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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 19th September, 2019

\+ SERTA 1/2019 & CM APPL. 1273/2019

MCCANN ERICKSON (INDIA) LTD ..... Appellant

Through Mr. Karan Sachdev, Adv. with
Ms. Avisha Khatri, Adv.

versus

PRINCIPAL COMMISSIONER OF GST & CENTRAL EXCISE,DELHI EAST ..... Respondent

Through Mr. Amit Bansal, Adv. with
Mr. Aman Rewaria and
Ms. Vipasha Mishra, Advs.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE C. HARI SHANKAR

JUDGMENT

% **19.09.2019**

D.N. PATEL, CHIEF JUSTICE (ORAL)

1. This appeal, under Section 83 of the Finance Act, 1994 read with Section 35-G of the Central Excise Act, 1944, is directed against the Final Order, dated 1st February, 2018, and Miscellaneous Order dated 14th September, 2018 passed by the Customs, Excise and Service Tax Appellate Tribunal (hereinafter referred to as "CESTAT").

2. The dispute pertains to the period 1st April, 2005 to 16th May, 2008. During the said period, the appellant was engaged in providing advertising and other services through media, television, radio, websites, newspapers magazines, bill-boards and hoardings and during

the period in issue the present case, for which it was duly registered with the Service Tax authorities.

3. The present dispute emanates from a Show Cause Notice dated 30th August, 2010, issued to the appellant, proposing two demands of service tax, of Rs. 24,72,677/- and Rs. 1,93,74,146/- respectively. Of these, the former demand, of Rs. 24,72,677/-, stands dropped; ergo, we are not required to concern ourselves therewith. The controversy, in the present appeal, relates to the sustainability of the second demand, as proposed in the aforesaid Show Cause Notice and as successively confirmed by the Commissioner of Central Excise (hereinafter referred to as "the Commissioner") and the CESTAT.

4. Qua this demand, of Rs. 1,93,74,146/-, the case of the Revenue – as accepted by the CESTAT in the impugned Final Order – is that the appellant erroneously paid the said amount of service tax by utilization of CENVAT Credit available with it, whereas the amount was required to be paid in cash. The CESTAT has, therefore, affirmed the decision, of the Commissioner, requiring the appellant to pay the said amount of service tax, all over again, in cash, with the caveat that, having done so, the appellant can avail CENVAT Credit of the said amount; in other words, the amount would stand re-credited in the appellant's CENVAT Credit account.

5. The issue in controversy is, therefore, limited to the question of whether the appellant was entitled to pay the aforesaid amount of

service tax of Rs.1,93,74,146/- from its CENVAT Credit account, or was necessarily required to pay the amount in cash.

6. *Vide* order dated 14th January, 2019, the present appeal was admitted on the following substantial questions of law:-

> "(i) Did Customs, Excise & Service Tax Appellate Tribunal [CESTAT] fall into error in holding that during the period from April, 2006 to March, 2008, the Assessee/Appellant could not have discharged its tax liability by utilizing the credit available to it, given that the explanation to Rule 3(4) of the Credit Rules, 2004 was brought into force from 1st July, 2012.
>
> (ii) Did the CESTAT fall into error in holding that proviso under Section 73(1) was unwarranted.
>
> (iii) Whether in the circumstances, the penalty was lawfully imposed."

7. Having heard learned counsel for the parties and having perused the available record as well as the relevant statutory provisions, we are of the opinion that the first question as framed hereinabove is required to be answered in favour of the appellant and against the respondent. The necessity of adjudicating on Questions (ii) and (iii) would, thereby, stand obviated.

8. The aforesaid amount of Rs. 1,93,74,146/-, constituting the subject matter of controversy in the present case, relates to service tax on services provided by various foreign companies. The services, on which, the said amount of service relates to various categories, namely, Advertising Agency Service, Manpower Recruitment Service, Business Auxiliary Service, Management Consultancy Service,

Management, Maintenance or Repair Service and On-line Information database Access Service. The provider of the said services was located outside India.

