Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench at Ahmedabad

REGIONAL BENCH-COURT NO. 3

Service Tax Appeal No. 10486 of 2016 - DB

(Arising out of OIA-BHR-EXCUS-000-COM-010-15-16 dated 30/11/2015 passed by Commissioner of Central Excise, Customs and Service Tax-Bharuch)

Smp Construction Pvt Ltd **.....Appellant**
Smp House, P-156, Phase-ii, Gidc, Bholav,
Bharuch, Gujarat

VERSUS

Commissioner of C.E-Bharuch **.....Respondent**
Vadodara-II,GST Bhavan,
Subhanpura,Vadodara
Vadodara, Gujarat- 390023

APPEARANCE:
Shri Vinay Kansara, Advocate for the Appellant
Shri Anoop Kumar Mudwel, Superintendent (AR) the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. RAJU

Final Order No. 10703/2024

DATE OF HEARING: 22.11.2023
DATE OF DECISION: 28.03.2024

RAMESH NAIR

Brief facts of the case are that the Appellant M/s. SMP Constructions is engaged in providing Industrial or Commercial Construction Services under different contracts. They were providing services under different contracts. In terms of some contracts, it was required for the appellant to provide the materials such as cement, steels etc., and in terms of some it was required for the appellant to provide the services along with the materials. In other words, some contracts were inclusive of materials.

1.1 Under Notification No. 1/2006 – ST dated 01.03.2006 whereby an abatement was provided with a condition that Cenvat Credit of duty paid on inputs or capital goods or input services has not been availed. In some cases, the appellant discharged their Service Tax Liability @4.12% and @4.94% on the value in terms of the Works Contract (Composition Scheme

for payment of Service Tax) Rules, 2007. In case of some contracts where the Appellant was required to bring the materials, they used to purchase directly from the manufacturers on payment of duty and to send the same directly to the concerned site. At the concerned cite, the Appellant would maintain the required records of the materials and accordingly, the Cenvat credit was being availed and in case of such contracts, they used to discharge Service Tax liability on 100% value, without availing benefit of the abatement as provided under the said notification.

2. Shri Vinay Kansara, Learned Counsel appearing on behalf of the appellant submits that the very same issue in appellant's own case has been decided by this Tribunal vide *order No. A/11599/2018 dated 01.08.2018* ***2018-TIOL-2937-CESTAT-AHM***. Therefore, the impugned order is not sustainable and he requests that the appeal be allowed.

3. Shri Anoop K. Mudval, Learned Superintendent AR appearing on behalf of the revenue reiterates the findings of the impugned order.

4. Heard both the sides and perused the records. We find that the issue settled by this Tribunal in the appellant's own case pertains to the condition as prescribed under Notification No. 1/2006-ST as regards exemption and benefit of abatement. The Tribunal vide *final order No. A/11599/2018 dated 01.08.2018* ***2018-TIOL-2937-CESTAT-AHM*** held as under:

> *"4. Sh. Amit Mishra Ld. Deputy Commissioner (AR) appearing on behalf of the Revenue reiterates the finding of the impugned order. He submits that the exemption is available to service provider therefore, once they have opted not to avail exemption Notification No. 1/2006-ST, in some of the contracts and availed the cenvat credit, even in other contract on which exemption Notification No. 1/2006-ST was availed, the condition of Notification i.e. credit should not be availed on the input services stand violated hence, the exemption is not available.*
>
> *5. We have carefully considered the submission made by both the sides. We find that the whole issue revolved the condition of Notification No. 1/2006-ST which is retracted below:*

Effective rate of Service tax for specified services — Percentage of abatements

In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994) (hereinafter referred to as the Finance Act), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts the taxable service of the description specified in column (3) of the Table below and specified in the relevant sub-clauses of clause (105) of section 65 of the Finance Act, specified in the corresponding entry in column (2) of the said Table, from so much of the service tax leviable thereon under section 66 of the said Finance Act, as is in excess of the service tax calculated on a value which is equivalent to a percentage specified in the corresponding entry in column (5) of the said Table, of the gross amount charged by such service provider for providing the said taxable service, subject to the relevant conditions specified in the corresponding aforesaid Table :

S.No.	***Sub-clause of clause (105) of Section 65***	***Description of taxable service***	***Conditions***	***Percentage***
1	*2*	*3*	*4*	*5*
7.	*(zzq)*	*Commercial or industrial construction service.*	*This exemption shall not apply in such cases where the taxable services provided are only completion and finishing services in relation to building or civil structure, referred to in sub-clause (c) of clause (25b) of section 65 of the Finance Act.* *Explanation . - The gross amount charged shall include the value of goods and materials supplied or provided or used by the provider of the constructio n service for uch service.*	*33*

Provided that this notification shall not apply in cases where, -

(i) the CENVAT credit of duty on inputs or capital goods or the CENVAT credit of service tax on input services, used for providing such taxable service, has been taken under the provisions of the CENVAT Credit Rules, 2004; or

(ii)the service provider has availed the benefit under the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 12/2003-Service Tax, dated the 20th June, 2003 [G.S.R. 503 (E), dated the 20th June, 2003].

