**2012 (25) S.T.R. 456 (Tri. - Mumbai)**

IN THE CESTAT, WEST ZONAL BENCH, MUMBAI

[COURT NO. II]

**Shri S.K. Gaule, Member (T)**

**GIMATEX INDUSTRIES PVT. LTD.**

*Versus*

**COMMISSIONER OF C. EX., NAGPUR**

*Final Order Nos. A/297-298/2011-WZB/C-IV(SMB), dated 14-7-2011 in Appeal Nos. E/1146-1147/2009-Mum*

**Cenvat credit of Service tax - Utilization of - Payment of Service tax on GTA services through Cenvat credit - For the period beyond 18-4-2006, the appellant not entitled to utilize Cenvat credit for payment of Service tax on GTA services - Section 68(2) of Finance Act, 1994 read with Rule 2(1)(d) of Service Tax Rules, 1994.** *[paras 6.1, 6.3]*

***Appeals disposed off***

**CASES CITED**

Commissioner v. Nahar Industrial Enterprises Ltd. — 2012 (25) S.T.R. 129 (P & H) — **Inapplicable** .....

Commissioner v. Philips Engineering Corporation — 2010 (20) S.T.R. 692 (Tri.-Mumbai) — *Referred* .....

Gimatex Industries Pvt. Ltd. v. Commissioner — Order No. A/162/2011/SMB/C-IV, dated 16-6-2011 — *Referred* .....

Iswari Spinning Mills v. Commissioner — 2011 (22) S.T.R. 549 (Tribunal) — *Relied on* .....

ITC Ltd. v. Commissioner — 2011 (23) S.T.R. 41 (Tri. - Bang.) — *Relied on* .....

REPRESENTED BY :Shri G.L. Deshpande, Advocate, for the Appellant.

Shri A.K. Prabhakar, JDR, for the Respondent.

**[Order]. -** Heard both sides.

**2.** The appellants filed these appeals against Orders-in-Appeal No. SR/191/NGP/2009 and SR/190/NGP/2009 both dated 4-9-2009 whereby the Commissioner (Appeals) upheld the orders of the lower adjudicating authority. Since the issue involved in these appeals is common, they are taken up for disposal together.

**3.** Briefly stated common facts of the case are that the appellant is engaged in the manufacture of cotton yarn, blended yarn and man made fabrics falling under Chapter 52 and 55 of the Central Excise Tariff Act, 1985. The appellant is also registered under GTA Service. The appellant avails CENVAT credit on inputs, capital goods and input services. On verification of records of the appellants it was found that the appellant paid Service tax on outward transportation of finished goods through CENVAT credit. Proceedings were initiated against them on the ground that duty is required to be paid through PLA or cash on the outward transportation for GTA and not by CENVAT credit. The lower adjudicating authority confirmed the demand of Rs. 44,487/- along with interest and equal amount of penalty was also imposed under Rule 15 of Cenvat Credit Rules, 2004 read with Section 11AC of Central Excise Act, 1944. The

appellants challenged the same. The learned Commissioner (Appeals) upheld the lower adjudicating authority's orders. Hence these appeals.

**4.** The learned Advocate. Counsel submitted that the appellant is not simply a provider of output service but also a manufacturer of the excisable goods. The appellant further contended that till 28-2-2008 for the manufacture of final products the service of Goods Transport Agency remained an output service and, therefore, CENVAT credit was permissible to be utilized for payment of Service tax upto 28-2-2008. In support of their contention they placed reliance on the decision of Hon'ble Punjab & Haryana High Court in the case of *CCE, Chandigarh* v. *M/s. Nahar Industrial Enterprises Ltd.*, dated 6-5-2010 [2012 (25) S.T.R. 129 (P & H)]. They have also placed reliance on the Tribunal's decisions in the case of *Gimatex Industries Pvt. Ltd.* v. *CCE, Nagpur* vide Order No. A/162/11/SMB/C-IV, dated 16-6-2011 and in the case of *Commissioner of Service Tax, Mumbai* v. *Philips Engineering Corporation* - 2010 (20) S.T.R. 692 (Tri.-Mum.). The learned Counsel has made alternate plea that since the issue involved is of interpretation of law and in view of various conflicting decisions in this case the penalty is not imposable.

