2014 (4) ECS (160) (Tri.- Del.)

In the Customs Excise & Service Tax Appellate Tribunal

West Block No.2, R. K. Puram, New Delhi-110066

M/s. HCL INFOSYSTEM LIMITED

V/s.

CC & CE, NOIDA

Date of hearing: 01.05.2014

Date of decision: 06.06.2014

Service Tax Appeal No. 61 of 2008

(Arising out of order-in-Original No. 44/Commissioner/Noida/2007 dated 21.11.2007 passed by the Commissioner, Central Excise, Noida).

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Service Tax Appeal No. 62 of 2008

(Arising out of order-in-Original No. 43/Commissioner/Noida/2007 dated 15.11.2007 passed by the Commissioner, Central Excise, Noida).

Appearance:
Shri R. Krishnan, Advocate — For the Appellant
Shri Govind Dixit, DR — For the Respondent

CORAM:
Hon'ble Mr. Justice G. Raghuram, President
Hon'ble Mr. Rakesh Kumar, Member (Technical)

(Final Order No. 52365-52366/2014)

"On a true and fair construction of the relevant provisions of the Credit Rules, 2002, it is apparent that credit could be taken on an input service falling in the same category of taxable service as the output service in respect of which the service tax liability arises and discharged from the available credit. It is axiomatic that trading in goods is neither a taxable service and could not, in the absence of a legislative / statutory fiction provided, capable of being construed as an exempted service."(para 6)

" From the provisions of both, the Credit Rules, 2002 and the Credit Rules, 2004 it is clear that trading is neither a service nor an exempted service. Therefore no credit of the service tax paid on taxable input services used for trading could be taken and utilized for remittance of service tax on taxable services provided by the assessee, even for discharging a percentage (35% or 20%, as a case may be) of the service tax liability on the taxable service provided." (para 9)

"Liability to interest under Rule 14 of the Cenvat Credit Rules, 2004 read with Section 75 of the Finance Act, 1994 would arise only on that amount of cenvat credit, both debited in assessee's books of accounts and utilised (taken) for remittance of the assessee's tax liability. There is no discussion in the adjudication order on this aspect of the matter. We, therefore, remit the matter to the respondent -Adjudication Authority for computation of the amount of interest liability, on the basis of the actual amount of cenvat credit utilised for discharging its service tax liability on the taxable services provided, by the assessee."(para 16)

Per: Justice G. Raghuram:

The assessee is the appellant in both appeals, preferred against adjudication orders dated 21.11.2007 and 15.11.2007 passed by the Commissioner, Customs and Central Excise, Noida.

2. The Order dated 21.11.2007 disallowed the availed CENVAT credit of Rs.1,20,40,920/-; appropriated this amount (which was already reversed by the assessee before issuance of the show cause notice); ordered recovery of interest of Rs.37,55,811.20; and imposed a penalty of Rs. 1,25,00,000/-, under Rule 15 of the Cenvat Credit Rules, 2004 read with Section 78 of the Finance Act, 1994 (the Act).

Proceedings were initiated by the show cause notice dated 11.10.2006, proposing recovery of cenvat credit wrongly availed and utilized by the assessee. According to Revenue, assessee is a trader in personal computers, photocopiers, telecom products and mobile phones etc. and had provided taxable services like Maintenance and Repair; Commissioning and Installation; Leased Circuit; Online Information and Data Processing and Business Auxiliary Services. Assessee obtained centralized registration for the taxable services and availed credit on Service Tax paid on input services utilized for its trading activities; assessee utilized credit to an extent not exceeding 35% upto 09.09.2004 and to an extent of 20% thereafter, of the Service tax payable on its taxable output services, purportedly in terms of Rule 3 of the Service Tax Credit Rules, 2002 and Rule 6 of the Cenvat Credit Rules, 2004 (as applicable during the relevant periods), treating trading as an exempted service. The show cause notice further alleged that as trading of goods is not a service, this cannot be considered as an exempted service and provisions of the Act and Rules thereunder do not apply to trading activities.

