IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH: KOLKATA

Service Tax Appeal No. 164 of 2012

(Arising out of Order-in-Original No. 60/COMMR/ST/KOL/2011-12 dated 05.01.2012 passed by Commissioner of Service Tax, Kolkata.)

M/s Paharpur Cooling Towers Ltd,
8/1B Diamond Harbour Road, Kolkata-700027.

...Appellant (s)

VERSUS

Commissioner of Service Tax, Kolkata.
180, Shantipally, Rajdanga Main Road (3rd Floor), Kolkata-700107.

. ..**Respondent(s)**

APPERANCE :
Shri Gopal Agarwal & Ms. Pritha Sarkar, both Chartered Accountants for the Appellant
Shri K. Chowdhury, Authorized Representative for the Respondent

CORAM:
HON'BLE MR. ASHOK JINDAL, MEMBER (JUDICIAL)
HON'BLE MR. K. ANPAZHAKAN MEMBER (TECHNICAL)

FINAL ORDER No...76503/2023

DATE OF HEARING : 28.08.2023

DATE OF PRONOUNCEMENT: 30.08.2023

PER K. ANPAZHAKAN :

Paharpur Cooling Towers Ltd. (The Appellant) are engaged in the manufacture of cooling towers and parts thereof at their factories located at various locations in India. A Show Cause Notice dated 30.03.2010 was issued to the Appellant demanding Service Tax of Rs. 58,52,901/- along with interest and penalty. The said Notice was adjudicated by the Commissioner vide impugned order dated 05.01.2012, wherein the duty demanded in the Notice was confirmed along with interest and imposed equal amount of duty as penalty under Section 78 of the Finance Act, 1994, read with Rule 15 of Cenvat Credit Rules, 2004. Aggrieved against the impugned order, the Appellant has filed the present appeal.

2. In their grounds of appeal, the Appellant stated that there are two issues involved in the present appeal.

(i) Denial of utilization of the CENVAT credit for discharging service tax liability in relation to Import of Service, on the ground that these services do not qualify as output services. The Period involved on this issue is March 2009 and the amount confirmed in the impugned order on this count, is Rs. 41,07,195/-.

(ii) Denial of inter-adjustment of amount paid within various heads against the liability. The Period involved on this issue is Financial Year 2007-08 and the amount confirmed in the impugned order on this count is Rs.17,45,706.

3. The Appellant stated that as per Rule 3(4)(e) of the Cenvat Credit Rules, 2004, CENVAT credit may be utilized for payment of service tax on any output service. As per Rule 5 of Taxation of Services (Provided from Outside India and received in India) Rules, 2006, taxable services provided from outside India and received in India shall not be treated as output services for the purpose of availing credit of duty of excise paid on any input or service tax paid on any input services under CENVAT Credit Rules, 2004. The Appellant stated that there is no bar under Rule 3(4) of the CENVAT Credit Rules, 2004 towards utilizing the CENVAT credit for payment of service tax by them, as a deemed output service provider. Moreover, the restriction under the Import Rules is limited only for the purpose of availing credit of duty/tax paid on input and input services and there is no restriction that the said services shall not be treated as output service for the purpose of utilization of CENVAT credit. Thus, the restriction provided under Import Rules cannot be extended to the provisions of CENVAT Credit Rules, 2004.

4. In support of their contention, the Appellant relied on the decision of the Tribunal, Delhi in the case of Kansara Modler Ltd. Versus Commissioner of Central Excise, Jaipur-II [2013 (32) S.T.R. 209 (Tri. - Del.), wherein Cenvat Credit availed has been permitted to be utilized for payment of duty on 'import of services.

4.1 The decision of the Tribunal cited above has been upheld by the Hon'ble Rajasthan High Court. The petition of Revenue against this judgement of Hon’ble Rajasthan High Court was dismissed by the Hon'ble Supreme Court 2018 (18) G.S.T.L. J36 (Supreme Court).

