CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL MUMBAI

REGIONAL BENCH – COURT NO.1

Appeal No.E/87845/2014

[Arising out of Order-in-Original No.95/COMMR(WLH)/LTU-M/CX/2013, dt.29.03.2014, passed by the CCE, LTU, Mumbai]

M/s KSB Pumps Ltd **......Appellant**
Mumbai-Pune Road, Pimpri,
Pune 411 018

VERSUS

Commissioner, CE & ST, LTU **......Respondent**
29th Floor, World Trade Centre, Cuff Parade,
Mumbai 400 005

Appearance:
Shri M.P. Joshi, Advocate for the Appellant
Shri A.C. Choudhary, DC (AR) for the Respondent

CORAM:

HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)
HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO.A/86088/2019

Date of Hearing: 10.06.2019
Date of Decision: 10.06.2019

PER: D.M. MISRA

This appeal is filed against Order-in-Original No.95/COMMR (WLH)/LTU-M/CX/2013, dt.29.03.2014, passed by the CCE, LTU, Mumbai.

2. Briefly stated the facts of the case are that the Appellants are engaged in the manufacture of 'Pumps' falling under Chapter 84 of

Central Excise Tariff Act, 1985. During the period May 2008 to March 2009, they received the services from overseas service providers and made payments for such services amounting to Rs.853.66 lakhs, but failed to discharge Service Tax of Rs.104.54 lakhs. However, on being pointed out in July 2009, they paid the entire amount of Service Tax and availed credit of the same. Alleging that the Appellant had contravened the provisions of Rule 9(1)(b) of CENVAT Credit Rules, 2004, demand notice was issued to them on 05.06.2012 for recovery of the credit with interest and penalty. On adjudication, the demand was confirmed with interest and penalty. Hence, the present appeal.

3. At the outset, the learned Advocate for the Appellant, advancing a two-fold argument, has submitted that during the relevant period, under Rule 9(1)(b) of CENVAT Credit Rules, 2004 supplementary invoices issued was only relating to 'inputs' and 'capital goods'. There is no mention of 'input services' in the said provision till the said Rule was amended by insertion of Rule 9(1)(bb) to the said CENVAT Credit Rules, 2004 w.e.f. 01.04.2011. In support, the learned Advocate referred to the judgment of Hon'ble Madras High Court in the case of CCE Salem Vs JSW Steels Ltd - 2018 (8) G.S.T.L. 153 (Mad.). Further, he has submitted that this Tribunal, after analysing the facts and the evidences on record, dropped the penal proceedings initiated against the Appellant in discharging the Service Tax of Rs.104.54 lakhs Service Tax under reverse charge mechanism vide Order No.A/89365/17/STB, dt.31.08.2017 on being pointed out by the Department observing that there was no suppression of facts with intent to evade payment

of duty. Hence, credit is even other wise admissible to the Appellant.

4. The learned A.R. for the Revenue reiterates the findings of the learned Commissioner (Appeals).

5. Heard both sides and perused the records. The limited issue involved for consideration is whether the Appellants are entitled to avail CENVAT Credit of Rs.1,04,53,676/- being the Service Tax paid on the value of sales commission to overseas service providers during the relevant period on reverse charge basis as per Sec.66A of Finance Act,1994. We find that on being pointed out by the Revenue in July 2009, the Appellants have discharged Service Tax for the services received from overseas clients under Section 66A of Finance Act, 1994. Consequently, they availed CENVAT Credit of the service tax amount so paid considering the same as an input service. Revenue does not dispute the said service as 'input service' but it is their contention that since the Service Tax was recovered from the Appellant, which was initially not paid by the Appellant due to wilful mis-statement or suppression of facts, therefore, the credit of the amount so paid is not admissible to them in view of Rule 9(1)(b) of CENVAT Credit Rules, 2004. We find that the applicability of Rule 9(1)(b) prior to the amendment to the said provision reads as under:-

" Rule 9. Documents and accounts –

(1) ...
(a)....
(b) a supplementary invoice, issued by a manufacturer or importer of inputs or capital goods in terms of the provisions of Central Excise Rules, 2002 from his factory or depot or from the premises of the consignment agent of the said manufacturer or importer or from any

other premises from where the goods are sold by, or on behalf of, the said manufacturer or importer, in case additional amount of excise duties or additional duty leviable under Section 3 of Central Tariff Act, has been paid, except where the additional amount of duty became recoverable from the manufacturer or importer of inputs or capital goods on account of any non-levy or short-levy by reason of fraud, collusion or any wilful mis-statement or suppression of facts or contravention of any provisions of the Excise Act, or of the Customs Act, 1962 (52 of 1962) or the rules made thereunder with intent to evade payment of duty."

