

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 19.06.2017

DELIVERED ON : 19.07.2017

CORAM

The Honourable Mr. Justice RAJIV SHAKDHER
and
The Honourable Mr. Justice R. SURESH KUMAR

Civil Miscellaneous Appeal Nos. 2498 & 3178 of 2010

The Commissioner of Central Excise,
No.1, Foulk's Compound,
Anai Road, Salem - 636 001. ... Appellant in both C.M.As.

Vs.

1. M/s. JSW Steels Ltd.,
Pottaneri M. Kalipatti,
Pottaneri (PO), Mecheri,
Mettur (Tk), Salem - 636 453.

2. The Customs, Excise and Service
Tax Appellate Tribunal,
South Zone Bench, Shastri Bhavan Annex 1st Floor,
26, Haddows Road,
Chennai 600 006. ... Respondents in both C.M.As.

Prayer in both C.M.As: Appeals filed under Section 35G of the
Central Excise Act, 1944 against the common order dated
29.09.2008 made in Final Order Nos. 1084 & 1085 of 2008 on the
file of the Customs, Excise and Service Tax Appellate Tribunal.

For Appellant : Ms. Hema Muralikrishnan

For Respondent 1 : Ms. Elizabeth Seshadri

C O M M O N J U D G M E N T

(Judgment of the Court was delivered by RAJIV SHAKDHER, J.)

1. These appeals are preferred by the Revenue, against the
common judgment and order of the Customs, Excise and Service Tax
Appellate Tribunal (in short, 'the Tribunal') dated 29.09.2008,
whereby, it disposed of two (2) appeals, preferred by the
Assessee.

2. The core issue, in these appeals, veers around the objection raised by the Revenue to the availment of CENVAT credit by the Assessee based on documents, (i.e. TR-6 Challan / supplementary invoice), which are adverted to by the Revenue as "ineligible documents".

3. The appeals in C.M.A.Nos.3178 of 2010 and 2498 of 2010 were admitted by this Court on 18.11.2010 and 03.12.2010 respectively, when the following questions of law were framed for consideration by this Court:

"i) Whether the Tribunal was right in holding that the service tax credit taken by M/s.JSW Steel Ltd., Salem on the basis of supplementary invoices/bills/challans issued by the service provider ?

ii) Whether in view of the suppression, detection of evasion of service tax and registration of offence case against the respondent, the Tribunal was right in law to allow the availment of credit under CENVAT Credit Rules 2004 ?

iii) Whether the violation of Rule 4A of Service Tax Rules, 1994 entitles the respondent to avail credit under CENVAT Credit Rules, 2004 ?"

4. In order to adjudicate upon the appeals, the following broad facts are required to be noticed.

Facts pertaining to the first appeal preferred by the assessee before the Tribunal:

4.1. The Assessee [formerly known as 'M/s.Southern Iron and Steel Company Ltd., (SISCOL)] was, at the relevant point of time, engaged in the manufacture of pig iron, steel bars and rods, flats etc.

4.2. The Assessee was providing manpower recruitment & supply services (input services) to an entity, known as M/s.Multicolour Projects (India) Ltd.

4.3. The services were provided at the Assessee's worksite, located at Pottaneri, Salem District, Tamil Nadu.

4.4. It appears that the service provider had not registered itself with the Department. Accordingly, a case was registered, against it, by the concerned Authority.

4.5. The record book shows that once the service provider

(M/s.Multicolour Projects (India) Ltd.,) had furnished an invoice, which included the service tax element, the Assessee availed of CENVAT credit to the extent of Rs.53,52,737/- (inclusive of Educational Cess amounting to Rs.1,55,903/-).

5. The Revenue discovered that the Assessee had availed of CENVAT credit when it conducted scrutiny of ER-1 monthly returns for the month of June, 2007.

5.1. Accordingly, a show cause notice dated 24.03.2008 (in short, 'the SCN'), was served on the Assessee.

5.2. By virtue of the said notice, the Assessee was called upon to show cause as to why wrong availment of CENVAT credit based on ineligible documents, amounting to Rs.53,52,737/- ought not to be disallowed / recovered under Rule 14 of CENVAT Credit Rules, 2004 (in short, '2004 CC Rules') read with Section 11A of the Central Excise Act, 1944 (in short, 'the 1944 Act').

5.3. Furthermore, since, the Assessee had utilised the CENVAT credit in payment of Excise Duty on its final product, the Excise Duty equivalent to the CENVAT credit was also demanded along with appropriate interest under Rule 14 of the 2004 CC Rules read with Section 11A of the 1944 Act.

