2021-TIOL-413-CESTAT-KOL

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
EASTERN ZONAL BENCH, KOLKATA
REGIONAL BENCH
COURT NO. 2

Excise Appeal No. 75608 of 2020
And
Excise Cross Objection No. 75094 of 2021

[Arising out of Order-in-Appeal No. 04/HAL/CE/2020-21 Dated: 25.09.2020
Passed by Commissioner of CGST & Central Excise (Appeals-II), Kolkata]

Date of Hearing: 11.06.2021
Date of Decision: 15.07.2021

M/s PETRO CARBON AND CHEMICALS PVT LTD

Vs

COMMISSIONER OF CGST AND CX, HALDIA COMMISSIONERATE

Appellant Rep by: Shri Ankit Kanodia, Chartered Accountant
Respondent Rep by: Shri S S Chattopadhyay, Authorized Representative

CORAM: P K Choudhary, Member (J)

CX

- The issue arises for consideration is, whether the appellant is entitled to Cenvat credit of Service Tax paid by it on the freight component in relation to transport of goods from non-taxable territory to India when as per the lower authorities the said service was exempted from levy of Service Tax during the period when such import of goods took place - The tax was paid and accordingly the appellant had availed Cenvat credit of the same - The issue is no longer ***res integra*** in view of judgment of Madras High court in case of ***TAMILNADU PETROPRODUCTS LTD.*** *2015-TIOL-2600-HC-MAD-CX* - By respectfully following the same, it is held that the appellant cannot be asked to reverse the Cenvat credit availed on tax paid under Reverse Charge basis when the payment is not disputed - Thus, demand on said ground is set aside - Additionally, Revenue has not been able to prove beyond reasonable doubt, the presence of fraud, collusion, wilful misstatement or suppression of facts on the part of appellant - Therefore, imposition of penalty under section 11AC of Central Excise Act, 1944 is unwarranted: CESTAT

Appeal allowed

Case law cited:

COMMR. OF C.EX. & S.T., LTU, CHENNAI Versus TAMILNADU PETROPRODUCTS LTD. - 2015-TIOL-2600-HC-MAD-CX...Para 6

FINAL ORDER NO. 75393/2021

Per: P K Choudhary:

The appellant assessee is in appeal against the Order-in-Appeal dated 25.09.2020 for confirmation of demand of Rs. 14,82,558/- as irregular Cenvat credit availed on payment made under Reverse Charge Mechanism as Service Tax on freight of imported goods along with interest

and penalty for the period 2016-17

2. Briefly stated, the facts of the case are that the appellant, M/s. Petro Carbon and Chemicals Private Limited, is engaged in the business of manufacture and sale of CPC classifiable under chapter 27 of the Central Excise Tariff Act, 1985.

3. Based on an EA 2000 audit of the Excise and Service Tax records of the Appellant for the period 2016-17, it was issued with a Show Cause Notice (SCN) dated 27.12.2018 alleging irregular availment of Cenvat credit to the tune of Rs. 14,82,558/- and to impose penalty. The said SCN culminated into Order-in-Original dated 03.10.2019 wherein the Adjudicating authority confirmed the total demand as proposed along with applicable interest and imposed penalty. On Appeal, the learned Commissioner (Appeals) upheld the Adjudication Order. Hence, the present appeal before the Tribunal.

4. Shri Ankit Kanodia, learned Advocate appeared on behalf of the appellant and Shri S.S. Chattopadhyay, learned Authorized Representative appeared on behalf of the Respondent department.

5. The learned Advocate appearing for the appellant submitted that the dispute relates to availment of Cenvat credit on Service Tax paid by the Appellant under import of service of transportation of goods by vessel category in the month of March 2017. He submitted that Appellant had imported certain goods from outside the territory of India and for this, they had availed the services of M/s. Siva Bulk Limited, Singapore and from M/s. Win Shipping Co. Ltd., Shanghai, China, both being in non-taxable territory, for transportation of such materials into India. Accordingly, the above two foreign shipping companies had invoiced to the Appellant for transportation charges and on which the Appellant had discharged Service Tax under import of service of transportation of goods by vessel category in the month of March 2017 by treating the same as import of transport services by vessel and had thus availed the said Cenvat credit of the Service Tax paid amounting to Rs. 14,82,558/- in the same month. He further stated that the department has disputed the availment of Cenvat credit of Service Tax paid above on the ground that such amount was not payable as Service Tax at all as the said services were exempted services as per section 66D of the Finance Act, 2017 as amended from time to time.

