

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 07.09.2016

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

W.P.No.31167 of 2016 &
W.M.P.Nos.27012 & 27013 of 2016

Southern Investments Private Ltd.,
Represented by its Finance
Director Joseph Sundararaj Gerard,
No.65, Montieth Road,
Egmore, Chennai-600 008. ... Petitioner

Versus

- 1.The Commissioner of Service
Tax (Appeals-1), Newry Towers,
2nd Floor, Plot No.2054,
1 Block, II Avenue, Anna Nagar,
Chennai-600 040.
- 2.The Assistant Commissioner
of Service Tax, Division-V,
Service Tax Commissionerate,
Chennai-600 040. ... Respondents

Prayer: This Writ Petition is filed under Article 226 of the Constitution of India, seeking for a Writ of Certiorari to call for the records relating to file C.No.IV/16/178/2012 in Order in Original No.41/2013, dated 18.11.2013 passed by the second respondent and the consequential Order in Appeal No.272/2016 (STA-1) in Appeal No.42/2014 (MST), dated 28.04.2016, passed by the first respondent and quash the same as arbitrary and illegal.

For Petitioner : Mr.S.Joseph Prabakar

For Respondents: Mr.N.Senthilkumar
Junior Standing Counsel
for Central Excise

O R D E R

Heard Mr.S.Joseph Prabakar, learned counsel appearing for the petitioner and Mr.N.Senthilkumar, Junior Standing Counsel for Central Excise, accepting notice on behalf of respondents. With the consent of the learned counsel on either side, the Writ Petition itself is taken up for disposal.

2. The petitioner in this Writ Petition has challenged the order passed by the first respondent in Order-in-Appeal No.272/2016 (STA-1), dated 28.04.2016, confirming the order passed by the second respondent in Order-in-Original No.41/2013, dated 18.11.2013.

3. At the commencement of the argument of the learned counsel for the petitioner, this Court raised an issue as to why the petitioner has not availed the Appeal remedy available to them in terms of Section 86 of the Finance Act, 1994. By virtue of the said provision, the petitioner is entitled to file an Appeal before the CESTAT.

4. The learned counsel for the petitioner submitted that the only reason for which the petitioner has not availed the Appeal remedy is on the ground that the impugned proceedings has been initiated by the second respondent by invoking the extended period of limitation which is not invocable in the petitioner's case. Though such was the statement made in the Show-cause notice, dated 14.09.2012, which was controverted by the petitioner by an elaborate reply, dated 27.11.2012, the second respondent while passing the Order-in-Original, dated 18.11.2013 has not rendered any findings as to the aspect as to why the extended period of limitation is invocable in the instant case.

5. Firstly, it has to be pointed out that the question of limitation in these matters, especially, in Central Excise and Service Tax matters is not essentially a pure question of law, but a mixed question of fact and law. Therefore, question whether extended period of limitation could be invoked or not is essentially a question of fact. The contention raised by the petitioner is that in the absence of specific and explicit averments about suppression of facts, the larger period of limitation cannot be invoked in the facts of the case and as there is no finding rendered to the said effect, both the Order-in-Original and Order-in-Appeal they are liable to be set-aside.

6. The petitioner/assessee is registered with the service tax Commissionerate for taxable service of construction of complex services on 01.01.2007 and included works contract service on 09.07.2007 and further amended to include business auxiliary services and input service distribution on 06.05.2008. The petitioner is engaged in property development and prompting residential units in the form of flats, villas and have branches in Kochi, Trivandrum, Calicut, Thrissur and Chennai, its Corporate Office.

7. The petitioner / assessee vide letter, dated 04.05.2009, intimated the Department that they have paid service tax under protest and to refund the service tax amount collected from their customers, as they have objected for payment of service tax based on the Circular No.108/02/09-ST

dated 29.01.2009. Based on the said letter given by the petitioner to the Commissioner, the Survey Intelligence & Research Section (SIR) of the respondent-Department took up the case for investigation. It was alleged that the assessee has availed in-eligible Input Credit on commission paid to overseas agent under reverse charge mechanism and distributed the same to their branches in Chennai Office and branches in Kerala. The assessee was called upon to produce balance sheet ST-2, ST-3 returns and other documents for verification which were submitted on various dates. On verification of the records produced by the petitioner, the respondent Department stated that the petitioners are discharging Service Tax only in respect of Meadows Enclave project under WCS at Chennai, a joint venture which was signed on 14.07.2007 as all other residential complex/villas at Chennai are exempted as they are less than 12 residential units; that they have first registered with the Service Tax on 11.01.2007 for the construction of Complex Service and included Works Contract Services on 09.07.2007 and have been discharging Service Tax under Works Contract Service; that the assessee registered themselves under BAS on 06.05.2008 and discharged Service Tax from April 07 onwards under reverse charge mechanism (as Service recipient) in respect of commission paid by him to their overseas agent stationed at Dubai; that the assessee is availing input credit on the overseas commission paid by them under ISD and subsequently transfers the credit to offices located in Chennai and Kerala. Subsequently, the Finance Director of the petitioner was summoned to appear before the Superintendent and a statement was recorded from the said Official. Based on such documents and statements, the second respondent issued a show-cause notice dated 14.09.2012, among other things pointed out that:-

" 3.1. The assessee pays commission to his overseas agent towards his market promotional activity abroad which is determined on the foreign inward remittances.