The assessee reversed Rs. 32,07,556.38 on 16.11.2005 and Rs.88,33,364/- on 31.03.2006 (representing the cenvat credit availed on input services and utilised for remitting part of its service tax dues in respect of its output services) and intimated this reversal to the Department by its letters dated 31.03.2006 and 07.04.2006. This reversal was of credit availed on service tax incurred by the assessee on sales commission, brokerage, travel agent service, warehouse charges, freight and courier charges, being input

services for its trading activities.

The assessee neither responded to the show cause notice nor attended personal hearing. Hence, the impugned order was passed ex-parte.

The adjudication Authority confirmed the specified levies for the following reasons and conclusions:

(a) Assessee is into trading and also provides taxable services, but availed cenvat credit earned on input services utilized for trading activities;

(b) Services utilized for trading of computers etc. would not amount to services utilized/ consumed in the rendition of output services, since output services were provided after culmination of trading activities i.e. sale and delivery of computers etc. to customers. Input services in respect of which cenvat credit was taken stood utilized prior to delivery of computers and cannot be said to have been consumed/ used in relation to rendition of output services;

(c) Assessee treated "trading" as an exempted service and on this basis utilized cenvat credit for payment of Service Tax to the extent of 35% or 20% as the case may be, payable on the taxable output services provided. Since trading is neither a service nor amounts to an exempted service, cenvat credit earned on an input services of trading cannot be considered as credit earned on exempted service;

(d) Consequently, cenvat credit taken in respect of input services of trading is liable to be reversed in toto and the inadmissible cenvat credit utilized for payment of Service Tax on taxable output services liable to be recovered, alongwith interest and penalty;

(e) Since the assessee deliberately availed to disclose availment of cenvat credit on services which were not an input services for its output services, assessee contravened Rules 3 and 4 of the Service Tax Credit Rules, 2002 and the Cenvat Credit Rules, 2004, with an intent to evade payment of Service tax and therefore the extended period is invokable and interest and penalty also leviable.

Order dated 21.11.2007 was passed in respect of cenvat credit taken during July 2003 to March, 2006, pursuant to the show cause notice dated 11.10.2006.

3. The Adjudication order dated 15.11.2007 covered the period July 2003 to September 2005, pursuant to proceedings initiated by show cause notice dated 11.10.2006. Assessee which traded in computers, photocopiers etc. also provided taxable services like Maintenance

and Repair, Commissioning and Installation, Transport of goods by road, Consulting Engineer and Business Auxiliary Service. Revenue alleged that assessee irregularly utilized cenvat credit on input services like Courier and Business Auxiliary Services, (commission paid for sale) etc. for discharging its service tax liability incurred on taxable services provided, irregularly. Assessee utilized cenvat credit to the extent not exceeding 35% upto 09.09.2004 and not exceeding 20% thereafter, of the service tax payable, treating trading as an exempted service.

The assessee reversed the availed cenvat credit, Rs.22,70,191/-, on 22.11.2005 and 27.03.2006, prior to issuance of the show cause notice dated 11.10.2006.

Responding to the show cause notice, the reply dated 29.09.2007 claimed that all taxable services were provided by the assessee only in relation to computers, photocopiers etc. sold to various customers; that commissioning, installation, maintenance and repair services etc. were also services provided in relation to these traded goods; that Rule 2(b) of the Service Tax Credit Rules, 2002 defines "Input Services" as any service received and consumed by a service provider in relation to rendering of output service; that the term "in relation to" has a wider connotation as explained by several precedents; that transport of goods by courier and other services pertain to and are concerned with services for which the assessee has a centralized registration; that transportation of goods and the other services utilized for despatching goods to customers premises, is integral to the post trading rendition of taxable services such as installation, commissioning, repair, maintenance etc.; and thus credit taken during 01.07.2003 to 09.09.2004 is unexceptionable; and for the period subsequent to 10.09.2004, the position is the same.

Assessee alternatively claimed that since credit was utilized only to the extent of 35% or 20% of the payable service tax, as the case may be, interest should be calculated only on amount of credit actually utilized; that there is a distinction between taking of credit and utilization of credit and it is utilization alone that results in lesser remittance of tax in cash to Government and not taking of credit in assessees books. Therefore, interest should be calculated only on the amount actually utilized, if wrongly utilized, but not on the gross credit wrongly availed.

