CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

WEST ZONAL BENCH, MUMBAI

Service Tax Appeal No. 85799 of 2019

(Arising out of Order-in-Appeal No. IM/CGST A-I/MUM/391/18-19 dated 12.10.2018 passed by the Commissioner of Central Tax (Appeals-I), Mumbai.)

M/s Vijay Group Housing Pvt. Ltd. ....Appellant
205 Marine Chambers,
43 New Marine Lines,
Mumbai – 400 020

VERSUS

Commissioner of CGST, Mumbai South ....Respondent
13th Floor, Air India Building,
Nariman Point, Mumbai – 400 021

APPERANCE:

Shri Rajiv Luthia, Chartered Accountant for the Appellant
Shri S.K. Hatangadi, Assistant Commissioner, Authorised Representative for the Respondent

CORAM:

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

FINAL ORDER NO. A/87324 / 2021

Date of Hearing: 01.11.2021
Date of Decision: 01.11.2021

This appeal is directed against the Order-in-Appeal passed by the Commissioner of Central Tax (Appeals-I), Mumbai confirming Service Tax demand of Rs.8,99,398/-, its appropriation along with interest and penalty under Section 77 as well as 78 of the Finance

Act passed by the adjudicating authority while reducing the quantum of penalty from 100% to 15% under Section 78.

2. Factual back drop of the case that has brought the appeal to this Tribunal stage is that EA Audit conducted in the appellant's firm noted certain CENVAT credits like outdoor catering, telephone bill, advertising charges, labour charges and works contract service availed during the period 2012-13 to 2015-16 as inadmissible and a show-cause cum demand notice was issued to the appellant accordingly on dated 09.03.2017 proposing payment of Service Tax along with interest, penalty etc. under various provisions of the Finance Act. Appellant had challenged the same in the forums below and challenged the order of Commissioner (Appeals) confirming the demand etc. as noted above.

3. During the course of hearing of this appeal, learned Counsel Mr. Rajiv Luthia for the appellant submitted that by various decisions of the Tribunal, those credits against which demand was raised were held to be eligible credits and during the course of audit itself, appellant had reversed the credits to avoid future litigation and that it had also sufficient balance in its CENVAT credit account for which duty was not payable. Further, learned Counsel has argued that Section 77 is invoked, without reference to the specific violation made there under, in the show-cause for which the order passed by the Commissioner (Appeals) is to be treated as arbitrary. He has drawn attention of the Tribunal to the audit report annexed to the

appeal memo under Annexure 3, wherein suggestion was made by the group of Auditors not to proceed for any demand against the appellant and on that score alone the order of Commissioner (Appeals) is unsustainable and required to be set aside.

4. In response to such submissions, learned Authorised Representative Shri S.K. Hatangadi for the respondent-department argued in favour of the reasoning and rationality of the order passed by the Commissioner (Appeals) and stated that having regard to the fact that appellant had wrongly availed CENVAT credit before issue of show-cause notice penalty under Section 78 was reduce to 15%, for which interference by the Tribunal in the order passed by the Commissioner (Appeals) is uncalled for.

5. Perused the case record and it is noteworthy to observe the remarks/recommendation of Auditor group available at page 28 of the appeal memo. It reads:-

> ***"Audit group's conclusion with remark/recommendation*** *– Para may be accepted. Since the assessee has reverse the amount of CENVAT credit wrongly claimed, the para may be considered for closure & no penalty to the imposed as sufficient CENVAT credit balance was available in the CENVAT credit account and there was no deliberate attempt/intention to avail wrong CENVAT credit.*
>
> ***Decision taken in MCM:***
> *Para admitted. The assessee has paid the inadmissible CENVAT credit. Since they had maintained sufficient credit in their CENVAT credit account, interest is not warranted. Assessee has availed inadmissible CENVAT credit on input service namely Outdoor catering service which is*

exclusively exempted input services as per Rule 2(l) of CENVAT Credit Rules, 2004. Hence they are liable for penalty on the CENVAT credit availed on catering services. If they pay penalty, para will be closed. Otherwise show-cause notice to be issued.

Further Development: *Show-cause cum demand notice No. AC/ST-I/DIV-X/Audit-I/03/2016-17 dated 09.03.2017 issued for recovery of the penalty."*

6. Even the decision taken by the MCM indicates that only outdoor catering services during the relevant period was exempted as an input service against which if appellant pays penalty, no show-cause notice was to be issued. This being the fact on record and in view of the fact that there was hegemony in respect of availability of input credits for outdoor catering service till the decision of Larger Bench came in 2018 in the case of *Wipro Ltd. Vs. Commissioner of Central Excise,* reported in *2018-TIOL-3256-Tribunal(LB)*, wilful suppression etc. to avoid payment of tax is not forthcoming. Further as has been observed by this Tribunal in the case of *Thyssenkrupp Industries India Pvt. Ltd.* vide order dated 20.11.2018. Audit cannot form the sole basis for imposition of penalty. It was held in that decision:-

"Now coming to the statutory audit procedure, the purpose of audit, as available in the Manual published by the Institute of Chartered Accountants of India in respect of EA audit and CERA audit under Chapter 17 is that the idea behind such conduct of verification is to reasonably ensure that no amount, which under the central excise law is chargeable as duty, escapes taxation and the process of verification is always carried out in the presence of assessee and in the process, the auditor is required to discuss the matter with the assessee and advice him to follow correct procedure in future. It is also referred in the said manual that after such submission of audit report, in

> *cases where the disputed amount have not already been paid by the assessee at the spot, demand notices are issued by the department for their recoveries. EA 2000 audit was therefore held to be participative audit. Likewise CERA audit is conducted by the Comptroller and Auditor General of India in respect of receipt and expenditure of the Government of India. It also discharges revenue audit which covers central excise, service tax and customs laws during which time the assesses were examined by CERA audit party to point out the deficiencies, leakage of revenue and non recoveries of dues by the Central Excise Department. Therefore, it cannot be said that only because audit party had found some credit availed as inadmissible, suppression of fact is made out. Further it is not established that appellant had any malafide intention to suppress its duty liability from the department."*

Moreover, imposition of penalty under Section 77 and its confirmation by the adjudicating authority that appellant was not maintaining its record properly is an astonishing observation, in view of the fact that basing on the record alone audit had prepared its report. Hence the order.

ORDER

7. The appeal is allowed and the order passed by the Commissioner of Central Tax (Appeals-I), Mumbai in Order-in-Appeal No. IM/CGST A-I/MUM/391/18-19 dated 12.10.2018 is here by set aside.

(Dictated & pronounced in open Court)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

Prasad