the order of the Commissioner (Appeals) is liable to be set aside.

4. In response to such submissions and by way of cross objection, learned Advocate for the respondent Shri Pulak Kumar Saha with Shri Manish Jalan submitted that it had reversed the amount on CENVAT credit taken on common input services proportionately instead of total input services which was the correct procedure followed by the respondent inconformity to Rule 6(3)(iii)(3) and it availed the credit only on such portion of input and input services used in providing taxable goods/services and confusion as well as dispute had arisen due to faulty description of the formula prescribed in Rule 6(3A)(C)(iii) which is (M/N) * P, where M denotes total value of exempted services and goods, N denotes total value of output and

exempted services & P denotes total value of input services taken during the financial year. He further contended that insistence of the department to categories P as the net CENVAT credit and not the gross CENVAT credit has resulted in such confusion in the calculation process and the method adopted by the respondent is appropriate for the reason that, to remove such confusion, the formula had been amended w.e.f. 01.03.2016 vide Notification No. 13/2006-CE(NT) and as held by the CESTAT, Bangalore in the case of *M/s Foods, Fats & Fertilisers Ltd. Vs. Commissioner of Central Excise, Guntur* reported in *2009 (247) ELT 209 (Tri.-Bang.)* such procedural rule will have retrospective application. Applying the said substituted rule, no error can be noticed in the calculation of the appellant, for which he justified the order of the Commissioner (Appeals) and sought no interference in it by the Tribunal.

5. Heard from both the sides at length and perused the case records. It is observed that the respondent's engagement in trading of goods and manufacturing has brought the dispute regarding availment of CENVAT credit on trading which is considered as exempted services, in view of explanatory note introduced into Finance Act.

5.1 Dispute relating to taxability on sale and levy of duty by the excise authority is not new in its origin and on many occasions, matter had reached the Hon'ble Apex Court level that necessitated passing of the Constitution (Forty Sixth Amendment) Act, 1982 and going by its Statement of Objects and Reasons, it can be ascertained that in conformity to the judgment of Hon'ble Supreme Court passed in *Ganon Dunkerley's case (AIR) 1958 SC 560* whereby the sale of goods as used in entry of the 7th schedule to the constitution was treated to have carried the same meaning as in the Sale of Goods Act, 1930, coupled with subsequent decisions of the Hon'ble Supreme Court were the prelude to passage of such an Amendment Act that suitably amended tax on the sale or purchase of goods and included the same in Article 366 of the Constitution of India under a new Article (29A).

5.2 On the other hand "Service" as defined under 65B (44) of the Finance Act, 1994 excludes (ii) such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of article 366 of the Constitution.

6. From a bare reading of the definition and provision reproduced above, it is apparently clear that a pure sale, unassociated with delivery of goods and services together, is not to be considered as service. Therefore what is contained in Section 66D of the Finance Act, 1994 dealing with negative list of services concerning trading of goods and the clarificatory circular referred above as well as inclusion of the same in the explanation appended to clause 2(e) of the Cenvat Credit Rules 2004 are mere clarificatory in nature since definition of service as contained in 65B(44) and exempted service in 66D are to be read conjointly and not in exclusion of each other. This being the statutory definition, sale of goods-be it made in the high sea or within the territorial boundary of India in which Finance Act, 1994

has its force, cannot be called a service to impose tax liability or deny the credit under Rule 6 of Cenvat Credit Rules.

7. Further, duty demand was made on the strength of the EA-2000 audit report. 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.

8. From the above discussion, it can very much will be inferred that trading is not at all a service, as it is a sale of goods for which vat is applicable and as because it is not a service, it is put in the exempted category as an example that trading is not a service for which exemption is also applicable. Likewise audit report cannot be the sole consideration for invocation of extended period to demand duty and impose of penalty under Section 11AC of the Central Excise Act. Moreover, application of formula for computation and arrival at a figure varies on the basis of understanding of the formula and its proper application that cannot be considered as wilful violation of the provision of the Act or Rule only on the ground that re-computation of the previous period on one occasion was accepted by the respondent and duty demand was met, since rule of acquiescence pre-supposes repeated acceptance of the same thing. Hence the order.

ORDER

9. Appeal of the appellant-department is dismissed and the order passed by the Commissioner of Central GST & Customs (Appeals), Goa vide GOA-EXCUS-000-APP-127-2017-18 dated 24.01.2018 is hereby confirmed. Cross objection filed by the respondent is therefore allowed.

(Order pronounced in the open court on 15.05.2019)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

Prasad