CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

WEST ZONAL BENCH

Service Tax Appeal No. 86276 of 2020

(Arising out of Order-in-Appeal No. AJV/119/RGD-APP/2020-21 dated 07.09.2020 passed by the Commissioner of CGST, Central Tax (Appeals, Raigad)

M/s Axis My India Ltd. **.....Appellant**
A-734, MIDC, TTC Indl. Area,
Khairane, Navi Mumbai

VERSUS

Commissioner of CGST & Service Tax, Raigad **.....Respondent**
4th Floor, Kendriya Utpad Shulk Bhavan,
Plot no. Sector 17,
Khandeshwar, Raigad

APPEARANCE:

Shri Neerav Mainkar, Advocate for the appellant
Shri Prabhakar Sharma, Superintendent (AR) for the respondent

CORAM:
HON'BLE MR. AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER No: A/87015/2023

DATE OF HEARING : 07.08.2023
DATE OF DECISION : 18.10.2023

Per: AJAY SHARMA

This appeal has been filed assailing the Order-in-Appeal dated 07.09.2020 passed by the Commissioner of Central Tax (Appeals), Raigad by which the learned Commissioner rejected the appeal on the ground that since the possibility of having

provided exempted excise duty activities from the premises in issue cannot be ruled out the impugned credit would be ineligible to the appellant and in such situation under Rule 9(6) of CENVAT Credit Rules, 2004 the burden to prove the admissibility of the said CENVAT Credit shall lie upon the manufacturer or provider of output services taking such credit. According to the learned Commissioner since the appellant has failed to provide any such proof as per rule 9(6) ibid, the CENVAT credit cannot be allowed to the appellant.

2. In brief, the facts leading to the filing of the instant appeal are that during the course of audit it has been observed that the appellant had availed ineligible CENVAT credit of service tax paid on rent services of their New Delhi Office and one of the objection of audit was that the New Delhi office being an administrative set up there are chances that it may be connected with sale/marketing for both their exempted printing materials & dutiable services of 'selling of space for advertisements in print media'. Accordingly for recovering the said CENVAT credit amount of Rs.4,70,175/- for the period October, 2014 to June, 2017 alongwith interest and penalty, a show cause notice dated 9.7.2019 was issued to the appellant on various grounds viz.(i) No nexus on the service tax paid on rent charges for their New Delhi Office as to the taxable services rendered from their Navi Mumbai office/factory as per rule 2(l) of CCR, 2004; (ii) New Delhi Office is not registered with the Service Tax department; and (iii) failed to produce burden of proof regarding admissibility

of the credit as per rule 9(5) ibid which lies upon the manufacturer or provider of output service taking such credit. The said show cause notice was issued after invoking extended period of limitation and the same culminated into Order-in-Original dated 6.2.2020 by which the demand made in the aforesaid show cause notice was confirmed along with interest and penalty. On appeal being filed by the appellant, the learned Commissioner vide impugned order dated 7.9.2020 although decided the issues regarding nexus and registration in favour of the appellant but rejected the appeal by observing that there is possibility of providing exempted excise duty activities from the said New Delhi premises and as the appellant has failed to discharge the burden of proof as mandated under Rule 9(6) ibid, therefore the CENVAT credit cannot be allowed to the appellant.

3. I have heard learned counsel for the appellant and learned Authorised representative for the Revenue and perused the case records including the written submissions/synopsis and case laws placed on record. Since the issues regarding nexus as per rule 2(l) ibid and registration of New Delhi premises have already been decided by the learned Commissioner in favour of the appellant therefore the issue involved herein is in a very narrow compass as to whether the learned Commissioner has rightly observed that appellant has failed to discharge the burden as mandated under the provisions of Rule 9(6) of CENVAT Credit Rules, 2004 for admissibility of CENVAT credit availed by them? The show cause notice has been issued on the basis of

presumption only and that's why rule 9(5) ibid has been invoked in the show cause notice. Learned counsel submits that the words *'possible link'* and *'possibility'* respectively have been used in the show cause notice as well as in the impugned order for denying the CENVAT credit to the appellant which is quite vague and that only on the basis of assumption and presumption a benefit cannot be denied.

4. In my view the show cause notice is the foundation on which the department has to build up its case and the allegations in the show cause notice have to be specific as oppose to vague or lacking details. The CENVAT credit has been denied by the learned Commissioner merely on the basis of assumption and presumption which is arbitrary and not as per law. While deciding the issue raised in the show cause notice about 'nexus' and 'non-registration of premises at Delhi', in favour of the appellant the said 1st appellate authority denied the CENVAT credit to the appellant by taking recourse to the provision of Rule 9(6) *ibid* merely on the basis of assumption and presumption by recording the finding that *'the possibility of having provided exempted Excise duty activities only from the said cannot be ruled out and therefore in such situation, the impugned credit would be ineligible to the appellant'* which, according to me, is not sufficient to deny the credit to the appellant. Another thing has been noticed by me while going through the case papers that although the learned Commissioner has denied the CENVAT credit to the appellant for not discharging the burden of proof as

laid down u/r. 9(6) ibid, the show cause notice dated 9.7.2019 has invoked the provision of Rule 9(5) ibid by stating that the appellant "*have failed to produce burden of proof regarding the admissibility of the credit, which lies upon the manufacturer or provider of output service taking such credit as per Rule 9(5) of CCR*" [emphasis supplied]. There is no mention about rule 9(6) ibid anywhere in the show cause notice. Rule 9(5) ibid mandates maintaining of proper records for the *receipt, disposal, consumption and inventory of the input and capital goods* whereas Rule 9(6) ibid talks about *maintaining of proper records for the receipt and consumption of input services* [emphasis supplied]. Rule 9(5) is about the input/capital goods whereas rule 9(6) is regarding input service and both are independent of each other. Time and again it has been laid down through various decisions that show cause notice is the foundation and judicial principles do not permit the adjudicating authority or the 1st appellate authority, as the case may be, to travel beyond the show cause notice. The Hon'ble Supreme Court in the matters of *Commr. of Customs, Mumbai* v. *Toyo Engineering India Ltd.; 2006(201)E.L.T.513(S.C.)* and *Commr. of Central Excise* v. *Gas Authority of India Ltd.; 2008 (232) E.L.T. 7 (S.C)* has laid down that the authorities under the Act cannot travel beyond the show cause notice. Therefore, in view of the settled legal principle, since the impugned order has travelled beyond the show cause notice and has been passed on a new ground, the same is not sustainable and is liable to be set aside. In such circumstances it

would not be necessary to examine the other issues viz. suppression or invocation of extended period.

5. Accordingly the impugned order is set aside and the appeal filed by the appellant is allowed with consequential relief, if any, as per law.

(Pronounced in open Court on 18.10.2023)

(Ajay Sharma)
Member (Judicial)

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