
(2024) 10 CESTAT CK 1209

In the Customs, Excise And Service Tax Appellate, New Delhi

Case No : Service Tax Appeal No.51462 of 2022

**Kei Industries Ltd, Bhiwadi @APPELLANT @Hash Principal Commissioner,
Cgst -Alwar @RESPONDENT**

Date of Decision : 29-10-2024

Acts Referred:

Finance Act, 1994 — Section 66, 66A, 68, 73(1), 73(2), 75, 78
Cenvat Credit Rules, 2004 — Rule 2(a), 2(k), 2(l), 3, 3(1), 3(4), 7, 10A
Service Tax Rules, 1994 — Rule 6
Central Excise Rules, 2002 — Rule 1

Citation : (2024) 10 CESTAT CK 1209

Hon'ble Judges : Dilip Gupta, President (J); P. V. Subba Rao, Member (T)

Bench : Division Bench

Advocate : B.L. Narasimhan, Kunal Agarwal, Rajeev Kapoor

Final Decision : Allowed

Judgement

Dilip Gupta, J

1. KEI Industries Limited, the appellant has sought the quashing of the order dated January 31, 2022 passed by the Principal Commissioner of Central Excise and Service Tax, Commissionerate, Alwar, the Principal Commissioner confirming the demand of service tax of Rs. 23,27,22,210/- and ordering for its recovery under section 73(2) of the Finance Act, 1994, the Finance Act with interest under section 75 of the Finance Act. The order also imposes penalty of Rs. 23,27,22,210/- upon the appellant under section 78 of the Finance Act.

2. The issue involved in this appeal relates to the demand of service tax short paid due to cross-utilisation of CENVAT credit pertaining to the manufacturing activity for payment of service tax.

3. The appellant claims that it is engaged in the manufacture of winding wire, plastic cable and SS wire and in addition to this manufacturing activity, the appellant is also engaged in providing turnkey project services and erection and commissioning services. According to the appellant, it has maintained two separate divisions in the same business premises for the manufacturing unit and

the 'erection, procurement and commissioning, EPC' division. The appellant has, therefore, the following registrations under the central excise and service tax which are as follows:

(a) Central Excise Registration No. AAACK0251CXM002 for the manufacturing activity undertaken by the appellant;

(b) Service Tax Registration No. AAACK0251CSD003 for the payment of service tax under reverse charge mechanism by the appellant;

(c) Centralised Service Tax Registration No. AAACK0251CSD008 for the provision of service of turnkey project & erection and commissioning services.

4. As a manufacturer of excisable goods as well as a provider of taxable services the appellant availed CENVAT credit of taxes/ duties and CESS paid on input, input services and capital goods under the provisions of the CENVAT Credit Rules, 2004, the 2004 Credit Rules. The appellant claims that the CENVAT credit availed by it was recorded in a common CENVAT credit register and the credit so availed was utilised for payment of excise duty/ service tax.

5. A show cause notice dated 30.12.2020 was, however, issued to the appellant and paragraph 3.1 of the show cause notice, which contains the charge against the appellant, is reproduced below:

"3.1 On being analysed the reason for excess payment, by the officers of AG Audit, it was noticed that the assessee was in practice of utilizing the credit of manufacturing unit to discharge the liability of EPC division. For this it first-transfers the credit available with EPC division to the manufacturing unit and thereafter paid the Service Tax from CENVAT Credit of manufacturing units. As the manufacturing unit and EPC unit of the assessee are separately registered and doing distinct business, they could not utilized the CENVAT Credit of one unit against the Tax liability of other unit except the condition of Rule 10A of the CENVAT Credit Rules which provides that a manufacture having excess credit of SAD can transfer the excess credit to its own other register unit."

6. The appellant filed a reply to the aforesaid show cause notice and contended that availment of CENVAT credit on input and input service maintained in common account is permitted to be cross-utilised for payment of central excise duty on manufactured goods and service tax for payment of output services under the 2004 Credit Rules. The appellant also pointed out that it was maintaining a common CENVAT register for availment of CENVAT credit of inputs service in connection with the EPC division and separate invoice-wise entries with respect to the CENVAT credit inputs/ inputs service/ capital goods in relation to the manufacturing unit.

7. The Principal Commissioner, however, by the order dated 31.01.2022 confirmed the demand of service tax with interest and penalty. The relevant portion of the order is reproduced below:

"6. The Noticee has not disputed that they were not in practice of utilizing the credit of manufacturing unit to discharge the liability of EPC division. It is a fact that they first transfers the credit available with EPC division to the manufacturing unit and thereafter paid the Service Tax from CENVAT Credit of manufacturing units.

