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CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD
Division Bench - Court No. – I

Service Tax Appeal No 1379 of 2010
(Arising out of **Order-in-Original** No. 13/2010-ST, dated 26.03.2010 passed by Commissioner of Customs, Central Excise & Service Tax, Hyderabad-II)

ECIL Rapiscan Ltd., .. **APPELLANT**
B1, Vikrampuri,
Secunderabad,
Telangana – 500 003.

VERSUS

Commissioner of Central Excise, .. **RESPONDENT**
Customs& Service Tax
Hyderabad – II
Kendriya Shulk Bhavan,
L.B. Stadium Road,
Basheerbagh, Hyderabad,
Telangana – 500 004.

Appearance
Shri Shankar Bala, Chartered Accountant for the appellant.

Shri A V L N Chary, Superintendent for the Respondent.

Coram: **Hon'ble Mr. P.V. SUBBA RAO, MEMBER (TECHNICAL)**
Hon'ble Ms. RACHNA GUPTA, MEMBER (JUDICIAL)

FINAL ORDER No. A/30016/2020

Date of Hearing:21.11.2019
Date of Decision:21.01.2020

[ORDER PER: MR. P.V. SUBBA RAO]

1. This appeal is filed against Order-in-Original No. 13/2010-ST, dated 26.03.2010.

2. The appeal was initially dismissed vide Final Order No. A/31431/2018 for non-prosecution as the appellant had not been appearing despite repeated notices. Subsequently, they filed an application seeking the restoration of the appeal and a decision on merits. It was submitted that the notices had gone to their old address and hence they could not appear before the Bench on the earlier occasions. By Misc Order No. M/30437/2019 dated 24.10.2019 the appeal was restored and listed for hearing on 21.11.2019. Heard both sides and perused the records.

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3. The appellant is engaged in supplying X-ray Baggage Inspection Systems (XBIS) manufactured by the Original Equipment Manufacturers (OEM) and providing Annual Maintenance Contracts (AMCs) for the same. They are registered with the service tax department for providing management, maintenance and repair services and man power recruitment services. They have been paying service tax and filing their returns. On scrutiny of ST-3 returns of the appellant for the period April 2008 to March 2009 it appeared to the Revenue that they had taken ineligible cenvat credit. Accordingly, show cause notice dated 21.10.2009 was issued calling upon them to explain why:

i) an amount of Rs. 48,20,564/- equivalent to Cenvat Credit attributable to input services used for provision of exempted services should not be recovered from them under Rule 14 of the Cenvat Credit Rules, 2004 read with Rule 6(3A) of the Cenvat Credit Rules, 2004 and Section 73(1) of the Finance Act, 1994.

ii) credit of Rs, 10,60,865/- irregularly taken by them on agency commissions should not be recovered from them under Rule 14 of the Cenvat Credit Rules, 2004 read with Section 73(1) of the Finance Act, 1994.

iii) interest at the applicable rate on the amount mentioned at (i & ii) above should not be demanded from them under Rule 14 of the Cenvat Credit Rules, 2004 read with Section 75 of the Finance Act, 1994; and

iv) penalty should not be imposed on them in terms of Rule 15(3) of the Cenvat Credit Rules, 2004.

4. After following due process, by the impugned order, the adjudicating authority has confirmed the demands as proposed along with the interest and imposed a penalty of Rs. 2,000/- upon the appellant under Rule 15(3) of Cenvat Credit Rules, 2004.

5. Aggrieved by this order, the present appeal is filed. Learned Counsel for the appellant submits that the following issues are in dispute.

i) Dis-allowance of cenvat credit amounting to Rs. 10,60,865/- taken by them on agency commission. He would submit that this agency commission included the agency commission which they have taken for procuring orders for trading goods, i.e., selling XBIS (on which no service tax was paid by

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them) and agency commission for procuring Annual Maintenance Contracts (on which then paid service tax). An amount of Rs. 1,31,191/- pertains to the former whereas Rs. 9,29,674/- pertains to the latter. He would submit that as far as the agency commission pertaining to the Annual Maintenance Contracts is concerned as they have been discharging service tax on Annual Maintenance Contracts and hence cenvat credit on such commissions cannot be denied.

