
(2023) 04 CESTAT CK 0052

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Excise Appeal No.41704, 41705, 41706, 41707 Of 2013

M/s. CPC (P) Ltd

APPELLANT

Vs

Commissioner Of GST & Central Excise

RESPONDENT

Date of Decision : 28-04-2023

Acts Referred:

Finance Act, 1994 — Section 66, 66A, 93(1)

Citation : (2023) 04 CESTAT CK 0052

Hon'ble Judges : Sulekha Beevi C.S., Member (j);M. Ajit Kumar, Member (T)

Bench : Division Bench

Advocate : R. Balagopal, Anandalakshmi Ganeshram

Final Decision : Allowed

Judgement

Sulekha Beevi C.S., Member (J)

1. The issue involved in all these appeals being the same, were heard together and disposed by this common order.

2. Brief facts are that the appellants hold Central Excise registration as well as Service Tax registration. During the scrutiny of CENVAT documents, it was noticed that the appellant has availed input service credit attributable to the service tax paid to various CHA services in relation to their exports. The Notification No.41/2007-ST dated 06-10-2007 provides exemption from service tax on specified services, including CHA services by way of applying for refund of the service tax paid by exporter provided no CENVAT credit on the service tax paid is availed. It was noticed by the department that the appellant, instead of applying for refund of the service tax paid on CHA service tax had availed CENVAT credit of the same which was not eligible. Show cause notice was issued to the appellant to recover the wrongly availed CENVAT credit along with interest and also for imposing penalties. After due process of law, the original authority dropped the proceedings holding that the appellant is eligible to avail CENVAT credit. Against such order, the department filed appeals before the Commissioner

(Appeals) who set aside the order and allowed the appeals filed by the department holding that the appellants are not eligible to take the credit and should have applied for refund. Aggrieved by such order, the appellant is now before the Tribunal.

3. On behalf of the appellant, the learned Consultant Shri R. Balagopal appeared and argued the matter. It is submitted by the Ld. Consultant that as per clause (d) of proviso to para 1 of the Notification No.41/2007-ST, in order to claim refund, the assessee should not avail CENVAT credit. This condition would indicate that there is an option for the manufacturers either to avail credit or to claim refund. In the instant case, the appellants have availed the credit instead of claiming refund and therefore ought to be allowed.

4. To support his argument, the Ld. Consultant relied upon the decision in the case of Monarch Catalyst Pvt. Ltd Vs. CCE 2016 (41) STR 904 (Tri. Mumbai) and Save Industry Vs. CCE 2016 (45) STR 551 (Tri. Chennai). He prayed that appeals may be allowed.

5. Learned AR Ms. Anandalakshmi Ganeshram supported the findings in the impugned order.

6. For better appreciation, the relevant part of Notification 41/2007-ST dated 06.10.2007 is reproduced as under,

"Export of goods – Exemption from Service tax on specified taxable services used therein

In exercise of the powers conferred by sub-section (1) 93 of the Finance Act, 1994 (32 of 1994) and in supersession of the notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 40/2007-Service Tax, dated the 17th September, 2007 which was published in the Gazette of India, Extraordinary, vide number G.S.R. 601(E) dated the 17th September, 2007, except as respects things done or omitted to be done before such supersession, the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts the taxable services specified in column (3) of the Schedule (hereinafter referred to as specified services) received by an exporter and used for export of goods (hereinafter referred to as said goods), from the whole of the service tax leviable thereon under section 66 and section 66A of the said Finance Act, subject to the conditions specified in the corresponding entry in column (4) of the Schedule:

Provided that –

(a) the exemption shall be claimed by the exporter of the goods for the specified service received and used by the exporter for export of the said goods;

(b) the exemption claimed by the exporter shall be provided by way of refund of service tax paid on the specified services used for export of the said goods;

(c) the exporter claiming the exemption has actually paid the service tax on the

specified services;

(d) no CENVAT credit of service tax paid on the specified services used for export of said goods has been taken under the CENVAT Credit Rules, 2004;

(e) the said goods have been exported without availing drawback of service tax paid on the specified services under the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995;

(f) exemption or refund of service tax paid on the specified services used for export of said goods shall not be claimed except under this notification."

7. As per clause (d) of the proviso, it is seen that the manufacturer shall not avail CENVAT Credit if refund claim is filed under the said Notification. It implies that the manufacturer has an option to avail credit instead of filing the refund. The issue has been analysed by the Tribunal in the case of Monarch Catalyst Pvt. Ltd (Supra). The relevant paragraph reads as under:

"8. It is pertinent to mention that in para 15 of the order-in-original, the adjudicating authority has specifically held that the services of commission agent abroad is input services as the commission agent procured the orders for the appellant and thereafter the appellant manufactured the goods. For holding the services of commission agent abroad as input services, the adjudicating authority relied upon the decisions cited above and while reversing the findings, the Commissioner (Appeals) did not give any reasons as to why the decisions cited by the appellant are not applicable in the facts and circumstances of the present case. Further, we find that as per Notification 41/2007-S.T., dated 6-10-2007 as superseded by Notification 18/2009-S.T., dated 7-7-2009, the appellant has an option either to avail Cenvat credit or to claim refund and the appellant has chosen to claim Cenvat credit and this fact has been reflected in the records of the appellant also, but the respondent has never raised any objections all through. Earlier to the present audit, the department has conducted the audit on two occasions but the department never raised this issue.

9. Further, with regard to limitation, we are of the considered opinion that the entire demand is barred by limitation as there is no material placed on record by the department to show that the appellant has suppressed the material facts with intent to evade duty. On the other hand, the appellant has placed on record two audit reports conducted by the department, wherein certain other objections were raised, but this issue was never raised which is sought to be raised now by the present show cause notice dated 27-4-2011 for the period from April 2006 to June 2009 by invoking the extended period of limitation. Further, the appellant has been disclosing the payment of commission to foreign based agent in all their shipping bills and also in their periodical returns submitted to the department.

10. Therefore, keeping in view all the facts and circumstances and the definition of 'input services' as well as Notification No.18/2009-S.T. and the judgments

cited supra, we are of the considered opinion that the appellant is entitled to avail Cenvat credit in respect of commission paid to the commission agent based abroad and the impugned order is liable to be set aside and we allow the appeal by setting aside the impugned order with consequential relief, if any.”

(Emphasis supplied)

8. The very same issue was decided by the Tribunal in the case of Save Industry (Supra) also. From the above discussions, after appreciating the facts and following the decision of the Tribunal, we are of the considered opinion that the demand cannot sustain. The impugned order is set aside. The appeals are allowed with consequential relief, if any, as per law.