CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
REGIONAL BENCH
Single Member Bench

Service Tax Appeal No. 85338 of 2020

(Arising out of Order-in-Appeal No. NA/CGST/A-I/MUM/222/2019-20 dated 30.10.2019 passed by the Commissioner of CGST & Central Excise (Appeals-I), Mumbai)

M/s. Worthwhile Properties Pvt. Ltd. **Appellant**
1st Floor, Crescent Chambers,
Tamarind Lane, Fort, Mumbai 400 023.

Vs.

Asstt. Commr. of C.E., Mumbai South **Respondent**
1st Floor, Old Customs House,
Shahid Bhagat Singh Road,
Fort, Mumbai 400 001.

Appearance:

Ms. Puloma Dalal, Chartered Accountant, for the Appellant
Shri Vinod Kumar, Assistant Commissioner, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

Date of Hearing: 06.04.2023
Date of Decision: 06.04.2023

FINAL ORDER NO. 85788/2023

This appeal is directed against Order-in-Appeal No. NA/CGST/A-I/MUM/222/2019-20 dated 30.10.2019 passed by the Commissioner of CGST & Central Excise (Appeals-I), Mumbai. By the impugned order, following has been held:-

"6.2 Appellants have contended that they have rendered "works contract service" and availed credit in terms of Rule 2A of the Service Tax Determination of Value Rules. It is their contention that "works contract service" is not exempt service and that appellants were engaged a providing output service. Therefore, entire cenvat credit availed by them is admissible to them and that provisions of reversal under Rule 6(3) of CCR would not be applicable to them. I Find that be fact is undisputed that appellants availed credit of different input services for construction of entire complex. Once they received occupation certificate on 27.01.2017, the unsold are of 46,200 sq.ft. of

flat/residential complex were rendered outside the purview of service tax as there was no requirement of payment of service tax once occupation certificate was granted. It is also undisputed that in the construction of the said unsold area of 46,200 sq.ft, all the input services on which credit had been taken by the appellants from time to time were used. Thus, the construction of the complex to the extent of the said unsold area was an activity on which service tax was not required to be paid. The said activity obviously became an exempted activity. Appellants have contended that they were undertaking "works contract service" and the said service was an output service which cannot be construed to be exempted service and therefore, there is no requirement of reversal under Rule 63) of CCR. They have also placed reliance on Tribunal Ahmedabad's decision in the case of Alembic Limited Vs. CCE. ST. Vadodara-1[2019]101 taxmann.com: 461 (Ahmedabad-CESTAT). I find that Rule 6(1) of the Cenvat Credit Rules, 2004 specifically bars availment of Cenvat Credit on exempted services as under:

Rule 6(1) The CENVAT credit shall not be allowed on such quantity of input as is used in or in relation to the manufacture of exempted goods or for provision of exempted services or input service as is used in or in relation to the manufacture of exempted goods and their clearance upto the place of removal or for provision of exempted services and the credit not allowed shall be calculated and paid by the manufacturer or the provider of output service, in terms of the provisions of sub-rule (2) or sub-rule (3), as the case may be.

It is now a settled matter that any activity which is not taxable goes out of the purview of the Cenvat Credit Scheme. This issue has reached finality by Hon'ble Apex Court in the case of LALLY AUTOMOBILES PVT. LTD. Versus COMMISSIONER [2019 (24) G.STL 115 (S.C.)]. Hon'ble Delhi High Court had in the judgement dated 25.07.2018 reported in 2018 (17) G.S.T.L. 422 (Del.) held as under:

Cenvat credit-Reversal of - Inputs services attributable to trading activity-Not eligible for credit -Assessee aware of its Service Tax liability and also eligible Service Tax inputs-

Assessee's claim excessive and unjustified- No infirmity with concurrent findings of lower authority and Tribunal ordering recovering of tax-Failure by assessee to maintain regular separate accounts in respect of Non-Service Tax leviable activities despite being aware that Service Tax was not payable on its trading activity Invocation of extended period of limitation proper Adoption of method of proportionate turnover based attribution to assessee's liability by Adjudicating Authority reasonable-Assessee not entitled to set-off or benefit of Service Tax credit on entire amount paid but on proportionate amount as substantial part of its business was trading - Rules 2(e), 6(2), (3) of Cenvat Credit Rules, 2004 Wherever someone undertakes activities that cannot be called a service or which is not "manufacture", that activity goes out of the purview of both Central Excise Act as well as Finance Act, 1994. In such cases, an assessee would be ineligible for claiming Input Service Tax Credit on an output which is neither a service nor excisable goods. There is no provision to cover situations where an assessee is providing a taxable service and is undertaking another activity which is neither a service nor manufacture