Assessee contended (in both cases) that no penalty should be imposed since availment of credit on the assumption that trading is an exempted activity was on account of interpretation and penalty is leviable only for wilful and deliberate conduct and not where availment of credit is on the basis of a mistaken but plausible interpretation of relevant provisions.

Order dated 15.11.2007 confirmed the proposals in the show cause notice with regard to demand and recovery of irregularly availed cenvat credit,

appropriated the entire credit availed which was already deposited (Rs. 86,17,994/-) and ordered recovery of interest of Rs. 12,96,132/- and penalty of Rs. 90,00,000/-.

The same assessee is the appellant in both the appeals. Appeals are preferred against adjudication orders dated 21.11.2007 and 15.11.2007 respectively, passed by the Commissioner, Customs and Central Excise, Noida.

4. The gross period covered by the adjudication orders impugned in the appeals is July, 2003 to March, 2006, during which period specified amounts of cenvat credit was availed and used by the assessee for discharging part of its service tax liability in respect of taxable services provided by it.

5. Provisions of the Service Tax Credit Rules, 2002, which came into force w.e.f. 16.08.2002 govern the entitlement to availment and utilization of cenvat credit upto 10.09.2004, on which date the Cenvat Credit Rules, 2004 came into force. The 2004 Rules govern the field since 10.09.2004.

6. Under the Credit Rules, 2002 input service is defined in Rule 2(c) as any taxable service received and consumed by a service provider in relation to rendering of output service. Rule 3(1) provided that an output service provider shall be allowed to take credit (service tax credit) of the service tax paid on input service, in the enumerated manner. Sub-clause (a) of this Rule provides that where an input service falls in the same category of taxable service as the output service, service tax credit shall be allowed to be taken on such input service for which invoice, bill or challan is issued on or after 16.08.2002; sub-clause (b) stipulates that in any other case, service tax credit shall be allowed to be taken on such input service for which invoice, bill or challan is issued on or after 14.05.2003. Sub rule (2) of Rule 3 provides that for the purpose of these rules, two services shall be deemed to be falling in the same category of taxable service, if the input service or output service fall in the same sub-clause of clause (105) of Section 65 of the Act (the Finance Act, 1994). Sub-rule (4) of Rule 3 states that where a service provider avails credit on any input service and renders output services which are chargeable to service tax as well as exempted or non-taxable services, as the case may be, he shall maintain separate accounts for receipt and consumption of input services meant for consumption in relation to rendering of taxable output services and input services meant for consumption in relation to rendering of exempted or non-taxable services, as the case may be. Sub-rule (5) of Rule 3 enacts that where a service provider opts not to maintain separate accounts, as stipulated in sub-rile (4), he shall be allowed to utilize service tax credit for payment of service tax on any output service only to an

extent of an amount not exceeding 35% of the amount of service tax payable on such output services.

6. On a true and fair construction of the relevant provisions of the Credit Rules, 2002, it is apparent that credit could be taken on an input service falling in the same category of taxable service as the output service in respect of which the service tax liability arises and discharged from the available credit. It is axiomatic that trading in goods is neither a taxable service and could not, in the absence of a legislative / statutory fiction provided, capable of being construed as an exempted service.

7. Rule 6 of the Credit Rules, 2004 sets out the obligations of a manufacturer of dutiable and exempted goods and provider of taxable and exempted services. Sub-rule (1) provides that no cenvat credit shall be allowed on such quantity of input or input service which is used in the manufacture of exempted goods or exempted services except in circumstances mentioned in sub-rule (2). Sub-rule (2) enjoins maintenance of separate accounts for receipt, consumption and inventory of input or input services meant for use in the manufacture of dutiable final products or in providing output service; and the quantity of input spent for use in the manufacture of exempted goods or services and authorizes taking of cenvat credit only on that quantity of input or input services which are intended for use in the manufacture of dutiable goods or in providing taxable output services. Sub-rule (3) of Rule 6 carves out specified exclusions to the requirements set out in sub-rule (2). Sub-clause (c) of Rule 6(3) stipulates that the provider of an output service shall utilise credit only to the extent of an amount not exceeding 20% of the amount of service tax payable on a taxable output service.