The assessee is not entitled to avail input credit on the provisions of non taxable service rendered under CCS / WCS i.e., Service Tax amount due on commission paid to the agent in respect of foreign inward remittances received towards projects having less than 12 residential units is ineligible.

The assessee is availing input credit on the non-taxable service as corporate overhead and distributes the credit so availed to their office at Chennai and branches in Kerala."

Upon verification of the agreement entered into between the petitioner and the overseas purchasers dated 01.06.2007 and 22.05.2008, it was stated that the overseas agent at Dubai is marketing building project developed by the assessee in India, the principal pays commission go upto 20% subject to a maximum

of US \$ 25,000 per transaction on all foreign inward remittances out of the sale generated by them.

8. The second respondent to justify their action in invoking extended period of limitation mentioned the following in the Show-Cause notice:-

"5.1. Whereas it appears from the foregoing that the assessee have contravened the provisions of Rules 6(1) and sub rule (6) of Rule 9 of the Cenvat Credit Rules, 2004, in as much as they have taken eligible credit. Whereas it also appears that the assessee deliberately did not disclose the fact of availment of input services credit on exempted services either in the ST3 Returns or in any other manner to the Department. But for the investigation taken up by SIR, the wrong availment of cenvat credit would not have come to light. It therefore appears that the assessee did not disclose the facts with intention to avail ineligible Cenvat Credit and to evade payment of service tax, by not disclosing the actual value of taxable services provided under WCS (by inflating the land value resulting in short payment of service tax). Hence, the extended period as contemplated under Rule 14 of Cenvat Credit Rules, 2004 read with proviso to Section 73(1) of the Act is invokable for demand of such ineligible credit. It further appears that the assessee are liable for penal action under Rule 15 of the Cenvat Credit Rules, 2004 read with Section 78 of the Finance Act, warranting invocation of suppression and wilful mis-statement of taxable value of services."

9. The petitioner submitted their reply to the show-cause notice vide letter dated 27.11.2012, followed by written submissions on 21.12.2012, in which, the petitioner pointed out that they have co-operated with the Department in full and responded to all the details and produced documents and it will go to prove that they have not employed any of the ingredients specified in proviso to Section 73(1).

10. The learned counsel for the petitioner vehemently contended that though in the show-cause notice in paragraph No.5.1 (quoted above) there is an averment as to why the extended period is being invoked in the Order-in-Original, there is no finding to the said effect and this defect was not rectified by the Appellate Authority and as this defect goes to the root of the matter, both the impugned orders are liable for interference by this Court exercising Writ Jurisdiction.

11. The Appellate remedy provided under the Act before the CESTAT is not only an efficacious, but an effective remedy and the CESTAT is entitled to appreciate and reappreciate the facts and therefore, there is no justification on the part of the petitioner to bye-pass the

Appeal remedy, more particularly, on the only ground raised by the petitioner before this Court which is purely a question of fact. Nevertheless, this Court examined the Order-in-Original as to whether any finding has been recorded in this regard. It is not in dispute that the basis of the show-cause notice was set-out in the impugned order that deliberately the petitioner did not disclose the fact of availment of Input Service Credit of exempted service. The record of the proceedings show that the second respondent has discussed the matter pertaining to the transaction done by the assessee and it cannot be disputed by the petitioner that the entire proceedings was on account of the investigation taken up by the SIT of the respondent Department.

12. Though option was given to the learned counsel for the petitioner to advise his client to pursue the remedy before the CESTAT, the learned counsel invited an order on merits of the contention raised. As mentioned above the only reason assigned by the petitioner to bypass the appellate remedy is by contending that there is no specific finding rendered in the impugned order justifying invocation of the extended period of limitation. Section 73 of the Finance Act deals with recovery of service tax not levied or paid or short levied or short paid or erroneous refunded. Sub-section (1) of Section 73 of the Act would be relevant for this case, which is as hereunder:-

"73. Recovery of service tax not levied or paid or short-levied or short-paid or erroneously refunded

(1) Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the Central Excise Officer may, within one year from the relevant date, serve notice on the person chargeable with the service tax which has not been levied or paid or which has been short-levied or short-paid or the person to whom such tax refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:

PROVIDED that where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of-

- (a) fraud; or
- (b) collusion; or
- (c) wilful mis-statement; or
- (d) suppression of facts; or

(e) contravention of any of the provisions of this Chapter or the rules by the person chargeable with the service tax or his agent, the provisions of this sub-section shall have effect, as if, for the words "one year", the words "five years" had been substituted."

