CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

Service Tax Appeal No: 87778 of 2014

[Arising out of Order-in-Original No: 23/ST-II/RS/2014 dated 21st March 2014 passed by the Commissioner of Service Tax, Mumbai – II.]

Afcons Infrastructure Limited … ***Appellant***
16 Shah Industrial Estate, Veera Desai Road, Azad Nagar, Post Box No. 11978, Andheri (W)
Mumbai – 400 053

versus

Commissioner of Service Tax ***…Respondent***
Mumbai – II
115 New Central Excise Building, MK Road,
Churchgate, Mumbai – 400 020

WITH

Service Tax Appeal No: 86746 of 2017

[Arising out of Order-in-Appeal No: MUM-SVTAX-002-APP-750-16-17 dated 28th February 2017 passed by the Commissioner of Service Tax (Appeals), Mumbai – II.]

Afcons Infrastructure Limited … ***Appellant***
Afcons House, 16, Shah Industrial Estate, Veera Desai Road, Azad Nagar, Post Box No. 11978, Andheri (W)
Mumbai – 400 053

versus

Commissioner of Service Tax ***…Respondent***
Mumbai – VI
9th Floor, Piramal Chambers, Jijibhoy Lane, Lalbaug, Parel, Mumbai – 400 012

APPEARANCE:

Shri Sunil Chabhariwalla, Chartered Accountant with Shri Dashan Ranawat, Chartered Accountant for the appellant

Shri Bidhan Chandra, Additional Commissioner (AR) and Shri Dilip Shinde, Assistant Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: A/ 87496-87497 / 2019

DATE OF HEARING:	10/06/2019
DATE OF DECISION:	29/11/2019

PER: C J MATHEW

Three issues are posited for resolution in these appeals of M/s Afcons Infrastructure Ltd against order-in-original no. 23/ST-II/RS/2014 dated 21st March 2014 of Commissioner of Service Tax, Mumbai-II and order-in-appeal no. MUM-SVTAX-002-APP-750-16-17 dated 28th February 2012 of Commissioner of Service Tax (Appeals), Mumbai. Common to both orders impugned before us is the proposition that CENVAT credit of duty paid on capital goods can be curtailed in proportion to the deployment for rendering of exempted services. At stake is the liability of credit availed on procurement of 'cube testing machines', 'excavators', 'generators' and 'EOT cranes' which, at some time or other, had been deployed in the erstwhile state of Jammu & Kashmir or for rendering services in Gabon and Mauritius. A second issue pertains to non-discharge of obligation as provider of 'erection, commissioning and installation service' held to be taxable under section 65(105)(zzd) of Finance Act, 1994 and the third arises from the finding of the original authority that appellant had availed depreciation under Income Tax Act, 1961 to disentitle them, under rule 4(4) of CENVAT Credit Rules, 2004, from availment of credit of duties paid on capital goods.

2. The appellant renders ‘commercial and industrial construction service’, as defined in section 65(25b) of Finance Act, 1994, to which end capital equipment is necessary and it has been held that, as per rule 6(4) of CENVAT Rules, 2004, the embargo on credit of duty paid on capital goods used exclusively for rendering exempt services required reversal of credit attributable to equipment that were used outside the territory over which Finance Act, 1994 empowered levy and collection of tax.

3. According to the adjudicating authority, the activities that were undertaken by deployment of the capital goods during the disputed period did not lie within the ambit of tax under section 65 (25b) of Finance Act, 1994 and hence were not eligible for coverage under CENVAT Credit Rules, 2004. Learned Chartered Accountant appearing for the appellant contested the applicability of rule 6(4) of CENVAT Credit Rules, 2004 which, according to him, could be invoked only if the equipment in question was, or could not be, used for rendering any taxable service. He placed reliance on the decision of the Tribunal in *Brindavan Beverages Pvt Ltd v. Commissioner of*

Central Excise, Meerut [2014 (310) ELT 398 (Tri-Del)]. It was also pointed out that the demand of differential tax of ₹ 1,14,80,780 on erection of 'Goliath cranes' was contrary to law settled by the Tribunal in *Neo Structo Construction Ltd v. Commissioner of Central Excise, Surat-I [2010 (19) STR 361]* and that the adjudicating authority had failed to take to take note of revised returns filed under Income Tax Act, 1961 after excluding the claim for depreciation on capital goods.

