CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. IV

SERVICE TAX APPEAL No. 50898 of 2019

(Arising out of Order in Appeal No. 18 (SM) ST/JPR / 2019 dated 23.01.2019 passed by Commissioner (Appeals), Central Excise & Central Goods and Service Tax, Jaipur)

M/s. Ahlcon Parenterals (India) Ltd. **...Appellant**
SP-918, RIICO Industrial Area,
Bhiwadi (Raj.) 301019.

Versus

Commissioner of Customs, **....Respondent**
Central Excise & Central GST, Jaipur

APPEARANCE:
Mr. J.M. Sharma, Consultant & Ms. Pooja Agarwal, C.A. for the appellant
Ms.Tamanna Alam, Authorized Representative for the Respondent

CORAM : HON'BLE DR. RACHNA GUPTA, MEMBER (JUDICIAL)

Date of Hearing: **11/07/2022**

Date of Decision: **25/07/2022**

FINAL ORDER No. 50652/2022

DR.RACHNA GUPTA

The appellant herein is engaged in manufacture of medicaments. After receiving certain information, the Officers of preventive wing of Central Excise Division, Bhiwadi visited the factory premises of the appellant on 19.10.2013. During the course of examination of appellants' record they observed that appellant has entered into contracts with manpower recruitment and supply agencies namely M/s. Best Labour Services and M/s. Karamvir Contractor for providing contract labour to them with one of the conditions that the appellant shall reimburse the Service Tax

at the applicable rates to both the service providers. Proceedings were initiated in February 2012 by Central Excise Headquarter team, Jaipur-1 against both the said service providers alleging the wilful short-payment of service tax by them, that too, by suppressing the material facts. The appellant was observed by the investigating team to have availed Cenvat Credit of input services on the basis of supplementary invoices all dated 31.03.2012 issued by both the said contractors after the offense cases were detected against both the said service providers. The appellant was also observed to have taken and utilized the Cenvat Credit of the input services on the basis of said supplementary invoices for an amount of Rs.38,17,248/-. Alleging that the said availement of Cenvat Credit is in clear violation of Rule 9 (bb) of Cenvat Credit Rules, 2004 that the aforesaid amount was proposed to be disallowed and recovered from the appellant alongwith the interest and the appropriate penalties vide Show Cause Notice No.16053 dated 28.03.2017. The said proposal was initially confirmed vide Order-in-Original No.23/2017-18 dated 10.11.2017. The appeal thereof has been rejected vide Order-in-Appeal bearing N.18/2019 dated 23.01.2019. Being aggrieved the appellant is before this Tribunal.

2. I have heard Mr. J.M. Sharma Consultant and Ms.Pooja Agarwal, Chartered Accountant for the appellant and Ms.Tamanna Alam, Authorised Representative for the respondent.

3. It is submitted on behalf of the appellant that Rule 9 (bb) of Cenvat Credit Rules has wrongly been invoked by Commissioner (Appeals) for the reason that the proceedings had already initiated against both the service providers of the appellant at the stage of their investigation itself, the differential duty demanded from them was voluntarily paid by them. It is also submitted that in fact service providers used to raise two separate bills for providing the manpower services to the appellants during the period 2006-2007 to 2011-2012. The first bill was for reimbursement of actual wages including employees EPF and employees ESI paid to the workers. The service provider did not charge any service tax on such reimbursement and accordingly, the same was not paid by the appellant. The second bill used to be for service charges in respect of the services provided. Service Tax charged on this amount has always been paid by the appellant and Cenvat Credit thereupon has regularly been availed.

3.1 It is submitted that there has been a bonafide understanding with the service providers as well as the appellant that the reimbursable expenses are not to be included in the taxable values. Hence, the same was neither demanded by the service providers nor paid by the appellant. But the moment investigation was initiated against the service providers in the year 2012 that the service tax as demanded against the reimbursable expenses was also voluntarily paid by the service providers who later issued the supplementary invoices demanding the amount of service Tax from

the appellant. The same was duly paid and appellant, being the manufacturer, that the Cenvat Credit was accordingly availed. It is submitted that Commissioner (Appeals) has wrongly denied the availment of Cenvat Credit by the appellant on those supplementary invoices. Demand to that extent is alleged to be wrong. Ld. Counsel has relied upon the decision of this Tribunal Chennai Bench in the case of **Hitech Manpower Consultant Pvt. Ltd. vs. Commissioner of GST & Central Excise reported in 2019 (5) TMI 159 – CESTAT, Chennai**. It is further submitted that in the proceedings against the service providers the adjudicating authority has set aside the penalties under section 76, 77 and 78 of the Finance Act for the reason that there was no intention to evade the duty with the service providers. It is submitted that in view of said findings the confirmation of violation of rule 9 (bb), under which availment of Cenvat credit on supplementary invoices is not available only in case of wilful intent to evade the duty, has wrongly been invoked by Commissioner (Appeals). The order accordingly, is prayed to be set aside and appeal is prayed to be allowed.

