2019-TIOL-3327-CESTAT-KOL

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
EASTERN ZONAL BENCH, KOLKATA

Appeal No. ST/77038/2018

Arising out of Order-in-Appeal No. 240/S. Tax-I/Kol/2018, Dated: 16.03.2018
Passed by the Commissioner of CGST & CX, Howrah

Date of Hearing: 18.06.2019
Date of Decision: 30.07.2019

M/s ETRANS SOLUTIONS PVT LTD
FD-404, SECTOR III, SALT LATE KOLKATA-700106

Vs

COMMISSIONER OF CGST AND CENTRAL EXCISE
BBSR, 180, SHANTIPALLY RAJDANGA, MAIN ROAD
2ND FLOOR, KOLKATA-700107

Appellant Rep by: Shri Ankit Kanodia, CA
Respondent Rep by: Shri S S Chattopadhyay, Suptd. (AR)

CORAM: P K Choudhary, Member (J)

ST -

The assessee is engaged in the business of providing vehicle tracking system through smart card/swipe card and Global Positioning System (GPS) and is accordingly registered under Business Support services - They are also engaged in some trading activity of GPS units procured from suppliers and sold to customers for tracking the movement of vehicles on real time basis - In terms of the order received from customers, assessee provides the services of vehicle tracking system and also sells the GPS units to different customers - They maintains common balance sheet for their manufacturing as well as trading activity - The short issue that arises for consideration is whether assessee is required to pay 6% of total sale value of the goods traded by them in terms of Rule 6(3)(i) when they paid the actual credit attributed to the quantum trading sale in terms of Rule 6(3A) along with interest following the option available under Rule 6(3)(ii) - It is an admitted fact that the assessee did not maintain separate accounts for input services used in or in relation to the provision of taxable service as well as exempt service i.e. trading of goods - Therefore, two options were available to them, i.e., either to pay 6% of value of the exempted service or pay an amount equal to the credit attributable to the input services used in or in relation to exempt services subject to the provisions of Sub-rule (3A) - When the mistake was pointed out, the assessee reversed the proportionate common credit taken on input services used in the provision of exempt services (trading of goods) along with interest thereon - Therefore, Rule 6(3) (i) will not have any application, when a credit is taken wrongly and the same is reversed along with interest as it tantamounts to not taking of the credit at all - The facts of the present case are squarely covered by the decision of co-ordinate Bench of Tribunal in ***M/s Mercedes Benz India (P) Ltd*** - 2015-TIOL-1550-CESTAT-MUM - Accordingly, the demand confirmed by lower appellate authority has no legs and therefore the same cannot be sustained - The impugned order is set aside: CESTAT

Appeal allowed

Case laws cited:

JOST ENGINEERING CO. LTD./ JAIPRAKASH CHAURASIA vs Commissioner of Central Excise, Mumbai-III - 2013-TIOL-732-CESTAT-MUM... Para 6

HMM Coaches Limited vs Commissioner of Central Excise, Panchkula, 2016(337) E.L.T. 598 (TRI.- CHAN)... Para 6

M/s MERCEDES BENZ INDIA (P) LIMITED VS COMMISSIONER OF CENTRAL EXCISE, PUNE-I - 2015-TIOL-1550-CESTAT-MUM ... Para 6

COMMISSIONER OF CENTRAL GST AND CX Versus HIMMAT GLAZED TILES - 2018-TIOL-1169-HC-AHM-CX... Para 6

FINAL ORDER NO. A/75927/2019

Per: P K Choudhary:

The appellant assessee is in appeal against the Order-in-Appeal dated 16/02/2018 wherein demand of CENVAT Credit reversal amounting to Rs.6,94,356/- under Rule 6(3) of the Cenvat credit Rules, 2004 on account of trading of goods and provision of taxable service was confirmed by the Ld. Commissioner (Appeals) on appeal filed by the Department against the Order-in-Original dated 31/03/2016. Vide the said Order-in-Appeal equivalent penalty has also been imposed with applicable interest.