7. I find that the contentions of the assessee are unsustainable and the case laws relied upon by the assessee are not applicable in the facts and circumstances of the present case in as much as the assessee, along with their Central Excise and Service Tax registrations, also holding Centralized registration (AAACK0251CSD008) for its Service Tax division (identified as 'EPC') at the same address which was providing 'The Erection & Commissioning Services and Works Contract Services'. Further, all the orders/execution or control of this registration was with their office situated at Delhi. The Company was also having an ISD registration at Delhi for distributing credit to its manufacturing Unit and EPC division separately and was maintaining separate input Service, credit register for both manufacturing unit and EPC units. These facts came to the notice of the Department during the course of AG Audit. Had the audit not conducted, the facts of cross utilization of Cenvat credit for payment of service Tax could not have come to light and the assessee would have escaped correct payment of Service Tax. Therefore, I find that the assessee have willfully and knowingly suppressed the material facts with intent to evade payment of Service Tax amounting to Rs. 23,27,22,210/- by contravening the provisions of Rule 6 of Service Tax Rules, 1994 read with Section 68 of Finance Act, 1994 therefore, extended period of limitation as envisaged under proviso to sub-section (1) of Section 73 of the Finance Act, 1994 is invokable for recovery of said short paid/ not paid service Tax amounting to Rs. 23,27,22,210/-."

(emphasis supplied)

8. The Principal Commissioner also held that the extended period of limitation under the proviso to section 73 (1) of the Finance Act was correctly invoked in the facts and circumstances of the case.

9. Shri B.L. Narasimhan, learned counsel for the appellant made the following submissions:

(i) The department has incorrectly understood the factual position inasmuch as the appellant did not maintain separate CENVAT credit register. In fact, there is a single CENVAT credit register wherein a single month wise entry is made with respect to CENVAT credit of input service qua the erection and commissioning services, engineering and procurement commissioning and separate invoice entry with respect to the CENVAT credit of inputs/ input service/ capital goods qua the manufacturing unit. This fact is also evident from the central excise return in Form ER-1 and service tax returns in Form ST-3;

(ii) Rule 3(1) of the 2004 Credit Rules allows a provider of output service to take CENVAT credit on only those goods or services which fall within the purview of

the definition of "input" or "input service" or "capital goods" as defined in rule 2(k), rule 2(l) and rule 2(a) respectively of the 2004 Credit Rules. Rule 3(4) provides that credit may be utilised for payment of either duty of excise of any final product or service tax on any output service. Thus, credit of excise duty and service tax is available and can be utilized according to the prerogative of the manufacturer or the provider of output service. To support this contention, learned counsel for the appellant placed reliance upon the judgment of the Gujarat High Court in Commissioner of C. Ex. & ST., Bhavnagar vs. Pipavav Shipyard Ltd., (2023) 4 Centax 246 (Guj.) as also judgment of Bombay High Court in Commissioner of Central Excise, Pune-I vs. S.S. Engineers, 2016 (42) STR 3 (Bom.); and

(iii) The extended period of limitation could not have been invoked in the facts and circumstances of the case.

10. Shri Rajeev Kapoor, learned authorised representative appearing for the department, however, supported the impugned order. Learned authorised representative, however, pointed out that the judgment of Gujarat High Court in Pipavav Shipyard has been challenged by the department before the Supreme Court.

11. The submissions advanced by the learned counsel for the appellant and the learned authorised representative appearing for the department have been considered.

12. The finding recorded by the Principal Commissioner in the impugned order that the appellant first transfers the credit available with the EPC division to the manufacturing unit and thereafter pays the service tax on the CENVAT credit of manufacturing units is not based on documents. The appellant had come out with a specific case that there is only one register. The impugned order does state that there are two registers. Only a bald statement has been made that there are two separate registers. The contention of the appellant, therefore, that there is a single CENVAT credit register in which entries are made deserves to be accepted.

13. The issue, therefore, that now arises for consideration is whether the appellant could have cross-utilised the CENVAT credit. In this connection, it would be pertinent to refer to relevant portion of rule 3 of the 2004 Credit Rules and the same is reproduced below:

"Rule 3-CENVAT credit Rules

3(1) A manufacturer or producer of final products or a provider of output service shall be allowed to take credit (hereinafter referred to as the CENVAT credit) of-

(2) xxxxxxxx

(3) xxxxxxxx

(4) The CENVAT credit may be utilised for payment of-

- (a) any duty of excise on any final product; or
- (b) an amount equal to CENVAT credit taken on inputs if such inputs are removed as such or after being partially processed; or
- (c) an amount equal to the CENVAT credit taken on capital goods if such capital goods are removed as such; or
- (d) an amount under sub-rule (2) of rule 16 of Central Excise Rules, 2002; or
- (e) service tax on any output service: "

14. It is, therefore, clear that availment of credit and utilisation of credit have been differently considered. Once credit of service tax/ excise duty is availed in terms of rule 3(1), it can be utilised for payment of excise duty on the final product/ or for payment of service tax on output service in terms of rule 3(4) of the 2004 Credit Rules.

