CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

SERVICE TAX APPEAL NO: 87185 OF 2015

[Arising out of Order-in-Original No: 13/ST/NGP-II/2015/C dated 25th June 2015 passed by the Commissioner of Central Excise, Customs & Service Tax, Nagpur – II.]

Seven Hills Constructions
Flat No. 403, Acharaj Tower-II, Chaoni Sadar
Nagpur – 440013 … ***Appellant***

Versus

Commissioner of Central Excise, Customs & Service Tax
Nagpur – II
Telangkhedi Road, Civil Lines, Nagpur - 440001 ***…Respondent***

APPEARANCE:

Shri H G Dharmadhikari, Advocate for the appellant

Shri Dilip Shinde, Assistant Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: A /86124 /2022

DATE OF HEARING: 06/06/2022
DATE OF DECISION: 29/11/2022

PER: C J MATHEW

In this appeal against order-in-original no. 13/ST/NGP-

II/2015/C dated 25th June 2015 of Commissioner of Central Excise, Customs & Service Tax, Nagpur-II, M/s Seven Hills Constructions impugns three separate recoveries of ₹71,68,563, ₹46,51,560 and ₹81,87,083; the latter two, totaling ₹1,28,38,643, under authority of rule 14 of CENVAT Credit Rules, 2004 for being credit held as ineligible on two separate counts even as availment of depreciation under Income Tax Act, 1961 was assailed as breach in common while the first arose from failure to discharge tax liability on ₹6,95,97,698 earned for rendering of taxable service for the period from 1st April 2009 to 30th September 2009 for which section 73 of Finance Act, 1994 has been taken recourse to.

2. The appellant is a provider of 'mining services' that was legislated as liable to tax with effect from 1st June 2007 by incorporation of

> *'(zzzy) to any person, by any other person in relation to mining of mineral, oil or gas;*

in section 65(105) of Finance Act, 1994 for which the appellant, however, acquired registration only on 3rd October 2008. According to the appellant, tax liability of ₹ 54,88,998 on ₹ 5,32,90,496 that had been received by them was discharged by three separate payments amounting to ₹32,62,611 between 4th December 2009 and 1st April 2010 and by debiting of ₹22,26,387 with the non-compliance regularized by 29th

April 2010 upon filing of returns in accordance with procedure as prescribed despite which further payment of ₹16,79,565 was also made on 10th December 2010 on insistence of service tax authorities well before issue of show cause notice on 14th October 2013.

3. The recovery of credit availed on procurement of capital goods – tippers – from M/s Navanit Motors Pvt Ltd pertained to ten invoices issued by the latter in January 2008 without the issuer registered as 'dealer' and without details therein of duty that was paid by the manufacturer, M/s Manforce Motors Ltd, in addition to four others issued by the manufacturer on 'tippers' sourced in February 2008. The other recovery was held as liable on account of two 'excavators' obtained in September 2006 and January 2008 from M/s Telco Construction Equipment Co Ltd, six 'tippers' sourced from M/s Asia Motor Works Ltd in February 2008 and five 'tippers' from M/s Volvo India Pvt Ltd in March 2008 in all of which the party was referred to as M/s Seven Hills Construction, Seoni and Wani Area, WCL Chandrapur even as registration was taken for address at Nagpur.

4. Though it is on record that the appellant herein had furnished written reply to notice, denial of opportunity to be heard in person, owing to casual approach to that facet of adjudication, has been raised in the grounds of appeal. We do have reason to believe that the outcome of the process has been impacted by impropriety in fixing of,

as well as in communicating, the dates of hearing.

5. According to Learned Counsel for appellant, the Tribunal has, in *Excel Consultancy v. Commissioner of Central Excise, Bhopal [2010 (19) STR 665 (Tri-Del)]*, held that

> *'6. The dispute is limited to five bills for a total amount of service charges of Rs. 1,04,153/- involving service tax of Rs. 11,358/-. From the order of the Commissioner (Appeals), it is clear that the Commissioner (Appeals) has not held that the disputed amount of service charges have been received by the appellants. The service tax liability is obviously subject to realisation of the service charges. Merely because bills have been received by the appellant and the said bills have been reflected in the books of accounts, the service tax is not payable unless the amount is realised.'*

and that

> *'4. After hearing both sides and perusing the case records, we are of the view that in terms of the said Rule 6(1) of the Service Tax Rules, 1994, the amount of tax payable by the appellants is to be calculated on the basis of payments received in the preceding month. The tax amount cannot be calculated on the basis of value of services shown on accrual basis in the profit and loss account. Secondly, where the appellants have not collected service tax separately from their clients, the value of services received from such clients has to be taken as value plus tax and accordingly, a bifurcation has to be done to determine the tax amount payable on such receipts. Since a detailed exercise is required to determine the tax liability in respect of the*

> *appellants keeping in view these two principles stated above, we set aside the impugned order and remand the matter to the original authority for fresh calculation of the tax amount. The appellants shall be given an adequate opportunity of hearing before passing a fresh order. The appellants are directed to fully cooperate with the original authority and furnish to him all the related documents to enable him to compute the tax liability in terms of the principles laid down by us above. The determination of penalty and applicability of extended period of time shall be determined afresh by the original authority after quantifying the tax amounts and after adjusting the tax amounts already paid.'*

in *Turret Industrial Security Pvt Ltd v. Commissioner of Central Excise & Customs, Jamshedpur [2008 (9) STR 564 (Tri-Kolkata)]* which suffice to establish that the computation of undischarged liability in the impugned order is erroneous. In this context, he also highlighted the observations of the Tribunal in *Evergreen Supplies v. Commissioner of Central Excise, Mangalore [2008 (9) STR 467 (Tri-Bang)]*.

