

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI**

WEST ZONAL BENCH, MUMBAI

Service Tax Appeal No. 85296 of 2016

(Arising out of Order-in-Original No. PUN-SVTAX-000-COM-33-34-15-16 dated 30th November, 2015 passed by the Principal Commissioner of Service Tax, Pune.)

M/s Maharashtra Enviro Power Ltd.
P-56, MIDC Ranjangaon,
Taluka – Shirur, Pune – 412 220

.....Appellant

VERSUS

Commissioner of Central Excise, Pune
41/A, ICE House, Sassoon Road,
Opp. Wadia College,
Pune – 411 001

.....Respondent

WITH

Service Tax Appeal No. 85990 of 2018

(Arising out of Order-in-appeal No. PUN-EXCUS-001-APP-790-2017-18 dated 5th December, 2017 passed by the Commissioner of Central Tax (Appeals-I), Pune.)

M/s Maharashtra Enviro Power Ltd.
P-56, MIDC Ranjangaon,
Taluka – Shirur, Pune – 412 220

.....Appellant

VERSUS

Commissioner of Central Excise, Pune
41/A, ICE House, Sassoon Road,
Opp. Wadia College,
Pune – 411 001

.....Respondent

APPEARANCE:

Ms. Meetika Baghel, Advocate for the Appellant

Shri Dilip Shinde, Assistant Commissioner (AR) with
Shri Suresh Merugu, Joint Commissioner (AR) for the Respondent

CORAM:

HON'BLE MR. C J MATHEW, MEMBER (TECHNICAL)
HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

FINAL ORDER NO. A/85731-85732/2020

Date of Hearing: 25.11.2019
Date of Decision: 2020

PER: DR. SUVENDU KUMAR PATI

Denial of CENVAT credit to the appellant for construction of landfill in setting up of Common Hazardous Waste Treatment, Storage and Disposal Facility on Build, Own and Operate basis on the ground that the same is a works contract service involving civil construction that was covered under the exclusion clause of the definition of 'input services' under Rule 2(I)(A)(a) of the CENVAT Credit Rules, 2004 is assailed by the appellant in these two appeals.

2. Facts of the case, in a nutshell, is that appellant is a limited company which was awarded contract by the Maharashtra Industrial Development Corporation for setting up of a Common Hazardous Waste Treatment system and in the process, it was required to have landfill (one of the prescribed methods of waste management) to prevent ground water, soil and surface water from being contaminated. A Multi Barrier System with layers of clay and HDPE had to be constructed as per State Pollution Control Board guidelines. Audit team from the respondent-department held the same construction to be civil works and denied CENVAT credit on tax

paid against inputs received by appellant for such civil work. Accordingly, appellant was put to Show-cause notice for improper availment of CENVAT credit of Rs.54,93,218/- for the period from March, 2013 to April 2013 and Rs.24,35,282/- for the period from October, 2013 to March, 2015. Upon its response matter was adjudicated and Order-in-Original dated 30.11.2015 confirmed duty demand of Rs.79,28,500/- alongwith equivalent penalty and interest. In appeal No. ST/85296/2016, appellant challenged the legality of the said order.

3. For the subsequent period for financial year 2015-16, duty demand of Rs.46,88,694/- was also made against which appellant reversed ineligible CENVAT credit of Rs.11,86,206/- alongwith interest of Rs.2,69,694/- and contested the balance amount of alleged ineligible credit of Rs.35,02,488/- that was confirmed in Order-in-Original passed by the adjudicating authority but in the appeal before the Commissioner (Appeals), duty demand of Rs.35,02,488/- with penalty to the extent of Rs.11,86,206/- equivalent to the reversed credit amount was confirmed. In appeal No. ST/85990/2018, appellant challenged the legality of such order.

4. In the memo of appeal and during the course of hearing of appeal, learned Counsel for the appellant Ms. Meetika Baghel submitted that the term 'civil structure' clearly means a building or a part thereon. In view of the definition of 'civil structure' of Rule 2(b) of the Kerala Value Added Tax Rules, 2005 which she borrowed as a reference in the absence of a clear definition in CENVAT Credit Rules,

2004 and in citing the case law of *Basha Baig Vs. Choodanath ILR, 1988 Karnataka 1632* of the Hon'ble High Court of Karnataka which had held that merely digging of earth without structure cannot be equated with construction. She further submitted that for the subsequent period i.e. financial year 2016-17 Learned Commissioner (Appeals) passed an order dropping the demand raised in the show-cause notice on identical ground against which department preferred no appeal, for which the order passed by the Principal Commissioner of Service Tax, Pune and Commissioner (Appeals) respectively are required to be set aside. Additionally, she argued that at the relevant period, invoking Section 76 of the Finance Act only 10% should have been imposed as penalty in the second case, since it was on issue of non payment of tax and cannot be equated with the intention to evade payment of duty, which was raised as an alternate plea.

