IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI

REGIONAL BENCH – COURT NO. I

Service Tax Appeal No. 41579 of 2019

(Arising out of Order-in-Appeal No. 218/2019 (CTA-I) dated 18.07.2019 passed by the Commissioner of G.S.T. and Central Excise (Appeals-I), 26/1, Mahatma Gandhi Marg, Nungambakkam, Chennai – 600 034)

M/s. Sundharams Private Limited **: Appellant**
No. 3, Smith Road, Off. Anna Salai,
Chennai – 600 002

VERSUS

Commissioner of G.S.T. and Central Excise **: Respondent**
Chennai North Commissionerate
26/1, Mahatma Gandhi Marg, Nungambakkam,
Chennai – 600 034

APPEARANCE:

Shri M.N. Bharathi, Advocate for the Appellant

Shri M. Ambe, Deputy Commissioner for the Respondent

CORAM:

HON'BLE MR. P. DINESHA, MEMBER (JUDICIAL)
HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)

FINAL ORDER NO. 40479 / 2023

DATE OF HEARING: 04.05.2023

DATE OF DECISION: 23.06.2023

Order : [Per Hon'ble Mr. P. Dinesha]

The Revenue entertaining a doubt that the appellant, for the period from July 2012 to June 2017, had paid Service Tax on "renting of motor vehicle" @ 40% of the taxable value after availing abatement of 60% under Sl. No. 9 of Notification No. 26/2012-ST dated 20.06.2012, formed an opinion that the said abatement availed by the appellant was not as per the requirement of the said Notification since the abatement was available to a person - availing full CENVAT Credit of such input services received

from a person who is paying tax on 40% of the value - or up to 40% CENVAT Credit of such input service received from a person who is paying Service Tax on the full value, and no CENVAT Credit on input services other than those specified above is taken under the provisions of the CENVAT Credit Rules, 2004.

1.2 It appears that the Revenue chose to verify further the documents such as CENVAT Credit account with S.T.-3 returns filed by the appellant, wherein they appear to have come across the fact that the appellant had availed CENVAT Credit of the Service Tax paid on input services received by them as well. This prompted the Revenue to believe that the appellant was not eligible for claiming abatement as above, which resulted in the issuance of Show Cause Notice dated 09.02.2018.

1.3 In the Show Cause Notice, it was alleged that the appellant was availing CENVAT Credit on the input services, though it had not fulfilled the conditions prescribed under the said Notification and therefore, the assessee was ineligible to avail the abatement provided under the said Notification for the period from July 2012 to June 2017, and that the assessee was consequently liable for payment of Service Tax on the entire taxable value without abatement in terms of Section 67 of the Finance Act, 1994.

1.4 In the said Show Cause Notice, the demand was quantified at Rs.36,16,412/- for wrong availment of the exemption, by means of abatement under the above Notification and, for the said reason, the Show Cause Notice also revealed that the action of the assessee required invoking the extended period of limitation under Section 73(1) of the Finance Act, 1994. It was thus pointed out in the Notice that but for the audit team finding out the wrong availment of abatement and consequent short payment of Service Tax, the same would have gone unnoticed and therefore the assessee had deliberately

mis-declared material facts with an intent to evade payment of correct Service Tax.

1.5 A further perusal of the Show Cause Notice also makes it clear that there is no indication as to whether the appellant had availed any CENVAT Credit on capital goods, inputs or input services and if so, the quantification thereof. The appellant in its submission has pleaded that it did not avail any CENVAT Credit either on inputs or input services or even capital goods in relation to renting of motor vehicle services rendered by it. Hence, there is a clear violation of the principles of natural justice in not putting the appellant to notice as to what amount of CENVAT Credit it had availed of while providing the services of renting of motor vehicles.

2. It appears from the record that the assessee filed a detailed reply justifying its stand as to availing the benefit of abatement of the Notification *(supra).* They also appear to have contended that the granting of abatement of 60% on the transaction value was subject to a condition that no CENVAT Credit should be availed by the person which is attributable to the services provided by them on which the abatement was claimed. Further, it is their case that the restriction on availing credit was confined only in respect of those taxable services for which the assessee had chosen to avail abatement. Further, they had not availed any CENVAT Credit on inputs, input services and capital goods attributable for this service, and therefore they had fulfilled all the conditions prescribed under the above Notification.

3. In the adjudication, the adjudicating authority having analysed the reply filed by the assessee, however, chose not to accept the same for the following reasons: -

- Few conditions were added for availing the benefit of abatement under Notification No. 26/2012-ST *(supra)*.

- The condition against entry No. 9 came to be amended with effect from 1st October 2014, wherein it prescribed that CENVAT Credit, on inputs, capital goods and input services, used for providing the taxable services, has not been taken under the provisions of CENVAT Credit Rules, 2004.

