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

WEST ZONAL BENCH, MUMBAI

Service Tax Appeal No. 88633 of 2018

(Arising out of Order-in-Appeal no. NA/GST/A-III/MUM/579/17-18 dated 28th March 2018 passed by the Commissioner (Appeals)-III, GST&CX, Mumbai)

PAWAN HANS HELICOPTERS LTD ....Appellant
Juhu Aerodrome,
S.V. Road, Vile Parle,
MUMBAI – 400056**.**

VERSUS

Commissioner of C.G.ST-Mumbai West ....Respondent
Null Mahavir Jain Vidyalaya
Juhu Lane,
Andheri (W), Mumbai – 400058.

<u>APPERANCE:</u>

Shri Vinod Awtani, C.A. for the Appellant

Shri Sudhir B. Mane Asst. Commissioner, Authorised Representative for the Respondent

CORAM:

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

FINAL ORDER NO. A/86440 / 2019

Date of Hearing: 07-06-2019
Date of Decision: 22-08-2019

SUVENDU KUMAR PATI:

Demand of duty of Rs. 14,11,029/- for the period between 2009 and September 2013 against appellant for not maintaining separate records for trading spare parts of helicopter and sale of scrape, being considered as exempted service, but availing entire CENVAT credits on inputs is assailed in this appeal.

2. Factual backdrop of this case is that appellant is a Public Limited Company engaged in providing helicopter repair & maintenance, service, trading and coaching services etc. During EA-2000 audit, it was observed that appellant was trading spare parts which was exempted service but it was not maintaining separate accounts for which 6% of the total price of exempted goods under Proviso 6(3)(b) of the CENVAT Credit Rules 2004 was demanded from it by way of Show cause Notice dated 27-06-2004 issued by the Joint. Commissioner, Service Tax, Mumbai-II that was adjudicated upon after receipt of reply to show cause and duty demand along with interest and equivalent penalty on the various provisions of Finance Act 1994 read with Cenvat Credit Rules was confirmed by the Adjudicated Authority. Appellant unsuccessfully challenged the same before the Commissioner (Appeals) and ultimately filed this appeal challenging legality of the order passed by Commissioner (Appeals).

3. In the memo of appeal and during the course of hearing of appeal, Learned Counsel for the appellant Mr. Vinod Awtani argued at length to justify that the nature of operation carried out by appellant was not trading for which demand under Rule (6) is not sustainable since appellant had no intention to purchase spares and sell the same but was only helping out the customers who could not procure spares immediately for repairing of the helicopter and appellant was providing them spares from its own inventory for consideration. Therefore, such act of appellant could be treated as clearance of input as such and not trading of goods or any exempted activity. He further, submitted that trading cannot be treated as exempted service prior to 1st April 2011 i.e. the effective date of insertion of explanation to the definition of exempted service and it can not have retrospective application for which he relied up on the case law of *MARTIN LOTTERY AGENCIES LTD. 2009 (14) S.T.R. 593 (S.C.)*. Further referring to this Tribunal's order no. *A/87732/2018 dated 22-10-2018 passed in the case of I.G. Petrochemicals*, he pointed out that trading is not a 'service' for which credit is not required tobe reversed. His alternative submission is that benefit of 6(3AA) should have been extended to the appellant and demand should have been recomputed on proportionate turnover that would limit the demand to Rs. 1,20,975/- and not to make such huge demand which could be equated with extraction of illegal amount that has been depreciated by this Tribunal in the case of *MERCEDES BENZ INDIA (P) LTD. report in 2015(40) S.T.R. 381 (Tri.-Mumbai*), judgment dt. 22-10-2018 of CESTAT Mumbai. He also challenged the maintainability of invocation of extended period and imposition of

equivalent penalty on the appellant which is Public Sector Undertaking and submitted that Cenvat Credit being not a duty, penalty under Rule(15), is not leviable.

4. Per Contra, Learned AR for respondent Department Mr. Sudhir B. Mane supported the reasoning and rationality of the order passed by the Commissioner (Appeals) and referring to circular 943/4/2011-CX. Dated 29th April 2011, he submitted that credit of any input and input service in trading cannot be availed and credits on common inputs and input services could be availed maximum upto 20% of duty liability for the period before 1-4-2008. With reference to the judicial decision reported in *2018-TIOL-3785-CESTAT-MUM in the case of M/s. Gunnebo India Pvt Ltd v. Commissioner of Service Tax, Mumbai-VII,* he pointed out that w.e.f. 1-4-2011, trading itself is not taxable service or activity subject to excise duty for which assesse is not entitled to avail proportionate credit on various input services attributable to trading activity and larger period of limitation has also been correctly invoked and confirmed by Commissioner (Appeals) that needs no interference by the Tribunal.