2. Briefly stated, the facts of the case are that the appellant, M/s. Etrans Solutions Private Limited, is engaged in the business of providing vehicle tracking system through smart card/swipe card and Global Positioning System (GPS) and is accordingly registered under Business Support services. They are also engaged in some trading activity of GPS units procured from suppliers and sold to customers for tracking the movement of vehicles on real time basis. In terms of the order received from customers, the Appellant provides the services of vehicle tracking system and also sells the GPS units to different customers. The appellant maintains common balance sheet for their manufacturing as well as trading activity. The appellant availed CENVAT Credit under Cenvat Credit Rules, 2004 on input and input services used in or in relation to the manufacture of finished goods. In this background, a spot memo dated 29/11/2013 was issued by the Service tax audit team and the Appellant was asked to pay an amount of Rs.6,94,356/- being 6% of the exempted turnover under Rule 6(3)(i) of the Cenvat Credit Rules, 2004. The Appellant vide their reply dated 18/08/2014 to the said spot memo, paid an amount of Rs.2,467/- vide Challan No. 00185 dated 16/08/2014 along with interest of Rs.807/- being proportionate CENVAT Credit reversed by following the procedure as prescribed in Rule 6(3)(ii) of the said Rules. However, Show cause notice dated 20/10/2014 was issued to the appellant for noncompliance of provisions of Rule 6(3) of the Cenvat Credit Rules, 2004 as the appellant neither maintained separate records for receipt and consumption of common services used for manufacture of dutiable goods and provisions for exempted services viz. trading nor they were restricting availment of credit to the extent of input services used in manufacture of dutiable goods and thus the demand of Rs.6,94,356/- was made under Rule 6(3)(i) of the said Rules.

The said Show Cause Notice culminated into Order-in-Original dated 31/03/2016 wherein the Ld. Adjudicating authority dropped the said demand of Rs.6,94,356/-. On Appeal, filed before the Commissioner (Appeals) by the department the Ld. Commissioner (Appeals) allowed the department's appeal and rejected the adjudication order on this issue. Hence, the present appeal before the Tribunal by the appellant assessee.

3. Shri Ankit Kanodia, CA, appeared on behalf of the appellant and Shri S. S. Chattopadhyay, A.R. appeared on behalf of the respondent department.

4. The Ld. CA appearing for the appellant submitted that the appellant on being pointed by the department audit had reversed the proportionate CENVAT Credit availed on common input services used in provision of taxable service as well as trading of goods along with appropriate interest and thus had made sufficient compliance of Rule 6(3) of the Cenvat Credit Rules, 2004. He also submitted copies of statements showing year wise calculations of the common CENVAT Credit on input services and proportionate reversal done in this regard along with a Chartered Accountant's certificate certifying the submitted calculations. It is his contention that the Ld. Commissioner (Appeals), without considering the ratio of turnover from manufacturing activity vis a vis trading activity has merely confirmed the demand at 6% of the total exempted turnover i.e. trading of GPS units which cannot be sustained and being completely perverse, the impugned order is liable to be set aside.

5. He further submits that the Ld. Commissioner (Appeals), confirmed the demand equivalent to 6% of the trading turnover despite admitting the fact that the appellants have reversed the required credit along with interest, mainly on the ground that the appellants have not complied with the condition and procedure laid down under Rule 6(3)(ii) read with rule 6(3A) of Cenvat Credit Rules, Rules. He states that since the appellant reversed the credit along with interest, thus compliance of the procedure as laid down under rule 6(3A) was duly made.

6. The Ld. C.A. also submits that it is not provided under the law that if there is any procedure infraction in availing the option of Rule 6(3)(ii), the option provided under Rule 6(3) (i) shall automatically apply. Two options have been provided under the law to the assessee. It is a choice of the assessee which option is to be availed. In the present case, the appellant admittedly availed the option available under rule 6(3)(ii) read with rule 6(3A). Therefore, the department cannot insist to avail the option of Rule 6(3)(i) and demand huge amount of money which is otherwise not payable by the appellant, nor it is part of CENVAT Credit availed by the Appellant. He submits that when the options have been provided, the department has no say for choice of the assessee, the assessee who has liberty to choose any of the option and therefore in the present case, the appellant has opted for the option available under Rule 6(3)(ii) of Cenvat Credit Rules, therefore department has no role to decide regarding any other option available in the Rules. He also refers to the adjudication order passed by the same Jurisdictional Commissioner vide Order-in-Original No. 2I/COMMR/ST-II/KOL/2016-17 dated 21/06/2016 in respect of M/s. Anmol Biscuits Limited, wherein involving identical facts, the Commissioner has dropped the proceedings of the show cause notice. The said order was accepted by the Department and no further appeal was filed against the order. He submits that in the same Commissionerate two different yardsticks cannot be followed for two different assessees. For this reason above, the impugned order is incorrect and illegal.