6. The second issue to be considered is a demand of reversal of proportionate amount of cenvat credit on the common input services demanded in the show cause notice and confirmed by the impugned order. He would submit that in the impugned order CENVAT credit on all the services which were availed have been taken as only common input services and accordingly the proportionate amount of cenvat credit has been demanded. The amount includes cenvat credit in respect of input services which are attributable only to taxable services and also services which are common input services. He would therefore urge that to this extent the matter needs to be remanded to the adjudicating authority for verification as it cannot be disputed that services which are used exclusively for providing taxable services cannot be counted as common input service for demanding proportionate reversal.

7. The third issue, he would argue, is that even among the common input services there are services which are covered by Rule 6(5) of Cenvat Credit Rules, 2004 which allows cenvat credit unless the service is used exclusively for providing exempted service. Rule 6(5) as applicable during the relevant period is as follows:

(5) Notwithstanding anything contained in sub-rules (1), (2) and (3), credit of the whole of service tax paid on taxable service as specified in sub-clause (g), (p), (q), (r), (v), (w), (za), (zm), (zp), (zy), (zzd), (zzg), (zzh), (zzi), (zzk), (zzq) and (zzr) of clause (105) of section 65 of the Finance Act shall be allowed unless such service is used exclusively in or in relation to the manufacture of exempted goods or providing exempted services.

He would therefore urge that the demand needs to be re-computed for this purpose.

8. His next argument is that all the services on which they have not paid service tax were treated as exempted services. This included services which they rendered in the state of Jammu & Kashmir. Chapter V of the Finance

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Act, 1994 which levies the service tax does not apply to the state of Jammu & Kashmir. Therefore, no service tax is levied on such services. When the Act itself does not apply to the services rendered in Jammu & Kashmir the question of treating them as exempted services does not arise. Therefore, they are entitled to cenvat credit on the input services used in rendering services in the state of Jammu & Kashmir even though no service tax is paid on such service. Therefore, the computation of demand of reversal needs to take this into account.

9. His next argument was that trading has been treated as an exempted service in the impugned show cause notice although the explanation to this effect has been inserted in the statute only with effect from 01.04.2011. Therefore, for the relevant period which is prior to 01.04.2011 trading cannot be considered as an exempted service at all. For that reason, the entire demand on this ground must be set aside.

10. He also contests the penalty imposed upon them and the demand for interest.

11. On the other hand, Learned DR supports the impugned order. With respect to the first question of dis-allowance of cenvat credit on the agency commission, he produces a copy of Final Order No. A/30027/2018 dated 17.01.2018 in respect of the same appellant for an earlier period where in it has been held that the agency commission used for procurement of orders of AMCs and service tax paid on such commission of agency services is not eligible for cenvat credit. In concluding so, the case law of Cadilla Healthcare Ltd., [Commissioner of Central Excise Vs Cadilla Healthcare Ltd., [2013 (1) TMI 30 & Gujarat High Court] in which the Hon'ble High Court of Gujarat has held that the service rendered in procurement of business cannot be considered as service rendered in relation to business activity was relied upon. He would therefore, submit that this issue is settled and regardless of whether the agency commission question was paid for procuring orders for sale of goods or procuring orders for AMCs the appellant is in-eligible for cenvat credit to this extent.

12. On the question of some cenvat credit being attributable to the services used wholly in relation to taxable services he would agree that the matter could be verified by the lower authority. With respect to the question of trading being not an exempted services during the relevant period being

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prior to 01.04.2011 he would submit that this issue has been settled by the Hon'ble High Court of Madras in the case of Ruchika Global Interlinks [2017-TIOL-1235-HC-MAD-ST] that both prior and post 01.04.2011 trading activity amounts to rendering of exempted service and pertaining amount of cenvat credit needs to be reversed. He would further submit that the Hon'ble High Court of Madras has also held so in the case of FL Smidth Pvt Ltd., [2014-TIOL-2186-HC-MAD-CX].

13. We have considered the arguments on both sides and perused the records. With regard to the first question of cenvat credit on agency commission, we find that in respect of the same appellant for a different period it has been held by this Bench that they are not entitled to cenvat credit on the agency commission because the commissions has been paid for procuring orders and not in relation to rendering the service. This decision was based on the judgment of the Hon'ble High Court of Gujarat in the case of Cadilla Healthcare Ltd., [2013-1-TMI-304-Guj-HC]. We respectfully follow the decision of the Hon'ble High Court of Gujarat even in this case and hold that the appellant is not entitled to cenvat credit on the agency commission paid for procuring order either for selling the goods or for procuring orders for AMC.

