CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH - COURT NO. 1

Service Tax Appeal No. 1681 of 2010

(Arising out of Order-in-Original No.029/2010-Commr.LTU dated 22.04.2010 passed by the Commissioner of Central Excise and Service Tax-LTU, Bangalore.)

M/s. Hewlett Packard India Sales Pvt. Ltd.,
No.24, Salarpuria Arena,
Hosur Main Road, Adugodi,
Bengaluru – 560 030.

Appellant(s)

VERSUS

The Commissioner of Service Tax, LTU,
JSS Towers,
100 feet Ring Road,
Banashankari – III Stage,
Bengaluru 560085.

Respondent(s)

APPEARANCE:

Mr. Syed Peeran and Ms. Megna Lal, Advocates for the Appellant

Mr. Dyamappa Airani, Jt. Commissioner(AR) for the Respondent

CORAM: HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)
HON'BLE MRS R BHAGYA DEVI, MEMBER (TECHNICAL)

Final Order No. 20630 /2024

DATE OF HEARING: 12.02.2024
DATE OF DECISION: 09.08.2024

PER : DR. D.M. MISRA

This is an appeal filed by the appellant against the Orders-in-Original No.029/2010-Commr.LTU dated 22.04.2010 passed by the Commissioner of Central Excise & Service Tax-LTU, Bangalore.

2. Briefly stated the facts of the case are that the appellant are engaged in providing taxable service viz. 'Business Support Services', 'Maintenance or Repair Services' and 'Commercial Coaching and Training Services' etc. during the relevant period. On the basis of the Central Excise Revenue Audit on scrutiny of their records, it revealed that they had availed inadmissible cenvat credit amounting to Rs.2,03,69,372/- during the period from September 2004 to November, 2006 on inputs which were not used in providing the output services but were removed from the registered premises "as such" for the purpose of trading activity. The amount equivalent to the cenvat credit availed on such goods being not admissible, later they have voluntarily reversed the cenvat credit availed during the March 2007 by taking recourse to Rule 6(3) of the Service Tax Rules, 1994 by adjusting erroneously paid service tax to the extent of Rs.2,89,78,046/- on output services which were exported in terms of Rule 6(3) of Service Tax Rules, 1994. Consequently, a show-cause notice was issued to them on 15.06.2009 for recovery of the said cenvat credit amount along with interest and penalty. On adjudication, the demand was confirmed with interest and penalty. Hence, the present appeal.

2.1 At the outset, the learned advocate for the appellant has submitted that it is an undisputed fact that they had erroneously paid service tax on services exported to overseas clients amounting to Rs.2,89,78,046/- which the Department has

accepted as refundable under Section 11B of the Central Excise Act, 1944. He has submitted that it is a settled law that where excess duty / tax has been paid, the same should be adjusted against short-payment in respect of other taxable events. In support, he relied upon the judgment in the case of CCE, Hyderabad Vs. Divya Enterprises Ltd. [2003(153) ELT 497 (SC)]; General Manager, Telecom, BSNL Vs. CCE, Raipur [2015(38) STR 1182 (Tri.-Del.)]. Further, he has submitted that not allowing adjustment of short-payment of tax with excess payment would go against the provisions of Article 265 of the Constitution of India. In support, he referred to the following judgements:

i. ***Dell India Pvt. Ltd. Vs. CST, Bangalore*** [2016(42) STR 273 (Tri. Bangalore)]
ii. ***General Manager (CMTS) Vs. Commissioner*** [2014(36) STR 1084 (Tri.)]
iii. ***Chola Business Services Ltd. Vs. CST, Chennai*** [2017(47) STR 192 (Tri. Chennai)]

2.2. Further, the learned advocate has submitted that the appellant had paid Rs.2,89,78,046/- on export of services which they are eligible to claim refund and instead of adjusting the said amount against the liability of Rs.2,03,69,372/- by way of filing refund claim under Section 11B of the Central Excise Act, 1994 would be a additional procedure which is against the spirit of provisions relating to adjustment of excess payment. In support, he has referred to the following decisions:-

i. ***Nirma Architects & Valuers Vs. CCE, Ghaziabad*** [2006(1) STR 305 (Tri. Del.)]
ii. ***B4U Television Network (I) P. Ltd. Vs. CST, Mumbai*** [2014(35) STR 88 (Tri. Mumbai)]

iii. ***CCE&ST, Hyderabad-II Vs. State Bank of Hyderaba***d [2016(43) STR 415 (Tri. Hyd.)]

