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

WEST ZONAL BENCH, MUMBAI

Excise Appeal No. 87572 of 2018

(Arising out of Order-in-Appeal No. NSK/EXCUS/000/APPL/307/17-18 dated 9-3-2018 passed by the Commissioner (Appeals), GST & Central Excise, Nashik)

BOSCH LTD ....Appellant
Plot No. 75, MIDC Estate
Trimbak Road
Nasik – 422 007.

VERSUS

Commissioner of C.E & S.T. NASIK ....Respondent
Kendr Rajaswa Bhawan
Old Agra Road
Gadkari Chowk
Nasik – 422 002

APPERANCE:

Ms. Anjali Hirawat, Advocate for the Appellant
Shri Sanjay Hasija, Supdt., Authorised Representative for the Respondent

CORAM:

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

FINAL ORDER NO. A/86713/2019

Date of Hearing: 12-06-2019
Date of Decision: 24-09-2019

SUVENDU KUMAR PATI:

Confirmation of the order by the Asst. Commissioner, C.E., Customs & Service Tax, GLT-I, LTU, Bangalore, by the Commissioner (Appeals), GST & Central Excise, Nashik, demanding duty on Cenvat Credit awaited on Catering Services attributable to EOU by the appellant DTA and ordering for proportionate reversal of Cenvat Credits on recovery made from the employees towards such Canteen/Catering Services is assailed in this appeal.

2. Brief fact of the appellant case is that it is a Large Tax Payer Unit (LTU) registered with Bangalore Service Tax Authority and it received catering and house-keeping services at the factory premises for both employees of its two units namely Export Oriented Unit (EOU) and Domestic Tariff Area (DTA). DTA unit i.e., appellant had paid the amount charged by the service provider for such canteen and house-keeping services and taken credit of the service tax paid on the said services. Appellant was issued with two show cause notices for the period April 2007 to December 2009 and April 2010 to December 2010 with allegation of availment of cenvat Creit on catering and house-keeping services which were no inputs having any relationship with manufacture products and against availment of Cenvat Credit on the amount recovered from employees towards canteen and catering service used by its employees of Export Oriented Unit (EOU). The adjudicating authority had dropped the demand made on catering

service holding the input as eligible input but confirmed demand of Rs. 2,00,192/- + Rs. 75,841/- on recoveries made from employees and also Rs. 3,24,047/- as irregular credits attributable to EOU unit along with interest and penalty of Rs. 6,00,080/- made against confirmed demand for both the periods.

3. In the memo of appeal and during the course of hearing of appeal, Learned Counsel Ms. Anjali Hirawat for the appellant submitted that no specific ground was proposed in the show cause notice to recover input service credit on catering services used in EOU and availed by DTA, which issue is squarely covered by the decision of Hon'ble Karnataka High Court in CCE & ST, LTU Vs. Bicon Ltd 2004 (309) ELT 66 (Kar.). She further submitted that in view of decision of CCE Vs. Sandvik Asia Ltd 2015 (10) TMI 2508 – CESTAT Mumbai and Behr India Ltd Vs. CCE 2016 (6) TMI 827 – CESTAT Mumbai as in the case of appellant, DTA and EOU situated at same place together would constitute as factory and in view of Rule 12A of Cenvat Credit 2004 such a transfer of credit from one unit to another unit, both register under LTU is permissible. She had also drawn attention of this Bench to the fact that EOU unit was de-bonded in 2010, in which case also appellant would have been entitled to Cevat Credit of accumulated credits available with EOU that would have put the appellant in a revenue neutral situation. On the issue of availment of credits on the portion of amount recovered from the employees, Learned Counsel for the appellant also pointed out that larger Bench of CESTAT in the case of CCE Vs. GTC Industries Ltd 2008 (12) STR 468 (T) had held it in favour of appellant but subsequently in

the case of CCE Vs. UltraTech Cement Ltd 2010 (260) ELT 369 (Bom), the said larger Bench decision was overruled and therefore his argument is that in a situation where the issue remained unsettled and no finality had emerged till pronouncement of the judgement of Hon'ble Bombay High Court, invocation of extended period is not permissible for which she prays to set aside order based by Commissioner (Appeals).

