NEUTRAL CITATION
2019:GUJHC:30384-DB

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/TAX APPEAL NO. 140 of 2019

With
CIVIL APPLICATION (FOR STAY) NO. 1 of 2019
In R/TAX APPEAL NO. 140 of 2019

FOR APPROVAL AND SIGNATURE:

HONOURABLE MS.JUSTICE HARSHA DEVANI

and
HONOURABLE MR. JUSTICE BHARGAV D. KARIA

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

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THE PRINCIPAL COMMISSIONER
Versus
M/S ALEMBIC LTD

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Appearance:
MR ANKIT SHAH(6371) for the Appellant(s) No. 1
for the Opponent(s) No. 1

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CORAM: **HONOURABLE MS.JUSTICE HARSHA DEVANI**
and
HONOURABLE MR. JUSTICE BHARGAV D. KARIA

Date : 12/04/2019

ORAL JUDGMENT
(PER : HONOURABLE MR. JUSTICE BHARGAV D. KARIA)

1. Revenue has filed this appeal under section 35G of the Central Excise Act, 1944 read with section 174(2) of the Central Goods and Service Tax Act, 2017 raising the following question of law stated to be substantial question of law from Final order No. 12229-12232/2018 dated 23.10.2018 rendered in Appeal No.ST/10018/2018 passed by the Customs and Service Tax Appellate Tribunal (CESTAT), Western Zonal Bench, Ahmedabad ("the Tribunal" for short):

   "Whether the Final Order passed by CESTAT can be said to be an order passed in accordance with law wherein the Tribunal has granted relief without taking congnizance of the provisions of the Rule 6(1) of Cenvat Credit Rules, 2004 on admissibility of Cenvat credit, Rule 6(2) of Cenvat Credit Rules, 2004 regarding maintenance of separate records for providing taxable service and exempted service, and the procedures to be followed under the provisions of Rule 6(3) of the CCR, 2004 when failed to maintain separate records for taxable and exempted services and also not taken into cognizance the Rule 2(1) of Cenvat Credit Rules 2004 pertains to "input service".

2. The respondent was engaged in providing taxable services within the meaning of the Finance Act, 1994 including construction of residential complex, commercial or industrial complex, special services provided by builders, renting of immovable property, maintenance and repair services, business support services, etc. The respondent was registered with Service tax department and also availing the facility of Cenvat credit as per Cenvat Credit Rules, 2004 ("the Rules" for short).

3. The respondent had paid service tax under works contract service category for the residential units sold to various customers from time to time. On 24.7.2014, the residential project of the respondent was awarded completion certificate and as on date of obtaining such completion certificate, approximately 32% of the residential apartments remained unsold for which no bookings were made. Therefore, whenever such property would be sold in future, no service tax would be payable thereon. The respondent had given due intimation to jurisdictional service tax authorities that they shall be availing only proportionate Cenvat credit on input services received by them after obtaining completion certificate, on the basis of square feet area, which suffered the levy of service tax as compared to the area which was converted into immovable property and on which no service tax would be paid.

4. Thereafter, during the course of audit conducted by service tax authorities, the respondent was compelled to reverse Cenvat credit amounting to Rs.1,17,68,904/- which the respondent reversed under protest towards the proportionate Cenvat credit availed by it during the period 2010-2011 till obtaining completion certificate, at which time output service activity of the respondent was wholly taxable on the ground that after receipt of completion certificate, the property had become immovable property and in case of future sale thereof, no service tax would have been payable and credit in proportion to “area which did not attract Service Tax” compared to the entire property area.

5. The respondent thereafter, filed a refund claim of Rs.1,17,68,904/-, of Cenvat credit reversed, which was paid under protest as no show cause notice was issued by the revenue authorities in this regard.

6. However, subsequently the revenue authorities issued show cause notice demanding 6%/8%/10% amount of sale of immovable property after obtaining completion certificate on the ground that no service tax was paid by the respondent and that it had availed Cenvat credit and provided taxable as well as exempt services i.e. sale of immovable property and it had not maintained separate accounts and the amounts paid under protest for input services received during the period 2010 till obtaining completion certificate for Rs.1,17,68,904/-, was sought to be appropriated against such demands. The Commissioner of service tax confirmed such demands against the respondent under rule 6 of the Rules. The refund claim of the respondent was also rejected and such rejection of refund came to be upheld by the appellate authority on the ground that such credit was correctly reversed and was not required to be refunded.