5.4. In addition thereto, penalties were also demanded from the Assessee.

6. The Assessee submitted a reply dated 22.05.2008. The Revenue not being impressed with the stand taken in the reply, after granting personal hearing in the matter, passed the Order-in-Original dated 28.05.2008.

6.1. Aggrieved by the same, the Assessee preferred an appeal with the Tribunal which was disposed of by the Tribunal via the impugned, albeit, common judgment and order, to which, we have made a reference above.

Facts pertaining to the second appeal preferred by the assessee before the Tribunal:

7. The Assessee, had availed of Banking and Financial Services (input service) from ICICI Bank Ltd., Since, the branch from which the services were availed of by the Assessee was located outside India, on the basis of Reverse Charge Mechanism, the Assessee had paid, in his capacity as the recipient, the requisite service tax.

7.1. The Assessee had availed of CENVAT credit based on TR-6 Challan, which, according to the Revenue, was not an eligible document under Rule 9(1)(b) of the 2004 CC Rules.

7.2. The CENVAT credit taken by the Assessee amounted to Rs.67,62,355/- (inclusive of Educational Cess equivalent to Rs.1,32,595/-).

7.3. Like in the other case, the Assessee was issued a Show Cause Notice, which incidentally is also dated 24.03.2008. The Assessee filed a reply dated 22.05.2008, qua the same.

7.4. The Revenue, after granting personal hearing, passed an Order-in-Original dated 28.05.2008, whereby, demand in the sum of Rs.67,62,355/- vis-a-vis wrong availment of CENVAT credit, was confirmed and also demand for interest was raised.

7.5. Furthermore, equivalent amount, in a sum of Rs.67,62,355/-, was demanded for having wrongly utilised the CENVAT credit towards payment of duty upon clearance of final products.

7.6. In addition, penalty of Rs.67,62,355/- was imposed on the Assessee under Rule 15 of the 2004 CC Rules.

7.7. This apart, penalty was also imposed, once again, amounting to Rs.67,62,355/- under Rule 25 of the Central Excise Rules, 2002 read with Section 11AC of the 1994 Act.

7.8. A further penalty of Rs.5,000/- was imposed on the Assessee under Rule 27 of Central Excise Rules, 2002.

7.9. Aggrieved by the same, the Assessee preferred an appeal to the Tribunal. The Tribunal disposed of the appeal along with the other appeal vide the impugned judgment.

8. It is, in this factual background, the instant appeals have been placed before us for adjudication.

9. On behalf of the Revenue, submissions were advanced by Ms.Hema Muralikrishnan, while on behalf of the Assessee, submissions were advanced by Ms.Elizabeth Seshadri.

10. We have perused the records and heard the learned counsel for the parties.

11. Having done so, according to us, the principal objection of the Revenue to the availment of CENVAT credit in both cases, centres around the interpretation, which is required to be placed on Rule 9(1)(b) of the 2004 CC Rules, in the context of the submission made on behalf of the Revenue that, not only did the Assessee avail of CENVAT credit, based on ineligible documents, but that it was done after offence cases were registered by the Department for infraction of the provision of the law.

11.1. In this connection, the Revenue sought to highlight that, in the matter involving receipt of manpower and recruitment services by the Assessee from Multicolour Projects (India) Ltd., credit was taken after an offence case was registered against the said service provider by the Department, whereas, in respect of Banking and Financial Services qua which service tax was paid by the Assessee on Reverse Charge Mechanism, the CENVAT credit was taken by the Assessee after an offence case was registered against it.

11.2. In support of the submission, emphasis was laid on behalf of the Revenue on Rule 9(1)(b) read with the Explanation appended thereto.

12. As against this, Ms.Elizabeth Seshadri, on behalf of the Assessee, submitted that the arguments advanced on behalf the Revenue qua the construction of Rule 9(1)(b) were misconceived. Learned counsel contended that Rule 9(1)(b) was applicable in a situation where supplementary invoice (based on which credit was taken), was issued by the manufacturer or importer of inputs or capital goods, and that, it had nothing to do with the provider of input services.

12.1. Furthermore, it was submitted that the exception carved out in Rule 9(1)(b) of the 2004 CC Rules pertained only to additional duty, which become recoverable from a manufacturer or importer of inputs or capital goods, on account of non-levy or short-levy by reason of fraud, collusion or any wilful misstatement or suppression of facts or contravention of any provisions of the 1994 Act or the Customs Act, 1962 or the Rules made thereunder with an intent to evade payment of duty.

12.2. In other words, the argument was, that Rule 9(1)(b) would not apply to a provider of input services and, furthermore, the denial of credit pertained to additional duty, which becomes recoverable on account of fraud, collusion or any wilful misstatement, etc.,

12.3. Learned counsel also submitted that the explanation which was appended to Rule 9(1)(b) of the 2004 CC Rules did not apply to the remaining Clauses of Rule 9(1), which included Clauses (e), (f) and (g).