8. The 2004 Credit Rules were amended w.e.f. 01.04.2011, by Notification No. 3/2011-CE (NT). To the extent relevant for this lis, by an explanation added to Rule 2 of the 2004 Rules, it was clarified by this amendment that "exempted services" include "trading".

9. From the provisions of both, the Credit Rules, 2002 and the Credit Rules, 2004 it is clear that trading is neither a service nor an exempted service. Therefore no credit of the service tax paid on taxable input services used for trading could be taken and utilized for remittance of service tax on taxable services provided by the assessee, even for discharging a percentage (35% or 20%, as a case may be) of the service tax liability on the taxable service provided.

The "Explanation" added in 2011 though stated to be clarificatory in character can have only a prospective effect since the Finance Act does not authorize rules to be made with retrospective effect. Therefore, trading would be comprehended within the scope of

an "exempted" service only w.e.f. 01.04.2011, the date of coming into force of the "Explanation" added to Rule 2 of the 2004 Credit Rules.

10. The appellant/ assessee not only availed cenvat credit of input services used/ consumed for its trading, by debiting in its cenvat credit account to that extent but had also utilized the credit for discharging its service tax liability for having provided taxable services, to the extent of 35% upto 10.09.2004 and 20% thereafter of the service tax payable on such taxable services, clearly contrary to the provisions of the 2002 Credit Rules and the 2004 Credit Rules, as the case may be.

11. On 29.04.2011, by Circular No. 943/4/2011-CX., dated 29.04.2011, consequent on the amendment introduced w.e.f. 01.04.2011 (noticed supra). Twelve clarifications were issued. Ld. Counsel for the appellant relies on the clarifications set out at Sl. No. 6 and 7. The clarification at Sl. No. 6 states that trading being an exempted service, credit of any inputs or input services used exclusively in trading cannot be availed. Clarification No. 7 specifies that trading is an exempted service and therefore credit of any inputs or input services used exclusively in trading cannot be availed; credit of common inputs and input services could be availed subject to restriction of utilization of credit upto 20% of the total duty liability, as provided for by the 2004 Rules. This clarification was issued on the aspect of what should be the treatment of credit of input and input services used in trading before 01.04.2011.

12. Show cause notices in both cases were issued invoking the extended period of limitation on the ground that the assessee had deliberately failed to disclose availment of cenvat credit utilized for trading which clearly does not amount to input service used for providing taxable or exempted services; and since trading would not in any event be considered an exempted service. Ld. Counsel for the appellant contends that this is a bonafide interpretational error on the part of the assessee and therefore invocation of the extended period is not justifiable. This contention of the assessee does not merit acceptance. Till the fiction was introduced that trading is an exempted service, by the "Explanation" introduced w.e.f. 01.04.2011 in the Cenvat Credit Rules, 2004, trading which is a sale of goods could not have been considered as a service, a taxable service or an exempted service. The input services (on which cenvat credit was earned by the assessee) were consumed for its trading activities and could not have been availed or taken for discharging service tax on the services provided by the assessee, after the trading activity. There is no scope for any interpretational misconception on this aspect. Invocation of the extended period is therefore without error.

The Tribunal in Orion Appliances Ltd. Vs. CST, Ahmedabad 1 clearly held that trading is purchase and sale of goods, covered by sales tax law and cannot be considered a service or an exempted service.

13. Alternatively, learned Counsel for the appellant relies on the decisions of the Delhi High Court in K.P. Pouches (P) Ltd. vs. Union of India 2 of the Gujarat High Court in CCE & Cus. Surat-I vs.Harish Silk Mills3;in CCE & Cus.Surat-II vs.Gopal Fibres Pvt. Ltd.4 and in Commissioner of C.Ex. Cus. & Service Tax, Vapi vs. Union Quality Plastics5 for contending that since the impugned adjudication orders had not indicated an option to pay 25% of the penalty alongwith interest and other dues within thirty days, such option should be given by this Tribunal and the confirmed liability to remit the entire penalty vide the impugned orders should be set aside to that extent. The decisions of Delhi and Gujarat High Courts referred to above clearly rule that an Adjudication Authority should explicitly specify the option available to the assessee under Section 11AC of the Act (which is similar to the option available under Section 78 of the Finance Act, 1994). The Gujarat High Court in Gopal Fibres Pvt. Ltd. also referred to a Board Circular dated 22.05.2008 clarifying that in all cases where penalty under Section 11AC of the Central Excise Act is imposed, provisions contained in the first and second proviso of this Section should be mandatorily mentioned in the adjudication order.