From the above Notification, it is clear that the service of commercial or industrial construction is exempted subject to condition given in second proviso of Notification

particularly Clause (i). On plain reading of the said provision it is clear that the Notification is not applicable in case where the cenvat credit in respect of inputs or capital goods or input services used for providing such taxable service has been taken. In the present case the appellant in respect of the service on which Notification No. 1/2006-ST availed, admittedly not availed cenvat credit in respect of input or capital goods or input services used in providing such taxable services. Therefore, the condition of the Notification was complied with, merely in some of the contract the appellant had availed the cenvat credit, and the same has no effect on the service where the exemption Notification No. 1/2006-ST was availed. This issue has been considered wherein the judgment cited by Ld. Counsel in the case of Bharat Heavy Electrical Ltd (Supra), Division Bench of this Tribunal dealing with the identical issue passed the following order:

4.1 The issue involved in this case relates to interpretation of Notification No. 15/2004-S.T., dated 10-9-2004 and Notification No. 1/2006, dated 1-5-2006. These Notifications are reproduced below :

Notification No. 15/2004-Service Tax

"In exercise of the powers conferred by sub-section (1) of Section 93 of the Finance Act, 1994 (32 of 1994), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the taxable service provided by a commercial concern to any person, in relation to construction service, from so much of the service tax leviable thereon under Section 66 of the said Act, as is in excess of the service tax calculated on a value which is equivalent to thirty-three per cent of the gross amount charged from any person by such commercial concern for providing the said taxable service :

Provided that this exemption shall not apply in such cases where –

(i) the credit of duty paid on inputs or capital goods has been taken under the provisions of the Cenvat Credit Rules, 2004; or

(ii) the commercial concern has availed the benefit under the notification of the Government of India, in the Ministry of Finance (Department of Revenue) No. 12/2003-Service Tax, dated the 20th June, 2003 G.S.R. 503(E), dated the 20th June, 2003]."

Notification No. 1/2006-S.T., dated l-3-2006

"In exercise of the powers conferred by sub-section (1) of Section 93 of the Finance Act, 1994 (32 of 1994) (hereinafter referred to as the Finance Act), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts the taxable service of the description specified in column (3) of the Table below and specified in the relevant sub-clauses of clause (105) of Section 65 of the Finance Act, specified in the corresponding entry in column (2) of the said Table, from so much of the service tax leviable thereon under Section 66 of the said Finance Act, as is in excess of the service tax calculated on a value which is equivalent to a percentage specified in the corresponding entry in column (5) of the said Table, of the gross amount charged by such service provider for providing the said taxable service, subject to the relevant conditions specified in the corresponding entry in column (4) of the Table aforesaid :

S. No.	***Sub-clause of clause (105) of Section 65***	***Description of taxable service***	***Conditions***	***Percentage***
1.	*..*			

7.	*(zzq)*	*Commercial or industrial construction service.*	*This exemption shall not apply in such cases where the taxable services provided are only completion and finishing services in relation to building or civil structure, referred to in sub-clause (c) of clause (25b) of Section 65 of the Finance Act. Explanation. - The gross amount charged shall include the value of goods and materials supplied or provided or used by the provider of the construction service for providing such service.*	*33*

Provided that this notification shall not apply in cases where, -

(i) the CENVAT credit of duty on inputs or capital goods or the CENVAT credit of service tax on input services, used for providing such taxable service, has been taken under the provisions of the Cenvat Credit Rules, 2004; or

(ii)the service provider has availed the benefit under the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 12/2003-Service Tax, dated the 20th June, 2003 [G.S.R. 503(E), dated the 20th June, 2003].

Explanation. - For the purposes of this notification, the expression "food" means a substantial and satisfying meal and the expression "catering service" shall be construed accordingly."

4.2 A plain reading of the Notifications clearly shows that the condition relating to non-availment of CENVAT credit on inputs/input services applies to "case" where CENVAT credit is taken either on the 'input' or 'input service', then the abatement under the aforesaid Notifications would not be available. In a "case" where the CENVAT credit on input/input service is not taken then the benefit of abatement would be available. The Notification uses the expression "in cases where". In other words, the Notification does not stipulate that in all cases, the condition of non-availment of CENVAT credit should be satisfied uniformly without exception. Therefore, in respect of a contract where the assessee has not taken input credit prior to 1-3-2006 and input/input service tax credit on or after 1-3-2006, the assessee would be rightly entitled for the benefit under the Notification No. 15/2004-S.T. as replaced by Notification No. 1/2006, dated 1-3-2006. In a case where the assessee avails credit, then in such cases the assessee is not entitled for abatement and the service tax liability will have to be discharged on the full value of the contract. There is nothing in these Notifications which prevents an assessee from not availing CENVAT credit and paying service tax on 100% of the contract value in respect of one particular contract and availing abatement and not availing CENVAT credit in respect of another contract. In other words, there is no stipulation in the Notification that the option to avail/non-avail CENVAT credit has to be exercised uniformly in respect of all the contracts executed by the assessee. It is for the assessee to choose which formulation he wants to follow in a given contract.