2.3. The appellant further submitted that the issue involved in the present case is revenue neutral; hence there is no intention to evade payment of duty. Further they have submitted that during the period in question, there is no mechanism to recover credit pertaining to inputs cleared as such under rule 3(5) of Cenvat Credit Rules, 2004 as neither Section 73 of the Finance Act, 1994 nor Rule 14 of the Cenvat Credit Rules, 2004 specifically contemplated for such recovery; only by virtue of Notification No.3/2013-CE(NT) dated 01.03.2013 w.e.f. 01.03.2013 and amended further, the recovery provision has been inserted only w.e.f. 01.03.2013 and not before that. Therefore, in the absence of recovery provision, the direction to recover the amount is bad in law. In support, they referred to the following judgments:-

i. ***GKN Driveline (India) Ltd. Vs. CCE, Delhi-III*** [2023(9) TMI 1131 – CESTAT Chandigarh]
ii. ***Udaipur Cement Works Ltd. Vs. CCG&ST*** [2019(11) TMI 610 – CESTAT, New Delhi]
iii. ***Haver Ibau India Pvt. Ltd. Vs. CCE&ST*** [2023-TIOL-1007-CESTAT-AHM]
iv. **Ericsson India Pvt. Ltd. Vs. CCE, Jaipur** [2019(3) TMI 776 – CESTAT, New Delhi]

2.4. Further, they have submitted that the demand is barred by limitation since there had been continuous communication between the appellant and the Department about the adjustment of the excess service tax paid since February 2007 and the show-cause notice has been issued on 15.06.2009 after they have discharged the amount of Rs.46,84,505/- by way of

interest i.e. after about 2 years from the date of occurrence of the event. Therefore, the demand is barred by limitation. In support, they have referred to the following decisions:

i. ***CCE Vs. Manuelsons Wood Industries*** [2007(210) ELT 230 (Tri. Bang.)]
ii. ***Highland Dye Works Pvt. Ltd. Vs. CCE*** [2000(121) ELT 502]; affirmed by Supreme Court 2006(198) ELT A66 (SC).
iii. ***RAD MRO Manufacturing Pvt. Ltd. Vs. CCE*** [2010(258) ELT 235 (Tri. Bang.)]
iv. ***Mordi Textiles and Processors Ltd. Vs. CCE, Jaipur-II*** [2013(293) ELT 686 (Tri. Del.)]

Consequently, no interest and penalty to be leviable against the appellant.

3. Learned AR for the Revenue reiterated the findings of the learned Commissioner.

4. Heard both sides and perused the records.

5. The short question involved in the present appeal is whether

(i) the adjustment of outstanding inadmissible credit of Rs.2,03,69,372/- against excess payment of service tax Rs.2,89,78,046/- under Rule 6(3) of the Service Tax Rules, 2004 is permissible; and

(ii) the recovery could be effected by invoking larger period of limitation?

6. The undisputed facts are that the appellant paid service tax amounting to Rs.2,89,78,046/- on various export services which they were not liable to pay in view of the Export of Service

Rules, 2005. Also, it is an admitted fact that they have availed cenvat credit on inputs which are cleared as such without reversal of the credit amounting to Rs.2,03,69,372/-, which was confirmed in the impugned order. Before proceeding to analyse the applicability of the relevant Rule 6(3) of the Service Tax Rules, 2004, the same needs to be reproduced, which reads as below:-

> *Rule 6(3) Where an assessee has paid to the credit of Central Government service tax in respect of a taxable service, which is not so provided by him either wholly or partially for any reason, the assessee may adjust the excess service tax so paid by him (calculated on a pro rata basis) against the service tax liability for the subsequent period, if the assessee has refunded the value of taxable service and the service* tax thereon to the person from whom it was received.

7. A plain and simple reading of the same makes it clear that in the event, the assessee pays service tax in respect of a taxable service which is not paid by either wholly or partially for any reason, he may adjust the service tax so paid by him against the service tax liability for the subsequent period. Therefore, it is clear that the assessee is allowed to adjust service tax excess paid against the service tax liability for the subsequent period. Whereas in the present case, the appellant had erroneously availed cenvat credit of Rs.2,03,69,972/- and sought to adjust against service tax paid on export of services previously which cannot be considered as an adjustment of service tax relating to service tax liability for the subsequent period. However, we find that erroneous availment of cenvat credit under Rule 3(5) of the Cenvat Credit Rules, 2004 could be

recoverable only after insertion of the recovery provision to the said Rule by insertion of an Explanation through amending Notification No.3/2013-CE(NT) dated 01.03.2013 as amended only w.e.f. 01.03.2013. The said explanation reads as under:-