- The above Notification is a conditional notification and the abatement is available only when the CENVAT Credit is not taken on inputs, capital goods and input services used for providing 'renting of motor vehicle'.

- Returns filed by the assessee revealed that in addition to providing renting of motor vehicle service, it is also providing some other services such as business support, service, clearing and forwarding agent service and rent-a-cab service.

- In the reply filed by the noticee, they have claimed to have reversed certain amount of CENVAT Credit by adopting the procedure given under Rule 6(3AA) of the CENVAT Credit Rules, 2004, for providing both dutiable and exempted services namely, abatement availed on 'renting of motor vehicle'.

- Rule 6(3AA) is not applicable to the assessee's case which will not justify the act of availing abatement under the said Notification since the same cannot be equated to providing an exempted service.

4. Seriously aggrieved by the order of the Assistant Commissioner dated 22.02.2019 whereby the demand proposed in the Show Cause Notice came to be confirmed along with the applicable interest and penalty, they appear to have preferred an appeal before the first appellate authority, and the first appellate authority also not accepting their appeal, the present appeal has been filed by them before this forum.

5.1 Shri M.N. Bharathi, learned Advocate appearing for the appellant, argued before us that in the first place, with regard to car hire charges, that the appellant did not avail any CENVAT Credit on inputs, input services and capital goods attributable to the service; that the assessee after receiving the Show Cause Notice had immediately reversed the attributable CENVAT Credit along with interest as per Rule 6(3AA) (sic), which fact was not considered by the lower authorities. Further, that the appellant had availed abatement in terms of the above Notification with regard to rent-a-cab service / car hire charges and discharged the Service Tax on the abated value.

5.2 It was further submitted that the appellant did not avail CENVAT Credit having direct nexus to the rent-a-cab service or car hire service and therefore, the assumption of the Revenue is incorrect. Moreover, the appellant had also reversed the attributable credit on common input services, which though was argued before the adjudicating authority, but however, adjudicating authority did not consider the same; thus, once the proportionate credit is reversed, the same would tantamount to the non-availment of credit and therefore, even on this ground, the impugned order is not sustainable in the eye of law.

6.1 *Per contra*, Shri M. Ambe, learned Deputy Commissioner, has relied on the findings of the lower authorities. He would invite our attention to the Notification No. 26/2012-ST *(supra)* to urge that the said Notification is a conditional notification and the abatement is available only when CENVAT Credit on inputs, capital goods and input services used for providing the taxable service has not been taken under the provisions of the CENVAT Credit Rules, 2004.

6.2 He further submitted that as per Rule 6(1) of the CENVAT Credit Rules, the credit shall not be allowed on such quantity of inputs 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 manufacture of exempted goods; that in the present case, the assessee had worked out the proportionate amount of credit to be reversed towards providing exempted output service; by availing CENVAT Credit on inputs, input services and capital goods which were utilised for providing taxable services, the appellant has become ineligible for abatement in terms of Notification No. 26/2012-ST and therefore, the finding of the lower authorities as to the violation of the conditions of the above Notification is correct.

7. We have considered the rival contentions and we have also gone through the documents placed on record.

8. After hearing both sides, we find that the only issue to be decided by us is: whether the appellant's claim for abatement in terms of Notification No. 26/2012-ST dated 20.06.2012 is correct?

9. The issue of abatement is an indirect way of granting exemption to the extent prescribed in the statute and abatement is not normally denied on mere surmises or on any allegation of insufficient credit, considering the scheme of CENVAT Credit. But in any case, the Notification granting the benefit of abatement does not exempt wholly or partially the rate of tax and therefore, no such rigorous exercises are required to be employed, unlike in cases of exemption notifications. That is to say, the abatement Notification merely sanctifies the deduction in the assessable value of taxable services, the availment of CENVAT Credit is a caveat for eligibility to claim abatement.

10.1 It has been held in the orders of various Benches of the CESTAT, namely: -

(i) Khyati Tours & Travels v. Commissioner of C.Ex., Ahmedabad [2011 (24) S.T.R. 456 (Tri. – Ahmd.)]

(ii) Travel INN India Pvt. Ltd. v. Commissioner of Service Tax, Delhi [2016 (41) S.T.R. 236 (Tri. – Del.)]

(iii) Commissioner of Central Excise, Mumbai-II v. Indian Oil Tanking Pvt. Ltd. [2017 (6) G.S.T.L. 417 (Tri. – Mum.)]

that subsequent reversal would meet the test of substantial compliance for claiming abatement and the above condition is incorporated with an intention to ensure that there is no unjust enrichment and that the end is achieved by erasure of the credit.

