

Cce Vs. Adishiv Forge P. Ltd. and ors.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Ahmedabad

Decided On : Dec-18-2007

Reported in : (2008)9STR534

Judge : V T M.

Appellant : Cce

Respondent : Adishiv Forge P. Ltd. and ors.

Judgement :

1. These appeals are by the Department and they involve common issues and therefore are being disposed of by a common order.

2. Heard the Id. DRs on behalf of the Department and Shri P.V. Sheth, Id. Advocate appearing for some of the respondents.

a. The service tax for the services of "goods transport operator" was introduced in the year 1997 and initially by rules, the recipients of the services were required to pay the service tax, which was challenged and the Hon'ble Supreme Court in the case of Laghu Udyog Bharti 1999 (112) ELT 365 (SC) did not uphold the provisions relating to recovery of service tax from the recipients.

b. Subsequently, the law was retrospectively amended by the Finance Act, 2003. Section 68(2) read with service tax rules enabled recovery of service tax from the recipients of services.

c. The respondents availed the services of goods transport agency; in some cases, they paid the service tax as deemed service providers; they have taken credit of the service tax so paid by them as credit and utilized them towards discharging liability of payments of both service tax and excise duty.

d. The Original Authority held that the service tax paid by them as deemed service provider cannot be treated as tax paid on input service for them. He therefore held that service tax so paid is not permissible as credit under Rule 3(4) of the Cenvat Credit Rules, 2004. He disallowed varying amounts of credit taken as service tax and ordered recovery of interest. He also imposed penalties of varying amounts on the respondents under Rule 15 of the Cenvat Credit Rules.

e. The Commissioner (Appeals) disagreed with the findings of the Original Authority that the input service availed by the respondents was not related to output GTA services. He accordingly held that there was no restriction on utilization of cenvat credit availed by the respondents towards payment of service tax on GTA services.

4. Ld. Advocate appearing for the respondents submitted that they are receiving the services of goods transport agencies; even though for the purpose of paying service tax they are deemed to be service providers, they do not cease to be recipients of services. He also submitted that in respect of dispatches made by the respondents, they, in some cases, pay the freight and consequently pay the service tax. For paying such service tax, they have utilized the credit of service tax paid by them on the input services. They are maintaining separate accounts in respect of credit taken on input services, which is different from the accounts maintained for credit taken on inputs and capital goods.

Therefore he submits that Commissioner (Appeals)' order allowing them cenvat credit is legal and proper. He also relies on the decisions of the Tribunal in the case of *India Cements v. CCE, Salem* 2007 (7) STR 569 (Tri. Chennai) and in the case of *CCE, Nagpur v. Visaka Inds. Ltd.* 2007 (8) STR 231 (Tri. Mumbai).

5. Ld. DRs reiterate the findings of the Original Authority and seek restoration of the orders of the original authority.

6.2. The relevant portion of a sample order of the original authority relating to appeal by M/s. Adishiv Forge P. Ltd. is reproduced below: I have carefully gone into the merits of the case and find that the said assessee has utilized the Cenvat Credit towards payment of service tax which is not admissible to them. The definition/explanation of input service given under Rule-2(L) of Cenvat Credit Rule, 2004 has been given as "input service" means any service- (i) used by a provider of taxable service for providing an output service, or (ii) used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products from the place of removal, Similarly the meaning of output service as per Rule-2(p) given as 'output service' means any taxable service provided by the provider of taxable service, to a customer, client, subscriber...as the case may be, and the expressions 'provider' and 'provided' shall be construed accordingly; The explanation has been given for the removal of doubt that if a person liable for paying service tax does not provide any taxable service or does not manufacture final product, the service for which he is liable to pay service tax shall be deemed to be output service. In the present case, assessee is the manufacture of final product, hence GTA services, where he a deemed service provider & paying the service tax, will be treated as input service for him.

As per Rule-3(4) of Cenvat credit Rules, 2004, credit may be utilized for payment of- (a) any duty.... (b) an amount.... (c) an amount.... (d) an amount under Sub-rule(2)...and (e) service tax on any output service.