The statutory backdrop

9. Service tax became payable, by the appellant, on the said services, by virtue of Section 66A of the Finance Act, 1994, which reads thus:

> "**66A. Charge of service tax on services received from outside India.** – (1) Where any service specified in clause (105) of Section 65 is, –
>
> (a) provided or to be provided by a person who has established a business or has a fixed establishment from which the service is provided or to be provided or has his permanent address or usual place of residence, in a country other than India, and
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> (b) received by a person (hereinafter referred to as the recipient) who has his place of business, fixed establishment, permanent address or usual place of residence, in India, such service shall, for the purposes of this section, be taxable service, and such taxable service shall be treated as if the recipient had himself provided the service in India, and accordingly all the provisions of this Chapter shall apply."

10. It is also necessary to refer to certain provisions of the CENVAT Credit Rules, 2004 (hereinafter referred to as "CENVAT Credit Rules"). Rule 3(4) of the CENVAT Credit Rules – *sans* the various provisos thereto, which are of no particular relevance – reads as under:

> "**3. Cenvat Credit. –**

(4) The CENVAT credit may be utilized for payment of –

(a) any duty of excise on any final product; or

(b) an amount equal to CENVAT credit taken on inputs if such inputs are removed as such or after being partially processed; or

(c) an amount equal to the CENVAT credit taken on capital goods if such capital goods are removed as such; or

(d) an amount under sub-rule (2) of rule 16 of Central Excise Rules, 2002; or

(e) *service tax on any output service*"

(Emphasis supplied)

11. With effect from 1st July, 2012, the following explanation was added to Rule 3(4) of the Cenvat Credit Rules (supra):-

"*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."

(Emphasis supplied)

Clearly, acceptance of the stand of the Revenue, in the present case, would amount to applying the afore-extracted Explanation retrospectively, to a period prior to its introduction.

12. Rules 3 and 4 of the of Taxation of Services (Provided from Outside India and Received in India) Rules,2006 (hereinafter referred to as "Taxation of Services Rules") are also relevant, and may be reproduced thus:

(10)

"3. **Taxable services provided from outside India and received in India.**– Subject to section 66A of the Act, the taxable services provided from outside India and received in India shall, in relation to taxable services –

(i) specified in sub-clauses (d), (p), (q), (v), (zzq), (zzza), (zzzb), (zzzc), (zzzh), (zzzr), (zzzy), (zzzz) and (zzzza) of clause (105) of section 65 of the Act, be such services as are provided or to be provided in relation to an immovable property situated in India;

(ii) specified in sub-clauses (a), (f), (h),(i), (j), (l), (m), (n), (o), (s), (t), (u), (w), (x), (y), (z), (zb), (zc), (zi), (zj), (zn), (zo), (zq), (zr), (zt), (zu), (zv), (zw), (zza), (zzc), (zzd), (zzf), (zzg), (zzh), (zzi), (zzl), (zzm), (zzn), (zzo), (zzp), (zzs), (zzt), (zzv), (zzw), (zzx), (zzy), (zzzd), (zzze), (zzzf), and (zzzp) of clause (105) of section 65 of the Act, be such services as are performed in India:

Provided that where such taxable service is partly performed in India, it shall be treated as performed in India and the value of such taxable service shall be determined under section 67 of the Act and the rules made thereunder;

(iii) specified in clause (105) of section 65 of the Act, but excluding –

(a) sub-clauses (zzzo) and (zzzv);

(b) those specified in clause (i) of this rule except when the provision of taxable services specified in clauses (d), (zzzc), and (zzzr) does not relate to immovable property; and

(c) those specified in clause (ii) of this rule, be such services as are received by a recipient located in India for use in relation to business or commerce.

4. Registration and payment of service tax.– The recipient of taxable services provided from outside India and received in India shall make an application for registration

(11)

and for this purpose, the provisions of Section 69 of the Act and the rules made thereunder shall apply."

13. The expressions "output service", "person liable for paying service tax" and "provider of taxable service" were defined in Clauses (p), (q) and (r) of Rule 2 of the CENVAT Credit Rules, during the relevant period, which read as under:-

> "(p) "output service" means any taxable service, excluding the taxable service referred to in sub-clause (zzp) of clause (105) of Section65 of the Finance Act, 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;
>
> (r) "provider of taxable service" includes a person liable for paying service tax;
>
> (q) "person liable for paying service tax" has the meaning as assigned to it in clause (d) of sub-rule (1) of Rule 2 of the Service Tax Rules, 1994"