4. Learned Authorised Representative took us through the findings that led to the disputed demand and, according to him, the restriction on availment of credit pertaining to capital goods removed from the premises of the provider of service to a place other than that at which the service was rendered makes it abundantly clear that the claim of the appellant, that capability of being used as the test, is not tenable. It was also pointed out by him that removal of the goods to non-taxable areas within and outside the country sufficed to disentitle the claim. He, too, placed reliance upon the finding of the Tribunal that

> *'12. On the other hand, the learned SDR reiterated the impugned order and submitted that the activities of the appellant are not excisable. Hence, they are liable to pay service tax. He further placed reliance on the decision of the Tribunal in the case of M/s. Dodsal Pvt. Ltd. v. CCE Bangalore as reported in 2006 (193) ELT 518 (Tri.-Mumbai), wherein it was held that "fabrication of tanks from bits and pieces of plates does not amount to manufacture." Hence, the activities undertaken by the appellant are not manufacturing activity.*

Therefore, they are liable to pay the service tax.'

in *re Neo Structo Construction Ltd*. He placed particular emphasis on the finding of the adjudicating authority that the fate of the revised return did not appear to be on record.

5. There is no dispute that the capital goods were brought into the premises of the appellant and were, therefore, entitled to claim the credit of duty liability discharged by the supplier. That the goods were utilised in the erstwhile state of Jammu & Kashmir and in Gabon is also not in dispute. That the activity rendered in Gabon and that provided in Jammu & Kashmir were not subject to tax under Finance Act 1994 and Central Excise Act, 1944 is also undisputed.

6. At this stage, the scope of rule 6 of CENVAT Credit Rules, 2004, relied upon in the impugned order, bears examination. The scheme of CENVAT credit envisages an option to adjust the levies borne on excisable goods and taxable services while discharging liability thereon and thereby permits accumulation of credit attributable to inputs and input services required for such manufacture or rendering of services. The converse, much favoured by tax authorities, of inadmissibility except when exclusively used for such manufacture or rendering of service is not found within the scheme. This is apparent from the wide-ranging ambit of rule 3 of CENVAT Credit Rules, 2004; the restrictions are incorporated therein and, particularly, when read with the

definitions of ‘input’, ‘input service’, ‘output’, ‘output service’ and ‘capital goods’ gives eligibility a logical perspective. The exclusion of levies borne exclusively, or proportionately, on ‘inputs’ and ‘input service’ used in the process of manufacture of ‘exempted goods’ and rendering of ‘exempted services’, implicit in the objectives of the scheme, is provided for in rule 6 of CENVAT Credit Rules, 2004. Therefore, a harmonious reading of the two rules leads to the inevitable conclusion that the asserted exclusion in the first and exclusion by prescribed machinery in the latter cannot be stretched beyond the express denial therein. The legislative intent of restriction, whether within the logic of the scheme or otherwise, must be demonstrated by reference to these express provisions.

7. The restriction in rule 6 (4) of CENVAT Credit Rules, 2004 cannot be expanded to cover ‘capital goods’ utilised for eligible and non-eligible production or rendering of services in the absence of specific legislative sanction. The exclusion machinery incorporated in rule 6 of CENVAT Credit Rules, 2004 by maintenance of record or by computation, is intended to retain the integrity of the scheme which enables eligibility for credit on procurement of inputs or input services whose utilisation is distinguishable only at a later stage. Thus, the exclusion of duties paid on ‘capital goods’ is similarly linked to ‘usage’; the marked absence of amortisation within the scheme that permits upfront, or near upfront, availment eloquently bespeaks legislative

intent of the limits of rule 6(4) of CENVAT Credit Rules, 2004. Hence, save when the intent of procurement of 'capital goods' is, from the very beginning, exclusively for ineligible activity, this restriction will not be applicable.