7. The respondent therefore, being aggrieved by the order passed raising the demand under rule 6 of the Rules as well as rejection of the refund claim by the revenue authorities preferred appeal before the Customs, Excise & Service Tax Appellate Tribunal, West Zone, Ahmedabad (hereinafter referred to as the Tribunal"). The Tribunal allowed the appeal of the respondent.

8. Learned Advocate for the appellant submitted that the Tribunal has committed an error in holding that the respondent was justified in availing only proportionate Cenvat Credit considering square foot area where service tax was paid and balance area where service tax will not be paid after completion certificate contrary to Rule 6(2) and 6(3) of the Rules. It was submitted that after holding that after receiving completion certificate the output activity was 'non-service' as per provisions of section 65B of the Finance Act,1994 read with definition of term 'exempted service under Rule 2(e) of the Rules, the Tribunal has erred in allowing the availment of Cenvat Credit to the respondent on proportionate basis. It was further submitted that the Tribunal has not considered the provisions of Rule 6(1) of the Rules on admissibility of Cenvat Credit read with Rule 6(3) of the Rules regarding maintenance of separate records for providing taxable service and exempted service and also not taken into consideration Rule 2 (l) of the Rules pertaining to "input service' in proper perspective.

9. The Tribunal has considered the question whether the respondent was liable to reverse any portion of the Cenvat credit availed by them after receipt of completion certificate for the projects, since thereafter, they will not be discharging service tax liability on properties sold thereafter, where no advance was received prior to receipt of completion certificate at all. The Tribunal found that the respondent was paying service tax in case of properties which were not yet sold by way of sale deed even after obtaining completion certificate, however, where advances

were received for such properties prior to the date of obtaining such completion certificate, the Tribunal noted that the respondent availed only proportionate Cenvat credit determined on scientific basis considering square foot area where service tax was paid and balance area where service tax will not be paid after completion certificate, the respondent had not only given due intimation in this regard at the time of obtaining completion certificate but also produced CA certificate to support their case in this regard. The Tribunal therefore, framed the following legal issues :

"a. Whether receipt of consideration for residential units sold as immovable property after receipt of completion certificate amounts to providing exempted service and Rule 6 of the CCR, 04 is applicable in such case and as such, whether the Appellants are liable to pay 8%/10% amount of exempted value under Rule 6 of the CCR, 04?

b. Whether Credit can be allowed to the Appellants under Rule 3 of the CCR, 04 in such circumstances?

c. Whether the Appellants can be said to have "maintained proper separate accounts" as required under Rule 6 of the CCR, 04?

d. Whether the Appellants are required to reverse Cenvat Credit availed during the period when output service was taxable before receipt of Completion Certificate, since such services were availed to construct entire property, and portion of such property did not attract Service Tax after receipt of Completion Certificate?

e. Connected to the question (d), whether the Appellants are eligible to seek refund of the amount paid under protest towards Credit availed from 2010 till receipt of completion certificate, based on CERA audit objection wherein such credit was sought to be reversed based on considering square foot area where Service Tax was paid and balance area where Service Tax will not be paid after

Completion Certificate."

10. The Tribunal after considering the facts of the case and relevant provisions of the Act arrived at following conclusion:

"a. For the above reasons, the Appellants are not liable to pay 8%/10% amount of value of service became exempted after receipt of completion certificate under Rule 6 of the CCR.

b. The Cenvat Credit on input services received after obtaining Completion Certificate cannot be wholly allowed to the Appellant, and since they had availed only proportionate credit by maintaining separate accounts, the same is therefore sufficient compliance of the legal obligation cast upon them.

c. The Appellants can be said to have "maintained proper separate accounts" as required under Rule 6 of the CCR, 04, having availed credit only to the extent input services in taxable activity, on the scientific basis after obtaining Completion Certificate.

d. The Appellants are not required to reverse Cenvat Credit availed during the period when output service was wholly taxable before receipt of Completion Certificate, in accordance with law.

e. Connected to (d) above, the Appellants are eligible to seek refund of the amount paid under protest towards Credit availed from 2010 till receipt of completion certificate, based on CERA audit objection wherein such credit was sought to be reversed based on considering square foot area where Service Tax was paid and balance area where Service Tax will not be paid after Completion Certificate, in accordance with law."