14. Clause (q) of Section 2 of the CENVAT Credit Rules refers us, therefore, to the definition of "person liable for paying service tax", as contained in Rule 2(1)(d)(iv) of the Service Tax Rules (as it stood then), which reads as under:

> "(iv) "person liable for paying service tax" means, in relation to any taxable service provided or to be provided by any person from a country other than India and received by any person in India under Section 66A of the Act, the recipient of such service;"

Orders of the authorities below

(17)

15. The reasoning of the Commissioner, as contained in the Order-in-Original, dated 6th July, 2012, insofar as it relates to the aforesaid demand of Rs.1,93,74,146/-, is contained in para 19.5 thereof, which may be reproduced as under:

> *"Rule 3 (1) of the CENVAT Credit Rules, 2004 inter alia allows a provider of taxable service to take CENVAT credit of – the duty of excise and other duties and cess specified therein, the service tax leviable under Section 66 of the Finance Act, 1994; the service tax leviable under Section 66A of the Finance Act, 1994, etc. paid on any input or capital goods received in the premises of the provider of output service, and any input service received by the provider of output service. Further, Rule 3(4)(e) of the CENVAT Credit Rules, 2004 provides that the CENVAT credit may be utilized for payment of service tax on any output service. It follows therefrom that CENVAT credit of duty or service tax, etc. availed on any input or input service etc. may be utilized towards payment of service tax on any output service. The services received by the Noticee from outside India are not output services for the purpose of utilization of CENVAT credit under Rule 3 of the CENVAT Credit Rules, 2004. Further, Rule 5 of the Taxation of Services (Provided from Outside India and Received in India) Rules, 2006, erases every shadow of doubt in this regard. This rule in clear and categorical items envisages that "the 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." Thus, a reading of statutory provisions contemplated in Section 66A(1) of the Act along with Rule 2(1)(d)(iv) of the said Rules, Rules 3(1) and 3(4)(e) of the CENVAT Credit Rules, 2004 and Rule 5 of the Taxation of Services (Provided from Outside India and Received in India) Rules, 2006, as a whole, clarifies unambiguously that the Noticee was not entitiled to utilize the CENVAT credit against payment of service tax on the services received by it from outside India. The Noticee was required to pay the service tax on the services received y it from outside India through cash. This amount as demanded in the impugned notice is liable to be recovered from them in cash. The contention of the Noticee that it is revenue neutral has no merit at all, for that payment of service tax through cash, in such circumstances, is the mandate of the law. The other contention of the Noticee that they had reflected the utilization of CENVAT credit on such services in the ST-3 returns also does not have any merit, for that, in this regard, a clear picture does not emerge from the returns. Moreover, the liability to pay service tax and the assessment thereof is upon the Noticee under self-assessment scheme and not upon the department. Thus,

this argument of the Noticee also does not sustain. Hence, it is rejected."

16. The CESTAT concurred with the Commissioner, holding that Section 66-A of the Finance Act, 1994 required service tax payable on reverse charge basis to be paid in cash. It was also held that CENVAT credit was allowable, to the person liable for paying service tax, in such cases only contingent on payment of the service tax in cash. The CESTAT, however, held that, consequent to payment of service tax under contending that there had been a mistake, Section 66-A of the Finance Act, 1994, in cash, the appellant would be entitled to avail CENVAT credit of the said amount, which would, therefore, be re-credited in its CENVAT credit account.

17. Contending that there had been a mistake in the aforesaid decision of the CESTAT, the appellant filed ROM Application No. ST/ROM/5046B, 50704/2018 & ST/MI5C/50526/2018, for rectification thereof. The appellant pointed out, in the said application that it was only with effect from 1st July, 2012, that an explanation had been appended to Section 3(4) of the CENVAT Credit Rules, proscribing payment of service tax, by utilization of CENVAT Credit, in cases in which the person responsible for paying service tax was the service tax recipient, i.e., where service tax was required to be paid on reverse charge basis. Per corollary, submitted the appellant in the said ROM Application, prior to 1st July, 2012, service tax, even on reverse charge basis, i.e., under Section 66-A of the Finance Act, 1994, was payable from the CENVAT credit account of the assessee.

18. The aforesaid ROM application, filed by the appellant, was also dismissed by the CESTAT, *vide* Miscellaneous Order dated 14th September, 2018.