14. On the question of the trading activity being an exempted service only post 01.04.2011 we find that this issue has been settled by the Hon'ble High Court of Madras in the case of Ruchika Global Interlinks (supra) and FL Smidth (supra) that either before 01.04.2011 or after this state trading activity is an exempted service. The amendment made with effect from 01.04.2011 specifying trading activity as an exempted service will not make a difference. Therefore, we find the argument of the appellant on this count without any force. We also find that in respect to the same appellant for the earlier period this Bench had held so following the judgments of the Hon'ble High Court of Madras.

15. The third question is regarding the calculation of the amount demanded to be reversed. It is the assertion of the Learned Counsel for the appellant that the department has taken into account not only common input services in terms of Rule 6(3) but also input services which were exclusively used in rendering taxable services. This is a fact which needs to be verified by the adjudicating authority after obtaining all relevant information from

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the appellant and we find that the matter needs to be remanded to the original authority as this count.

16. As far as the services covered by Rule 6(5) of CCR, 2004 are concerned these are eligible for cenvat credit notwithstanding Rule 6(1) and Rule 6(2) of the CCR, 2004 as the rule position stood during the relevant period. If any of the services in question were covered by Rule 6(5), the appellant is entitled to the full amount of cenvat credit even if the services were partly used for rendering exempted services also. Learned Counsel for the appellant has also submitted that some of the services were rendered for providing manpower supply and recruitment services and they are entitled to cenvat credit to this account. We find that this is also a matter which is fit to be remanded to the original authority for verification.

17. Coming to the last question of whether the appellant is entitled to cenvat credit on input services with respect to the services rendered in Jammu & Kashmir are concerned, it is the argument of the Learned Counsel for the appellant that as Chapter V of the Finance Act, 1994, under which the Service Tax is levied itself does not cover the state of Jammu and Kashmir, neither should the provisions of Rule 6(3) of the CENVAT Credit Rules, 2004 which require reversal in respect of an exempted service. It is his position that Services rendered in J&K cannot be called as 'exempted services' at all. Therefore, they are not obliged to reverse proportionate amount of CENVAT credit even if some of the services were rendered in J&K. He relies on the following case laws:

(1) ECIL Rapisan Ltd vs Commissioner [2014 (35) STR 398 (Tri-Bang)
(2) ECIL Rapisan Ltd vs Commissioner [2010 (17) STR 433 (Tri-Bang)
(3) Rambol Imisoft Pvt. Ltd (2017 (47) STR 61 (Tri-Hyd)

18. We find that the case law at S.No. 3 above relied on S.No. 1&2 above. None of the three Orders appeared to have considered the definition of 'exempted service' as per Rule 2(e) of the Cenvat Credit Rules, 2004. This definition was amended by Notification no. 28/2012- CE(NT), dated 20-6-2012 with effect from 01-07-2012. We are also unable to determine whether the relevant periods of these case laws was prior to the amendment or thereafter.

19. On the other hand, the position of the Ld. AR is that when no service tax is payable under the Finance Act, 1994 it falls under 'exempted service'

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as held in the case of Prathyusha Associates shipping P Ltd. [2014 (36) STR 1145 (Tri- Bang)]. This case pertained to the period prior to the amendment of the definition of exempted service and Rule 2(e) as applicable during the relevant period was considered.

20. We, therefore, find it important to examine the definition of 'exempted service' under Rule 2(e) during different periods as follows:

Before 1-4-2011

Rule 2 (e)

(e) "exempted services" means taxable services which are exempt from the whole of the service tax leviable thereon, and ***includes services on which no service tax is leviable under section 66 of the Finance Act;***

After 1-4-2011 up to 1-3-2016

Rule 2 (e)

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

After 1-3-2016

Rule 2 (e)

'(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. Or*
- *(b) by way of transportation of goods by a vessel from customs station of clearance in India to a place outside India;*

21. The relevant period in this case is prior to 1-4-2011 when the definition of 'exempted service' under Rule 2(e) of CENVAT Credit Rules, 2004 included any service on which no service tax could be levied under the provisions of Chapter V of the Finance Act, 1994. Since no service tax could be levied on any service rendered in Jammu and Kashmir under this Act, it