4. In response to such submissions, Learned Authorised Representative Mr Sanjay Hasija for respondent department, in citing decision reported in *2018 (16) G.S.T.L. 187 (Mad.)* in the case of *Commissioner of Centrl Excise, Coimbatore Vs. Pricol*, argued that credit is not admissible to the manufacturer as part of service was borne by employee towards cost of food supplied to them. Placing his reliance on decision reported in 2016 (44) SCR 391 (Guj.) in the case of Commissioner Vs. Larsen & Toubro Ltd., he further argued that DTA and EOU units being two separate legal entities, though situated in the same premises, Rule of mutuality would not come to the rescue of the appellant. He also urged that Rule 12 (A) of CCR 2004 deals with transfer of inputs between two units providing taxable services is only permissible for which interference by the Tribunal in the order or Commissioner (Appeals) is uncalled for.

5. Heard from both the sides at length and perused the case record. To start with, the argument led by the Appellant that no specific ground was proposed in the show cause to recover input credits except that it was irregular, is not acceptable in view of the fact that the entire

narration in show cause notice is based on the allegation as to why the credits were inadmissible. It is the settled principle of law that service tax paid on catering and house-keeping services are eligible input credits before negative list came into force, for which both in order-in-appeal and order-in-original, the credits were held to be admissible. It is undisputed fact that the appellant is a large tax payer (LTU) unit which is governed by Rule 12 A. Sub Rule 4 of Rule 12 A reeds:

> *Explanation – For the purpose of this sub-rule 'intermediate goods' shall have the same meaning assigned to it in sub-rule (1) of rule 12BB of the Central Excise Rules 2002.*
> *A large tax payer may transfer, CENVAT credit available with one of his registered manufacturing premises or premises providing taxable service to his other such registered premises by*
> *(i) making an entry for such transfer in the record maintained under rule 9;*
> *(ii) issuing a transfer challan containing registration number name and address of the registered and premises transferring the credit as well as receiving such credit, the amount of credit transferred and the particulars of such entry as mentioned in clause (i),*
> *and such recipient premises can take CENVAT credit on the basis of such transfer challan as mentioned in clause (ii)*

Cursory reading of the above Rule would indicate that Cenvat Credit available with one of registered manufactured premises can be used by other such registered manufactured premises and if the transfer is done from the premises providing taxable service, the other registered premises should also be providing taxable service and not vice versa, which is applied by the authorities below and argued by Learned Authorised Representative. This being so, I have got no hesitation to say that the credit attributable to the EOU could be taken and utilised by the appellant DTA.

6. Concerning availability of Cenvat Credit on the recovery made from employees towards canteen service, though lots were was argued upon, the issue has now been set at rest by the Hon'ble Bombay High Court in the case of UltraTech Cement Ltd, cited Supra, that such availment of credit is not admissible. However, considering the unsettled position of law on the issue of admissibility and inadmissibility of credits on catering and house-keeping services, extended period cannot be invoked but since the 2nd show cause notice is confined to the normal period and even show cause notice does not indicate malafide intention on the part of the appellant to avail ineligible credit, confirmation of penalty u/s 78 by the Commissioner (Appeals) cannot be said to be in accordance with the provisions of the Rule. Hence the order.

ORDER

7. The appeal is partially allowed and the Order-in-Appeal No. NSK/EXCUS/000/APPL/307/17-18 dated 9-3-2018 passed by the Commissioner (Appeals), GST & Central Excise, Nashikto the extent of imposition penalty u/s 78 of the Finance Act 1994 is hereby set aside.

(Order pronounced in the court on 24-09-2019)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

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