

OD-6

**IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (CENTRAL EXCISE)
ORIGINAL SIDE**

HEARD ON : 13.07.2022
DELIVERED ON: 13.07.2022

CORAM:

**THE HON'BLE MR. JUSTICE T.S. SIVAGNANAM
AND
THE HON'BLE MR. JUSTICE BIVAS PATTANAYAK**

**CEXA/11/2022
IA NO:GA/1/2022**

**COMMISSIONER OF SERVICE TAX-1, KOLKATA
Vs.
M/S. SURYA VISTACOM PRIVATE LIMITED**

Appearance:

**Mr. Kaushik Dey, Adv.
Mr. Tapan Bhanja, Adv.**

...for the appellant.

**Mr. Ankit Kanoria, Adv.
Ms. Megha Agarwal, Adv.**

....for respondent.

(Judgment of the Court was delivered by T.S. Sivagnanam, J.)

1. This appeal filed by the appellant/revenue under Section 35G(1) of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994 is directed against the order dated 9th

November, 2021 passed by the Learned Customs, Excise and Service Tax Appellate Tribunal, Kolkata (CESTAT) in service tax appeal No.75642 of 2017.

2. The revenue has raised the following substantial questions of law for consideration:

- i) Whether in the facts and circumstances of the case the Learned Tribunal is right and justified in setting aside the demand of duty when the respondent/assessee in spite of providing both taxable and exempted service held to maintain separate account as required under Rule 6(2) of the Cenvat Credit Rules and also failed to exercise option as stipulated under Rule 6(3) of the Cenvat Credit Rules, 2004 ?*
- ii) Whether under Rule 6 of the Cenvat Credit Rules, 2004 the respondent is under obligation to reverse proportionate Cenvat Credit in respect of trading activity which is exempted in terms of Rule 2(e) of the Cenvat Credit Rules, 2004 ?*

3. We have heard Mr. Kaushik Dey, learned standing counsel assisted by Mr. Tapan Bhanja, learned Advocate for the appellant/revenue and Mr. Ankit Kanoria, learned counsel assisted by Ms. Megha Agarwal, learned Advocate appearing for the respondent/assessee.

4. The respondent/assessee was issued a show cause notice dated 17th October, 2016 alleging that they have availed and utilized Cenvat Credit of the amount of service tax paid by them against renting of immovable property and security services on the ground that they are recipient of the said services. The assessing officer perused the balance-sheet of the assessee and, after noting the details of income, pointed out that the primary business of the assessee is trading of goods and maintenance or repair is ancillary to the business and service portion is less than 0.1% of the total income as reflected in the balance-sheet. The allegation was the assessee availed credit of total service tax that has been paid by them as recipient of service of renting of immovable property and security service. The assessing officer referred to Rule 6(2) of the Cenvat Credit Rules where a provider of output service avails Cenvat Credit on input/input services and provides output services which are chargeable to tax as well as exempted services, then, the provider of output service shall maintain separate accounts for receipt and use of input/input services. Further, it was pointed that Rule 6(3) of the said Rules, gives liberty not to maintain separate account as prescribed under Rule 6(2), subject to the condition that the assessee pays an amount equal to 6% of

value of the exempted services or pay an amount equivalent to the Cenvat Credit attributable to inputs and input services used in or in relation to the manufacture of exempted goods or for provision of exempted service. Further, it was pointed out that under the said scheme, the assessee has to intimate in writing, to the Superintendent of Central Excise and pay provisionally for every month under Rule 6(3A) of the said Rules.

5. The assessing officer pointed out that the assessee is not maintaining separate account/register for receipt and use of input/input services as required under Rule 6(2) and, as such, they are under obligation to pay an amount at the rate of 6 per cent of the value of the exempted services. The assessing officer, to justify the invocation of the extended period of limitation as per proviso to Section 73(1) of the Act, stated that the non-payment of service tax would be undetected unless investigation was initiated and the assessee has not disclosed any material fact to the department's officer who checked the documents of the assessee during investigation and, therefore, opined that the assessee had made a wilful mistake with an intent to evade payment of service tax. The documents which were noted during the investigation, namely, the documents pertaining to M/s. Titan

Industries were held to be invalid documents. Accordingly, the show cause notice proposed to recover a sum of Rs.3,29,07,268/- under Section 73(1) of the Finance Act, 1994 read with Rule 14 of the Cenvat Credit Rules, 2004. Interest was also proposed to levy as well as penalty.