4. Per contra, ld. DR has laid emphasis upon the findings in para 7.6 of the order under challenge. It is impressed upon that suppression of facts has clearly been held as against the appellant. The cogent reasons are very much available in the order itself or those findings. Impressing upon no infirmity in the order under challenge, the appeal is hereby prayed to be dismissed.

5. After hearing the rival contentions of the parties and perusing the entire record, I observe and hold as follows:-

The Commissioner (Appeals) has confirmed the impugned demand against the appellant on following three counts:-

(1) That appellant cannot take Cenvat Credit of service tax on the strength of supplementary invoices issued by the service providers.

(2) Cenvat Credit is availed based upon such supplementary invoices which were raised by those service providers who short paid the service tax with *mala fide* intent.

(3) The appellant suppress the fact of availment of Cenvat Credit on the strength of supplementary invoices.

5.1 With respect to first ground of rejection, I observe that Rule 3 (1)of Cenvat Credit Rules, 2004 is relevant to ascertain about who can avail the Cenvat Credit. It reads as follows:-

Rule 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 C#ENVAT credit) of –

(i) - (xi)……..

(xi) (i) any input or capital goods received in the factory of manufacture of final product or by the provider of output service on or after the 10th day of September, 2004; and

(ii) any input service received by the manufacturer of final product or by the provider of output services on or after the 10th day o September, 2004.

5.2 The Rule clarifies that credit can be availed by manufacturer of final product for any input service received by him. In the present case apparently and admittedly, appellant is the manufacturer of medicaments. The contract labour was received for the said manufacture by two manpower recruitment supply agencies. Hence the services received from said agencies are nothing but the input service for the appellant being used in manufacture of his final product. Thus, it stands clear that appellant was entitled for availment of Cenvat credit.

5.3 As far as second ground of rejection by Commissioner (Appeals), I observe that in the present case, there is no dispute about availment of Cenvat Credit by the appellant on the amount of initial invoices which was for service charges in respect of providing manpower services to the appellant. The dispute is only with respect to the Cenvat Credit availed on the amount of service tax which was paid for certain reimbursable amounts which were demanded by the service providers by way of supplementary invoices due to the reason that an investigation had initiated against them in February, 2012 denying them the exemption from the tax liability towards the reimbursable amounts. Since the service providers had voluntarily paid the said duty demand that

they issued the supplementary invoices to the appellants claiming the amount of tax liability already discharged by them.

5.4 The issue with regard to non-payment of service tax on the reimbursable expenses of the salary/ wages of the contract labours received by the service providers of manpower recruitment agencies from their service recipients had travelled upto Hon'ble Apex Court wherein it got settled by the decision in the case of **Union of India and Anr. Vs. M/s. Intercontinental Consultants and Technocrats Pvt. Ltd. reported as 2018 (3) TMI 357 (S.C.)**. Hon'ble Apex Court therein has held as per Section 67 (un-amended prior to 1st May, 2006) or after its amendment w.e.f. 1st May, 2006 the only possible interpretation of the said section 67 is that for the valuation of taxable services for charging service tax, the gross amount charged for providing such taxable services only has to be taken into consideration. Any other amount which is not for providing such taxable service cannot be the part of the said value. It was clarified that the value of service tax cannot be anything more or less than consideration paid as quid pro quo for rendering such services. Accordingly, it was held that section 67 of Finance Act, 1994 do not allow inclusion of reimbursable expenses in valuation of service rules. Hon'ble Apex Court also observed that it is only by virtue of Rule 5 of Cenvat Credit Rules that the expenses which are incurred while rendering the services and were reimbursed i.e. for which the service receiver has made payment to the assessee were brought

within the sweep of taxable amount / the value of taxable service. Rule 5 came into effect from May, 2014 to 2015 the Hon'ble Apex Court vide the aforesaid decision has held that since this amendment has brought a substantive change to section 67 it has to be prospective in nature. From this observation and keeping in view that the period of dispute in the present case is the period prior to May,2015 I hold that the appellant as well as its service providers were rightly under the bonafide belief that there is no service tax liability as far as the reimbursable part of the salary/ wages is concerned. This Tribunal in the case **M/s. Hitech Manpower (supra)** while relying upon the decision of Apex Court in the case of **M/s. Intercontinental Consultants (supra)** has held that Section 67 of Finance Act, 1994 dealing with valuation of taxable services, does not include reimbursable expenses for providing such expenses for the period prior to 14.05.2015 when Rule 5 of Service Tax Rules was amended.