19. Aggrieved by the aforesaid final order dated 1st December, 2018 of the CESTAT upholding the confirmation, against it, of the service tax demand of Rs.1,93,74,146/- as well as by Miscellaneous Order dated 14th September, 2018 (*supra*), dismissing the application, filed by the appellant for rectification of mistake therein, the appellant has moved this Court, by means of the present appeal under Section 83 of the Finance Act, 1994 read with Section 35-G of the Central Excise Act, 1944.

20. We have heard Mr. Karan Sachdev, learned counsel for the appellant and Mr. Amit Bansal, learned Standing Counsel appearing for the respondent.

21. A query was put to Mr. Amit Bansal at the outset, as to how, when the Explanation, prohibiting payment of service tax, on reverse charge basis, from the CENVAT credit account, was introduced in Rule 3(4) of the CENVAT Credit Rules only with effect from 1st July, 2012, the Revenue was effectively making the said prohibition applicable to a prior period. Mr. Amit Bansal's response was that the said Explanation was only clarificatory in nature. The response, needless to say, merits submission only to invite rejection. The Explanation to Rule 3(4) of the CENVAT Credit Rules, as engrafted

on 1st July, 2012, created a substantive liability, and a prohibition, on payment of service tax on reverse charge basis from the CENVAT credit account. It is trite that provisions creating substantive rights, or liabilities, cannot have retrospective application. [Refer ***State of Punjab v. Bhajan Kaur AIR 2008 SC 2276***] It is equally trite that a provision cannot be treated as clarificatory until and unless the provision itself so declares. [Refer ***Virtual Soft Systems Ltd. v. Commissioner of Income Tax, Delhi (2007) 9 SCC 665***]

Inasmuch as the Explanation to Rule 3(4) of the CENVAT Credit Rules, 2004 engrafts a prohibition in the CENVAT Credit Rules, resulting in a liability on the assessee, it cannot, quite obviously, be accorded retrospective effect, or be applied to a period prior to the date of its introduction in the statute, i.e. 1st July, 2012.

22. Inasmuch as the entire period of demand, in the present case, is prior to 1st July, 2012, the appellant is entitled to succeed even on that score.

23. We, however, propose to accord to the dispute a more empirical analysis.

24. Section 66A of the Finance Act, 1994 makes the recipient of any service, specified in Section 65(105) of the Finance Act, 1994 – which would cover all "taxable services" – received by a person located in India, from a service provider located outside India, liable to pay service tax thereon as if he had himself provided the service in India. This, in taxing parlance, is known as payment on "reverse

charge basis". In the service tax universe, service tax is payable, on reverse charge basis in various circumstances, chiefly in cases of "import of service", i.e. where the service tax provider is located outside India and the service tax recipient is located in India, and where the service provider is a Goods Transport Agency (GTA).

25. Rule 2(1)(d)(iv) of the CENVAT Credit Rules defines the recipient of the service, in cases where the service, received by a recipient in India, is provided by a service provider located outside India, as the "person liable for paying service tax".

26. The issue to be determined is whether the appellant, as the person liable to pay the service tax on services provided by service providers located outside India, could pay the said service tax by utilization of CENVAT credit available with it.

27. A bare reading of the CENVAT Credit Rules reveals that the answer to this question has necessarily to be in the affirmative. This may be demonstrated thus:

(i) Rule 3(4) of the CENVAT Credit Rules clarifies that CENVAT credit may be utilised for payment, *inter alia*, of service tax on any output service.

(ii) "Output service" is defined, in Rule 2(p) of the CENVAT Credit Rules, which envisages that any taxable service, excluding the taxable service referred to in sub-clause (zzp) of

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Clause (105) of Section 65 of the Finance Act,1994 provided by the provider of taxable service, to a customer, is an "output service".

(iii) "Provider of taxable service" is defined, in Rule 2(r) of the CENVAT Credit Rules as including a person liable for paying service tax.

(iv) Rule 2(q) of the CENVAT Credit Rules defines "person liable for paying service tax" as having the same meaning, assigned to the expression, in Rule 2(1)(d) of the Service Tax Rules, 1994 (hereinafter referred to as "the Service Tax Rules").

(v) In case of services provided by a provider located outside India and received by a recipient located in India, the Indian recipient is, by virtue of Rule 2(1)(d)(iv) of the Service Tax Rules, defined as the "person liable for paying service tax".