4.2. In the case of M/S Toyota Kirloskar Motors Vs Commissioner of Central Excise, Customs and Service Tax Bangalore-LTU(Tri. Bang, the Tribunal has held as under:

> *"The jurisdictional High Court of Karnataka in the case of M/s. Aravind Fashions (supra) observed that in the instant case that he is the recipient of service tax, the service provided is outside the country. In law, he is treated as service provider and he is levied tax. In other words, the liability to pay tax on the services which he has received is fastened on him in law. It is to discharge this liability he is entitled to use the CENVAT credit which was available with him and therefore, the Tribunal was justified in interfering withthe order passed by the Commissioner"*

4.3 In the case of Commissioner of Central Tax Vs M/S Toyota Kirloskar Motors [2022-TIOL-30-HC-KAR-ST] ,while analysing the Explanation inserted in Rule 3(4) of the Cenvat Credit Rules, 2004, The Hon'ble Karnataka High Court has observed as under:

> The Explanation *"Explanation – CENVAT credit cannot be used for payment of service tax in respect of services where the person liable to pay tax is the service recipient"* added to Rule 3(4)(e) of the CCR, 2004, w.e.f., 1.7.2012, thus in case the dispute is related to prior period the aforesaid explanation inserted to Rule 3(4)(e) w.e.f., 1.7.2012 is not applicable.

4.4 In the case of Commissioner of Service Tax, Bangalore Versus Arvind Fashions Ltd [2009 (13) S.T.R. 544 (Tri. - Bang.), the Tribunal, Bangalore has held as under:

> Intellectual Property service received from abroad deemed as output service when person receiving service liable to pay Service tax and accordingly the service tax on deemed output service can be paid by utilizing CENVA credit on input services in view of deeming fiction

4.5 In the case of Commissioner of Service Tax, Bangalore Versus Aravind Fashions Ltd [2012 (25) S.T.R. 583 (Kar.), The Hon'ble High Court has held as under:

> *"In the instant case, though he is the recipient of service tax, the service provider is outside the country. In law, he is treated as a service provider and is levied tax. In other words, the liability to pay tax on the service which he has received is foisted on him under law. It is to discharge the liability he is entitled to use the CENVAT credit which was available with him and therefore the Tribunal was justified in interfering with the order passed by the Commissioner. In that view of the matter,*

> *we do not see any merit in these appeals. As there is no liability to pay tax the question of imposing penalty would not arise"*

4.6 In the case of Mccann Erickson (India) Ltd. Versus Pr. Commr. of Gst& C. Ex., Delhi East [2019 (30) G.S.T.L. 425 (Del.) it has been held as under:

> Explanation to Rule 3(4) of CENVAT Credit Rules,2004 prohibiting payment of Service Tax on reverse charge basis from the CENVAT credit account creating a substantive liability and cannot have retrospective application, i.e., prior to 1-7-2012 - Demand not sustainable, Service Tax not required to be paid in cash prior to insertion of Explanation to Rule 3(4) of CENVAT Credit Rules,2004

4.7. In view of the above judicial pronouncements, the Appellant contended that the demand confirmed in the impugned order on this count is not sustainable.

5. Regarding the second issue, the Appellant stated that they have short paid service tax, education cess and secondary and higher education cess, in some months and made excess payments of the same amount in other heads. However, the Department refused to adjust that excess payment made on the ground that in accordance with provisions of Rule 3(7) of the CCR, 2004 the excess paid service tax cannot be treated as payment towards education cess/SHE and vice versa. In this regard, they relied on ***Circular No. 58/7/2003-S.T., dated 20-5-2003,*** issued by CBEC, wherein the Board has clarified that in the event of mentioning wrong Accounting Code while paying service tax the assessees need not be asked to pay the service tax again. They stated that the short payment has been duly highlighted in impugned Order-in-original, however the excess payment made by them has not been considered at all for adjustment against short payment. The Ld. Commissioner has ignored the fact that, although under wrong head but tax has already been paid to the Government, and thus, there was no evasion of payment of tax and no revenue loss to the Government, making the entire situation revenue neutral. Accordingly, they contended that the demand confirmed in the impugned order on this count is not sustainable.

