Serial No. 01
Supplementary List

HIGH COURT OF MEGHALAYA AT SHILLONG

WP(C) No. 86 of 2022

Date of order: 19.05.2022

The Commissioner of Goods and Services Tax	vs.	M/s Amrit Cement Limited

Coram:

Hon'ble Mr. Justice Sanjib Banerjee, Chief Justice
Hon'ble Mr. Justice W. Diengdoh, Judge

Appearance:

For the Petitioner : Dr. N. Mozika, ASG with
Ms. S. Rumthao, Adv.

For the Respondent : Mr. J.P. Khaitan, Sr. Adv. with
Mr. A. Sengupta, Adv.
Mr. K. Ch. Gautam, Adv.

i) Whether approved for reporting in Law journals etc.: Yes

ii) Whether approved for publication in press: Yes/No

JUDGMENT: (per the Hon'ble, the Chief Justice) (Oral)

The Revenue questions the propriety of an order passed by the Commissioner of Appeals to the extent that the appellate authority has declined the Revenue's demand pertaining to a sum of Rs. 2,18,75,232/- for which undue credit, according to the Revenue, was obtained by the respondent assessee.

2. The matter pertains to the period of transition in 2017 to the goods and services tax regime. The substance of the dispute relates to the payment by the assessee of the service tax component pertaining to manpower and the like services received by the assessee partly for the quarter ending March 31, 2017 and partly for the quarter ending June 30, 2017 long after the appointed date of July 1, 2017 and claiming cenvat credit therefor.

3. For possible financial constraints on the part of the assessee – and it is unnecessary to go into the reason for the delay – the service tax payment on account of the relevant manpower and like services obtained by the assessee during the aforesaid periods was made on or about October 23, 2017. The service tax due was tendered by the assessee under the applicable reverse charge mechanism, whereunder it is the service recipient, rather than the service provider, which is obliged to deposit the tax directly. There is no dispute as to the receipt of such payment by the Revenue.

4. The issue that arose and which culminated in a later show-cause notice of July 31, 2019 issued by the Revenue was as to the entitlement of the assessee to claim cenvat credit on the quantum of Rs. 2,18,75,232/-

paid by way of service tax, but which was paid long after the appointed date of July 1, 2017 when the goods and services tax regime came to be embraced. The short ground raised by the Revenue in the show-cause notice in such regard was that since such payment of service tax was not made prior to the appointed date and could not have been reflected in the electronic ledger account maintained by the assessee as on the appointed date, in terms of Section 140 of the Central Goods and Services Tax Act, 2017, the assessee was not entitled to obtain any credit therefor.

5. There were other issues covered in the said show-cause notice of July 31, 2019 and these other aspects have been adjudicated upon, but they are not the subject-matter of the present proceedings. The assessee has accepted the adverse findings pertaining to such other aspects and there is no challenge thereto. The Revenue has only questioned the propriety of the assessee being allowed credit for the aforesaid sum of about Rs. 2.18 crores and Article 226 of the Constitution has been invoked in the absence of the Tribunal being constituted under the Act of 2017. To repeat, the challenge to the appellate order of January 8, 2021 which is assailed in the present proceedings is confined to the assessee

availing cenvat credit to the extent of the aforesaid amount of Rs. 2,18,75,232/- and the appellate order permitting the same.

6. The Revenue first refers to Section 140 of the Act of 2017. Sub-section (1) from the relevant provision has been placed:

> "140. **Transitional arrangements for input tax credit**. – (1) A registered person, other than a person opting to pay tax under section 10, shall be entitled to take, in his electronic credit ledger, the amount of CENVAT credit of eligible duties carried forward in the return relating to the period ending with the day immediately preceding the appointed day, furnished by him under the existing law in such manner as may be prescribed:
>
> Provided that the registered person shall not be allowed to take credit in the following circumstances, namely:-
>
> (i) where the said amount of credit is not admissible as input tax credit under this Act;
>
> or
>
> (ii) where he has not furnished all the returns required under the existing law for the period of six months immediately preceding the appointed date; or
>
> (iii) where the said amount of credit relates to goods manufactured and cleared under such exemption notifications as are notified by the Government."

