* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Decided on : 08.11.2012

\+ **CEAC 1/2009**

CEAC 40/2011

COMMISSIONER OF SERVICE TAX ..... Petitioner
Through: Sh. V.C. Jha, Advocate.

Versus

M/S. HERO HONDA MOTORS LTD. ..... Respondent
Through: Sh. P.K. Ram, Advocate.

CORAM:
MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE R.V. EASWAR

MR. JUSTICE S.RAVINDRA BHAT (OPEN COURT)

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1. In these appeals, the question which arises for consideration is whether the Tribunal fell into error in holding that in terms of Section 68(2) of the Finance Act, 1994, the respondent/assessee was entitled to claim that it had paid or adjusted service tax dues on the basis of CENVAT credit instead of cash.

2. The brief facts are that the assessee i.e. respondent in this case was issued a show cause notice on 30.1.2006 proposing recovery of dues (including interest) and penal action in terms of Finance Act, 1994. The Revenue took action on the basis that the assessee had wrongly claimed to have paid service tax on goods transport agency under Section 68(2) of the said Finance Act, by adjustment of CENVAT credit instead of payment in cash. The Revenue's contention was that the tax liability had to be discharged by cash and not through a claim of CENVAT credit. The Revenue also contended that the assessee was not a service provider but recipient of a taxable service and that the CENVAT credit facility was only provided to a service provider but not to the recipient such as assessee. The adjudicatory authority by order dated 10.5.2006 confirmed the allegations made in the show cause notice and the claim for duty and imposed penalty. The respondent-assessee appealed to the Commissioner (Appeals). The latter, taking note of the provisions of Section 68(2) and the legal function provided by it as well as the decision of the *Commissioner of Central Excise, vs. M/s. Nahar Industrial Enterprises Ltd;* 2007 (7) STR 26 (Del) and *RRD Tex Pvt. Ltd. vs. CCE Salem*, 2007 (8) STR 186, Chennai held that the assessee was entitled to the benefit of claiming payment of service tax on GTA services through adjustment of CENVAT credit. The appeal preferred by the Revenue to the CESTAT was rejected following the previous order in *Nahar Industrial Enterprises;* it also noticed other decisions on the same subject i.e. *India Cements vs. CCE, Salem*, 2007 (7) STR 569; *Bhushan Power & Steel Ltd. vs. CCE* 2008 (10) STR 18, and *CCE, Nagpur vs. Visaka Industries Ltd.*, 2007(8) STR 231.

3. The Revenue claims to be aggrieved by the impugned order. It is

stated at the outset that the view expressed by the Tribunal has been carried in appeal to the Supreme Court in Special Leave Petitions.

4. It appears that the Revenue had challenged the CESTAT's order in *Nahar Industrial Enterprises Ltd. (supra)* before the Punjab and Haryana High Court and advanced various contentions. The question of law framed by that High Court was identical to what was urged in the present case. The High Court by its order reported as *CCE vs. Nahar Industrial Enterprises Ltd.*, 2012 (25) STR 129 held as follows:-

> *"6. Learned counsel for the revenue has contended that the respondents cannot pay the service tax from the Cenvat credit availed by them. But this argument has no force, because a perusal of para 2.4.2 of CBEC's Excise Manual of Supplementary Instructions shows that there is no legal bar to the utilisation of Cenvat credit for the purpose of payment of service tax on the GTA services.*
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> *7. Apart from the above, even as per Rule 3(4)(e) of the Cenvat Credit Rules, 2004, the Cenvat credit may be utilized for payment of service tax on any output service.*
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> *8. In the present case also, the service tax was paid out of the Cenvat credit on GTA services and, hence, the respondents were well within their right to utilize the Cenvat credit for the purpose of payment of service tax. The Commissioner (Appeals) as well as the Tribunal have rightly held that the respondents were entitled to pay the service tax from the Cenvat credit."*

5. As is evident, the Punjab and Haryana High Court had relied on Rule 3(4)(e) of the CENVAT credit Rules, 2004. The operative part of Rule 3(1) states that a manufacturer or producer of final products or a provider of taxable service shall be allowed to take credit i.e. CENVAT credit in terms of its provisions. Rule 3(4), to the extent it is material for the present

purpose reads as follows:-

> *"(4) The CENVAT credit may be utilized for payment of –*
>
> *a) any duty of excise on any final product; or*
> *b) an amount equal to CENVAT credit taken on inputs if such inputs are removed as such or after being partially processed; or*
> *c) an amount equal to the CENVAT credit taken on capital goods if such capital goods are removed as such; or*
> *d) an amount under sub rule (2) of rule 16 of Central Excise Rules, 2002; or*
> *e) service tax on any output service:"*

S. 68 (1) and (2) of the Finance Act, 1994 read as follows:

Sec.68. Payment of Service Tax: -

(1) "*Every person providing taxable service to any person shall pay service tax at the rate specified in section 66 in such manner and within such period as may be prescribed.*

(2) *Notwithstanding anything contained in sub-section (1), in respect of any taxable service notified by the Central Govt. in the Official Gazette, the service tax thereon shall paid by such person and in such manner as may be prescribed at the rate specified in section 66 and all the provisions of this chapter shall apply to such person as if he is the person liable for paying the service tax in relation to such service."*

6. In view of the specific reference to service tax and the benefit allowed to a service provider, read with the fiction created by Section 68(2) of the Finance Act, 1994, this Court is of the opinion that there is no ground to disagree with the judgment and reasoning of the Punjab and Haryana High Court in *Nahar Industrial Enterprises Ltd.* The appeal consequently fails

and the question of law is answered in favour of the appellant and against the Revenue.

The appeal is dismissed.

S. RAVINDRA BHAT
(JUDGE)

R.V. EASWAR
(JUDGE)

NOVEMBER 8, 2012
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