13. As alluded to above, the main issue centres around the interpretation which is to be accorded to Rule 9(1)(b) of 2004 CC Rules and the Explanation appended thereto.

13.1. Therefore, for the sake of convenience, the said Rule is extracted hereafter:

"Rule 9. Documents and accounts.-

(1) The CENVAT credit shall be taken by the manufacturer or the provider of output service or input service distributor, as the

case may be, on the basis of any of the following documents, namely :-

(a) an invoice issued by -

(i) a manufacturer for clearance of -

(I) inputs or capital goods from his factory or depot or from the premises of the consignment agent of the said manufacturer or from any other premises from where the goods are sold by or on behalf of the said manufacturer;

(II) inputs or capital goods as such;

(ii) an importer;

(iii) an importer from his depot or from the premises of the consignment agent of the said importer if the said depot or the premises, as the case may be, is registered in terms of the provisions of Central Excise Rules, 2002;

(iv) a first stage dealer or a second stage dealer, as the case may be, in terms of the provisions of Central Excise Rules, 2002; or

(b) a supplementary invoice, issued by a manufacturer or importer of inputs or capital goods in terms of the provisions of Central Excise Rules, 2002 from his factory or depot or from the premises of the consignment agent of the said manufacturer or importer or from any other premises from where the goods are sold by, or on behalf of, the said manufacturer or importer, in case additional amount of excise duties or additional duty leviable under section 3 of the Customs Tariff Act, has been paid, except where the additional amount of duty became recoverable from the manufacturer or importer of inputs or capital goods on account of any non-levy or short -levy by reason of fraud, collusion or any wilful misstatement or suppression of facts or contravention of any provisions of the Excise Act, or of the Customs Act, 1962 (52 of 1962) or the rules made there under with intent to evade payment of duty.

Explanation.-For removal of doubts, it is clarified that supplementary invoice shall also include challan or any other similar document evidencing payment of additional amount of additional duty leviable under section 3 of the Customs Tariff Act; or

- (c) a bill of entry; or
- (d) a certificate issued by an appraiser of customs in respect of goods imported through a Foreign Post Office; or
- (e) a challan evidencing payment of service tax by the person liable to pay service tax under sub clauses (iii) and (iv) of clause (d) of sub-rule (1) of rule (2) of the Service Tax Rules, 1994; or
- (f) an invoice, a bill or challan issued by a provider of input service on or after the 10th day of, September, 2004; or
- (g) an invoice, bill or challan issued by an input service distributor under rule 4A of the Service Tax Rules, 1994.

Provided that the credit of additional duty of customs levied under sub-section (5) of section 3 of the Customs Tariff Act, 1975 (51 of 1975) shall not be allowed if the invoice or the supplementary invoice, as the case may be, bears an indication to the effect that no credit of the said additional duty shall be admissible; "

13.2. A careful perusal of Sub-Rule (1) of Rule 9 would show that CENVAT credit can be taken by the manufacturer or provider of output service or input service distributor based on the documents referred to in Clauses (a) to (g). Clause (a) of Sub-Rule (1) of Rule 9, inter alia, allows a manufacturer, (which is, what the Assessee is) to claim CENVAT credit based on an invoice, which could be issued by a manufacturer or an importer or even a first stage dealer or a second stage dealer, as the case may be, in terms of the provisions of the Central Excise Rules, 2002 (In short 'the 2002 Rules').

13.3. The invoices issued by a manufacturer for clearance of inputs or capital goods from his factory or depot or from the premises of his consignment agent or from any other premises from where the goods are sold, by or on his behalf, also qualify for availment of CENVAT credit.

13.4. This facility, under the Rule, it is made clear, extends to an invoice issued by the manufacturer for clearance of inputs or capital goods as well. [See Rule 9(1)(a)(i)(I) and (II)]. A similar provision qua invoices issued by the importer

and first stage or a second stage dealer is also embedded in the very same Rule. [See Rule 9(1)(a)(ii), (iii) and (iv)].

13.5. Clause (b) of Clause (1) to Rule 9 of the 2004 CC Rules enables availment of CENVAT credit against supplementary invoices, issued by a manufacturer or importer of inputs or capital goods. There is no reference, whatsoever, to input service provider. The Explanation which is appended to Clause (b) of Rule 9(1), clarifies what a supplementary invoice would include. The clarification adverts to the fact that the supplementary invoice would include a challan or any other similar document evidencing the payment of additional duty, leviable under Section 3 of the Customs Tariff Act. Clause (c) which follows the Explanation appended to Clause (b) is prefixed with the word "or". As indicated above, Clauses (a) to (g) of Sub-Rule (1) of Rule 9 of 2004 CC Rules generally advert to various documents, based on which, a manufacturer or a provider of output services or input service distributor, can avail of CENVAT credit.