[paras 16, 17, 18, 19, 20]

Hon'ble Apex Court vide its decision dated 1" April, 2019 dismissed the assessee's appeal against Hon'ble Delhi High Court Order. While dismissing the appeal Hon'ble Apex Court observed:

"We have heard Learned Counsel appearing for the appellant and perused the impugned order passed by the High Court of Delhi.

In our considered view, the reason assigned by the High Court in passing the impugned order needs no interference as the same is in consonance with law

Accordingly, there is no merit in the appeal and [it] is dismissed."

In view of the categorical ruling of Hon'ble Apex Court the decision of CESTAT Ahmedabad in the case of Alembic Ltd. Vs.

CCE & ST Vadodara, relied upon by the appellant is no longer a correct ratio. Therefore, the requirement of reversal under Rule 6(3) of CCR is established in terms of the prevailing law.

6.3 Appellants have contested the quantification of the amount of reversal arrived at by the department arguing that if at all reversal was required, the cenvat credit balance as on the date of grant of occupation certificate should be taken. It would be seen from discussion in the prevailing para that the entire credit attributable to the construction of the said unsold area of 46,200 sq.ft no matter when taken, will have to be taken into account for working out the reversal. It is seen that the department has sought to quantify as per the following formula-

Ineligible Cenvat Credit to be reversed =

Total Cenvat Credit availed in r/o total saleable area built X Unsold area as on date of OC Total saleable area built

Total Cenvat Credit availed from 2012-2013 to 31.01.2017.

I find that Rule 6(1) lays down that cenvat credit shall not be allowed on such quantity of input service used in or in relation to the provision of exempted services. Therefore, the entire credit attributable to the provision of the unsold area will be required to be taken and the same has been done by the department. The same is also in consonance with the spirit of the decision of Hon'ble Apex Court in the case of Larry Automobile supra. Therefore, I find that the computation of the amount of Rs. 31,46,324/-required to be reversed is correct.

6.4. Appellants have raised the contention that the SCN raised the demand of cenvat credit of Rs. 21.33,150/- whereas the 0-1-0 has confirmed the demand of service tax amounting to Rs 31,46,324/- I have examined the contention. In the SCN the ineligible cenvat credit required to be reversed was mentioned as Rs. 31,46,324/- Thereafter, it has been stated that the assessee have already paid an amount of Rs. 10,13,174 It would be apt to quote from the SCN.

"Hence the said proportionate credit involved in the exempted services works out to Rs. 31,46,324/- as per formula mentioned in para 2 above. It is observed that the assessee have already reversed/paid an amount of Rs. 10,13,174/- in this regard. Therefore, it appears that the assessee have failed to reverse/pay the differential Cenvat Credit of Rs. 21,33.150 ie. Rs. 31.46.324/--Rs 10.13,174/-) on the said exempted services"

It is further seen that in the operative para 7 of the SCN, the assessee was required to Showcause as to why

"Cenvat credit of Rs 21,33,150- (Rupees Twenty One Lakhs Thirty Three Thousand One Hundred Fifty only) should not be disallowed and recovered under Rule 14 of the CENVAT Credit Rules, 2008 read with proviso to Section 73(1) of the Finance Act, 1994, alongwith appropriate interest under Rule 14 of the CENVAT Credit Rules, 2004, read with Section 75 of the Finance Act, 1994".

It is evident that the quantum of demand raised in the SCN is Rs. 21,33,150/- only. It is a settled law that the SCN is the foundation of an Order, therefore, the adjudicating authority has clearly erred in confirming demand of Rs. 31,46,324/-. Obviously, the amount liable to be reversed remains the same i.e. Rs. 31,46,324/- (Rs 21,33,150/- ie the demand raised in the SCN R 10,13,174/- already paid by the appellants) However, the requirement of confirmation derby to the extent of the demand raised in the SCN would have consequences in respect of penalty. As the penalty is required to be equal to the duty tax confirmed, and in the instant case, the demand could not have been confirmed beyond Rs. 21,33,150/- as raised in the SCN, the penalty of Rs 31,46,324 imposed under Section 78 in the 0-I-0 would merit to be scaled down to Rs. 21,33.150/-."