7. The Revenue reads the provision to imply that only the amount of cenvat credit due to a registered person within the meaning of the relevant expression as on the appointed date could be taken credit of. As a corollary, the Revenue contends that since the service tax component in

this case of Rs. 2,18,75,232/- was paid only on October 23, 2017, cenvat credit for such amount could not have been availed of by the assessee.

8. The order-in-original of June 18, 2020, passed by the Joint Commissioner (CGST), Shillong, upheld the Revenue's demand on such count by agreeing with the show-cause notice that for an assessee to obtain cenvat credit, the service tax corresponding thereto ought to have been received by the Revenue prior to the appointed date of July 1, 2017. The second ground that impressed the Joint Commissioner and is reflected in the order-in-original is that double benefit had been obtained by the assessee; first, in terms of the locational exemption applicable and, later, the cenvat credit.

9. It is necessary to deal with the second ground first, since such ground was also before the appellate authority and the appellate authority found no merit therein, particularly since, on a plain reading of the applicable provision, the assessee was entitled to obtain due credit for the aforesaid sum of Rs. 2,18,75,232/-. There is no doubt that to the extent the assessee availed of the locational exemption, it paid less tax; and, as a consequence, since cenvat credit is relatable to the tax actually paid, it

obtained correspondingly lower cenvat credit. There is no merit in the ground and the appellate authority appropriately repelled the same.

10. Before engaging on the primary issue involved herein, judicial notice has to be taken of the complex and convoluted way in which the law and the procedure are reduced to writing in matters pertaining to revenue, especially GST. There are enactments which are qualified by rules that are modified by notifications which are exempted by periodic instructions handed down by the Department. It appears that there is a concerted attempt to make the matter more complex than it is actually is and for obvious reasons for a lot of the gravy to seep through the cracks. The matter may be emphasised by referring to a 2018 amendment of Section 140 of the Act of 2017 by which the second Explanation to the provision, which was till then confined to sub-section (5) of Section 140, was extended to sub-section(1) thereof. Though the amendment has taken place in 2018, such amendment is to take effect from a day which has to be notified. Such date has not yet been notified, though the effect of the amendment is already found in Rule 117 of the Central Goods and Services Tax Rules, 2017.

11. Indeed, such rule apparently enlarges the scope of what is contained in Section 140 of the statue when it refers to "eligible duties and taxes" though amended Section 140(1) of the Act confines the matter only to "eligible duties". Quite plainly, the amendment to Section 140(1) of the Act of 2017 to incorporate the words "of eligible duties" was wholly unnecessary as the preceding expression "cenvat credit" was already self-contained and the incorporation of the amendment sans a reference to the tax component made it somewhat anomalous which Rule 117 of the Rules of 2017 rectifies. However, a rule cannot, ordinarily, rectify or alter any statutory provision. Be that as it may.

12. The key to the issue, as had to be discerned with a great deal of difficulty from the equally convoluted appellate order, is in the existing law or practice under the previous regime continuing and the rights, obligations and liabilities of both the Revenue and the assesses being saved by the repeal and savings provision in Section 174 of the Act of 2017. Section 2(48) of the Act of 2017 defines "existing law" and the applicability thereof to the manner in which the relevant service tax return in this case was filed by the respondent assessee cannot be questioned. In

any event, the operative words in Section 140(1) of the Act of 2017 also refer to "existing law", if only to emphasise the matter.

13. In terms of Section 140(1) of the Act of 2017, a qualified registered person is entitled to take the amount of cenvat credit carried forward in the return relating to the period immediately prior to the appointed date as furnished by such person under the existing law. In other words, the essence of Section 140(1) of the Act of 2017 is that if a matter is reflected in the return for the relevant period, due credit therefor may be taken as long as the return has been filed in accordance with the existing law and in the manner prescribed thereby. In this case, the return pertaining to the quarter immediately preceding the appointed date was filed on October 24, 2017, a day after the service tax component pertaining to the payment was tendered by the assessee, together with a GST TRAN-1 form duly filled up.

14. The assessee refers to Rule 117 of the Rules of 2017 which requires every registered person entitled to take credit of input tax under Section 140 of the Act to submit a declaration electronically in the specified form GST TRAN-1 within 90 days of the appointed date. Since, a proviso to such Rule permits the Commissioner to extend the period by

a further 90 days, by general notifications, which are not disputed, the period was extended till December 27, 2017. Thus, it is evident that the relevant GST TRAN-1 form was filed by the assessee within the time permitted.