6. The assessee filed their reply dated 4th November, 2016. The primary submission made by the assessee by contending that an audit was conducted by the audit wing of the appellant department and the findings were recorded by the audit party pointing out that the assessee were eligible to take Cenvat credit of Rs.41,17,269/- as per the relevant input service invoices produced by them but they have availed credit to the tune of Rs.66,44,518/- resulting in availment of inadmissible excess credit of Rs.25,27,249/-. The audit party noted that the assessee, on their own volition, well before the audit was undertaken, had reversed Rs.23,45,135/-. Therefore, the assessee was directed to reverse Rs.1,82,114/- and also pay interest and penalty as applicable. The assessee accepted the lapse and voluntarily paid the wrong credit availed by them to the tune of Rs.1,82,114/- along with applicable interest of Rs.1,35,318/- and penalty at the rate of 15% of the tax being Rs.27,317/-. The assessee stated that due to

oversight and certain mistake in calculation, they had paid the wrong credit of service tax along with appropriate interest and penalty in terms of the CBEC Clarification dated 18th August, 2015 and prayed that no show cause notice may be issued and the matter may be treated to be closed. The audit party has noted the said submission as could be seen from the final audit report dated 24th October, 2016. The assessee pointed out this fact and submitted that there was no cause for issuing a show cause notice after the matter stood concluded pursuant to the audit as recorded by the audit wing of the appellant/department. That apart, the assessee also contended that the extended period of limitation could have been invoked as there was nothing brought on record to show that the assessee had wilfully suppressed facts with an intent to evade payment of duty. To support such contention, decisions of the Hon'ble Supreme Court were referred to. The assessee also submitted their reply on the merits of the matter stating that they are engaged in the business of trading of goods for M/s. Titan Industries from many show rooms in Kolkata. However, the assessee provided repair services only from two of such units namely, Mani Square and Avani Mall and hence, if at all the trading turn-over of the noticee has to be taken

into account, it cannot go beyond the turn-over of the above two units and the department has mechanically taken the entire sales turn-over of the assessee as reflected in the balance sheet and calculated the value for trading turn-over based on such figures of all units from where the assessee does not provide any sort of taxable services. That apart, the assessee also questioned the jurisdiction of the assessing officer to invoke Rule 6(2) of the Act. Certain decisions of the High Courts were relied on this aspect.

7. The appellant, while adjudicating the show cause notice, did not agree submissions made by the assessee and rejected the contention that the show cause notice could not have been issued after the final audit report came to be passed. Ultimately, the proposal in the show cause notice was affirmed. Challenging the said order the assessee had preferred appeal before the learned Tribunal.

8. The issue which falls for consideration before the tribunal was whether the assessee was required to pay 6% on the total sale value of the goods credited by them in terms of Rule 6(3)(i) of the CCR, 2004. And, whether the Cenvat Credit availed by the assessee for its Mani Square unit qualifies as Cenvat credit for the purpose of Rule 6 of the said Rules. Apart from that, the tribunal also considered

as to whether the extended period of limitation could have been invoked.

9. We first take the second issue for consideration. The tribunal pointed out that the audit department had issued final audit report from which it is seen that the audit report was issued on 24th October, 2016 whereas the order-in-original was passed much later i.e., on 31st January, 2017 and the tribunal also noted that the audit report was placed before the adjudicating authority. However, the same has been ignored.

10. With regard to the aspect as to whether the extended period of limitation could have been invoked, the tribunal had referred to a co-ordinate Bench decision of the Calcutta High Court in the case of **Castrol India Ltd. vs. Commissioner of CGST & CX, Kolkata South Commissionerate**¹ and held that there was no justification for invoking the extended period of limitation.

11. We have perused the show cause notice issued by the adjudicating authority and we found that there is no specific allegation against the assessee of any deliberate suppression or misstatement with an intent to evade taxes.