6. He further stated that since it is not disputed by the Revenue that the Service Tax has been paid by the Appellant under Reverse Charge and the same is for business use only, the question of denial of Cenvat credit cannot arise as the entire situation is revenue neutral. He relied on the judgment of Hon'ble Madras High Court in the case of
COMMR. OF C.EX. & S.T., LTU, CHENNAI Versus TAMILNADU PETROPRODUCTS LTD. [2015 (40) S.T.R. 878 (Mad.)] = 2015-TIOL-2600-HC-MAD-CX
, wherein, in a similar situation of payment of tax under Reverse Charge Mechanism and availment of Cenvat Credit of the said payment, the Hon'ble High Court had dismissed the departmental appeal for recovery of Cenvat Credit. He further contended that there is no scope of invoking extended period of limitation in the given case. He relied on many judgments on account of non- imposition of penalty as held in various decisions.

7. The learned Authorized Representative for the Revenue, on the other hand, justified the order of the first appellate authority.

8. Heard both sides through video conferencing and perused the appeal records.

9. The short issue that arises for consideration in the instant appeal is whether the Appellant is entitled to Cenvat credit of Service Tax paid by it on the freight component in relation to transport of goods from non-taxable territory to India when as per the lower authorities the said service was exempted from levy of Service Tax during the period when such import of goods took place. In this regard observation of the Adjudicating authority in para 5.1 to 5.4 is important, whereby the learned Adjudicating authority has dealt with the history of taxation of services of transport of goods by vessel from non-taxable territory to India and has concluded that during the said period in which the Appellant had availed the services of shipping lines, the said services were exempt from Service Tax. Thus, it is an admitted fact that the first Appellant was not liable to pay Service Tax on the transportation of goods by vessel services. However, the tax was paid and accordingly the Appellant had availed Cenvat credit of the same.

I find that the issue above is no longer ***res integra*** in view of the judgment of the Hon'ble Madras High court in the case of ***COMMR. OF C.EX. & S.T., LTU, CHENNAI*** Versus ***TAMILNADU PETROPRODUCTS LTD***
. (supra), wherein the Hon'ble High Court held as under :-

"9. It is an admitted fact that the first respondent/assessee was not liable to pay service tax on the transportation of goods both inward and outward upto 31-12-2004. The liability was imposed only with effect from 1-1-2005. But, unfortunately, the first respondent/assessee paid service tax, even at a time when there was no liability on them. Since they made payment of tax under the impression that they were due to pay, they claimed Cenvat credit to that extent. It is not the case of the Department that the first respondent claimed Cenvat credit in respect of an amount that they had not paid or in excess of the amount that they have paid. The only grievance of the Department is that if the assessee had paid tax which they were due to pay or if they had paid duty in excess of what they are liable to pay, the only course open to them is to claim refund and not to make use of Cenvat credit. But, we do not think so. If, upon a misconception of the legal position, the assessee had paid the tax that he was not liable to pay and such assessee also happens to be an assessee entitled to certain credits such as Cenvat credit, the availing of the said benefit cannot be termed as illegal. Therefore, we find no infirmity in the order of the Tribunal. The question of law is answered against the Revenue and the appeal is dismissed. No costs."

10. By respectfully following the aforesaid judgement of the Hon'ble High Court, I hold that the Appellant assessee cannot be asked to reverse the Cenvat credit availed on tax paid under Reverse Charge basis when the payment is not disputed. Thus, I set aside the demand on the above ground. Additionally, the Revenue has not been able to prove beyond reasonable doubt, the presence of fraud, collusion, wilful misstatement or suppression of facts on the part of the appellant assessee. Therefore, imposition of penalty under section 11AC of the Act is unwarranted.

11. Accordingly, the appeal filed by the appellant is allowed with consequential relief, if any.

(Order pronounced in the open court on 15.07.2021.)