2.1 Appellant is providing taxable services viz. construction of residential complex services.

2.2 During the course of audit, it was observed that the appellant had reversed Cenvat credit of Rs.10,13,174/- proportionate pertaining to unsold area of 46,200 sq.ft. of flat/residential complex for which they got occupation certificate on 27.01.2017. Since the flats pertaining to the said unsold area became exempted in terms of Section 66E of the Finance Act, 1994, such reversal was warranted. However, Revenue was of the view that the amount reversed has not been determined properly in the manner as prescribed by the formula and the amount to be reversed was worked out to Rs.31,46,324/-.

2.3 A show cause notice dated 28.03.2018/02.04.2018 was issued to the appellant seeking to demand inadmissible Cenvat credit along with interest and proposed imposition of penalty.

2.4 The show cause notice was adjudicated by the original authority confirming the demand of service tax amounting to Rs.31,46,324/- under Section 73(1) of the Finance Act, 1994 along with recovery of interest and penalty of equivalent amount under Section 78 of the Finance Act, 1994. A penalty of Rs.10,000/- was imposed under Section 77 of the Service Tax Act, 1994. The original order was challenged before the Commissioner (Appeals) and the Commissioner (Appeals) vide the impugned order referred in para 1 above modified the order-in-original as follows:-

"ORDER

In view of the above, I modify the impugned 0-1-0 No. 9/GM/2019-20 dated 21.06.2019 issued on 25.06.2019 passed by the Assistant Commissioner, Dn-IX, CGST&CX, Mumbai South Commissionerate, as under:-

(i) After taking into account the payment of Rs. 10.13.174/- already made by the appellants, I hold that the demand liable for confirmation in pursuance of the SCN is Rs. 21.33.150/-.

(ii) Penalty imposed under Section 78 is scaled down from Rs. 31,46.324- to Rs. 21.33.1.50/-

(iii) The rest of the impugned Order is upheld."

3.1 I have heard Ms. Puloma Dalal, Chartered Accountant, for the appellant and Shri Vinod Kumar, Assistant Commissioner, Authorised Representative for the Revenue.

3.2 Arguing for the appellant, learned C.A. relies upon the following decisions in her support:-

- Alembic Ltd. [2019 (28) GSTL 71 (Tri.-Ahmd.)]
- Alembic Ltd. [2019 (29) GSTL 625 (Guj.)]
- Shreno Ltd. (Real Estate Division) [2020 (34) GSTL 416 (Guj.)]
- Prajapati Developer [2019-TIOL-806-CESTAT-HYD]
- J Krishna Palemar [2019-TIOL-3329-CESTAT-BANG]
- Shanti Construction Co. [2021 (54) GSTL 164 (Tri.-Ahmd.)]
- Tractor and Farm Equipment Ltd. [2015 (320) ELT 357 (Mad.)].

3.3 Learned AR reiterates the findings recorded in the impugned order.

4.1 I have considered the impugned order along with the submissions made in the appeal and during the course of arguments.

4.2 I find that the issue involved is no more res integra covered squarely by the decision of Hon'ble High Court of Gujarat in the case of Alembic Ltd. [2019 (29) GSTL 625 (Guj.)], wherein the Hon'ble High Court has held as follows:-

*"**10.** The Tribunal after considering the facts of the case and relevant provisions of the Act arrived at following conclusion :*

"(a) For the above reasons, the Appellants are not liable to pay 8%/10% amount of value of service became exempted after receipt of completion certificate under Rule 6 of the CCR.

(b) The Cenvat credit on input services received after obtaining Completion Certificate cannot be wholly allowed to the Appellant, and since they had availed only proportionate credit by maintaining separate accounts, the same is therefore sufficient compliance of the legal obligation cast upon them.

(c) The Appellants can be said to have "maintained proper separate accounts" as required under Rule 6 of the CCR, 04, having availed credit only to the extent input services in taxable activity, on the scientific basis after obtaining Completion Certificate.

(d) The Appellants are not required to reverse Cenvat credit availed during the period when output service was wholly taxable before receipt of Completion Certificate, in accordance with law.