¹ 2021-TIOL-405-CESTAT-KOL

At this juncture, it will be beneficial to take note of the decision of the Hon'ble Supreme Court in **Uniworth Textiles Ltd. vs. Commissioner of Central Excise, Raipur**² wherein the Hon'ble Supreme Court held that every non-payment/non-levy of duty does not attract extended period and there must be deliberate default. Further, it was held that the conclusion that mere non-payment of duties is not equivalent to collusion or wilful misstatement or suppression of fact is untenable as the Act contemplates a positive action which betrays a negative intent of wilful default. Further, in **Pushpam Pharmaceuticals Co. vs. CCE**³ it was held that misstatement or suppression of fact must be wilful since the word 'wilful' precedes the words 'misstatement or suppression of fact' which means with an intent to evade duty. Bearing in mind the above legal principle, if we examine the allegations in the show cause notice dated 17th October, 2016, we find that there is no specific allegation or prima facie finding of any wilful misstatement or suppression on the part of the assessee. That apart, the details have been culled out by the adjudicating authority from the available records and there is no new or fresh

² 2013 (288) ELT 161 (SC)

³ 1995 (75) ELT 721 (SC)

tangible materials available in the hands of the adjudicating authority to make out a case of wilful misstatement or wilful suppression. Therefore, the tribunal was fully justified in holding that the extended period of limitation could not have been invoked.

12. The issue as to whether the adjudicating authority could have mechanically applied the 6% rule on the assessee, was considered in the case of ***Tiara Advertising vs. Union of India***⁴ and it was held as follows:

"14. Further, we may reiterate that Rule 6(3) of the Cenvat Credit Rules, 2004, merely offers options to an output service provider who does not maintain separate accounts in relation to receipt, consumption and inventory of inputs/input services used for provision of output services which are chargeable to duty/tax as well as exempted services. If such options are not exercised by the service provider, the provision does not contemplate that the Service Tax authorities can choose one of the options on behalf of the service provider. As rightly pointed out by Sri S.Ravi, Learned Senior Counsel, if the petitioner does not abide by the provisions of Rule 6(3) of the Cenvat Credit Rules, 2004, it was open to the authorities to reject its claim as regards the disputed Cenvat Credit of Rs. 17,15,489/-."

13. As pointed out in the aforementioned decision, if according to the adjudicating authority, the assessee did

⁴ 2019 (30) G.S.T.L. 474 (Telangana)

not abide by the provisions of Rule 6(3) of the Rules, it was open to the adjudicating authority to reject the assessee's claim as regards the disputed Cenvat Credit and it could not mechanically invoke 6% Rule on the assessee. That apart, the tribunal also, on facts, noted that the department mechanically applied 6% of the entire balance-sheet turn over of the assessee without detailing as to why the said turn over has been taken and why not the value of trading that is provided in Rules, namely, the difference between the sale price and the cost of goods sold or 10% of the cost of goods sold whichever is more in terms of Explanation-1 as contained in Rule 6(3A). This factual finding could not be dislodged by the revenue before us and we agree with the tribunal on the said aspect. That apart, as pointed out by the learned Advocate appearing for the respondent/assessee, a new rule has been introduced namely, sub-rule 3(aa) in Rule 6 which came into force w.e.f. 1st March, 2016 which states that where a manufacturer or provider of output services has failed to exercise the above, under sub-rule 3 and follow the procedure provided under sub-Rule 3(a), the Central Excise Officer, competent to adjudicate the case, based on amount of Cenvat Credit involved, may allow such manufacturer or provider or output

service to follow the procedure and pay the amount referred to in Clause 2(i) of sub-Rule (3) with interest calculated at the rate of 15% per annum from the date of payment of amount for each of the months till the date of payment thereof. The adjudicating authority has not invoked the said rule. That apart, what is important to note is that the amount of legible Cenvat credit to the assessee was Rs.41,17,269/- whereas the demand which was impugned before the tribunal fastened a liability of Rs.3,29,07,268/- which is not legally sustainable.

14. Thus, for the above reasons, we find that the learned tribunal rightly allowed the assessee's appeal. In the result, the appeal filed by the revenue (CEXA/11/2021) stands dismissed and the substantial questions of law are answered against the revenue.

15. Consequently, the connected application for stay (IA No.GA/1/2022) also stands closed.

(T.S. SIVAGNANAM, J.)

I agree.

(BIVAS PATTANAYAK, J.)