13. In terms of sub-section (1) of Section 73, the Central Excise Officer may within one year serve notice on the person chargeable with the service which has not been levied or paid or short levied or short paid or erroneously refunded, requiring such person to show cause why he should not pay the amount specified in the notice. In terms of the proviso under Section 73(1) the words "one year" stands substituted with the words "five years" when any service tax has not been levied or paid or has been short levied or short paid or erroneously refunded by reason of fraud, or collusion, or wilful misstatement, or suppression of facts or contravention of any of the provisions of the said chapter or of the Rules made thereunder with intent to evade payment of service tax.

14. In the case on hand there is no allegation of fraud or collusion and the case against the petitioner is brought under Clause (c) to (e) in the proviso under Section 73(1), viz., wilful misstatement, suppression of facts, contravention of the provisions with intent to evade payment of service tax. On perusal of the show cause notice, dated 14.09.2012, the allegation against the petitioner which emerges upon investigation by the Special Investigation Team, verification of the records and documents produced by the petitioner and the statement given by the Assistant General Manager of the petitioner on 10.04.2012, is that they deliberately did not disclose the fact of availment of input services credit on exempted services either in the ST3 Returns or in any other manner to the Department. But for the investigation by the SIT the wrong availment of Cenvat Credit would not have come to light and these facts would disclose that the petitioner did not disclose the facts with intention to avail ineligible Cenvat Credit and to evade payment of service tax, by not disclosing the actual value of the taxable service provided under works contract service by inflating the land value resulting in short payment of service tax. This appears to be the basis for invoking the extended period under the proviso to Section 73(1) read with Rule 14 of Cenvat Credit Rules, 2004. For the above allegations, the reply by the petitioner as found in their letter dated 27.11.2012 is that admittedly, the petitioner had submitted Balance Sheet, ST-2, ST-3 Returns agreements etc., as the details of input credit availed vide various letters and during the personal hearing. Thus having co-operated with the Department in full, the ingredients in proviso to Section 73(1) are not attracted. After referring to the input tax credit paid for April 2007 and May 2007 in September 2008 it was stated that they voluntarily disallowed credit attributable towards exempted services at ISD levels, which according to the petitioner was not warranted as per Rule 6(3). The petitioner further stated that the Cenvat credit of Rs.1,10,064/- paid for April 2007 and May 2007 paid in September 2008 could have been utilized by them, as cenvat credit can be availed on basis of the date of payment of service tax and could have fully utilized without disallowing Rs.93,462/- under Rule 6(3).

15. The petitioner relied on a decision in the case of M/s.WARDHA POWER COMPANY LTD., Vs. COMMISSIONER OF CENTRAL EXCISE, NAGPUR reported in 2012-TIOL-700-CESTAT-MUM and stated that the stand of the Department that the service tax refund will be available only for the services rendered on or after 03.03.2009 is without legal basis as the stand of the Revenue is liable to be rejected. Based on the above stand, the petitioner stated that invoking larger period of limitation is not in accordance with law.

16. Thus the Adjudicating Authority was required to examine the merits of the contentions raised and decide the issues and also to take note, in the given facts and circumstances extended period of limitation, could have been invoked. The Court on perusal of the explanation offered to the show cause notice finds that the petitioners have justified their action by referring to the Rules and decisions of CESTAT, Mumbai.

17. The second respondent while adjudicating the show cause notice has rendered factual findings to justify the proposal in the show cause notice as well as regarding the conduct of the petitioner being deliberate in not disclosing the facts. On a perusal of the impugned Order-in-Original as a whole, this Court finds that reasons have been recorded to justify the action. The relevant portions of the findings are as hereunder:-

"The assessee prompting residential dwellings units either in the form of residential flats or villas. The assessee paid service tax on the commission amount paid to their overseas agent under Business Auxiliary Service (Import of Service) and have subsequently availed input credit on the same. Further as input service distributor they had distributed the input credit to their branches in Chennai & Kerala. On verification it was found that the assessee had wrongly availed input credit paid under BAS (on less than 12 residential dwelling units) being the non taxable output service rendered under CCS/WCS. It was noticed that the assessee have availed in-eligible input credit on the commission paid to overseas agent under reverse charge mechanism and have distributed the same to their branches in Chennai and Kerala.