5.1 In support of their contention, the Appellant relied on the following judicial pronouncements:

5.2 In the case of Devang Paper Mills Pvt. Ltd. Versus Union of India 2016 (41) S.T.R. 418 (Guj.), the Hon'ble High Court has held as under:

> *"Whatever be the accounting difficulty, when undisputed fact is that the petitioner did pay a certain excise duty, merely mentioning wrong code in the process, cannot result into such harsh consequence of the entire payment not being recognized as valid, incurring further liability of repayment of the basic duty with interest and penalties. Such amount was deposited by the petitioner with the Government of India and it was duly credited in the Government account."*

5.3 In the case of Commissioner of Central Excise, Haldia Versus M/S Tata Metaliks Ltd. (Vice-Versa) [2023 (6) TMI 10 - CESTAT Kolkata, it has been held as under :

> *"We find that the Appellant has discharged their Service Tax liability under RCM on GTA services. They have deposited the service tax in the account of Kolkata Commissionerate (AABCT1389BST002) instead of Haldia Commissionerate (AABCT1389BST001). The mistake in remittance of service tax in a difference service tax registration of the same assessee is a matter of internal adjustment at department's end and the assessee cannot be saddled with the demand of service tax again. This clarification has been issued by Boardin Circular No 58/07/2003 dated 20/05/2003 and communicated to the trade vide Trade Notice No 03/2014dated 10/07/2014 by Cochin Commissionerate…*
>
> *In this case, service tax has already been paid to the Government Account albeit in Kolkata Commissionerate instead of Haldia Commissionerate. It is not the case of the department that service tax was not paid at all. Accordingly, we hold that the provisions of Section 76 of the Finance Act 1994 are notapplicable in this case and hence the penalty imposed under section 76 is set aside*

5.4. Dell India Pvt. Ltd. Versus Commissioner of Service Tax, Bangalore [2016 (42) S.T.R. 273 (Tri. - Bang.), the Tribunal has held as under:

> *"…when the assessee paid excess amount of tax to the exchequer, law of the land is very clear under Article 265 of the Constitution of India, which says that "No tax shall be levied or collected except by authority of law." If Revenue becomes very rigid on strict compliance of the procedure every time and all the time, there could be situations where such rigidness and strictness on the part of the Revenue could become contrary to the provisions of the Article 265 of the Constitution of India."*

5.5. The Appellant submitted that there is no short payment of service tax, education cess and SHE cess during the FY 2007-08 except Rs. 895,160/- in the month of January 2008 which ha s already been paid

on 5th May 2008. Accordingly, they contended that the demand confirmed in the impugned order is not sustainable.

6. The Appellant also stated that the impugned SCN and the corresponding proceedings are barred by limitation of time inasmuch as the demand has been raised in respect of period April, 2007 to March 2009 vide SCN dated 30.03.2010, whereas in terms of Section 73 of the Finance Act, 1994, a period of one year from the relevant date has been prescribed to serve the notice on the person chargeable with the service tax which has not been levied or paid or short levied or short paid. Therefore, the instant demand for the said period is barred by the limitation of time and on this ground also the impugned order is liable to be set aside.

7. The Ld. A.R. submitted that Rule 3(4)(e) of Cenvat Credit Rules does not allow the utilization of Cenvat credit for payment of duty on 'Import of Service', as it is not their 'output service'. He also submitted that service tax cannot be used to pay Education Cess or SHE Cess and vice versa. Hence, excess payment, if any, made in service tax cannot be adjusted against Education Cess and SHE Cess. Accordingly, they prayed for upholding the impugned order.

