CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

REGIONAL BENCH – COURT NO.405

Service Tax Appeal No. 85126 of 2015

(Arising out of Order-in-Appeal No. PUN-EXCUS-002-APP-55-14-15 dated 08.10.2014 passed by the Commissioner of Central Excise (Appeals), Pune.)

M/s Siddharth Earthmovers ....Appellant
513/B E'Ward Plot No. 8/9 Nalawade Colony
Samarth Nagar Rajarampuri Kolhapur
416 008

VERSUS

Commissioner of Central Excise, Kolhapur ....Respondent
Vasant Plaza Rajaram
Roadkolhapur 416 003

APPERANCE:

Shri V.B. Gaikwad, Advocate for the Appellant
Shri Saikrishna Hatangadi, Assistant Commissioner, Authorised Representative for the Respondent

CORAM:

HON'BLE SHRI AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO. A/86129 / 2019

Date of Hearing: 02/04/2019
Date of Decision: 19/06/2019

PER: AJAY SHARMA

Order dated 08.10.2014 passed by the Commissioner of Central Excise (Appeals), Pune in Order-in-Appeal No. PUN-EXCUS-002-APP-55-14-15 has been impugned in the instant Appeal.

2. The main issue to be decided is whether the credit of duty paid on the capital goods is admissible to the Appellants and whether the

service tax to the extent of utilisation of said credit is recoverable from the appellants?

3. I have heard learned counsel for the appellant and learned authorised representative for the revenue and perused the records of the case including the written submissions filed on behalf of the Appellant. The learned counsel for the appellant contended that while rejecting the Cenvat Credit of Rs.6.42 lacs in respect of hydraulic excavator, the learned commissioner erred in relying upon the decision of the Tribunal in the matters of *CCE, Surat vs. Aneri Construction ; 2012(28) STR 578 (Tri.Ahm.)* which in turn relied upon the decision of the Larger Bench in *Spenta International Ltd.; 2007 (216) ELT 133 (Tri.-LB)*. Whereas according to him the plain reading of Rule 6(4) of the Cenvat Credit Rules, 2004, which were in operation during the relevant period, clearly reveals that the same intends to disallow the credit on capital goods only when they are exclusively used in the manufacture of exempted goods or exclusively used for providing exempted services. He further submitted that the term '*exclusively'* used in Rule 6(4) ibid indicates that the use should be only and only for exempted final product/services without any exception and if the use is partly for dutiable final product/taxable services and partly for exempted final products/services, the provisions of Rule 6(4) will not be applicable, as held by the Hon'ble High Court of Karnataka in the matter of *CCE vs. Kailash Auto Builders Ltd.; 2012(280) ELT 49 (Kar.)* and the Hon'ble Chhattisgarh High Court in the matter of *UOI vs. HEG Ltd.; 2012(275) ELT 316(Chhatisgarh.)*. He further submitted that so far

as the denial of credit of Rs. 8,05,192/- pertaining to Screen with vibrating grid and hig purchased vide Bill of Entry dated 24.10.2009 is concerned, the same has been denied to him for the reason that when the Appellant availed the credit on the said screen in October, 2009 they were enjoying the SSI Exemption upto Rs.10 lakhs provided under Notification No.6/2005-ST, dated 1.3.2005. Whereas according to the learned commissioner as per condition No.2(iii) of the aforesaid notification, the provider of taxable service shall not avail the Cenvat Credit under Rule 3 of the said rules, on capital goods received in the premises of provider of such taxable service during the period in which the service provider avails exemption from payment of service tax under this notification. According to learned counsel, if one carefully reads condition No.2(iii) of the notification it only prohibits the *availing* of Cenvat credit while enjoying the exemption under the said notification and that mere taking of credit does not amounts to *availing of credit* and that the credit can be held as availed only when it is taken as well as utilised and in support of his submission the learned counsel relied upon the decision of the Tribunal in the matter of *Sagar Twisters vs. CCE; 2005(188) ELT 497*. Per contra learned Authorised Representative for the Revenue reiterated the findings recorded in the impugned order and submitted that none of these submissions as mentioned above have been raised by the Appellant before the learned Commissioner.

4. I have gone through the impugned order and find that none of these submissions have been recorded in the impugned order and it is not clear whether any such submissions have been made by the

Appellant during the course of hearing. Even, if it is assumed that these submissions were not raised earlier, then also learned Counsel for the Appellant is entitle to raise them at this stage since these are legal submissions. In any case, these submissions were not discussed in the impugned order, therefore interest of justice demands that the matter should be remanded back to the learned commissioner to decide it afresh after taking into consideration the aforesaid submissions raised by the learned counsel for the Appellant and also after following the principle of natural justice and after giving a reasonable opportunity of hearing to the Appellants. Additional submissions, if any, are also permitted to be made by the appellants during the course of such hearing.

The Appeal is therefore allowed by way of remand.

(Order pronounced in the court on 19/06/2019

(Ajay Sharma)
Member (Judicial)

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