11. In order to understand the controversy in proper perspective it would be necessary to refer to Rule 2(e) of the Rules which defines the term "exempted service" and

reads as under :

"e. "exempted service" means a-

(1) taxable service which is exempt from the whole of the service tax leviable thereon; or

(2) service, on which no service tax is leviable under Section 66B of the Finance Act; or

(3) taxable service whose part of value is exempted on the condition that no credit of inputs and input services, used for providing such taxable service, shall be taken;

[but shall not include a service -

(a) which is exported in terms of rule 6A of the Service Tax Rules, 1994

(b) by way of transportation of goods by a vessel from customs station of clearance in India to a place outside India.]"

Upon receipt of completion certificate for the projects, the output activity of sale of residential units becomes "non -service" as per the provisions of section 65B(44) of the Finance Act, 1994 which reads as under:

"65(44) "service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include -

(a) an activity which constitutes merely -

(i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or

(ii) such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of article 366 of the Constitution; or

(iii) a transaction in money or actionable claim"

12. For the purpose of invoking provisions of Rule 6 of the Rules in facts of the present case, the output service must first be exempt from service.

"6. [(l) The CENVAT credit shall not be allowed on such quantity of input as is used in or in relation to the manufacture of exempted goods or for provision of exempted services or input service as is used in or in relation to the manufacture of exempted goods and their clearance upto the place of removal or for provision of exempted services and the credit not allowed shall be calculated and paid by the manufacturer or the provider of output service, in terms of the provisions of sub-rule (2) or sub-rule (3), as the case may be :

Provided that the CENVAT credit on inputs shall not be denied to job worker referred to in rule 12AA of the Central Excise Rules, 2002, on the ground that the said inputs are used in the manufacture of goods cleared without payment of duty under the provisions of that rule.

Explanation 1.-For the purposes of this rule, exempted goods or final products as defined in clauses (d) and (h) of rule 2 shall include non-excisable goods cleared for a consideration from the factory.

Explanation 2,-Value of non-excisable goods for the purposes of this rule, shall be the invoice value and where such invoice value is not available, such value shall be determined by using reasonable means consistent with the principles of valuation contained in the Excise Act and the rules made thereunder.

Explanation 3.- For the purposes of this rule, exempted services as defined in clause (e) of rule 2 shall include an activity, which is not a 'service' as defined in section 65B(44) of the Finance Act, 1994 (provided that such activity has used inputs or input services."

13. From the above provisions, it is clear that with effect from 13.4.2016, Explanation 3 was amended specifically dealing with a situation as in the present case, where a deeming fiction was created that for the purposes of Rule 6 of the Rules, exempted services as defined in clause (e) of rule 2 shall include an activity, which is not a service as defined in section 65B(44) of the Finance Act, 1994 provided that such activity has used inputs or input services. However, there was no such stipulation prior to 13.4.2016 in law and prima facie, such situation was not to be treated as exempted service and did not attract the mischief created under rule 6 of the Rules. Therefore, for the period prior to 13.4.2016, the situation would be governed by rule 3 of the Rules for availing Cenvat Credit till such time i.e. till the time rule 6 was specifically made applicable by virtue of the deeming fiction created.

14. As per rule 3 of the Rules, Cenvat credit of service tax paid on input services used to provide output service, is eligible. In the facts of present case, it is evident that the respondent has started taking only proportionate credit after receipt of completion certificate which was after due intimation to the revenue department and also certified by independent CA. Therefore, rule 6 of the Rules in toto cannot apply prior to 13.4.2016 to the facts of the case since sale of immovable property is not exempt service at all. Therefore, in the light of the provisions of Rule 3 of the Rules, respondent cannot avail full Cenvat credit on input services received after obtaining completion certificate. Hence, the respondent cannot be expected to pay an amount equal to 8%/10% of sale price of immovable

property after obtaining such completion certificate where no service tax is paid as if it is sale of immovable property since Rule 6 of the Rules per-se does not apply to the present case until 13.4.2016 at all.