8. Heard both sides and perused the appeal records.

9. We observe that the impugned order covers two issues. The first issue is with respect to denial of utilization of the CENVAT credit for discharging service tax liability in relation to Import of Service. The department's contention is that Rule 3(4)(e) of Cenvat Credit Rules,2004 prohibits such utilization. In the impugned order it is alleged that these services do not qualify as ‘output services’ and hence Cenvat credit cannot be utilized for payment of service tax liability on 'import services'.

10. We observe that the interpretation of Rule 3(4) of the Cenvat Credit Rules, 1994 by the Ld. Commissioner in the impugned order is legally not tenable. We find that an ‘Explanation’ has been added to Rule 3(4)(e) of the Cenvat Credit Rules, 2004, w.e.f.01.07.2012, to the effect that Cenvat credit cannot be used for payment of service tax in respect of services where the person liable to pay tax is the service

recipient". Thus, it is amply clear that there was no such restriction in the Cenvat Credit Rules, 2004, prior to 01.07.2012. The period involved in the present dispute is 2009, which is prior to insertion of the Explanation to Rule 3(4)(e) w.e.f., 1.7.2012. Hence we, hold that such restriction of utilization of Cenvat credit was not applicable for the period under dispute.

11. Further, we observe that this issue is no more res integra, as the Tribunal, Delhi has held the same view in the case of Kansara Modler Ltd. Versus Commissioner of Central Excise, Jaipur-II [2013 (32) S.T.R. 209 (Tri. - Del.)]. The relevant portion of the decision is reproduced below:

> *"If we read Rule 2(q) of CENVAT Credit Rules with Rule 2(1)(d)(iv), we find that appellant is a person liable to Service Tax. Once appellant is person liable to service tax, he becomes provider of taxable service under Rule 2(r) and consequently becomes output service provider under Rule 2(p) of the CENVAT Credit Rules. Revenue is also relying on Rule 5 of Taxation of Services (Provided from Outside India and Received in India) Rules. We find that Rule 5 refers to availing of CENVAT credit and not to utilization of credit. We are therefore of the view that the finding of the Commissioner not treating the appellant as output service provider, is not correct and accordingly we set aside the impugned order and allow the appeal.*

12. The decision of the Tribunal cited above has been upheld by the Hon'ble Rajasthan High Court. The petition of Revenue against this judgement of Hon'ble Rajasthan High Court was also dismissed by the Hon'ble Supreme Court , reported in 2018 (18) G.S.T.L. J36 (Supreme Court).Thus, we find that the issue has attained finality in favour of the Appellant.

13. In view of the discussion above and on the basis of the decision of the Hon'ble Supreme Court cited above, we hold that the utilization of Cevat Credit for payment of service tax on 'import of service' by the Appellant is legally tenable. Accordingly, we hold that the impugned order confirming the demand on this count is not sustainable.

14. The next issue involved in the present appeal is denial of inter-adjustment of amount paid within various heads against the liability. The Period involved on this issue is Financial Year 2007-08. During this period, the Appellant has paid service tax in excess on some months

and short paid Education Cess and SHE Cess on some months. The department has taken into account only the amount of service tax and Education Cess/SHE Cess short paid and confirmed Rs.17,45,706 in the impugned order. The excess/short payment of service tax and Education Cess/SHE Cess on various months during the period in dispute is furnished below:

Month	Service Tax	Edu. Cess	SHE	Total	Service Tax	Edu. Cess	SHE	Total	Difference
May 07	3,268,351	65,367	2,150	3,335,868	3,270,237	43,738	21,869	3,335,844	(24)
June	3,053,910	61,078	18,622	3,133,611	3,068,062	43,754	21,877	3,133,693	82
July	5.458.567	109.171	22.849	5.590.587	5.473.841	77,829	38,914	5,590,584	(3)
Aug.	5,257,492	105,150	50,653	5,413,296	5,317,767	63,687	31,843	5,413,297	1
Sept.	8,914,597	178,292	65,163	9,158,052	8,977,089	120,640	60,321	9,158,050	(2)
Oct.	9,406,480	188,033	28,582	9,623,095	9,424,571	132,350	66,175	9,623,096	1
Nov.	4,145,114	82,902	38,997	4,267,014	4,224,916	28,065	14,032	4,267,013	(1)
Dec.	4,261,334	85,227	42,613	4,389,174	4,319,749	46,283	23,142	4,389,174	0
Jan.08	7,711,621	154,232	77,116	7,942,969	6,932,705	76,736	38,368	7,047,809	(895,160)
Feb.	8,101,618	62,033	81,016	8,344,667	8,168,896	117,181	58,590	8,344,667	(0)
Mar.	10,465,683	209,314	104,657	10,779,653	10,577,286	134,912	67,456	10,779,654	1

15. From the above table, we observe that the Appellant has paid the total tax payable during the disputed period correctly. If the adjustment is allowed between the excess service tax paid and the short paid Education Cess/SHE Cess and vice versa, then there was short payment of Rs. 895,160/- only in the month of January 2008, which has already been paid by them on 5th May 2008. Thus, the contention of the Appellant is that if the adjustment is permitted then there won't be any short payment overall. Accordingly, they contended that the demand confirmed in the impugned order is not sustainable. *Thus, we observe that the issue to be decided in this case is whether excess /short paid amount under the service tax head can be adjusted for payment of excess/short paid amount in Education Cess or not.*

16.We observe that a similar issue under Central Excise came before the Hon'ble High Court of Guwahati in the case of Kamakhya Cosmetics & Pharmaceuticals Pvt. Ltd reported in 2015(323)ELT33(Gau), wherein it has been held as under:

> **5.**In the present case, the assessee utilized Cenvat credit of Basic Excise duty for paying Education Cess to which department raised objection. The Adjudicating authority held that Cenvat Credit of Basic Excise Duty could not be utilized for payment of Education Cess and accordingly deducted the amount from the refund due to the assesse.
>
> **6.**The assessee preferred revision petition under Section 35EE of the Act which was allowed as follows :
>
> ñThe appellant has utilized the Cenvat credit for payment of education Cess on final products in respect of which exemption under said notification is availed of and since Education Cess is also a Duty of excise, I hold that the appellantôs action is correct and is in conformity with the Cenvat Credit Rules, 2004.ò
>
> **7.**The above view was upheld by the Tribunal while dismissing appeal of the Revenue against the above order. It was held that there was no bar to utilize Cenvat credit of Basic Excise Duty for payment of Education Cess.
>
> **8.**Since the view taken by the Tribunal is in conformity with the view taken by this Court referred to above, the question of law raised by the Revenue has to be decided against it and answered in the affirmative.

17. In the decision cited above, the Hon'ble High Court has held that Cenvat credit of Basic Central Excise duty can be utilzed for payment of Education Cess/SHE Cess and vice versa. The same analogy is applicable for service tax also. Following the above decision of the Hon'ble Guwahati High Court, we hold that excess amount paid in service tax can be adjusted against the short payment in Education Cess/SHE Cess. After adjustment, there was a short payment of Rs.8.95.160/- only in the month of January 2008, which has already paid by the Appellant. Accordingly, we hold that the demand confirmed in the impugned order on this count is not sustainable.

18. Since both the issues involved in the present appeal are decided in favour of the Appellant, the entire demand along with interest confirmed in the impugned order is liable to be set aside. As the demand is not sustainable, there is no penalty imposable on the Appellant. Accordingly, we set aside the impugned order.

19. In view of the above discussion, we set aside the impugned order and allow the appeal filed by the Appellant.

(Pronounced in the open court on…30.08.2023…)

Sd/-
(Ashok Jindal)
Member (Judicial)

Sd/-
(K. Anpazhakan)
Member (Technical)

Tushar