6. Drawing our attention to the invoices for the 'tippers' that allegedly did not include the details of duty discharged, Learned Counsel has furnished the corresponding documents issued by the manufacturer. It was pointed out by him that despite taking note of the reversal of depreciation availed on the capital goods, the adjudicating authority has stretched his jurisdictional reach to render the finding that no evidence of revision of returns filed under Income Tax Act,

1961 having been accepted has been furnished. According to him, the decision of the Tribunal in *Spandana Spoorthy Financial Ltd v. Commissioner of Central Excise & Service Tax, Hyderabad [2016 (45) STR 265 (Tri-Hyd)]*, in *Prudential Process Mgmt. Services (I) (P) Ltd v. Commissioner of Service Tax, Mumbai Zone-II [2016 (42) STR 764 (Tri-Mumbai)]*, in *Hinduja Global Solutions Ltd v. Commissioner of Central Excise, Service Tax & Customs, Bangalore-I [2016 (42) STR 932 (Tri-Bang)]* and *C Metric Solutions Pvt Ltd v. Commissioner of Central Excise, Ahmedabad [2012 (28) STR 460 (Tri-Ahmd)]* have settled several issues relating to technical nature of procedure for availment of CENVAT credit including admissibility of credit of tax/duty discharged on 'input service'/ 'inputs' before being registered as provider of 'output service' and discrepancy in address in the related invoices.

7. According to Learned Authorized Representative, the impugned order has applied the relevant statutory provisions correctly and that the decisions of the Tribunal in *Securipax India Pvt Ltd v. Commissioner of Central Excise, NOIDA [2004 (175) ELT 212 (Tri-Del)]*, *Simplex Mills C Ltd v. Commissioner of Central Excise, Ahmedabad [1998 (102) ELT 201 (Tribunal)]* and of the Larger Bench in *Spenta International ltd v. Commissioner of Central Excise, Thane [2007 (216) ELT 133 (Tri-LB)]* have ruled on ineligibility of credit in such circumstances. He contends that the decision of the

Hon'ble High Court of Karnataka in *Commissioner of Central Excise & Service Tax v. Suprajit Engineering Ltd [2010 (253) ELT 69 (Kar)]* is abundantly clear on the ineligibility for credit while having availed depreciation for the purposes of Income Tax Act, 1961 and that framework of interpretation has been elaborated upon by the Hon'ble Supreme Court in *Krishi Upaj Mandi Samiti v. Commissioner of Central Excise and Service Tax, Alwar [2022-TIOL-15-SC-CX]*.

8. The decisions of the Tribunal cited by Learned Authorized Representative pertain to credit availed by manufacturers and the criticality of establishing that the capital goods/'inputs' did arrive at the place of manufacture as well as of utilization in the manufacturing process. The present dispute relates to provider of service and it surely cannot be the case of service tax authorities that services are required to be rendered only at the registered premises; hence the relative insignificance of registration as merely technical that is not critical to entitlement for credit. In view of the submission that depreciation has been foregone in the revised returns filed by the appellant under Income Tax Act, 1961, the decision of the Hon'ble High Court of Karnataka does not impact the case set forth by the appellant.

9. The adjudicating authority has failed to consider the altered paradigm consequent upon notification of Point of Taxation Rules, 2011 by which the regime of taxation of receipts was substituted by

taxation of accruals. The impugned order has also failed to take into consideration the liability discharged by the appellant; settled law on such compliance must be given effect to. The contention of the appellant that depreciation claimed earlier has since been revised and appropriate changes made in returns under Income Tax Act, 1961 should have been considered in the light of judicial decision without exceeding the jurisdictional competence of the adjudicating authority for insisting upon acceptance of the same by authorities empowered under that statute.

10. The adjudicating authority is required to consider the evidence furnished by the appellant that duty liability having been discharged on 'tippers' sourced by them, as now placed on record, before concluding that the credit availed therein is ineligible.

11. The decisions cited on behalf of the appellant make it clear that registration is not relevant in the absence of evidence of non-utilization of the capital goods in rendering of 'output service' and of eligibility to credit even f the address on invoices is other than the registered one. That should apply to all capital goods procured after the said service was made taxable.

12. The impugned order is, thus, bereft of findings based on law, as enacted and judicially determined, applied to the facts put forth by the assessee and requires re-determination. To enable this, we set aside

the impugned order and remand the matter back to the original authority for fresh disposal of show cause notice after granting opportunity to assessee to make submissions on all issues. Appeal is accordingly disposed off.

(Order pronounced in the open court on 29/11/2022)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*