5. Heard from both the sides at length and perused the case record as well as order passed by the Commissioner (Appeals). It is observed that Learned Commissioner (Appeals) had stretched the explanation appended to Section 66 of the Finance Act w.e.f. 1-4-2011 that clarified that exempted service would include trading and given it a retrospective effect to cover whole disputed period of the appellant by

invoking the principle laid down by the Tribunal in the case of R.M. Gupta Textiles (P) Ltd. v. CCE, Hyderabad-II [2000 (122) E.L.T. 229 (Tribunal)] and stated that clarificatory notes have retrospective effect attached with it. However, as discussed in the I.G. Petrochemicals' case cited Supra, trading is not a service for which explanation appended to section 66 could be conjointly read with the definition of service given in section 65 (44) of Finance Act 1994 that excludes delivery or supply of any goods which is deemed to be a sale within the meaning of clause 29(a) of article 366 of Constitution of India. It is, worthwhile, to reproduce para 6 to 8 of the order to give clarity to the above discussion.

> *"6. In order to ascertain whether trading is a service so that it can be brought into the definition of exempted service as found in Board circular no. 943/04/2011-CX dated 29.04.2011 under Sr. No. 7 its meaning is required to be ascertained. "Trade" is a transfer of ownership of goods and services from one person or entity to another by getting something in exchange from the buyer which is known as consideration amount and it is pure sale when the same relates to transfer of ownership of goods. "Goods" as defined under clause (25) of Section 65B of the Act means every kind of movable property other than actionable claim and money; and includes securities, growing crops grass and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale. In the common parlance, trading is buying and selling of goods. If goods are bought and sold then sales tax is levied which later becomes value added tax and now being dealt under GST. The taxable event of service tax is the act of providing service while act of sale alone is covered under taxable event of sales tax. Therefore, to call trade as service is conceptually improper. Hon'ble Supreme Court, in the presidential reference made in 1962, gave its landmark verdict that has been reported in 1963 AIR SC 1760 said, "in one case (excise), the imposition is on the act of manufacture or production while in other (sale tax) it is on the act of sale."*
>
> *6.1. It is a matter of different interpretation that sometimes there is marginal overlapping of case where goods and services are delivered together like service of food in restaurant, selling of news to agency etc. but these are in different parameters since the instant case is confined to the allegation made in the show-cause notice that there was high sea sale of "Phthalic Anhydride" which department claims to be a exempted service and*

appellant claimed to have not been covered under tax statute of the country in view of article 286 of Constitution of India.

7. Dispute relating to taxability on sale and levy of duty by the excise authority is not new in its origin and on many score matter had reached the apex court level that necessitated passing of the Constitution (Forty Sixth Amendment) Act, 1982 and going by its Statement of Object and Reason, 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 preludes 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).

"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"

8. 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 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."

6. Be that as it may, even the Commissioner (Appeals) had accepted trading to be a service but exempted from Service Tax, in para 9 of his order. He has clearly given his findings that appellant was **either** required to maintain separate account for receipt and use of input **or** pay the amount equivalent to 6% of the value of exempted service as per the provision of Rule 6(3) of CCR **or** pay an amount determined under sub rule 3A of Rule 6 of CCR but in his order, in the operating portion, he rejected the appeal and confirmed Order-In-

Original by which appellant was directed to pay 6% of the value of exempted service. This order is erroneous for the reason that appellant was not provided with the opportunity to exercise either of these two options though it was willing to go for proportional reversal that would have substantially reduced the demand. However, having regard to the fact that trading, as held in the I.G. Petrochemicals Ltd judgement, being not a service, reversal of proportionate credit is uncalled for. Hence the order.

ORDER

7. The appeal is allowed and the order passed by the Commissioner (Appeals)-III, GST&CX, Mumbai vide Order-In-Appeal no. NA/GST A-III/MUM/579/17-18 dated 28-3-2018 is hereby set aside.

(Order pronounced in the court on 22-08-2019)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

John