In view of the above, I find that even if the said assessee considered as a deemed output service provider in terms of Rule 2(p) and 2(r) *ibid*, the input service credit which they utilized towards payment of service tax on the service received by them from goods transport agencies cannot be considered as their input service since the same is not being permissible as per the Rule 3(4) of Cenvat Credit Rules, 2004 since it could not be treated as output service for the assessee. Thus I find that the said assessee wrongly availed and utilized credit for the reasons as discussed *supra*. Therefore such credit required to be disallowed and recovered under Rule 14 of Cenvat Credit Rules read with Section 73 of the said act alongwith interest under Section 75 of the said act. As the said assessee wrongly

utilized the credit, they rendered themselves liable for penal action under Rule 15 of the Cenvat Credit Rule, 2004. In the light of the above fact, I pass the order as follow.

6.3. The order of the original authority lacks clarity on certain relevant facts. It is not clear as to whether the credit has been taken by the respondents in respect of service tax paid by them in relation to incoming consignments or for outgoing consignments as well. It is not clear whether the credit taken on input services is sought to be denied for utilization in respect of service tax paid in relation to outgoing consignments of finished goods.

6.4. It would be appropriate to reproduce Section 68(2) of the Finance Act, 1994, definition 2(d)(v) in Service Tax Rules, 1994, the definitions of input service and output service from Cenvat Credit Rules, 2004: Section 68(2):- Notwithstanding anything contained in Sub-section (1), in respect of any taxable service notified by the Central Government in the official gazette, the service tax thereon shall be paid by such person and in such manner as may be prescribed at the rate specified in Section 66 and all the provisions of this Chapter shall apply to such person as if he is the person liable for paying the service tax in relation to such service.

Rule 2(d)(v):- in relation to taxable service provided by a goods transport agency, where the consignor or consignee of goods is,- a. any factory registered under or governed by the Factories Act, 1948 (63 of 1948); b. any company (formed or registered under the Companies Act, 1956 (1 of 1956); d. any society registered under the Societies Registration Act, 1860 (21 of 1860) or under any law corresponding to that Act in force in any part of India; f. any dealer of excisable goods, who is registered under the Central Excise Act, 1944 (1 of 1944) or the rules made thereunder; or g. any body corporate established, or a partnership firm registered, by or under any law, any person who pays or is liable to pay freight either himself or through his agent for the transportation of such goods by road in a goods carriage.

(i) used by a provider of taxable service for providing an output service, or (ii) used by the manufacturer, whether directly or indirectly, in or in relation to the

manufacture of final products and clearance of final products from the place of removal, and includes services used in relation to setting up, modernization, renovation or repairs of a factory, premises of provider of output service or an office relating to such factory or premises, advertisement or sales promotion, market research, storage upto the place of removal, procurement of inputs, activities relating to business, such as accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry, and security, inward transportation of inputs or capital goods and outward transportation upto the place of removal; (p) "output service" means any taxable service provided by the provider of taxable service, to a customer, client, subscriber, policy holder or any other person, as the case may be, and the expressions 'provider' and 'provided' shall be construed accordingly; 6.5. All these respondents are manufacturers of excisable goods and registered accordingly with the excise authorities. They are also registered with the excise authorities as service tax assessees. They received various raw materials from different persons and for the said purpose they use the services of goods transport agency. In respect of such receipts, the freight may be paid either by the consignors or the consignees who are the respondents. If the freight was paid by the consignor of the raw materials, naturally the consignors are required to pay the service tax. If the freight was to be paid by the consignees (the respondents), in respect of freights paid on such consignments, the service tax has been paid by the respondents. In respect of service tax on the freight paid for receiving inputs/raw materials, the service tax paid whether by the consignor or by the respondents as consignees they are eligible to take credit of the service tax paid.

6.6. The respondents are dispatching their finished goods to various consignees either from the factory gate or from their depots which are considered as "place of removal". The freight may be paid either by the respondents as consignors or by the recipient of the finished goods who will be consignees. In cases where the freight is paid by the respondents as consignors they are required to pay the service tax. But such service tax relates to output services. The said output services are rendered only by the goods transport operators/agencies. The respondents are required to pay service tax only as consignors and that does not make them as providers of goods transport services and therefore the question of

their taking credit does not arise. The credit of service tax paid by the respondents as consignors shall be available to the consignees of the finished goods. In the case where the respondents do not pay the freight the question of their paying service tax did not arise and the same shall be paid by the consignees and the credit shall be available to the consignees of the finished goods as their input service credit.

6.7. The respondents are playing two major roles. Undoubtedly, they are recipients of services under the category of goods transport agencies.