4.3 As regards the issue whether centralised registration has any effect on the availment of benefit under Notification 15/2004-S.T. or 1/2006- S.T., these notifications do not refer to or stipulate any such conditions. Therefore, the benefit of these notifications can be availed by any assessee so long as he satisfies the terms and

conditions specified therein, irrespective of the fact whether he is centrally registered or not. Centralised registration is only a facility for accounting purposes and filing of the returns and the same has nothing to do with the availment of benefit under an exemption notification.

4.4 The next issue for consideration is in a case/contract where abatement benefit is availed under Notification 15/2004 or 1/2006, without taking CENVAT credit on inputs or capital goods or input service and service tax liability is discharged on the reduced value, whether for the purpose of discharge of service tax liability, accumulated CENVAT credit arising from some other case/contract can be utilised or not. In our view, there is no such bar or restriction/prescribed in the notification. The notification only stipulates that in respect of a case/contract, where abatement is availed, no CENVAT credit on inputs, capital goods or input services shall be taken. So long as this condition is satisfied, abatement is permissible. Discharge of service tax liability on the non-abated portion of value is a totally different matter. Hence there is no bar/restriction in discharging service tax liability through accumulated CENVAT credit so long as no CENVAT credit is taken on the inputs/capital goods or input services used in the rendering of the service in the given case or contract and we hold accordingly.

4.5 In the light of the above, the interpretation of law taken by the lower adjudicating authorities are not correct in law and, therefore, the demands on the basis of such a wrong interpretation of the notification have to be set aside. Accordingly, we set aside the impugned orders and remand the matter back to the adjudicating authority for consideration afresh and re-computation of the differential service tax demand, if any, in the light of the decision given above.

5. Thus the appeals are allowed by way of remand.

6. In another case of Afcons Infrastructure Ltd (Supra) this Tribunal considered the identical issue wherein the following order was passed:

"4. I have gone through the rival submissions. I find that the issue is squarely covered by the decision of Bharat Heavy Electricals Ltd. (Supra), wherein the Tribunal has observed as follows:-

4.2 plain reading of the notifications clearly shows that the condition relating to non-availment of CENVAT credit on inputs/input services applies to "case" where CENVAT credit is taken either on the 'input' or 'input service', then the abatement under the aforesaid notifications would not be available. In a "case" where the CENVAT credit on input/input service is not taken then the benefit of abatement sould be available. The notification uses the expression "in cases where". In other words, the notification does not stipulate that in all cases, the condition of non-availment of CENVAT credit should be satisfied uniformly without exception. Therefore, in respect of a contract where the assessee has not taken input credit prior to 01.03.2006. and input/input service tax credit on or after 01.03.2006, the assessee would be rightly entitled for the benefit under the notification no. 15/2004-ST as replaced by notification no. 1/2006 dated 01.03.2006. In a case where the assessee avails CENVAT credit, then in such cases the assessee is not entitled for abatement and the service tax liability will have to be discharged on the full value of the contract. There is nothing in these notifications which prevents an assessee from not availing CENVAT credit and paying service tax on 100% of the contract value in respect of one particular contract and availing abatement and not availing CENVAT credit in respect of another contract. In other words, there is no stipulation in the notification that the option to avail/non-avail CENVAT credit has to be exercised uniformly in respect of all the contracts executed by the assessee. It is for the assessee to choose which formulation he wants to follow in a given contracts."

In view of the above, it is clear that the appellants can avail Notification No. 1/2006-ST, so long as in respect of such projects, no CENVAT credit is availed. The appellants are free t avail CENVAT credit in respect of projects on which Notification No. 1/2006-ST has not been availed. However, the assertion of the appellant that the credit was availed only in respect of project on which Notification No. 1/2006-ST has not availed, needs verification. In view of the above, the impugned order is set aside and the above findings. The appeal is allowed by way of remand."

7. In view of the above judgement and over discussion made herein above the issue in hand already stand settled, hence the same is not res integra. Accordingly, the impugned order is set aside and appeal is allowed."

We observe that following the above observations of this Tribunal, the adjudicating authority can reconsider the issue afresh based out of the factual matrix of the present case taking into account the submissions made by the Appellant as regards the effect of availment of Cenvat credit and abatement where credit was not availed at all. Therefore, we find that the issue needs to be remanded back to the adjudicating authority for reconsideration.

5. Accordingly, the appeal is allowed by way of remand to the adjudicating authority. We make it clear no findings have been recorded on the merits of the issue.

(Pronounced in the open court on 29.03.2024)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Raksha