14. In the light of the decisions and pronouncements of High Courts adverted to in the preceding paragraph, the assessee was required to be provided an option to remit 25% of the penalties imposed under Rule 15 of the Cenvat Credit Rules, 2004 read with Section 78 of the Finance Act, 1994, within thirty days from the date of the adjudication order, alongwith interest and the amount of cenvat credit disallowed, after taking credit for the service tax and interest if any already remitted. It requires to be noted that the total amount of disallowed cenvat credit was already remitted by the assessee in respect of both the adjudication orders impugned in these appeals, even prior to issue of the respective show cause notices. The judgments also clarify that if no such option was indicated in an adjudication order, the Tribunal must provide such option from the date of its order.

15. Another contention urged on behalf of the appellant is that interest is due and payable only on the amount of cenvat credit utilised for discharging the assessee's service tax liability on the taxable services provided by it and not on the amount of cenvat credit taken in its books of account but reversed later. Reliance for this proposition is placed on the judgment of the Karnataka High Court in CCE &

ST, LTU, Bangalore vs. Bill Forge Pvt. Ltd. 6. After considering the judgment of the Supreme Court in Union of India vs. Ind-Swift Laboratories Ltd.7, the Karnataka High Court ruled that where credit was taken or utilised and the mistake is brought to assessee's notice; an assessee corrects the mistake and immediately reverses the entry, the assessee cannot be said to have been taken benefit of the wrong entry in the accounts books; and if the assessee had not taken the benefit of cenvat credit it would be not liable to pay interest i.e. when credit taken is reversed before utilisation of the credit; once the entry was reversed it is as if that cenvat credit was not available. The Karnataka High Court pointed out that only that when assessee had taken the credit, i.e. if it had not paid the duty which is legally due to Government by utilising such cenvat credit, the Government would sustain loss; the liability to pay interest from the date the amount became due arises under Section 11AB; and Government would be entitled to be compensated for deprivation of the unpaid / under paid duty. Learned Counsel has placed before us some "tables" setting out service tax credit reconciliations to contend that of the actual amount of cenvat credit debited in its books of accounts but actually utilised (taken) for discharge of its tax liability (on rendition of taxable services by it), is much less than is assumed by the Revenue, and that the consequent interest component would therefore be much less. Counsel states that appellant had provided these reconciliation tables to the Adjudicating Authority but were not considered by that Authority.

16. From the judgment in Bill Forge Pvt. Limited, it is clear that liability to interest under Rule 14 of the Cenvat Credit Rules, 2004 read with Section 75 of the Finance Act, 1994 would arise only on that amount of cenvat credit, both debited in assessee's books of accounts and utilised (taken) for remittance of the assessee's tax liability. There is no discussion in the adjudication order on this aspect of the matter. We, therefore, remit the matter to the respondent -Adjudication Authority for computation of the amount of interest liability, on the basis of the actual amount of cenvat credit utilised for discharging its service tax liability on the taxable services provided, by the assessee.

17. In the result, the impugned Adjudication orders are sustained to the extent of the asssessed demand of cenvat credit and appropriation of the irregularly availed credit reversed by the assessee. The amount of penalty is also confirmed subject to an option that shall be provided to the appellant, to remit 25% of the penalty together with the specified interest, within thirty days from the date an order is passed by the Respondent determining the interest liability afresh, under Rule 14 of the Cenvat credit Rules read with Section 75 of the

Finance Act, 1994, and the order is communicated to the appellant. This option shall be provided by the adjudication Authority in the order to be passed, pursuant to this remand.

18. The appeals are partly allowed as above, but in the circumstances without costs.

(Pronounced on 06.06.2014)