15. This is what was observed by the Gujarat High Court in Pipavav Shipyard and the relevant portion of the judgment is reproduced below:

"45. The case of the appellant is that the Cenvat credit sought to be availed was reflected in the respondent's Monthly Return (ER-2) filed before the Central Excise Officer but not in the respondent's ST-3 Return to be filed before the jurisdictional Service Tax authorities. It is, therefore, contended that such credit should not be allowed to the respondent as an output service provider, since the criteria to qualify for Cenvat credit are purportedly different for a manufacturer and for an output service provider.

46. First, it may be noted that, contrary to what the appellant seeks to contend, the provisions governing the Cenvat credit on Excise duty paid on inputs or capital goods and on Service Tax paid on input services are contained only in the Cenvat Credit Rules, 2004 and the service tax law does not contain separate provisions for availing Cenvat credit. Likewise, whether a person is a manufacturer or a service provider or both, any Cenvat credit, whether in respect of excise duty or on Service Tax paid, is to be availed only under and in terms of the Cenvat Credit Rules, 2004.

47. The Rule 3 of the Cenvat Credit Rules, 2004 allows a manufacturer of the final product or a provider of taxable services to take Cenvat Credit of duty of excise paid on any input or capital goods received in the factory or premises and the Service Tax paid on any input services received by the manufacturer of final product or provider of output services. The said Rule 3 does not contain different criteria to qualify for Cenvat Credit for a manufacturer and for an output service provider. No other provision of the Cenvat Credit Rules, 2004 prescribes different criteria to qualify for Cenvat Credit for a manufacturer and for an output service provider. Moreover, the Cenvat Credit Rules, 2004 do not provide that Cenvat Credit can be disallowed if it is not reflected for ST-3 Return to be filed before the jurisdictional Service Tax authorities.

48. As is held by the CESTAT, the input service credit cannot be denied on the ground that it is shown in the ER-1 return instead of the ST-3 returns since the cross-utilization of credit of input and input service is permissible and Cenvat Credit on input, capital goods and input services used in the manufacturing goods or providing output service is available in common pool and Cenvat Credit taken during the period shown in ER-1 or ST-3 return would be the same and there is no restriction on utilization of the common input credit."

16. The same view was taken by the Bombay High Court in S.S. Engineers and the relevant portion of the judgment is reproduced below:

"3. Ordinarily an interpretation of a rule and in the light of a substantive legislation on Central Excise and Service Tax, would have raised a substantial question of law. However, we find that the Tribunal has arrived at a conclusion that the credit is admissible during the course of manufacture of the final product of duty paid on inputs as well as service tax on the input service availed of. While availing of that credit, the cross utilization is not ruled out, leave alone barred or prohibited. That is how Cenvat Credit Rules have been analyzed. Rule 3(1) of the Rules provides that the manufacturer or producer of final products or a provider of output service shall be allowed to take credit on various duties and that is the substantive provision in the rules. That is titled "Cenvat credit". That takes within its fold the duty of excise, other duties and service tax leviable under Section 66 of the Finance Act, 1994 and thereafter with effect from 18 April, 2006, service tax leviable under Section 66A of the said Act. If these are various duties of which credit can be availed of, then, further sub-rules as analyzed by the Tribunal in paragraph 5 do not suffer from any perversity. The only difficulty that may have been presented throughout was of scrutiny and verification of the accounts. The accounts are maintained in relation to payments of both levies. Even that does not present any difficulty once the Revenue has issued a circular to guide the officers. That circular, a copy of which is handed over to us and contained in the compilation at page 36, is dated 30 March, 2010. It is on the subject of cross-utilization of credit on inputs and input service. The Tribunal, therefore, has rightly come to the conclusion that there are certain restrictions on the utilization of particular type of duty and for that purpose it has relied on Rule 7 of Cenvat Credit Rules. A reference to that also does not vitiate the impugned order inasmuch as Rule 7 states that input service distributor may distribute the Cenvat credit in respect of the service tax paid on the input service to its manufacturing units or units providing output service, subject to the conditions stipulated therein. In such circumstances, the cross utilization of credit on goods and services being not covered by any restrictive provision, leave alone any prohibition or embargo, the Tribunal's order does not call for any interference. The interpretation placed on the Rule is a probable and a possible view. That cannot be termed as perverse. Further, there is no revenue deficit muchless any loss. Hence, we do not think that the appeal deserves to be entertained. It does not raise any substantial question of law. Hence, the appeal is dismissed with no order as to costs."

(emphasis supplied)

17. In view of the clear provisions of rules 3(1) and 3(4) of the 2004 Credit Rules and the aforesaid two judgments of the Gujarat High Court and the Bombay High Court in Pipavav Shipyard and S.S Engineers, it has to be held that the appellant could have cross-utilised the CENVAT credit and the finding to the contrary recorded by the Principal Commissioner cannot be sustained.

18. The impugned order dated 31.01.2022 passed by the Principal Commissioner is, accordingly, set aside and the appeal is allowed.

(Dictated and pronounced in open court)