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squarely falls under the definition of 'exempted service'. When there is a statutory definition which is clear and unambiguous, it must be applied regardless of the consequences as held by the Five Member Constitution Bench of Hon'ble Supreme Court. In the case of Commissioner of Customs (Import) Mumbai vs Dilip Kumar and Company [2018 (361) ELT 577(SC)] it was held that where the words in a statute are clear and plain and unambiguous and only one meaning can be inferred, Courts are bound to give effect to the said meaning irrespective of the consequences. The relevant paragraphs are as follows:

> "***19. The well-settled principle is that when the words in a statute are clear, plain and unambiguous and only one meaning can be inferred, the Courts are bound to give effect to the said meaning irrespective of consequences****. If the words in the statute are plain and unambiguous, it becomes necessary to expound those words in their natural and ordinary sense. The words used declare the intention of the Legislature. In Kanai Lal Sur v. Paramnidhi Sadhukhan, AIR 1957 SC 907, it was held that if the words used are capable of one construction only then it would not be open to the Courts to adopt any other hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of the Act.*
>
> ***20. In applying rule of plain meaning any hardship and inconvenience cannot be the basis to alter the meaning to the language employed by the legislation. This is especially so in fiscal statutes and penal statutes.*** *Nevertheless, if the plain language results in absurdity, the Court is entitled to determine the meaning of the word in the context in which it is used keeping in view the legislative purpose [Assistant Commissioner, Gadag Sub-Division, Gadag v. Mathapathi Basavannewwa, 1995 (6) SCC 355]. Not only that, if the plain construction leads to anomaly and absurdity, the Court having regard to the hardship and consequences that flow from such a provision can even explain the true intention of the legislation. Having observed general principles applicable to statutory interpretation, it is now time to consider rules of interpretation with respect to taxation.*

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22. This judgment of the Constitutional Bench of the Apex Court is binding on us. We find that Rule 2(e) as it stood during the relevant period squarely covered within the ambit of 'exempted service' any service rendered in J&K. We are not aware of any ruling on the vires of this Rule or even its challenge. The case laws relied upon by the Ld. Counsel for the appellant do not indicate what the definition of 'exempted service' during the relevant periods was and why the services rendered in J&K do not fall under the definition. Thus, we find that the services rendered by the appellant in J&K are exempted services and must be treated as such while computing the ineligible/reversible CENVAT credit under Rule 6 (3) of CCR, 2004.

23. In view of the above, we find that this is a fit case to be remanded to the original authority to re-determine the amount of cenvat credit which needs to be dis-allowed, the interest thereon and the appropriate penalty as follows:

i) while computing the amount of cenvat credit on common input services the value of input services, if any, used exclusively for providing taxable services must be excluded.

ii) The appellant is not entitled to cenvat credit on the input service used for payment of agency commission whether such commission is towards payment of AMCs or towards procuring orders.

iii) The value of services if any covered by Rule 6(5) of CCR, 2004 cannot be treated as common service since Rule 6(5) prevails over Rule 6(1) and Rule 6(2). The appellant is entitled to cenvat credit of such amounts without any proportionate reversal unless such services are used exclusively for rendering exempted services.

iv) The turnover of manpower supply and recruitment service, if any, rendered by the appellant and on which tax has been paid should be considered as taxable services for computation.

v) Trading service, whether prior to 01.04.2011 or after this date is and will continue to be exempted service in view of the judgment of the Hon'ble High Court of Madras in the case of Ruchika Global Interlinks (supra). Therefore reversal must be made reckoning this as exempted service.

(vi) The value of services rendered in Jammu & Kashmir on which no service tax is leviable under the Finance Act, 1994 are 'exempted services' in terms

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of Rule 2(e) of the CCR, 2004 as it stood during the relevant period and these services should be reckoned as such while deciding the amount of CENVAT credit to be reversed.

24. The appeal is disposed of by way of remand to the original authority with a direction to re-determine the amount of cenvat credit to be reversed, interest and imposition of penalty if any, after following principles of natural justice.

(Order pronounced on 21-01-2020 in open court)

(P. VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

(RACHNA GUPTA)
MEMBER (JUDICIAL)

Jaya