15. Rule 3 of the Cenvat Credit Rules, 2004 indicates, inter alia, the various forms of service tax for which cenvat credit may be obtained. There is no dispute that the assessee in this case was qualified to obtain cenvat credit as the service tax on manpower and like services was levied originally under Section 66 of the Finance Act, 1994 and, subsequently, under Section 66B thereof.

16. Under the Service Tax Rules, 1994, returns have to be filed on a periodic basis in terms of Rule 7 thereof. In accordance with such rule, every assessee is required to submit half-yearly returns by the 25th day of the month following the particular half-year. During the process of transition to the GST regime and particularly since it was only a quarter of the financial year which was covered prior to the appointed date, a circular was issued on June 22, 2017 to amend Rules 7 and 7B of the said Rules of 1994. By such amendment, the service tax return in original had to be filed by August 15 and any revised return in respect thereof by 45

days from the date of filing of the original return. Rule 7C of the said Rules of 1994 contemplates enlargement of the time for filing the original return and indicates the amounts to be paid for the delays beyond the prescribed period in furnishing the service tax return. Different amounts are payable for different periods of delay. For the present purpose, since the delay in this case was in excess of two months, the assessee was liable to pay Rs.1000/- together with Rs.100/- for every day's delay after the 31st day till the date of furnishing the return, subject to a cap of Rs.20,000/- in terms of Section 70 of the Act of 1994. Thus, there was a statutory mechanism for filing the service return and making up for the delay by paying a nominal additional amount. This was the procedure prescribed by the existing law, within the meaning of Section 2(48) of the Act of 2017 and which was saved by Section 174 thereof.

17. Since it is evident that the service tax return relating to the quarter ended June 30, 2017, immediately preceding the appointed date, was filed in accordance with the existing law and there is no dispute that it has been filed in the prescribed form since the Revenue has acted thereon, it is now necessary to see the impact of such service return filed in October, 2017

qua the entitlement of the assessee to obtain cenvat credit for the service tax component.

18. For such purpose, it is Section 140(1) of the Act of 2017 which is the only guiding light. As noticed earlier, the relevant provision pertains to the cenvat credit carried forward in the relevant return. Cenvat credit is qualified in the amended provision by the additional words incorporated therein "of eligible duties" and further qualified by Rule 117 of the Rules of 2017 that refers to "eligible duties and taxes". A fortiori, if the relevant return of an assessee – irrespective of whether it was filed before the appointed date or not – was furnished in accordance with the existing law and in the prescribed manner, the cenvat credit on account of service tax reflected therein could be availed of in terms of Section 140(1) of the Act of 2017.

19. The Revenue's contention that the tax component or duty component for which cenvat credit is sought must have been paid prior to the appointed date, is not supported by the clear words of Section 140(1) of the Act of 2017. In the event the relevant provision or any other incidental convoluted rule required the return to be filed prior to the

appointed date, the Revenue's contention would have held good. However, the eligibility to obtain cenvat credit depends on what is indicated in the return and, as long as the return is in order, the cenvat credit cannot be denied. There is no dispute in this case that the return filed was in order. The eligibility or entitlement to obtain cenvat credit, in terms of Section 140(1) of the Act of 2017, is based on whether the matter is reflected in the return which is filed as per the existing law in the manner prescribed; and not on when the return was filed or whether the duty or tax for which cenvat credit is claimed had been deposited prior to the appointed date.

20. Accordingly, the Revenue's limited challenge to the appellate order of January 8, 2021 pertaining to cenvat credit claimed by the respondent assessee to the extent of Rs.2,18,75,232/- fails and the appellate order in such regard is found to be unexceptionable. As a consequence, WP (C) No.86 of 2022 is found to be without merit and the same is dismissed.

21. Since an arguable case was put forth on the interpretation of a somewhat unhappily worded transitional provision, no order is made as to costs.

(W. Diengdoh)
Judge

(Sanjib Banerjee)
Chief Justice

Meghalaya
19.05.2022
"Sylvana PS"