(e) Connected to (d) above, the Appellants are eligible to seek refund of the amount paid under protest towards credit availed from 2010 till receipt of completion certificate, based on CERA audit objection wherein such credit was sought to be reversed based on considering square foot area where Service Tax was paid and balance area where Service Tax will not be paid after Completion Certificate, in accordance with law."

11. *In order to understand the controversy in proper perspective it would be necessary to refer to Rule 2(e) of the Rules which defines the term "exempted service" and reads as under :*

"e. "exempted service" means a -

(1) taxable service which is exempt from the whole of the service tax leviable thereon; or

(2) service, on which no service tax is leviable under Section 66B of the Finance Act; or

(3) taxable service whose part of value is exempted on the condition that no credit of inputs and input services, used for providing such taxable service, shall be taken;

but shall not include a service -

(a) which is exported in terms of rule 6A of the Service Tax Rules, 1994

(b) by way of transportation of goods by a vessel from customs station of clearance in India to a place outside India."

Upon receipt of completion certificate for the projects, the output activity of sale of residential units becomes "non-service" as per the provisions of Section 65B(44) of the Finance Act, 1994 which reads as under :

"65(44) "service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include -

(a) an activity which constitutes merely -

(i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or

(ii) such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of article 366 of the Constitution; or

(iii) a transaction in money or actionable claim"

12. *For the purpose of invoking provisions of Rule 6 of the Rules in facts of the present case, the output service must first be exempt from service.*

"6. (1) The CENVAT credit shall not be allowed on such quantity of input as is used in or in relation to the manufacture of exempted goods or for provision of exempted services or input service as is used in or in relation to the manufacture of exempted goods and their clearance upto the place of removal or for provision of exempted services and the credit not allowed shall be calculated and paid by the manufacturer or the provider of output service, in terms of the provisions of sub-rule (2) or sub-rule (3), as the case may be :

Provided that the CENVAT credit on inputs shall not be denied to job worker referred to in rule 12AA of the Central Excise Rules, 2002, on the ground that the said inputs are used in the manufacture of goods cleared without payment of duty under the provisions of that rule.

Explanation 1. - For the purposes of this rule, exempted goods or final products as defined in clauses (d) and (h) of rule 2 shall *include non-excisable goods cleared for a consideration from the factory.*

Explanation 2. - Value of non-excisable goods for the purposes of this rule, shall be the invoice value and where such invoice value is not available, such value shall be determined by using reasonable means consistent with the principles of valuation contained in the Excise Act and the rules made thereunder.

Explanation 3. - For the purposes of this rule, exempted services as defined in clause (e) of rule 2 shall include an activity, which is not a 'service' as defined in section 65B(44) of the Finance Act, 1994 (provided that such activity has used inputs or input services."

13. *From the above provisions, it is clear that with effect from 13-4-2016, Explanation 3 was amended specifically dealing with a situation as in the present case, where a deeming fiction was created that for the purposes of Rule 6 of the Rules, exempted services as defined in clause (e) of Rule 2 shall include an activity, which is not a service as defined in Section 65B(44) of the Finance Act, 1994 provided that such activity has used inputs or input services. However, there was no such stipulation prior to 13-4-2016 in law and prima facie, such situation was not to be treated as exempted service and did not attract the mischief created under Rule 6 of the Rules. Therefore, for the period prior to 13-4-2016, the situation would be governed by Rule 3 of the Rules for availing Cenvat credit till such time i.e. till the time Rule 6 was specifically made applicable by virtue of the deeming fiction created.*

14. *As per Rule 3 of the Rules, Cenvat credit of service tax paid on input services used to provide output service, is eligible. In the facts of present case, it is evident that the respondent has started taking only proportionate credit after receipt of completion certificate which was after due intimation to the Revenue Department and also certified by independent CA. Therefore, Rule 6 of the Rules in toto cannot apply prior to 13-4-2016 to the facts of the case since sale of immovable property is not exempt service at all. Therefore, in the light of the provisions of Rule 3 of the Rules, respondent cannot avail full Cenvat credit* *on input services received after obtaining completion certificate. Hence, the respondent cannot be expected to pay an amount equal to 8%/10% of sale price of immovable property after obtaining such completion certificate where no service tax is paid as if it is sale of immovable property since Rule 6 of the Rules per se does not apply to the present case until 13-4-2016 at all.*