> Explanation: For removal of doubts, it is clarified that supplementary invoice shall also include challan or any other similar documents evidencing payment of additional amount of additional duty leviable under Section 3 of the Customs Tariff Act."

6. This provision has been interpreted by the Hon'ble Madras High Court considering the Revenue's appeal in the case of JSW Steel Ltd (supra) and observed as follows:-

"13.2 A careful perusal of sub-rule (1) of Rule 9 would show that CENVAT credit can be taken by the manufacturer or provider of output service or input service distributor based on the documents referred to in clauses (a) to (g). Clause (a) of sub-rule (1) of Rule 9, *inter alia*, allows a manufacturer, (which is, what the assessee is) to claim CENVAT credit based on an invoice, which could be issued by a manufacturer or an importer or even a first stage dealer or a second stage dealer, as the case may be, in terms of the provisions of the Central Excise Rules, 2002 (in short 'the 2002 Rules').

13.3 The invoices issued by a manufacturer for clearance of inputs or capital goods from his factory or depot or from the premises of his consignment agent or from any other premises from where the goods are sold, by or on his behalf, also qualify for availment of CENVAT credit.

13.4 This facility, under the Rule, it is made clear, extends to an invoice issued by the manufacturer for clearance of inputs or capital goods as well. [See Rule 9(1)(a)(i)(I) and (II)]. A similar provision qua invoices issued by the importer and first stage or a second stage dealer is also embedded in the very same Rule. [See Rule 9(1)(a)(ii), (iii) and (iv)].

13.5 Clause (b) of [sub-rule] (1) of Rule 9 of the 2004 CC Rules enables availment of CENVAT credit against supplementary invoices, issued by a manufacturer or importer of inputs or capital goods. There is no reference, whatsoever, to input service provider. The Explanation which is appended to clause (b) of Rule 9(1), clarifies what a supplementary invoice would include. The clarification adverts to the fact that the supplementary invoice would include a challan or any other similar document evidencing the payment of

> additional duty, leviable under Section 3 of the Customs Tariff Act. Clause (c) which follows the *Explanation* appended to Clause (b) is prefixed with the word "or". As indicated above, Clauses (a) to (g) of sub-rule (1) of Rule 9 of 2004 CC Rules generally advert to various documents, based on which, a manufacturer or a provider of output services or input service distributor, can avail of CENVAT credit.
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> 13.6 Therefore, in our view, the assessee is right in taking up the stand that Clause (b) of sub-rule (1) of Rule 9 of 2004 CC Rules has no application to invoice or challan issued by a service provider.
>
> 13.7 It is clear, on a plain reading of Rule 9(1) of 2004 CC Rules, that the *Explanation* appended to Clause (b) of sub-rule (1) of Rule 9 only seeks to clarify that supplementary invoice would also include a challan or any other similar document, which evidences payment of "additional amount of additional duty" leviable under Section 3 of the Customs Tariff Act, issued by a manufacturer, importer of inputs or capital goods.
>
> 13.8 Therefore, the documents included in Clauses (e), (f) and (g) of sub-rule (1) of Rule 9 of 2004 CC Rules, would not be governed by the *Explanation*, as it is sought to be argued by the Revenue.
>
> 14. Thus, according to us, the assessee has correctly availed the CENVAT credit, based on the invoice/TR 6 challan.
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> 15. Furthermore, since, we have come to the conclusion that Rule 9(1)(b) of 2004 CC Rules would have no application to the facts obtaining in the instant case, the exception carved out in clause (b) of sub-rule (1) of Rule 9 of 2004 CC Rules, which prohibits availment of credit in a case of additional amount of duty becomes payable on account of fraud, collusion or any wilful misstatement or suppression of facts, etc., will not be applicable to the assessee."

7. Also, we find that this Tribunal, analysing the circumstances under which the service tax was paid by the Appellant for the value of sales commission paid to the overseas buyers under reverse charge mechanism have arrived at the conclusion that there was no suppression, mis-statement etc on the part of the Appellant in discharging the service tax even though it was paid after being pointed by the department.

8. Thus, in these circumstances, we do not find justification in denying CENVAT Credit of Rs. Rs.1,04,53,676/- to the Appellant.

Consequently, the impugned order is set aside and the appeal is allowed with consequential relief, if any, as per law.

(Operative part of the order pronounced in the open court)

(D.M. Misra)
Member (Judicial)

(P. Anjani Kumar)
Member (Technical)

Bahalkar