

Vijayanand Roadlines Ltd. Vs. the Commissioner of Central

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT

Decided On : Dec-26-2006

Reported in : (2006)(105)ECC437

Judge : S Peeran, J T T.K.

Appellant : Vijayanand Roadlines Ltd.

Respondent : The Commissioner of Central

Judgement :

1. This appeal has been filed against the Order-in-Appeal No. 177/2005 dated 09.09.2005 passed by the Commissioner of Central Excise (Appeals) Mangalore. The Revenue proceeded against the appellants on the ground that they had exceeded the limit of utilization of credit under Rule 3(5) of Service Tax Credit Rules, 2002. The adjudicating authority confirmed the demand of Rs. 3,01,932/- along with interest and imposed penalty of Rs. 100/- per day under Section 76 of the Chapter V of the Finance Act, 1994. On appeal, they were not successful. The Commissioner (Appeals) held that the availment of credit in terms of Rule 3(5) to the extent of 35% of amount payable has to be made with reference to periodical liability. Consequently an effective restriction was imposed, as a result of which accumulated credit cannot be used beyond 35% of the amount payable for each month/quarter when such payment is due. He has observed that Rule 4(1) of the Credit Rule does not come to the rescue of appellant overriding the restriction accepted by them in terms of Rule 3(5). Hence he upheld the order of the lower authority.

3. Shri M.S. Nagaraja, learned Advocate appeared for the appellants and Shri K. Sambhi Reddy, learned JDR appeared for the Revenue.

4. The learned Advocate urged the following points: (i) The appellants had accumulated Input Service Tax Credit of Rs. 16,46,949/- on their input service from 14.5.2003 to 31.3.2004. They had not utilized the credit for payment of service tax from May 2003 to November 2003, but had paid the entire service tax in cash.

However, they utilized the accumulated Input Service Credit of Rs. 4,94,494/- (which is 35% of the total service tax of Rs. 14,12,842/- payable on output service from May 2003 to March 2004) for payment of service tax for the period from November 2003 to March 2004. The appellants submit that the utilization of service tax credit was thus only to the extent of 35% of the total service tax payable on the out put service from May 2003 to March 2004.

(ii) The learned Advocate took us through the relevant provision, namely Rule 3(5) of the Service Tax Credit Rules, 2002 and submitted that the above rule does not specify that 35% of the credit should be used on each occasion of payment of Service Tax or otherwise the credit would lapse. In the absence of any specific time frame incorporated in Rule 3(5) within which the input service credit is to be utilized, the restriction is on the extent of utilization of the credit vis-a-vis payment of service tax on output services.

(iii) It is settled law that the credit is indefeasible and there is no time limit within which the credit is to be utilized. So long as the utilization of the input service credit does not exceed 35% of the service tax payable on out put service, there is no violation of Rule 3(5) of the Service Tax Credit Rules, 2002.

(iv) CBEC through Circular No. 77/7/2004-ST dated 10.3.2004 2004 (165) ELT T21 has clarified that the input service tax credit can be utilized only to the extent of 35% of the total service tax payable on all the taxable out put services. The Board has not laid down any restriction or clarified the utilization of 35% of the credit is on each occasion of payment of service tax on out put service monthly or quarterly as the case may be.

(v) The Rule 6(3) of the Service Tax Rules, 1994 provides that the assessee may adjust excess Service Tax paid by him against the Service Tax liability for the subsequent period. Since adjustment of service tax payable itself is specifically permissible in law, the utilization of input service credit cannot be said to be limited to each month/quarter as held by the Commissioner (Appeals). The Commissioner (Appeals) has extrapolated the law to deny the benefit of input service credit. The following decisions in respect of Modvat/Cenvat credit are relevant: (a) CCE, Pune v. Dai Ichi Karkaria Ltd. (b) Shankeshwar Fabrics Pvt. Ltd. v. Union of India 2002 (142) ELR 42 (Raj.) Padhman Herbal Care (P) Ltd. v. CCE, Pondicherry 2004 (175) ELT 536 (T-Che.) (vi) Section 76 applies only when any person liable to pay service tax fails to pay such tax. When there is no dispute as to payment of service tax, and the issue is only with regard to utilization of the credit for payment of service tax, the provisions of Section 76 are not attracted. Consequently the imposition of penalty is not justified. The learned Counsel relied on the Tribunal decision rendered in the case of RB Bahutule v. CCE, Mumbai wherein it was held that the Section 76 of the Finance Act, 1994 applies to a person who fails to pay service tax including persons who fail to pay such tax for any period of time beyond due date.

(vii) The appellants were under bonafide belief that they could utilize the credit at any time so long as the credit was utilized to the extent of 35% of the service tax payable. Show cause notice does not allege that there was any intention to evade payment of service tax. Therefore, there is no cause for imposition of penalty.

(viii) Interest is liable to be paid only when there is a delay in payment of service tax under Section 78. The appellants have paid the service tax in terms of Section 78 of the Finance Act, 1994.

Since there is no provision of Section 68, the demand of Interest under Section 78 is not correct in law. The same deserves to be set aside.