15. Even after 13.4.2016, since the respondent had availed only proportionate credit, the respondent was not legally required to pay 8%/10% amount under rule 6(3) of the Rules, since it can be said to have maintained separate accounts as required under rule 6(2) of the Rules. As respondent has taken only proportionate credit on input services after receipt of completion certificate, duly backed by CA certificate and certified work sheets for the proportionate credits availed after completion certificate, it has fulfilled its obligation under Rule 3 of the Rules read with Rule 6 thereof and therefore, no liability to pay any amount equal to 8%/10% of the sale price of immovable property can be fastened after receipt of completion certificate under Rule 6 of the Rules. While the law does not intend to allow any undue benefit to a service provider in terms of Cenvat credit of service tax paid on input services used in providing non-taxable output activity, however, once it is legally and validly availed, the same cannot be denied and/or recovered unless specific provisions exist for the same and credit entitlement is on the date of receipt of inputs when the output activity was wholly dutiable and merely because the finished goods eventually became exempt later on, the credit availed on inputs which were contained in semi-finished/finished goods state was held as not deniable.

16. The Tribunal therefore, on a harmonious reading of

Rule 3 of the Rules read with Rules 6 and 11(4) of the Rules held that eligibility/entitlement to credit has to be examined only at the time of receipt of input service and once it is found to be availed at a time when output service is wholly taxable, and the said credit is availed legitimately, the same cannot be denied and/or recovered unless specific machinery provisions are made in this regard. Sub-rule (7) of Rule 4 of the Rules held that the assessee is not required to wait till output service is sold to the service recipient and the assessee can take the credit immediately after the day on bill/challan of input service is received. In facts of the case, there is no dispute that the respondent availed the credit after receipt of bill/challan in respect of input service and, therefore, it was legally entitled to take the credit on the date after the receipt of service bills/challans. Therefore, the availment of Cenvat credit by the respondent is absolutely legal and correct and in accordance with Rule 4(7) of the Rules. As at the time of taking credit, there was no existence of any exempted service, therefore, there is no application of Rule 6. That part of the service was exempted only after obtaining completion certificate and thereafter, the respondent was not required to avail the Cenvat credit on the input service, if any, received after obtaining the completion certificate. The respondent did not avail the Cenvat credit in respect of the services received after obtaining the completion certificate in respect of exempted service or avail proportionate credit attributed to the taxable output service. Therefore, Rule 6 has application for the period after obtaining the completion certificate. Rule 11(1)(2) and (3) of the Rules applicable to provision for manufactured

goods to hold that in case of service becomes exempted at a later stage, there is no such provision in respect of the service. The only provision for the service is provided under sub-Rule (4) of Rule 11 of the Rules which reads as under :

"11(4). A person provider of output service shall be required to pay an amount equivalent to the CENVAT credit, if any, taken by him in respect of inputs received for providing the said service and is lying in stock or is contained in the taxable service pending to be provided, when he opts for exemption from payment of whole of the service tax leviable on such taxable service under a notification issued under Section 93 of the Finance Act, 1994(32 of 1994) and after directing the said amount from the balance of CENVAT credit, if any, lying in his credit, the balance, if any, still remaining shall lapse and shall not be allowed to be utilized for payment of duty on any excisable goods, whether cleared for home consumption or for export or for payment of service tax on any other output service, whether provided in India or exported."

17. From the above sub-rule (4), it is clear that even if an output service provider avails the credit and output service becomes exempted in such case the credit only in respect of inputs lying in stock or is contained in taxable service is required to be paid whereas there is no provision for payment of Cenvat credit equivalent to the input services used in respect of exempted service. Therefore, Cenvat credit availed in respect of input service is not required to be paid back under any circumstances and therefore, the respondent was not legally required to reverse any credit which was availed by them during the period 2010 till obtaining completion certificate i.e. during the period when output service was wholly taxable in their hands, merely because later on, some portion of the property was

converted into immovable property on account of receipt of completion certificate and on which no service tax would be paid in future.

18. The Tribunal therefore, rightly held that once the respondent are not required to reverse any credit availed by them on valid input services availed during the period 2010 till obtaining of completion certificate, the said amounts reversed by them under protest cannot be retained by the revenue authorities and have to be refunded to the respondent.

19. In the light of the aforesaid discussion, it is not possible to state the Tribunal has committed any legal error so as to warrant interference. No question of law, as proposed or otherwise, much less, substantial question of law, can be stated to arise out of the impugned order of the Tribunal. The appeal is, accordingly dismissed with no order as to cost. No order on Civil application as appeal is dismissed.

(HARSHA DEVANI, J)

(BHARGAV D. KARIA, J)

RAGHUNATH R NAIR