In support of his submissions, the Ld. CA has referred to decisions of the Tribunal and the High Court in the case of ***(i) JOST ENGINEERING CO. LTD./ JAIPRAKASH CHAURASIA vs Commissioner of Central Excise, Mumbai-III - 2013-TIOL-732-CESTAT-MUM***
(ii) HMM Coaches Limited vs Commissioner of Central Excise, Panchkula, 2016(337) E.L.T. 598 (TRI.- CHAN), (iii) M/s MERCEDES BENZ INDIA (P) LIMITED VS COMMISSIONER OF CENTRAL EXCISE, PUNE-I - 2015-TIOL-1550-CESTAT-MUM
(iv) COMMISSIONER OF CENTRAL GST AND CX Versus HIMMAT GLAZED TILES 2018 (15) G.S.T.L. 486 (Guj.) = 2018-TIOL-1169-HC-AHM-CX .

7. The learned Authorized Representative for the Department, reiterates the findings of the Ld. Commissioner (Appeals). He submits that the appellant paid the amount of CENVAT Credit attributable to the input services used in exempted services i.e. trading of GPS units but procedure was not followed inasmuch as in the beginning of the financial year, have not intimated in writing to the Jurisdictional superintendent regarding the availment of the option provided under clause (ii) of Rule 6(3). They have not furnished the information as provided under clause (i) to (v) of sub clause (a) of Rule 6(3A). Once the appellant became disentitled for this option, the other option available is under rule 6(3)(i). Therefore, appellant had no other option but to follow the provisions of Rule 6(3)(i) and accordingly they were required to pay 6% of the value of the exempted services (trading of GPS units).

8. Heard both sides at length and perused the appeal records.

9. The short issue that arises for consideration in the instant appeal is whether appellant is required to pay 6% of total sale value of the goods traded by them in terms of Rule 6(3)(i) when the appellant paid the actual credit attributed to the quantum trading sale in terms of Rule 6(3A) along with interest following the option available under Rule 6(3)(ii). The relevant rule is reproduced below:

> ***"RULE 6. [Obligation of a manufacturer or producer of final products and a [provider of output service]]. — (1) The CENVAT credit shall not be allowed on such quantity of [input used in or in relation to the manufacture of exempted goods or for provision of exempted services, or input service 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], except in the circumstances mentioned in sub-rule (2) :***
>
> ***[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.]***
>
> ***[(2) Where a manufacturer or provider of output service avails of CENVAT credit in respect of any inputs or input services and manufactures such final products or provides such output service which are chargeable to duty or tax as well as exempted goods or services, then, the manufacturer or provider of output service shall maintain separate accounts for -***
>
> ***(a) the receipt, consumption and inventory of inputs used –***
>
> ***(i) in or in relation to the manufacture of exempted goods;***
>
> ***(ii) in or in relation to the manufacture of dutiable final products excluding exempted goods;***

(iii) for the provision of exempted services;

(iv) for the provision of output services excluding exempted services; and

(b) the receipt and use of input services —

(i) in or in relation to the manufacture of exempted goods and their clearance upto the place of removal;

(ii) in or in relation to the manufacture of dutiable final products, excluding exempted goods, and their clearance upto the place of removal;

(iii) for the provision of exempted services; and

(iv) for the provision of output services excluding exempted services,

and shall take CENVAT credit only on inputs under sub-clauses (ii) and (iv) of clause (a) and input services under sub-clauses (ii) and (iv) of clause (b).]

[(3) Notwithstanding anything contained in sub-rules (1) and (2), the manufacturer of goods or the provider of output service, opting not to maintain separate accounts, shall follow [any one] of the following options, as applicable to him, namely :-

[(i) pay an amount equal to [six per cent.] of value of the exempted goods and exempted services; or

(ii) pay an amount as determined under sub-rule (3A); or

(iii) maintain separate accounts for the receipt, consumption and inventory of inputs as provided for in clause (a) of sub-rule (2), take CENVAT credit only on inputs under sub-clauses (ii) and (iv) of said clause (a) and pay an amount as determined under sub-rule (3A) in respect of input services. The provisions of sub-clauses (i) and (ii) of clause (b) and sub-clauses (i) and (ii) of clause (c) of subrule (3A) shall not apply for such payment :

Provided that if any duty of excise is paid on the exempted goods, the same shall be reduced from the amount payable under clause (i) :

Provided further that if any part of the value of a taxable service has been exempted on the condition that no CENVAT credit of inputs and input services, used for providing such taxable service, shall be taken then the amount specified in clause (i) shall be [six per cent.] of the value so exempted.]

