IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 06.03.2015

CORAM

THE HON'BLE MR.JUSTICE R.SUDHAKAR
AND
THE HON'BLE MR.JUSTICE R.KARUPPIAH

C.M.A.No.432 of 2015
& M.P.No.1 of 2015

Neem Engineering Pvt. Ltd.,
(Formerly Mero Structures (India) Pvt. Ltd.,)
No.16, Ashok Kedar,
19th Avenue, Ashok Nagar,
Chennai - 600 083. .. Appellant / Applicant

Vs.

1. Customs, Excise and Service Tax Appellate Tribunal
South Zonal Bench, Sasthri Bhavan
Haddows Road, Chennai - 600 006.

2. The Commissioner of Service Tax,
Service Tax Commissionerate,
Newry Towers, No.2054-I, II Avenue,
Anna Nagar, Chennai - 600 040.
.. Respondents/Respondents

Prayer: Appeal filed under Section 35G of the Central Excise Act, 1944 against the order dated 07.01.2015 made in Mis.Order No.40085 of 2015 in ST/Stay/42132/2013 in Appeal No.ST/42274/2013-DB passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench at Chennai.

Prayer in Appeal No.12/2013:- against the order in Original No.12/2013 passed by the Commissioner of Central Excise, Chennai-1 Commissionerate dated 19.6.2013.

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For Appellant : Mr.C.Saravanan

For Respondents : Mr.Vikram Ramakrishnan
for 2nd respondent

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J U D G M E N T
(Delivered by R.SUDHAKAR,J.)

This appeal is filed by the assessee challenging the Order dated 07.01.2015 made in Mis.Order No.40085 of 2015 in ST/Stay/42132/2013 in Appeal No.ST/42274/2013-DB passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench at Chennai raising the following questions of law:

"1. Whether under the provisions of the Finance Act, 1994 during the material period service tax was payable on the amount billed or the amount received by a service provider from the recipient of service?

2. Whether the appellant was entitled to avail credit on inputs supplied to the job worker for fabrication of excisable goods on which job worker did not avail credit as both the consignee and the buyer was the appellant in the invoice raised by the supplier of such material?

3. Whether the Honourable Tribunal was justified in directing the appellant to pre-deposit an amount of Rs.20.00 lakhs merely based on few paragraphs in the order of the lower authority which in any event suffers from serious non application of mind and shows patent revenue bias?

4. Whether the appellant can be called upon to pre-deposit the amount ignoring the fact that the appellant is financially incapable of pre-depositing the amount as it has closed down the operations?"

2.1. The brief facts of the case in a nutshell are as follows:

The appellant/assessee is engaged in the business of executing structural glazing, spider glazing and wall cladding works on high rise and commercial buildings. Alleging that the assessee has availed cenvat credit wrongly to the tune of Rs.29,22,491/-; irregular cenvat credit taken by the assessee on inputs to the tune of Rs.14,33,583/-; claim of cenvat credit without valid documents to the tune of Rs.23,782 and for short payment of service tax to the tune of Rs.30,10,986/- a show cause notice was issued demanding service tax and for imposing penalty. After taking into consideration the reply filed by the assessee, the Adjudicating Authority confirmed the demand holding as follows:

"In terms of Section 70 of the Finance Act 1994, the responsibility is on the shoulders of the M/s. NEPL to correctly assess the Service Tax due and file the return for the same before due date. From the facts of the case, it is evident that M/s. NEPL did not correctly assess the Service Tax due on various counts stated above and did not correctly avail the Service Tax credit where they are found ineligible.

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Further the facts relating to receipt of differential value and incorrect availment of cenvat credit would have gone unnoticed but for the efforts of the department to bring it to light, thus warranting invocation of proviso to Section 73(1) and Rule 14 of the Cenvat Credit Rules, 2004 for demand of Service Tax not paid and cenvat credit wrongly availed. It further requires recovery of interest under Section 75 of the Finance Act, 1994 and Rule 14 of the Cenvat Credit Rules, 2004 together with attendant penalties under Section 76 and 78 of the Finance Act, 1994 and Rule 15 of the Cenvat Credit Rules, 1994."