Annexure II of the SCN indicated the breakup of input credit written off on 31.03.2010 as well as the details of Input Service Distributor (ISD) return for the period 2009-10. Further vide their letter dated 07.03.2012 the assessee had stated that the unadjusted Cenvat Credit of Rs.97,190/- has been written off in their book of accounts on 31.03.2010 have been erroneously shown in their ST-3 return as

closing balance of Cenvat Credit available for distribution which would be rectified in their next return. Further, it has been verified that they have not availed input credit under Input Service Distributor (ISD) in respect of service tax paid under BAS towards commission to overseas agent in their subsequent ST-3 return from May 2009 onwards. Further, the assessee had voluntarily adjusted the input credit balance of Rs.97,199/- in their ST-3 return for Sep 11 Mar 12 and have arrived the closing balance as Nil."

18. In the grounds of appeal filed before the first respondent the focus is on the merits of the assessment and in summation, in paragraph 27 of the appeal, it has been stated that invocation of larger period and levy of penalty as per Section 78 are not as per law. The first respondent while deciding the appeal has rendered the following findings:-

" 5. It is a fact that the appellants had taken credit of service tax paid under reverse charge as recipient of service on the Commission paid to the agent appointed by them abroad towards marketing of their projects abroad; and that the projects in question (the flats) that were marketed abroad were exempted as the said projects were less than 12 units (flats). The above facts are not disputed by the appellants. However, they argued that they as an ISD availed credit and distributed in terms of Rule 7 of CCR, 2004 and that Rule 6 of CCR, 2004 had no application on them. It is observed that the appellants are basically a service provider registered as ISD. Therefore, they cannot claim that Rule 6 of CCR, 2004 is not applicable to them which categorically excludes the Cenvat Credit shall not be allowed on input service used for provision of exempted services. Further, Rule 7(b) of CCR, 2004 restricts that credit of service tax attributable to service used by units exclusively engaged in providing of exempted services shall not be distributed. In this case, the impugned credit pertaining to the exempted service alone and accordingly, the appellants are not entitled for both availing and distributing the same.

6. Regarding the plea of quantification, it is observed that the Impugned Order quantified based on the details provided by the appellants and on perusal, it revealed that there is no difference in the cenvat credit for the respective month as both the appellants and the Impugned Order mentioned the same amount as cenvat credit taken during the respective period. Further, the appellants had not quantified any differential amount towards their claim. Therefore, the appellant's plea does not require any consideration.

7. As regards the imposition of penalty under Section 78, it is observed that the appellants had taken the wrong credit for which they are not entitled. Such wrong availment of cenvat credit had not been in the knowledge of the Department. This was identified only during the investigation by the SIR wing of the Department which would have otherwise gone unnoticed. Thus, the appellants had contravened relevant provisions of Act and Rules in order to avail the undue benefit and therefore, as a sequel, they are liable for penal action as provided under the relevant provisions of Act and Rules."

19. In *Uniworth Textiles Ltd. Vs. Commissioner of Central Excise, Raipur*, [2013 (288) E.L.T. 161 (SC)] while construing the proviso under Section 28(1) of the Customs Act, which is in pari materia with the proviso under Section 73(1) of the Act, the Hon'ble Supreme Court observed:-

"12..... In our opinion, the main body of the Section, in fact, contemplates ordinary default in payment of duties and leaves cases of collusion or willful misstatement or suppression of facts, a smaller, specific and more serious niche, to the proviso. Therefore, something more must be shown to construe the acts of the appellant as fit for the applicability of the proviso.

20. Thus to ascertain as to whether there was wilful misstatement or suppression of facts or contravention of the provisions of the Act or the Cenvat Credit Rules with intent to evade payment of service tax is essentially and purely a question of fact, which has to be agitated before the Tribunal. The decision of the Hon'ble Supreme Court in the case of *Aircel Ltd. Vs. Commercial Tax Officer* reported in 2016 TIOL 90 (SC), would not come to the aid of the petitioner as in the said case the facts were not disputed.

21. Therefore, this is not a case where this Court can straight away interfere by exercising its power under Writ Jurisdiction, since disputed question of facts are to be examined while considering the validity and correctness of the impugned order. Therefore, this Court is of the view that the petitioner should avail the Appeal remedy available under the Act and no grounds have been made by the petitioner to justify their conduct in bypassing the remedy before the CESTAT.

22. In the light of the above, the Writ Petition is dismissed as not maintainable. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

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To

- 1.The Commissioner of Service Tax (Appeals-1),
Newry Towers, 2nd Floor, Plot No.2054,
1 Block, II Avenue, Anna Nagar,
Chennai-600 040.
 - 2.The Assistant Commissioner of Service Tax,
Division-V,
Service Tax Commissionerate,
Chennai-600 040.
 3. The Sub Assistant Registrar,
Writ Section, High Court,
Madras.
- + 1 cc to Mr.N. Senthilkumar, Advocate Sr.51052
+ 1 cc to Mr.Joseph Prabakar, Advocate sR.51015

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