[Provided also that in case of transportation of goods or passengers by rail the amount required to be paid under clause (i) shall be an amount equal to 2 per cent. of value of the exempted services.]

Explanation I. - If the manufacturer of goods or the provider of output service, avails any of the option under this sub-rule, he shall exercise such option for all exempted goods manufactured by him or, as the case may be, all exempted services provided by him, and such option shall not be withdrawn during the remaining part of the financial year.

[Explanation II.- For removal of doubt, it is hereby clarified that the credit shall not be allowed on inputs used exclusively in or in relation to the manufacture of exempted goods or for provision of exempted services and on input services used exclusively in or in relation to the manufacture of exempted goods and their clearance upto the place of removal or for provision of exempted services."

10. In the present case, it is an admitted fact that the appellant did not maintain separate accounts for the input services used in or in relation to the provision of taxable service as well as exempt service i.e. trading of goods. Therefore, two options were available to them, i.e., either to pay 6% of value of the exempted service or pay an amount equal to the credit attributable to the input services used in or in relation to exempt services subject to the provisions of Sub-rule (3A). When the mistake was pointed out, the appellant reversed the proportionate common credit taken on input services used in the provision of exempt services (trading of goods) along with interest thereon. Therefore, Rule 6(3) (i) will not have any application, when a credit is taken wrongly and the same is reversed along with interest as it tantamounts to not taking of the credit at all.

11. I find that the Tribunal in the case of M/s MERCEDES BENZ INDIA (P) LIMITED VS COMMISSIONER OF CENTRAL EXCISE, PUNE-I (Supra) while dealing with a similar situation has held as under:-

"5.4 We find that the appellant admittedly paid an amount of Rs.4 ,06,785 /plus interest, this is not under dispute. Therefore in our view, the appellant have complied with the condition prescribed under Rule 6(3)(ii) read with sub rule (3A) of Rule 6 of Cenvat Credit Rules, therefore demand of huge amount of Rs.24,71,93,529/of the total value of the vehicle amounting to Rs.494,38,70,577/sold in the market cannot be demanded. We are also of the view that Rule 6 of the Cenvat Credit Rules is not enacted to extract illegal amount from the assessee. The main objective of the Rule 6 is to ensure that the assessee should not avail the Cenvat Credit in respect of input or input services which are used in or in relation to the manufacture of the exempted goods or for exempted services. If this is the objective then at the most amount which is to be recovered shall not be in any case more than Cenvat Credit attributed to the input or input services used in the exempted goods. It is also observed that in either of the three options given in sub rule (3) of Rule 6, there is no provisions that if the assessee does not opt any of the option at a particular time, then option of payment of 5% will automatically be applied. Therefore we do not understand that when the appellant have categorically by way of their intimation opted for option provided under subrule (3)(ii), how Revenue can insist that option (3)(i) under Rule 6 should be followed by the assessee.

5.5 As discussed above and in the facts of the case that actual Cenvat credit attributed to the exempted services used towards sale of the bought out cars in terms of Rule 6(3A) comes to Rs.4,06,785/whereas adjudicating authority demanded an amount of Rs.24,71,93,529/. In our view, any amount, over and above Rs.4,06,785/- is not the part of the Cenvat Credit, which required to be reversed. The legislator has not enacted any provision by which Cenvat credit which is other than the credit attributed to input services used in exempted goods or services can be recovered from the assessee."

12. I observe that the facts of the present case are squarely covered by the above-mentioned decision of the co-ordinate Bench of the Tribunal. Accordingly, I hold that that the demand confirmed by the lower appellate authority has no legs and therefore the same cannot be sustained. The impugned order is set aside and the Appeal filed by the appellant is allowed with consequential benefits, if any

(Pronounced in the open court on 30.07.2019)