CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

REGIONAL BENCH – COURT NO.405

ST Appeal No. 88234 of 2018

(Arising out of Order-in-Appeal No. SM/CGST & CX/BHIWANDI/APP/ 117/17-18 dated 25.03.2018 passed by the Commissioner of CGST & Central Excise, Mumbai)

M/s ACE Pipeline Contract ....Appellant
4 Stanburg Estate Ground Floor
Juhu Kolwada, Hira Buwa Gawde Marg,
Santacruz West, Mumbai-400049

VERSUS

C.C.G.S.T, Mumbai West ....Respondent
Mahavir Jain Vidyalaya, Juhu Lane,
Andheri West, Mumbai-400058

APPERANCE:

Shri Mr Mahesh Raichandani, Advocate for the Appellant
Shri Mr. S.B.Mane, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO. A/86042/2019

Date of Hearing: 06.03.2019
Date of Decision: 29.05.2019

AJAY SHARMA:

Order dated 25.03.2018 passed by the Commissioner of CGST & Central Excise, Mumbai in Order-in-Appeal No. SM/CGST & CX/BHIWANDI/APP/ 117/17-18 has been impugned in the instant Appeal.

2. The Appellants are registered for providing services, inter alia, under the category of 'works contract service, construction services other than residential complex including commercial/industrial

building or civil structures, supply of tangible goods for use, Renting of immovable property service and Goods Transport Service as a recipient under reverse charge. They are also availing facility of Cenvat Credit on their various input services. At the time of audit it was noticed that they were also engaged in trading of the goods and have availed the cenvat credit in respect of common input services such as Telephone Bills, mobile, courier, conveyance, professional fee etc.etc. for providing output services which are chargeable to tax as well as for their trading activities, which is exempted service, without maintaining separate account as required under Rule 6(3)(iii) of CCR, 2004. Since as per Rule 6(3) of CCR, 2004, if the assessee has not opted for maintaining separate accounts of Cenvat Credit on input services used for taxable service as well as exempted service and also not opted for payment under Rule 6(3A), CCR, 2004, they are liable to pay an amount equal to 5/6 percent (as applicable from time to time) of the cost of traded goods in terms of Rule 6(3)(i), CCR, 2004, therefore a show cause notice dated 25.8.2015 was issued to the Appellant to pay an amount of Rs.17,15,866/- for the period April, 2010 to March, 2014 alongwith interest and penalty. The Adjudicating Authority vide Order-in-Original dated 27.12.2016 confirmed the demand of wrongly availed Cenvat Credit of Rs.17,15,866/- u/r.14 ibid r/w section 78 of Finance Act, 1994 alongwith interest and penalty of equivalent amount and appropriated the amount of Rs.1,92,917/- already paid by the appellant towards the demand and Rs.806/- paid towards interest by assessee. On the appeal filed by the Appellant, the learned

Commissioner vide impugned order dated 27.12.2016 rejected the same.

3. According to learned counsel, the Appellants have already reversed the Cenvat Credit before the issuance of show cause notice but there is no finding in the impugned order about the submission of the appellants relating to reversal of cenvat credit on proportionate basis. He further submitted that there have been several correspondences between the appellant and the department right from the conduct of first audit i.e. between August, 2011 to November, 2013 and therefore there is no suppression of facts on the part of the appellants and therefore the extended period has been wrongly invoked. According to him although the appellants have raised these issues before both the authorities below but none of them have considered this while passing the orders. Per contra the learned Authorised Representative appearing on behalf of Revenue reiterated the findings recorded in the impugned order and prayed for dismissal of the Appeal.

4. I have heard learned counsel for the appellant and learned authorised representative for the Revenue and perused the Appeal memo alongwith its annexures. A similar issue has come up for consideration before the Principal Bench Tribunal in the matter of *Jai Balaji Industries Ltd. vs. CCE & ST, Raipur; 2017(352) ELT 86 (Tri-Del)* in which although the assessee reversed the cenvat credit on proportionate basis, but the same was not accepted by revenue authorities. The Tribunal while disposing of the Appeal by way of remand observed as under:-

> "5. The Hon'ble Supreme Court in the case of Chandrapur Magnet Works (P) Ltd. v. CCE, Nagpur-1996 (81) E.L.T.3(S.C.)

> which has been followed in many other decisions of the High Court as well as the Tribunal has held that once Cenvat credit is reversed, it is to be considered ab initio not availed. In the light of this judgment of the Hon'ble Supreme Court, the reversal of Cenvat credit already made by the appellant is to be considered as not taken ab initio.
>
> The Government has introduced the facility of proportionate reversal w.e.f. 1.4.2008 to mitigate the difficulties faced by manufacturers to maintain separate accounts for inputs/input services as well as when the same are commonly used for dutiable as well as exempted products/services. Though detailed procedure starting with an option to be exercised by manufacturer has been prescribed, in the present case, the appellant has not followed the same. However, it is on record that they have already reversed an amount claimed to be proportionate. It is also pertinent to record that this has been done by the appellant even before the issue of the show cause notice in this case. We are of the considered view that the failure of the appellant to follow the procedure perfectly should not come in the way of extending the substantial benefit of proportionate reversal. However, we find that in the order passed by the lower authority, he has not given any finding as to whether the reversal already made satisfies the test of proportionate reversal in terms of quantum of reversal. Hence, we are of the considered opinion that the matter is to be remanded to the original adjudicating authority to verify whether the amount of Cenvat credit already reversed along with interest satisfies the requirement of proportionate reversal. We also make it clear that there is no justification for demand of the amount equivalent to 10%/5% of the value of electricity wheeled out. The appellant should be given an opportunity to argue their case before the original adjudicating authority who is directed to pass order expeditiously within a period of three months of the date of receipt of this order.
>
> 6. The appeal stands disposed of by way of remand as above."

5. Since in the instant matter also it is one of the contentions of the Appellant that the reversal of proportionate cenvat credit has not been considered by the authorities below while deciding the matter, therefore without going any further in the merits of the matter and following the decision as aforesaid, I am inclined to remand the matter to the Adjudicating Authority. The matter is accordingly remanded to the Adjudicating Authority to decide the matter afresh after verifying whether the amount of Cenvat credit reversed by the

Appellant satisfies the requirement of proportionate reversal. All the contentions raised by the Appellants are left open. It is needless to mention that the Adjudicating Authority must give a fair opportunity of hearing to the Appellant.

6. The Appeal is therefore allowed by way of remand.

(Order pronounced on 29/05/2019)

(Ajay Sharma)
Member (Judicial)

arch