The Section 68(2) and the rules made there under shifts the responsibility of paying the service tax on them. Because of this deeming provision which made them responsible for paying the tax, they do not cease to be recipient of services. For the purpose of cenvat credit, the duty paid by them that deemed service provider should be treated as tax paid on input services and should be extended the benefit of cenvat credit. In other words, the goods transport service in relation to receipt of inputs in the factory has to be considered as input service. Whether the service tax was paid by the consignor of the inputs or by the respondents does not make any difference in so far as eligibility for credit of the duty paid. The nature of input service does not undergo a change merely because the tax is paid by the recipient. Similarly, merely because the respondent pays the service tax in respect of goods transport services availed for dispatching their goods to various consignees, the service does not become input service and they do not become service providers.

6.8. The Tribunal in the case of M/s. India Cements has taken similar view, which is reproduced below: 3. After examining the provisions of the Cenvat Credit Rules, 2004, we come across an Explanation to the definition of "output service" under Rule 2(p), which reads as under: Explanation. - For the removal of doubts it is hereby clarified that if a person liable for paying service tax does not provide any taxable service or does not manufacture final products, the service for which he is liable to pay service tax shall be deemed to be the output service.

Admittedly, the appellants did not provide any taxable service, though they did manufacture an excisable product. Again, it is not in dispute that they were liable

to pay service tax on GTA Service received by them in connection with clearance of their product from factory. But for the above Explanation, the GTA Service so received by the appellants would have been covered under the definition of "input service" under Rule 2(l) of the aforesaid Rules. By virtue of the Explanation, it shall be deemed to be "output service". In other words, the appellants, while paying service tax on GTA Service availed in connection with removal of their final product from factory, were doing so on an "output service" and, therefore, they were entitled to utilize, for payment of service tax on such service, credit of the tax paid on the input GTA service availed by them in connection with receipt of inputs, into their factory.

Apparently, learned Commissioner lost sight of the above Explanation to the definition of "output service".

7.1. The other issue relates to applicability of the Notification No.32/2004-ST dt.3/12/2004 effective from 1/1/2005. According to the above notification, the service tax on GTA services are payable on a value which is 25% of the freight amount paid i.e. after availing 75% abatement. To avail the benefit, a condition requires to be fulfilled.

The condition is that cenvat credit should not have been availed on the GTA services. The restriction envisaged in Notification No. 32/2004 about non-availment of cenvat credit should be in respect of the service provider of GTA services and cannot be applied to the recipient of services merely because they were required to pay the service tax.

The respondent may be paying the service tax in respect of the services of goods transport service in respect of consignments dispatched by them to their various customers. Therefore, denial of the credit on the ground that the respondents are availing the credit of the tax paid by them in respect of input services is not justified.

7.2. In respect of the Goods Transport Agency services, the service provider is undoubtedly goods transport agency. However, the liability to pay tax in certain cases has been shifted to either the consignor or to the consignee depending

upon who actually paid the freight. In other cases where neither the consignee nor consignor is required to pay the service tax, the responsibility for paying service tax continues with the concerned Goods Transport Agency. The condition of not taking "credit of duty paid on inputs of capital goods used for providing such taxable service" necessarily should relate to the services actually rendered by the Transport Agency. The respondent has not actually rendered the said services; as a consignor he has not availed the credit of duty paid on inputs or capital goods for providing such taxable services; the respondent merely paid the tax which, in the normal course, should have been paid by the transport agency.

a. the service tax on goods transport agencies service paid by the respondents does not make them as service provider.

b. in respect of services availed for incoming consignments for which the respondents pay the service tax, they continued to be service recipients and therefore, such services are input services for them.

c. the service tax paid by the consignors / respondents in respect of incoming consignments shall be eligible as credit.

d. the service tax paid by the respondents in respect of outgoing consignments of finished goods, in their capacity of consignors shall not be eligible as credit to the respondents.

e. the respondents, while paying service tax on GTA service availed in connection with removal of their finished goods from factory are entitled to utilize, for payment of service tax on such service, the credit of tax paid on the input GTA service availed by them in connection with receipt of inputs received in their factory as held by the Tribunal in the case of M/s. India Cements Ltd. cited supra.

f. notwithstanding taking of credit of service tax paid under goods transport operator/agency services in respect of incoming consignments, the respondents are eligible to avail the benefit of notification No. 32/2004-ST dt.3/ 12/2004.

g. in the given facts and circumstances of the case, which involve interpretational difference, imposition of penalty is not justified.

9. In the light of the above, the original authority shall re-determine the credit eligibility after giving reasonable opportunity of hearing to the respondents.

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