10.2 The Mumbai Tribunal in the case of *M/s. Indian Oil Tanking Pvt. Ltd. (supra)* has dealt with an identical issue and the Bench, after considering a catena of decisions, has held as under: -

> *"17. There is no prejudice to Revenue by such erasure as it has not deprived the State of any tax that was due. On the contrary, denial of abatement would be an act of encroachment by taxing sale of goods which is beyond the scope of legislative authority. To avoid such encroachment, erasure of credit is the only option. There is no allegation that such erasure has lead to deficiency of available credit at any time. Erasure would thus be substantial compliance and hence denial of abatement in the impugned order is not tenable.*
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> *18. The decisions in re M/s. Hari Chand Shri Gopal and re Meridien Industries Ltd. were rendered in the context of taxability of products and application of rate of tax. The condition of exemption/concession was specific, the objective of the notification was unambiguously clear and could be met only by strict compliance. The decision of the Hon'ble High Court of Bombay in re Dilip Chhabria Designs Pvt. Ltd. does not further the cause espoused by Revenue as the finding therein that -*
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> *"15. To our mind, this was a clear distinguishing feature from the cases and decisions relied upon by the Tribunal. The Order-in-Original concluded and to our mind rightly that this was an admitted position of a clandestine removal. There was no payment of Excise duty by the manufacturer on excisable goods. The payment was not made by claiming exemption and entitlement under Notification No. 3/2001-C.E., which is a conditional exemption. This is a case of admitted Modvat credit taken on glasses used in the manufacture of buses and tempo travellers. The assessee did not reverse the Modvat credit at the time of removal of goods or after removal. No efforts were made by the assessee to reverse the same. In the circumstances, when there is an admitted position emerging from the record, we are of the view that the*

Tribunal erred in law in reversing such a conclusion in the Order-in-Original. The Tribunal, in reversing this order, relied upon the cases and which have been brought to our notice. We must note them and in some details."

held that reversal is sufficient compliance with condition of non-availment. Though the decision of the Tribunal in Mysore Sales International Limited v. Commissioner of Central Excise, Customs and Service Tax, Bangalore LTU [2014-TIOL-1950-CESTAT-BANG] pertains to the same abatement notification, the issue confronting the Bench was the failure on the part of the assessee to evince proof of not having availed credit; in the matter before us, the allegation of reversal not being sufficient compliance establishes that the credit taken had, indeed, been erased.

19. We do not have to go beyond the law laid down by the Hon'ble High Court of Rajasthan in Commissioner of Central Excise, Jaipur-I v. Sanjay Engineering Industries [2016 (43) S.T.R. 354 (Raj.)] which, relying upon the decision of the Hon'ble High Court of Gujarat in Commissioner of Central Excise v. Ashima Dyecot Ltd. [2008 (232) E.L.T. 580 (Guj.)] and of the Hon'ble High Court of Allahabad in Hello Minerals Water (P) Ltd. v. Uni on of India [2004 (174) E.L.T. 422 (All.)], sustained the decision of the Tribunal against which Revenue had preferred appeal."

11.1 Coming back to the case on hand, at paragraph 12 of the impugned Order-in-Original, the Assistant Commissioner records the reply of the appellant that they had reversed certain amount of CENVAT Credit by adopting the procedure given under Rule 6(3AA) (sic), but however, the same is not accepted for the reason that abatement is not exemption.

11.2 We do not find from the statute any distinction being made, as done by the adjudicating authority, but the facts borne on record clearly reflect the action in good faith by the appellant in reversing voluntarily before claiming abatement, which is the condition precedent in terms of the abatement Notification (*supra*).

11.3 In view of our above discussions and the orders of various Benches of the Tribunal quoted hereinabove, we hold that the denial of abatement by the authorities below

is not in accordance with law and consequently, they are liable to be set aside.

12.1 The appellant had also contended, right from its reply to the Show Cause Notice, that the larger period was invoked improperly and therefore the demand cannot sustain even on that ground.

12.2 A perusal of the Show Cause Notice reveals that "the assessee has not furnished the correct taxable value in the statutory ST-3 returns filed with the Department and the wrong availment of abatement under Notification No. 26/2012-ST dated 20.06.2012 came to light only upon audit of accounts ….. But for the audit team finding out the wrong availment of abatement and short payment of Service Tax the same would have gone unnoticed…"

12.3 The claim of abatement is, therefore, available in the S.T.-3 returns which was only sought to be denied and that per se would not amount to mis-declaration because the appellant claimed the abatement based on its understanding of the law and the authority chose to deny the same perhaps giving a different interpretation of the Notification. Hence, there cannot be any scope for mis-declaration, that too with an intention to evade payment of tax. Therefore, the demand, if any, for the normal period alone can sustain.

13. In any case, we have held that on merits, the appellant should succeed, as indicated at paragraph 11.3 of this order.

14. Hence, we set aside the impugned order and allow the appeal with consequential benefits, if any, as per law.

(Order pronounced in the open court on **23.06.2023**)

Sd/-
(VASA SESHAGIRI RAO)
MEMBER (TECHNICAL)

Sd/-
(P. DINESHA)
MEMBER (JUDICIAL)

Sdd