5. The learned JDR reiterated the findings in the impugned Order-in-Appeal.

6. We have gone through the provisions of "Service Tax Credit Rules 2002". The above mentioned rules have been made in exercise of the powers conferred by

Clause (ee) of Sub-section (2) of Section 94 of the Finance Act, 1994 (32) of 1994). These rules are similar to Cenvat Credit Rules. In case of the goods, the duty paid on the inputs, can be taken as Cenvat credit. The credit so taken can be utilized for payment of duty on the goods manufactured and cleared from the factory. If the final products are exempted, no input credit is allowed. The Service Tax Credit Rules, 2002 are similar to the Cenvat Credit Rules. The Service Tax Credit Rules, 2002 have been superseded by the Cenvat Credit Rules, 2004 with effect from 09.9.2004. Presently both the goods and services are covered by the Cenvat Credit Rules 2004. Just as Cenvat credit is taken on the inputs, the service tax paid on input service can be taken as credit and the credit so accumulated can be utilized for payment of service tax on output service in terms of Service Tax Credit Rules 2002. In case a service provider avails credit on any input service and renders such output services which are chargeable to service tax as well as exempted, then the service provider is required to maintain separate accounts for receipt and consumption of input service meant for taxable output service and non-taxable (exempted) output service. However, there is a provision under Rule 3(5) of the Service Tax Credit Rules, 2002 by which the service provider can opt not to maintain separate accounts. In such circumstances, what are his obligations? In order to understand the same, we are reproducing the Rule 3(5) of Service Tax Credit Rules, 2002 herein below: (5) In case the service provider opts not to maintain separate accounts of input service meant for consumption in relation to rendering of such output services which are chargeable to service tax as well as exempted services or non-taxable services, he shall be allowed to utilize service tax credit for payment of service tax on any output service only to the extent of an amount not exceeding thirty five percent of the amount of service tax payable on such output service.

A careful reading of the above provisions show that when the service provider does not maintain a separate accounts of input service for taxable and non-taxable output service, there is a restriction on utilization of the credit. As per the above rule, the utilization is restricted to 35% of the amount of service tax payable on such out put service. At any point of time, the service provider can arrive at his liability which is service tax payable on his output service. He should calculate 35% of his liability. From out of the accumulated credit, he has allowed to utilize up

to 35%. There is no indication that the service tax credit accumulated during the earlier period would lapse.

In other words, there is no question of lapse of the credit legally taken. In the present case, from May 2003 to March 2004, even though the appellant had input credit available, he chose to pay tax only through PLA. As on November 2003, he had accumulated credit to the tune of Rs. 3,01,932/-. However, for the period from November 2003 to March 2004, the payment was done mostly by utilization of credit. In the month of March 2004, a part of the liability was paid by PLA and another part by utilization of credit. In other words, the total tax paid from December 2003 to March 2004 by utilizing the credit comes to Rs. 4,94,494.00. This is actually equal to 35% of their liability from May 2003 to March 2004. There is no rule which says that the credit accumulated during the month should be used in the same month. In fact no time frame has been fixed in the rules. In these circumstances, the utilization of credit to the extent of Rs. 4,94,494/- during December 2003, January 2004, February 2004 and March 2004 is in order and in consonance with Rule 3(5) of the Cenvat Credit Rules, 2002. The statement showing availment and utilization of input credit by the appellants is also incorporated in this order for proper appreciation of facts: STATEMENT SHOWING AVAILMENT AND UTILISATION OF INPUT SERVICE CREDIT FOR DISCHARGE OF SERVICE TAX ON OUTPUT SERVICE DURING THE PERIOD MAY 2003 TO MARCH 2004

Period	Input Credit Availed	Service Tax payable on output service	Input Credit available for utilisation for payment of service tax (35% of (c))	Service Tax paid through PLA	Credit Utilized	Accumulated Credit available for Utilisation	(f) + (d) - (9)
Rs.	Rs.	Rs.	Rs.	Rs.	Rs.	Rs.	Rs.
(a)	(b)	(c)	(d)	(e)	(g)	(f)	
14.5.2003 to 31.5.2003	42402.92	96249.00	33687.00	96249.00	NIL	33687.00	June 2003
66991.24	119596.00	41859.00	119596.00	NIL	75546.00	July 2003	75512.59
144706.00	50647.00	144706.00	NIL	126193.00	August 2003	126466.82	
117150.00	41002.00	117150.00	NIL	167195.00	September 2003	123984.92	
126067.00	44120.00	126067.00	NIL	211318.00	October 2003	166697.40	
129801.00	45430.00	129801.00	NIL	256748.00	November 2003	158534.49	
129097.00	45184.00	129097.00	NIL	301932.00	December 2003	82764.38	
144480.00	50568.00	NIL	144480.00	208020	January 2004	361252.17	138166.00
48358.00	NIL	138166.00	118212	February 2004	180606.97	124273.00	43496.00

NIL 124273.00 37435 March 2004 261734.65 143257.00 50140.00 55682.00
87575.00 NIL GRAND TOTAL 16,46,949/- 14,12,842/- 4,94,494/- 4,94,494/- -- In
fine, we allow the appeal with consequential relief. There is no question of
imposition of any penalty. Since the appellants have discharged the duty liability
correctly, no interest also can be levied.

(Operative portion of the has been pronounced in the open court on completion of
hearing)

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