(vi) The Indian recipient of the service also, therefore, becomes the "person liable for paying service tax", under the CENVAT Credit Rules.

(vii) The Indian recipient of the taxable service also, consequently, becomes the "provider of taxable service", as defined in Rule 2(r) of the CENVAT Credit Rules.

(viii) Rule 3 (4) of the CENVAT Credit Rules permits CENVAT Credit to be utilised for payment of service tax on any "output service". "Output service" is defined, in Rule 2(p) of the CENVAT Credit Rules as service provided, by a provider of taxable service. It has already been pointed out, hereinabove, that the petitioner was, by dint of the definition of the expression, as contained in Rule 2(r) of the CENVAT Credit Rules, the "provider of taxable service". Section 66A of the Finance Act, 1994, holds that, in cases where service, provided by a provider located outside India, is received by a recipient in India, the service would be deemed to have been provided by the Indian recipient.

(ix) Resultantly, therefore, the services received in India, by the appellant, from the service providers located outside India, were deemed to be output services, provided in India, for which the appellant was the service provider.

(x) In this scenario, therefore, service tax, on such services, was payable by utilisation of CENVAT Credit, by virtue of Rule 3(4) of the CENVAT Credit Rules.

28. We may also observe, in this context, that this issue has engaged the attention of various High Courts from time to time, including, *inter alia*, the High Court of Rajasthan in ***U.O.I. v. Kansara Molder Ltd. 2018 (15) GSTL 255 (Raj)***, the High Court of Karnataka in in ***CST v. Aravind Fashions Ltd., 2012 (25) STR 583***

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(Kar) [SLP (C) Diary No. 23369/2018, preferred against which, has also been dismissed by the Supreme Court on 3rd August, 2018], the High Court of Punjab and Haryana in ***C.C.E. v Nahar Industrial Enterprises Ltd., 2012 (25) STR 129 (P & H)*** and the High Court of Bombay in ***C.C.E. v. U. S. V. Ltd, 2019-VIL-334-BOM-ST***.

29. All these decisions have been digested by the High Court of Bombay in ***U. S. V. Ltd (supra)***, para 7 of which reads thus:

> "The view taken by the Tribunal in respect of Rule 3(4)(e) of the Cenvat Credit Rules, 2004 now stands concluded against the revenue by the decision of the Gujrat High Court in the case of ***Commissioner of C.Ex. & Customs vs. Panchmahal Steel Ltd., 2015 (37) S.T.R. 965 (Guj.)***, Delhi High Court in the case of ***Commissioner of Service Tax vs. Hero Honda Motors Ltd. 2013 (29) S.T.R. 358 (Del.)*** and Punjab and Haryana High Court in ***Commr. Of C.Ex. Chandigarh vs. Nahar Industrial Enterprises Ltd., 2012 (25) S.T.R. 129 (P & H)***. The aforesaid decisions have been followed by this Court in ***The Commissioner of CGST & Central Excise v/s. Godrej & Boyce Mfg Co. Ltd. (Central Excise Appeal No. 23 of 2019) decided on 24th June, 2019*** to allow utilisation of CENVAT credit for payment of service tax on reverse charge basis GTA (Goods Transport Agency). The above decision of Gujrat, Delhi and Punjab High Courts were also followed by us in ***Commissioner of CGST and General Excise, Belapur Commissionerate vs. M/s. GTL Infrastructure Limited in (Central Excise Appeal No. 94 of 2019) decided on 25th June, 2019*** . In respect of discharge of service tax obligation on reverse charge basis on import of services under Section 66A of the Finance Act, 1994 by utilization of cenvat credit. Thus there is no reason not to follow our Court's decision in ***GTL Infrastructure Limited (supra).***"

30. In view of the above, keeping in view the statutory provisions and judicial pronouncements as referred to hereinabove, it is clear that

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the impugned Final Order, dated 1st February, 2018, of the CESTAT cannot sustain in law. It is, accordingly, set aside.

31. The appeal, of the appellant, is accordingly allowed.

CM APPL. 1273/2019

32. In view of the order passed in this appeal, this Civil Miscellaneous Application is disposed of.

CHIEF JUSTICE

C.HARI SHANKAR, J

SEPTEMBER 19, 2019/*r.barariа*