8. In arriving at this conclusion, we are also guided by the commercial appreciation of 'capital goods' in which, unlike for 'inputs' or 'input services', consumption is with reference to time and not with reference to amenability in utilisation. In the face of such convention of commerce, a special provision for a contrary handling alone can be a reflection of legislative intent to demarcate partial utilisation for restricting of credit.

9. The decision of the Tribunal in *re Brindavan Beverages Pvt Ltd* holding that

> *'7. In terms of the provisions of sub-Rule (4) of Rule 6 of the Cenvat Credit Rules, 2004 Cenvat credit shall not be admissible on capital goods which are used exclusively in the manufacture of exempted goods or in providing exempted services, other than the final products which are exempt from the whole of the duty of excise leviable thereon under any notification, where the exemption is granted based on the value or quantity or clearances made in a financial year. From a perusal of this sub-Rule, it is clear that capital goods Cenvat credit would be admissible when the capital goods are used either only for dutiable final product or for dutiable as well as exempted final product. The capital goods Cenvat credit is also admissible when a manufacturer is availing full duty*

exemption based on the value or quantity of the goods cleared in a financial year, in which case, while initially the manufacturer will be availing full duty exemption (for some months or for several financial years at a stretch) but subsequently at some point of time when he crosses the threshold limit for exemption, his final product becomes dutiable and in such a case, even during the period of full exemption, the manufacture can take capital goods Cenvat credit which he can utilize when this final product becomes dutiable. A question arises as to when capital goods are used for manufacture of dutiable as well as exempted final product, whether for availing capital goods credit, the dutiable as well as exempted final product have to be manufactured simultaneously. In our view this is not necessary, and Cenvat credit would be admissible even if the capital goods are used for manufacture of dutiable goods and exempted goods at different points of time. However, if at the time of receipt of the capital goods, the manufacturer was using the capital goods only for manufacture of fully exempted final product and had no plan or intention to use them for dutiable final products and later on, either the final product becomes dutiable or he changes his plans and starts using the capital goods for manufacture of dutiable final products, the judgment of the Tribunal in the case of CCE, Indore v. Surya Roshni Ltd. (supra) and Spenta International Ltd. v. CCE, Thane (supra) would become applicable. But, if at the time of receipt, the manufacturer had clear intention to use the capital goods for manufacture of dutiable as well as exempted final products, in such a situation just because at the time of receipt, he uses the capital goods for manufacture of exempted final product and subsequently he switches over to the manufacture of dutiable final product, the capital goods Cenvat credit cannot be denied. When at the time of receipt of capital goods, capable of use in manufacture of dutiable as well as exempted final

> *products, there is evidence to show that the manufacturer had intention to use them for manufacture of dutiable as well as exempted final product, the eligibility of the capital goods for Cenvat credit cannot depend upon the order in which the same are used - whether first for the manufacture of exempted final products or for the manufacture of dutiable final product. We are supported in this view by the judgment of Hon'ble Gujarat High Court in case of CCE, Vadodara II v. Gujarat Propack reported in 2009 (234) ELT 409 (Guj.), wherein the Hon'ble High Court has held that when the capital goods installed in the year 2000 were used for manufacture of exempted goods on trial basis and subsequently were used for manufacture of dutiable goods when regular production was started, the Cenvat credit in respect of capital goods cannot be denied and the Tribunal's judgment in case of M/s. Surya Roshni Ltd. (supra) would not be applicable.'*

is confirmation of our independent evaluation of legislative intent.