5.5 As far as third ground of rejection recorded by Commissioner (Appeals) is concerned i.e. the issue of taking Cenvat credit on supplementary invoices is also no more *res-integra*. For appreciating these observations in the light of Rule 9 (1) (bb), it is foremost important to first see the rules which read as follows:-

a. *That the Rule 9 (1) (bb) of the CENVAT Credit Rules, 2004 reads as under;*

   "[9(1)(bb) a supplementary invoice, bill or challan issued by a provider of output service, in terms of the provisions

of Service Tax Rules, 1994 except where the additional amount of tax became recoverable from the provider of service on account of non-levy or non-payment or short-levy or short-payment by reason of fraud or collusion or wilful misstatement or suppression of facts or contravention of any of the provisions of the Finance Act or of the rules made there-under with the intent to evade payment of service tax;]"

6. The conjoint reading of the above discussion with this Rule makes it abundantly clear that a recipient of input service who otherwise is a manufacturer is entitled to take Cenvat credit based upon the supplementary invoices also. As already discussed above, there was no malafide intent on the part of the appellant nor even on the part of his service providers, there can be no question of misstatement or suppression of facts. It is not the case of department that anywhere provision of Finance Act/ Rules has been violated with an intent to evade duty. Nor there is any evidence about any act on part of appellant or even on the part of service provider. Hence it becomes clear that the case of appellant do not fall within the exception mentioned in rule 9 (1) (bb). Hence, I hold that Commissioner (Appeals) has committed an error while relying upon this rule to deny the availment of Cenvat Credit by the appellant on supplementary invoices. This Tribunal in the case of Madras Cements Ltd. vs. Commissioner of Central Excise, Trichy reported as 2010 (258) ELT 463 has held that supplementary invoices on the strength of which disputed credit was taken cannot be an in-eligible document. The restriction

contained under Rule 9 (1) (b) when there is no intentional evasion of duty.

7. Coming to the last ground of decision of Adjudicating Authority, it is observed that the entire amount of service tax along with interest as agreed by the service providers in their statements dated 21/03/2012 was deposited by the service provider voluntarily that too before Adjudication. The Adjudicating Authority has appropriated the said amount. After noting the said facts, the Adjudicating Authority has not imposed any penalty under section 76, 77 and 78 of the Finance Act, 1992. Section 78 of the Finance Act provides for imposition of penalty due to suppression of facts or contravention of provision of law on part of the assessee with the intent to evade payment of duty etc. As already observed above that the service tax liability was duly discharged by the appellant and by the service provider with reference to the amount charged for providing manpower and that there is no denial about the same. It has also been appreciated that there was decision of Hon'ble Apex Court declining reimbursable expenses to form the part of taxable value. Therefore, the proviso to Rule-9(1)(bb) containing exclusion clause cannot be pressed into service to deny CENVAT Credit against supplementary invoices. Above all, Commissioner (Appeals) himself has set aside the penalty as was imposed under section 78 of Finance Act observing no malafide on part of the appellant. Confirmation of demand still relying upon section 9 (1) (bb) is therefore held wrong.

8. I further observe that neither the SCN nor the impugned Order-in-Original dated 04.12.2017 alleges that the invoices were not genuine, the services were not received or the same were not utilized in the manufacture of dutiable final product. Mere fact that the differential amount of service tax was paid by the service provider on being pointed out by central excise officers doesn't establish that the service tax was short paid or was not paid by reason of fraud, suppression, misstatement etc. with an intent to evade the payment of service tax.

9. Otherwise also CBEC vide Master Circular No. 1053/02/2017-CX dated 10/03/2017 has clarified the circumstances where extended period can be invoked. Relevant portion of the said circular is reproduced below for ready reference -

> *"3.2 Ingredients for extended period: Extended period can be invoked only when there are ingredients necessary to justify the demand for the extended period in a case leading to short payment or non-payment of tax. The onus of establishing that these ingredients are present in a given case is on revenue and these ingredients need to be clearly brought out in the Show Cause Notice alongwith evidence thereof. The active element of intent to evade duty by action or inaction needs to be present for invoking extended period."*

10. Since the Commissioner (Appeals) himself has not imposed any penalty under section 78 upon the appellants allegation of

malafide intent of service provider or even of the appellant is not sustainable. Also it is apparent that the Department was fully aware of the fact of availment of Cenvat Credit on the basis of supplementary invoices as the Department had conducted inquiry in this respect against the service provider of the appellants in the year 2012 and in the year 2013 even against the appellants. Even the statements of supply chain manager of the appellant, Shri Mahipal Bhisht was got recorded in 2013 itself. The issuance of Show Cause Notice in the year 2017 is apparently beyond the reasonable time for issuing the same. At least it stands clear that fact of availment of Cenvat credit on disputed supplementary invoices was in the notice of the Department since the year 2012-2013. The Department is not entitled to invoke the extended period of limitation.

11. In view of entire above discussion, three of the grounds based whereupon, the entitlement of the appellant to avail Cenvat credit has been denied are hereby set aside. The order under challenge is, therefore, set aside. Consequent thereto appeal stands allowed.

[Pronounced in the open Court on 25.07.2022]

(DR.RACHNA GUPTA)
MEMBER (JUDICIAL)

Anita