13.6. Therefore, in our view, the Assessee is right in taking up the stand that Clause (b) of Sub-Rule (1) of Rule 9 of 2004 CC Rules has no application to invoice or challan issued by a service provider.

13.7. It is clear, on a plain reading of Rule 9(1) of 2004 CC Rules, that the Explanation appended to Clause (b) of Sub-Rule (1) of Rule 9 only seeks to clarify that supplementary invoice would also include a challan or any other similar document, which evidences payment of "additional amount of additional duty" leviable under Section 3 of the Customs Tariff Act, issued by a manufacturer, importer of inputs or capital goods.

13.8. Therefore, the documents included in Clauses (e), (f) and (g) of Sub-Rule (1) of Rule 9 of 2004 CC Rules, would not be governed by the Explanation, as it is sought to be argued by the Revenue.

14. Thus, according to us, the Assessee has correctly availed the CENVAT credit, based on the invoice / TR 6 challan.

15. Furthermore, since, we have come to the conclusion that Rule 9(1)(b) of 2004 CC Rules would have no application to the facts obtaining in the instant case, the exception carved out in Clause (b) of Sub-Rule (1) to Rule 9 of 2004 CC Rules, which prohibits availment of credit in a case of additional amount of duty becomes payable on account of fraud, collusion or any

wilful misstatement or suppression of facts, etc., will not be applicable to the Assessee.

15.1. The Tribunal via the impugned common judgment has come to the same conclusion.

15.2. Therefore, insofar as Question Nos.(i) and (ii) are concerned, they will have to be answered in favour of the Assessee and against the Revenue.

15.3. Insofar as Question No.(iii) is concerned, which pertains to the alleged violation of Rule 4A of the Service Tax Rules, 1994 (as it then obtained), we find that, in the two Orders-in-Original of even date, i.e., 28.05.2008, there is no discussion with regard to the same. Consequently, it appears that there was no discussion on this aspect before the Tribunal. We must also note that, at the stage of hearing, no arguments were advanced based on Rule 4A of the Service Tax Rules, 1994.

15.4. Therefore, according to us, the question of law No. (iii) does not emanate either from Order-in-Original or from the order of the Tribunal and hence, strictly need not be answered.

15.5. Having said so, we notice that Rule 4A of the Service Tax Rules, 1994, inter alia, at the relevant time, required the provider of taxable service, to issue, not later than fourteen days from the date of provisioning of taxable service, an invoice, bill or challan. The details, which were to be provided in such an invoice, bill or challan, are also set out in the Rule.

15.6. A bare perusal of the Rule would show that the obligation, in that behalf, essentially rests on the service provider. The Rule does not advert to any consequences, in case issuance of invoice, bill or challan is delayed. The period provided appears to be directory and not mandatory. Nothing to the contrary has been articulated by the Revenue.

15.7. Furthermore, even in the grounds raised in the appeal, the Revenue, apart from articulating that the Tribunal failed to take into account the fact that the Assessee had claimed CENVAT credit based on ineligible documents, it, sought to emphasise the factum of delay in the claim being made without adverting to the consequences of such delay. The delay, in our view, in this case, has been broadly explained by the Assessee. In one case, the Assessee could not claim CENVAT credit till such time it was served with an invoice, while in other case, it claimed credit only after it had paid service tax on the basis of reverse charge. Going by these peculiar circumstances, arising in the instant case, we are of the view, that the delay involved cannot be categorised as an inordinate period of delay, as was sought to be conveyed by the Revenue, via its averments made in the appeal.

15.8. In these circumstances, we are of the view, as indicated above, question of law No.(iii), if at all, would have to be answered in favour of the Assessee and against the Revenue.

16. Accordingly, both the appeals filed by the Revenue were dismissed; the impugned judgment of the Tribunal is sustained. Further, given the facts and circumstances of the case, there shall be no order as to costs.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

kk

To

- 1.The Customs Excise and Service Tax Appellate Tribunal,
South Zone Bench,
Shastri Bhavan Annex 1st Floor,
26, Haddows Road, Chennai 600 006.
- 2.The Commissioner of Central Excise,
No.1, Foulk's Compound,
Anai Road, Salem - 636 001.

+1cc to Mr.Hema Murali Krishnan, Advocate SR.No.51228
+2cc to Mr.H.Karthik Seshadri, Advocate SR.No.51101

सत्यमेव जयते

C.M.A.Nos.2498 & 3178 of 2010

RR(CO)
GN(09/08/2017)

WEB COPY