CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI

REGIONAL BENCH - COURT NO. I

Service Tax Appeal No. 85250 of 2019

(Arising out of Order-in-Appeal No. NA/GST-A-III/MUM/159/18-19 dated 25.07.2018 passed by the Commissioner of GST & Central Excise (Appeals), Mumbai-III)

M/s Netmagic Solutions Pvt. Ltd. .... Appellant
Lighthall, 'C' Wing, Hiranandani Business Park,
Saki Vihar Road, Chandivali, Mumbai – 400072

Versus

Commissioner of GST & CX, Mumbai-III .... Respondent
9th Floor, Piramal Chambers, Lalbaug, Parel,
Mumbai – 400 012.

Appearance:

Shri Mehul Jivani, C.A. for the Appellant

Shri O. Shivadikar, AC, Auth. Representative for the Respondent

CORAM:

HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)

FINAL ORDER NO. A/86246 / 2021

Date of Hearing: 05.04.2021

Date of Decision: 05.04.2021

Per: Dr. D.M. Misra

This is an appeal filed against Order-in-Appeal No. NA/GST-A-III/MUM/159/18-19 dated 25.07.2018 passed by the Commissioner of GST & Central Excise (Appeals), Mumbai-III.

2. Briefly stated the facts of the case are that the appellants are engaged in providing various taxable services and discharging Service Tax after availing the CENVAT Credit

on the input services used in providing the taxable services. During the course of EA-2000 Audit, it was noticed that the appellant also engaged in providing trading of service (exempted service), however, even though availed credit on common input services, but failed to discharge 6%/8% of the value of the trading service as applicable in accordance with Rule 6(3) of the CENVAT Credit Rules, 2004. Consequently, demand notice was issued to them on 08.10.2013 proposing recovery of 6%/8% of the value of the said exempted services for the period from April, 2008 to March, 2009 and April, 2010 to March, 2011 amounting to Rs. 17,12,653/- with interest and penalty. On adjudication, the demand was confirmed with interest and penalty. Aggrieved by the said order, they filed an appeal before the learned Commissioner (Appeals), who in turn, partly allowed their appeal to the extent of benefit of reducing penalty at 25% of the total penalty imposed. Hence, the present appeal.

3. At the outset, the learned C.A. for the appellant submits that during the relevant period, they have reversed the proportionate CENVAT Credit attributable to the exempted services. He has submitted that for the period 2008-09 they have reversed the credit of Rs.3,67,390/- and for the period 2010-11 they have reversed credit of Rs.2,18,572/-. Also they have duly reflected the said reversal in the periodical ST-3 returns filed from time to time with the Department. He has referred to sample copy of the Returns enclosed with appeal memo. It is his contention that since all the facts were within the knowledge of the Department, the demand is barred by

limitation. Further referring to the impugned order of the learned Commissioner (Appeals), he has submitted that even though the learned Commissioner (Appeals) in the order observed that issue of trading activity whether would fall under the scope of the definition of 'exempted service' or otherwise was in dispute till the clarification was issued on 1.3.2011 and also held that the said issue is a question of interpretation of law, but erroneously upheld the imposition of penalty and interest on the appellant. The learned C.A. in support referred to the judgment of this Tribunal in the case of *Trent Hypermarket Ltd. Vs. Commissioner of Central Excise, Pune-III – 2009 (6) TMI 1327 (CESTAT-Mum).*

5. Learned AR for the Revenue reiterates the findings of the learned Commissioner (Appeals).

6. Heard both sides and perused the records.

7. The limited issue for consideration is whether the demand is barred by limitation. It is not in dispute that the appellants are providing taxable services as well as engaged in trading activity during the relevant period. Also, it is not in dispute that common input services were used in providing taxable services and the trading activity. The appellants have been meticulously reversing the proportionate credit attributable to the trading activity. However, the Department has demanded 6%/8% of the value of the trading activity considering the same as an exempted service. The learned C.A. for the appellant submits that since all the facts relating

to availment of common input services and reversal of the CENVAT Credit attributable to trading activity have been reflected in their ST-3 Returns, the demand notice issued to them invoking extended period of limitation is not sustainable in law. I have considered their argument. This Tribunal in similar facts and circumstances in *Trent Hypermarket Ltd.'s case (supra)* observed that invoking extended period of limitation in such circumstances is unwarranted. The Tribunal's observation reads as under: -

> *"6.1 We find that the Learned adjudicating authority has recorded in the submissions of the appellant that it had filed the periodic ST-3 returns, reflecting therein the particulars of availment of Cenvat credit on the disputed input services. Thus, under such circumstances, it cannot be said that the appellant had suppressed the facts regarding availment of irregular credit, with the intent to defraud the Government revenue. Further, the issue with regard to interpretation of the amending definition of "exempted service" under the Cenvat statute, whether to be applicable prospectively or retrospectively, was highly debatable and there were divergent views in the judicial forum. The law is well settled that in case of interpretational issue, the extended period of limitation cannot be invoked, without proper substantiation that availment of credit is owing to the reason mentioned in the proviso to Section 73(1) ibid. In this case, on perusal of both the show cause notice and the impugned order, we do not find any justifiable reason being assigned by the department for invocation of the extended period of limitation. Thus, we are of the considered view that the adjudged demands confirmed against the appellant cannot be sustained on the ground of limitation."*

8. I do not find any reason not to adopt the aforesaid principle in deciding the present case. Consequently, the impugned order is set aside and the appeal is allowed with consequential relief, if any, as per law.

(Dictated and pronounced in open court)

(Dr. D.M. Misra)
Member (Judicial)

Sinha