2.2 Aggrieved by this order of the Adjudicating Authority, the assessee preferred an appeal along with an application for waiver of pre-deposit before the Tribunal.

2.3 The Tribunal, taking note of the submissions made, directed the appellant to make a pre-deposit of Rs.20.00 lakhs.

2.4 Aggrieved by the said order of the Tribunal, the assessee is before this Court raising the questions of law referred supra.

3. Heard learned counsel appearing for the assessee and the learned Standing Counsel appearing for the Department and perused the materials placed before this Court.

4. It is seen that there are two major components in the order, which the assessee is aggrieved. He pleads that pre-deposit may be modified stating that the assessee is entitled to the cenvat credit alleged to have been availed twice one on inputs by the job worker and the another on the finished products to an extent of Rs.29.00 lakhs (approx.). The other component is the difference between the billed amount and the amount received. According to the Department, the ST-3 returns filed by the assessee shows the actual sum of Rs.14,40,75,608/- and the amount received is Rs.11,97,14,888/-. Therefore, there is a difference of Rs.2,43,60,720/- on which service tax is demanded to an extent of Rs.30,10,986/-. The plea of the assessee is that it should be based on the actual amount received. The Department proceeded on the basis of the ST-3 returns filed by the assessee.

5. The first issue on the availment of cenvat credit twice, is an arguable issue and the second issue on the difference between the billed amount and the actual amount received on the basis of the ST-3 returns over which an explanation has been given, however, not accepted by the Department, is a matter for reconciliation by the Tribunal. We, therefore, are not inclined to go into the issue at this point of time. Taking note of the total amount of demand under

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the adjudication order amounting to Rs.74.00 lakhs (approx.), the Tribunal ordered pre-deposit of Rs.20 lakhs.

6. We find that the Tribunal has not considered the legal aspect of the prima facie plea that whether cenvat credit is eligible or not in respect of inputs as well as finished products, as contended by the assessee. However, insofar as inputs consigned by branch office and the claim of service tax on the basis of ST-3 returns, we find that there are some prima facie case in favour of the Department. Therefore, pre-deposit requires to be ordered. However, taking note of the submissions of the assessee that the assessee is entitled to claim cenvat credit, some leverage should be given on the plea of cenvat credit and hence the pre-deposit ordered by the Tribunal has to be modified.

7. For the foregoing reasons, we pass the following order:

(i) On the question of law raised, we are of the view that the Tribunal was not justified in ordering the pre-deposit in the manner stated in its order dated 07.01.2015;

(ii) Consequently, the order of the Tribunal dated 07.01.2015 is modified to the effect that the appellant shall make a pre-deposit of Rs.10,00,000/- (Rupees Ten Lakhs only) towards pre-deposit on or before 31.03.2015 and subject to such compliance, as stated in the order of the Tribunal dated 07.01.2015, the pre-deposit of balance amount demanded shall remain waived and its collection shall stand stayed during the pendency of the appeal before the Tribunal; and

In the result, this appeal is disposed of in the above terms. No costs. Consequently, connected Miscellaneous Petition is closed.

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Sd/-
Asst.Registrar (CS III)

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Sub Asst. Registrar

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To

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South Zonal Bench, Sasthri Bhavan
Haddows Road, Chennai – 600 006.

2. The Commissioner of Service Tax,
Service Tax Commissionerate,
Newry Towers, No.2054-I, II Avenue,
Anna Nagar, Chennai - 600 040.

3. The Commissioner of Central Excise
Chennai I Commissionerate
26/1 Mahatma Gandhi Road
Nungambakkam
Chennai-34

1 cc to Mr.C. Saravanan, Advocate, sr. 13085
1 cc to Mr.P. Rajkumar, Advocate, sr. 12667
1 cc to Mr.Vikram Ramakrishnan, advocate, sr. 12910

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