15. *Even after 13-4-2016, since the respondent had availed only proportionate credit, the respondent was not legally required to pay 8%/10% amount under Rule 6(3) of the Rules, since it can be said to have maintained separate accounts as required under Rule 6(2) of the Rules. As respondent has taken only proportionate credit on input services after receipt of completion certificate, duly backed by CA certificate and certified work sheets for the proportionate credits availed after completion certificate, it has fulfilled its obligation under Rule 3 of the Rules read with Rule 6 thereof and therefore, no liability to pay any amount equal to 8%/10% of the sale price of immovable property can be fastened after receipt of completion certificate under Rule 6 of the Rules. While the law does not intend to allow any undue benefit to a service provider in terms of Cenvat credit of service tax paid on input services used in providing non-taxable output activity, however, once it is legally and validly availed, the same cannot be denied and/or recovered unless specific provisions exist for the same and credit entitlement is on the date of receipt of inputs when the output activity was wholly dutiable and merely because the finished goods eventually became exempt later on, the credit availed on inputs which were contained in semi-finished/finished goods state was held as not deniable.*

16. *The Tribunal therefore, on a harmonious reading of Rule 3 of the Rules read with Rules 6 and 11(4) of the Rules held that eligibility/entitlement to credit has to be examined only at the time of receipt of input service and once it is found to be availed at a time when output service is wholly taxable, and the said credit is availed legitimately, the same cannot be denied and/or recovered unless specific machinery provisions are made in this regard. Sub-rule (7) of Rule 4 of the Rules held that the assessee is not required to wait till output service is sold to the* *service recipient and the assessee can take the credit immediately after the day on bill/challan of input service is received. In facts of the case, there is no dispute that the respondent availed the credit after receipt of bill/challan in respect of input service and, therefore, it was legally entitled to take the credit on the date after the receipt of service bills/challans. Therefore, the availment of Cenvat credit by the respondent is absolutely legal and correct and in accordance with Rule 4(7) of the Rules. As at the time of taking credit, there was no existence of any exempted service, therefore, there is no application of Rule 6. That part of the service was exempted only after obtaining completion certificate and thereafter, the respondent was not required to avail the Cenvat credit on the input service, if any, received after obtaining the completion certificate. The respondent did not avail the Cenvat credit in respect of the services received after obtaining the completion certificate in respect of exempted service or avail proportionate credit attributed to the taxable output service. Therefore, Rule 6 has application for the period after obtaining the completion certificate. Rule 11(1), (2) and (3) of the Rules applicable to provision for manufactured goods to hold that in case of service becomes exempted at a later stage, there is no such provision in respect of the service. The only provision for the service is provided under sub-rule (4) of Rule 11 of the Rules which reads as under :*

"11(4). A person provider of output service shall be required to pay an amount equivalent to the CENVAT credit, if any, taken by him in respect of inputs received for providing the said service and is lying in stock or is contained in the taxable service pending to be provided, when he opts for exemption from payment of whole of the service tax leviable on such taxable service under a notification issued under Section 93 of the Finance Act, 1994 (32 of 1994) and after directing the said amount from the balance of CENVAT credit, if any, lying in his credit, the balance, if any, still remaining shall lapse and shall not be allowed to be utilized for payment of duty on any excisable goods, whether cleared for home consumption or for export or for payment of service tax on any other output service, whether provided in India or exported."

17. *From the above sub-rule (4), it is clear that even if an output service provider avails the credit and output service becomes exempted in such case the credit only in respect of inputs lying in stock or is contained in taxable service is required to be paid whereas there is no provision for payment of Cenvat credit equivalent to the input services used in respect of exempted service. Therefore, Cenvat credit availed in respect of input service is not required to be paid back under any circumstances and therefore, the respondent was not legally required to reverse any credit which was availed by them during the period 2010 till obtaining completion certificate i.e. during the period when output service was wholly taxable in their hands, merely because later on, some portion of the property was converted into immovable property on account of receipt of completion certificate and on which no service tax would be paid in future."*

4.3 Same view was expressed by the Hon'ble High Court of Gujarat in the case of Shreno Ltd. (Real Estate Division) [2020 (34) GSTL 416 (Guj.)].

5.1 Following the judicial precedents as per the above decisions of Hon'ble High Court of Gujarat, I do not find any merits in the impugned order. However, while setting aside the above order, I make it clear that the amount of Rs.10,13,174/- admitted and reversed by the appellant even prior to audit and show cause notice will not be impacted by this order.

5.2 Appeal is allowed in above terms.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

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