5. In response to such submissions, learned Authorised Representative for the respondent-department Shri Dilip Shinde, Assistant Commissioner (AR) have submitted that work undertaken by the appellant was in the nature of "works contract" and appellant was not merely digging the earth to prepare landfill but was also constructing civil structure including floor base and mud walls and in view of the exception, provisions contained in Rule 2(a) of the CENVAT Credit Rules, 2004, execution of 'works contract' and 'construction services' are excluded from the definition of 'inputs service' for which interference by the Tribunal in the order passed by the Commissioner (Appeals) is uncalled for.

6. We have taken note of the submissions of the adversaries and perused the case record. Short issue involved in this litigation is whether CENVAT credit availed by the appellant for construction/setting up of landfill is covered under the exclusion clause of the definition of 'inputs service' given in Rule 2(l)(a) of the CENVAT Credit Rules, 2004 and if so whether entire credit availed by it is be denied by the appellant. In order to ascertain the exact nature of works required to setup the landfill, reference to the show-cause notice from para 3 to 6 can be taken that was summed up in para 7 of show-cause notice which is reproduced below:-

"Thus the landfill is created by excavating soil up to a certain depth, thereafter, laying with various layers of clay and HDPE etc to ascertain non seepage of toxic waste in the ground adjacent to the landfill as per Pollution Control Boards guidelines. Thus the making of the same comes under the ambit of works contract given for the construction."

7. Going by the language of para 3 of the show-cause notice one thing is clear that setting of landfill is a mandatory requirement of the guidelines set by the State Pollution Control Board and the said construction was made for storage and disposal of Hazardous Waste which can be equated with construction of immovable property but not other than plant and machinery as found in the definition of works contract services. Further, it is difficult to arrive at a definite conclusion if the said setting up of a landfill is civil structure or not, in view of the fact that civil structure has to be a structure of a permanent nature and the life of landfill ends after the same gets fill up, as has been reflected in para 9 of the show-cause notice. It is

apparently therefore held by the Commissioner (Appeals-I) Central Tax, Pune on 17th April, 2018 while disposing of Order-in-Appeal No. PUN-EXCUS-001-APP-0016/18-19 in the appellant's own case for the subsequent period that landfill created by digging out the land to be used for waste management cannot be treated as civil structure, since it was done in a scientific process to ensure that toxic waste is managed effectively. Be that as it may, even by going through the definition contained in Rule 2(I) of CENVAT Credit Rules, 2004 dealing with exclusion clause, service portion in the execution of a works contract and construction service including services listed under clause B of Section 67E of the Finance Act excluding all other specified services therein are only excluded from the definition of 'inputs service' and not the whole portion of work including raw material used etc. However, in the demand raised against the appellant, every expenditure concerning setting up of the landfill and tax paid there on was taken into consideration to deny the credits on the entire amount. It is, noteworthy, to mention here that in the show-cause, demand was made, as it appeared to the respondent department, that the inputs credits were outside of the definition and more interestingly Learned Commissioner (Appeals) who confirmed the demand had candidly admitted that he was not sure about precise or legal definition of the term 'civil structure' which has taken the demand to a doubtful proposition (Para 25 of the Order-in-Original). Further contradictory findings by two Commissioners on the same issue would demonstrably illustrate that issue involved in this litigation is interpretative in nature that would defeat invocation of extended period for imposition of penalty on the appellant.

Moreover, the subsequent Commissioner, in the similar facts of the case and issue involved therein, had hold a finding that such landfill is not a 'civil structure'. Having regard to the fact that only service portion of the civil structure is disallowed for CENVAT credit and the landfill setup had a very limited life span that help in storage and disposal of Hazardous Waste and setting up of such landfill is a mandatory requirement in waste management as per guidelines of the State Pollution Control Board, we have no hesitation to hold a finding that credit taken by the appellant in setting up of such landfills are admissible credits. Hence the order.

ORDER

8. These two appeals are allowed and the order of the Principal Commissioner of Service Tax, Pune vide Order-in-Original No. PUN-SVTAX-000-COM-33-34-15-16 dated 30th November, 2015 as well as order of the Commissioner of Central Tax (Appeals-I), Pune vide Order-in-appeal No. PUN-EXCUS-001-APP-790-2017-18 dated 5th December, 2017 are hereby set aside.

(Order pronounced in the court on)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

(C J Mathew)
Member (Technical)