10. In the facts of the dispute before us, there is no finding that the impugned 'capital goods' were intended in the exclusive usage for activities that are beyond the scope of taxation under Finance Act, 1994. Furthermore, we are unable to ascertain from the findings whether deployment of the 'capital goods' in Gabon and Mauritius was not for performance of activities that would have been taxed but for being export of services. The impugned order has also placed reliance on rule 3(5) of CENVAT Credit Rules, 2004 to justify the recovery of credit; we are unable a find reference to this provision in the show cause notice. It is settled law that the noticee cannot be denied an opportunity

to rebut the grounds on which proceedings are initiated against them. These aspects need examination before the claim of the appellant on these counts can be accepted.

11. In *re Neo Structo Construction Ltd*, it has been held that

> *'19. The structures are not covered under Plant/Machinery & Equipments, which have been clarified vide Boards Circular No. 58/8/2003, dt. 20-6-2003. The extract of the same are reproduced below:*
>
> > *"A doubt has been raised as to whether charges for erection of plant are covered under the service tax or only commissioning and installation charges. It is clarified that the law specifically provides for taxation of commissioning and installation of plant, machinery or equipment. Thus, all activities other than the commissioning and installation of the plant/machinery/equipment per se, will not be chargeable to service tax."*
>
> *20. In the Circular No. B2/8/2004-TRU, dt. 10-9-04, as per the changes in the Budget for 2004-2005, the service tax on installation & commissioning was extended to erection services also and Board has clarified that erection would refer to civil work to installation/commissioning of a plant or machinery. The extract relating to the clarification is reproduced below:*
>
> > *"14. Extension of service tax on installation and commissioning, to erection services:*
> >
> > *Service tax was levied on commissioning and installation of plant, machinery and equipment w.e.f. 1-7-2003. The general practice is that 'erection, commissioning and installation' are contracted as a composite package. There have been a number of doubts and queries regarding the distinction between erection and commissioning/installation. Erection would refer to the civil works to installation/commissioning of a plant or machinery. In this year's budget, the scope of service tax under installation and commissioning is being extended to include erection also. Erection involves civil works, which*

> *would otherwise fall under the category of construction services. However, in case of a composite contract for erection, commissioning and installation, the erection charges would be taxed as part of this category of service."*

21. Circular No. 334/4/2006-TRU, dt. 28-2-06 further clarified the scope of the existing services is being extended or clarified and the extract of the same are reproduced as under:

> *"(9) Erection, commissioning or installation service, to include erection, commissioning or installation of structures, whether or not prefabricated;"*

> *"5.4 "Erection, commissioning or installation service" is amended to cover erection, commissioning or installation of pre-fabricated structures."'*

12. Furthermore, the adjudicating authority appears to have come to the conclusion of taxability under the designated service on the premise that the claim of excisability, without having discharged that obligation, can lead to no conclusion other than that of taxability under Finance Act, 1994. Our attention is been drawn to notification no. 24/2003-CE dated 31st March 2003. The scope of taxability under the impugned entry in section 65(105) of Finance Act, 1994 has been settled by the decision of the Hon'ble Supreme Court in *Commissioner of Central Excise & Customs, Kerala v. Larsen & Toubro Ltd [2015-TIOL-187-SC-ST]*. It is moot whether the contract value in the dispute before us can be vivisected for isolating the tax liability under Finance Act, 1994 and, therefore, needs further examination.

13. The appellant has submitted that a revised return has been filed under Income Tax Act,1961 to exclude the claim for depreciation. The adjudicating authority has not accepted the claim of consequent

eligibility in the absence of evidence. Nevertheless, the claim of the appellant on this aspect also requires consideration.

14. For this purpose, we set aside the impugned orders and remand the matter back to the respective original authorities to assess the claims of the appellant in accordance with the principles laid out by us.

(Order pronounced in the open court on 29/11/2019)

(C J Mathew)
Member (Technical)

(Ajay Sharma)
Member (Judicial)

**/as*