> ***Cenvat Credit Rules, 2004 — Amendment***
>
> *In exercise of the powers conferred by section 37 of the Central Excise Act, 1944 (1 of 1944) and section 94 of the Finance Act, 1994 (32 of 1994), the Central Government hereby makes the following rule to amend the CENVAT Credit Rules, 2004, namely :-*
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> *1. (1) These rules may be called the CENVAT Credit (Amendment) Rules, 2013.*
>
> *(2) They shall come into force on the date of their publication in the Official Gazette.*
>
> *2. In the CENVAT Credit Rules, 2004 (hereinafter referred to as the said rules), in rule 3, after the proviso to sub-rule (5B), the following shall be inserted, namely :-*
>
> *"Explanation. - If the manufacturer of goods or the provider of output service fails to pay the amount payable under sub-rules (5), (5A), and (5B), it shall be recovered, in the manner as provided in rule 14, for recovery of CENVAT credit wrongly taken."*
>
> *[Notification No. 3/2013-C.E. (N.T.), dated 1-3-2013]*

Therefore, recovery of the said cenvat credit by the learned Commissioner is erroneous. This principle has been laid down by the Tribunal in the case of ***Ericsson India Pvt. Ltd***., which later followed in ***GKN Driveline (India) Ltd***. (supra), which reads as:-

> *12. After considering the submissions of both the parties and perusal of material on record, we find that the appellant as per the normal commercial practice in the automobile industry has made a provision for writing off the cenvat credit on inputs as per Rule 3(5B) of the Cenvat Credit Rules, 2004. During the audit, the department was of the view that the appellant is required to reverse Cenvat Credit availed on inputs which were written off as per Rule 3(5B) of the Cenvat Credit Rules.*
>
> *13. Further, we find that during the relevant period, there was no recovery mechanism under Rule 3(5B) of the Cenvat Credit Rules and the explanation which was*

introduced vide Notification No. 3/2013 dated 01.03.2013 was from 01.03.2013 vide which it was provided that if the manufacturer of goods or the provider of output service fails to pay the amount payable under sub-rules (5), (5A), and (5B), it shall be recovered, in the manner as provided in rule 14, for recovery of CENVAT credit wrongly taken. This recovery mechanism introduced from 01.03.2013 cannot be made applicable from the retrospective date and it can be only prospective and this issue was considered in various decisions cited (supra) by the Tribunal wherein it was held that when there was no recovery mechanism before 01.03.2013, therefore, no recovery can be affected and accordingly the present proceedings initiated under Rule 14 of Cenvat Credit Rules read with Rule 3(5B) of the Cenvat Credit Rules is liable to be dropped. 14. It is pertinent to note that the identical issue was considered by the Division Bench of the Tribunal in the case of Ericsson India Pvt. Ltd. cited (supra) wherein the Tribunal has held as under:-

> *"7. Having considered the rival contentions, we find that the issue is one of interpretation. We further find that for reversal of cenvat credit on partial writing down of value of inputs , the provision was introduced only first time by amendment of Rule 3(5B) of Cenvat Credit Rules, with effect from 01.03.2011. Further, there was no provision prior to 01 March 2013 for recovery of cenvat credit and interest thereon under Rule 3(5B) etc. which was made applicable with effect from 01.3.2013 only, by virtue of Notification No. 3 of 2013-CE(NT) dated 01.03.2013. The notification provides that if the manufacturer of goods or the provider of output service fails to paythe amount payable under sub-rule (5), (5A) and (5B), it shall be recovered, in the manner as provided in Rule 14, for recovery of CENVAT credit wrongly taken. 8. Learned Counsel have also pressed the ground that as they were not required to reverse the cenvat credit on partial writing down the value of inputs, prior to 01.03.2011, accordingly, we hold that as there was no such legal requirement. The learned Counsel also prays that they are entitled to refund, already reversed credit on account of partial writing down of value, prior to 01.03.2013. 9. In this view of the matter, we hold that the issue has arisen due to change of opinion on the part of the Revenue, but there is no suppression of facts on the part of the appellants. Further, we find that no amount was due to be reversed under rule 3(5B) on the date*

> *of issue of show cause notice. Accordingly, we hold that larger period for limitation cannot be invoked and no show cause notice was required to be issued. Accordingly, we hold that impugned order is not sustainable, and is set aside. Appeal is allowed with consequential relief. In this view of the matter, we set aside the demand, penalty and interest"*
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> *Though the Revenue has filed appeal against the decision before the Hon'ble High Court of Rajasthan, but no stay has been granted by the Hon'ble High Court.*

8. Further, we find that the Department was aware of the adjustment of the inadmissible cenvat credit against the excess service tax paid since February 2007 as communications have been exchanged between the appellant and Department resulting to payment of interest in March, 2009; and the show-cause notice was issued on 15.06.2009 i.e. after two years; thus invocation of extended period of limitation alleging suppression of fact cannot be sustained.

9. In the result, the impugned order is set aside and appeal is allowed.

(Order pronounced on 09.08.2024)

(D.M. MISRA)
MEMBER (JUDICIAL)

(R BHAGYA DEVI)
MEMBER (TECHNICAL)

Raja……..