**5.** On the other hand the learned JDR submitted that this issue is settled in view of the Tribunal's decision in the case of *M/s. ITC Ltd.* v. *CCE, Guntur* - 2011-TIOL-568-CESTAT-BANG = 2011 (23) S.T.R. 41 (Tri. - Bang.) wherein it was held that "irrespective of period prior to 19-4-2006 or period after 19-4-2006, the taxable service received by them, on which they were liable to pay Service tax as service recipient under the provisions of Section 68(2) of the Finance Act, 1994 read with Rule 2(1)(d) of the Service Tax Rules, 1994, could be treated as their 'output service' and service tax on the same was required to be paid in cash, not by utilizing Cenvat credit. With regard to Hon'ble Punjab & Haryana High Court decision in the case of *M/s. Nahar Industrial Enterprises Ltd.* (supra) the learned JDR submits that the period involved in the case in hand is beyond 18-4-2006 and which was not the case before the Hon'ble High Court of Punjab & Haryana. He also placed reliance on the Tribunal's decision in the case of *Iswari Spinning Mills* v. *CCE, Madurai* - 2011 (22) S.T.R. 549 (Tri.-Chennai).

**6.1** I have carefully considered the submissions and perused the records. The appellants paid service tax on the GTA services through CENVAT credit for the period from April, 2007 to March, 2008. With effect from 19-4-2006 the explanation to Rule 2(p) in Cenvat credit was deleted. The above facts are not in dispute. It is apt to quote here the decision cited by learned JDR in the case of *M/s. ITC Ltd.* (supra) wherein it was held that -

> "11. Thus, in respect of the persons providing some taxable output service/services and/or manufacturing dutiable final products, neither during the period prior to 19-4-2006 nor during the period w.e.f. 19-4-2006, the taxable service received by them, on which they were liable to pay Service tax as service recipient under the provisions of Section 68(2) of the Finance Act, 1994 read with Rule 2(1)(d) of the Service Tax Rules, 1994, could be treated as their 'output service' and service tax on the same was required to be paid in cash, not by utilizing CENVAT credit . As regards the category of persons neither providing any taxable service nor manufacturing any dutiable final products, to which the appellant belong, but liable to pay service tax on some taxable service received by them, as discussed above, while during the period w.e.f. 19-4-2006 such taxable service received by them can not be treated as their 'output service", during the period

prior to 19-4-2006 while the taxable service received by them, on which they were liable to pay service tax, was deemed to be their "output service" by virtue of Explanation to Rule 2(p), they were still required to pay service tax on such deemed output service" through cash, not through CENVAT credit as discussed in para 8.1 above, without providing any taxable output service or manufacture of dutiable final products by them or other taxable services received by them. The duty paid goods received or other taxable service received by such person can not be deemed to be inputs and input services for his deemed output service."

12. In view of the above discussion, to the extent the service tax on the GTA services received by the appellant was not paid in cash but was paid through CENVAT credit account, the same would be recoverable from them."

**6.2** Similarly the Tribunal in the case of *Iswari Spinning Mills* (supra) in para 8 has held that -

8. As regards the period beyond 18-4-2006, it has been stated by both sides that only a few of these appeals involve periods beyond 18-4-2006 also (from 19-4-2006 but prior to 1-3-2008, when the Service Tax Law was further amended). In respect of this period, a few of the learned counsels have argued that despite the deletion of Explanation to Rule 2(p) of the CENVAT credit on 19-4-2006, the manufacturer-assessees should be deemed as service providers in view of the legal provision imposing the burden of paying service tax on them for GTA service received by them, till the law was further amended on 1-3-2008. This contention is opposed by the Department. I find that all the decisions which are in favour of the assessee-appellants/respondents have held them to be service providers for the period upto 18-4-2006 solely on the ground of the Explanation to the definition of output service under Rule 2(p). Hence, with the deletion of the Explanation with effect from 19-4-2006, the benefit of these decisions cannot be extended to them for the period from 19-4-2006. As far as the period beyond 18-4-2006 is concerned, the Tribunal in the case of *Alstom Ltd.* v. *CCE* - 2008 (12) S.T.R. 23 has also dealt with the issue for this period and has held in that case that the credit cannot be utilized for paying service tax for this period as well. As such, as far as the period beyond 18-4-2006 is concerned, I hold that the appellant/respondent-assessees are not entitled to utilize CENVAT credit for payment of service tax on GTA service and therefore, the duty demand and demand of interest are justified. However, considering the disputed nature of the issue, I hold that imposition of penalty in respect of the period from 19-4-2006 to 28-2-2008 is not justified and wherever penalties have been imposed, the same are set aside."

**6.3** From the above it follows that for the period beyond 18-4-2006 the appellant is not entitled to utilize CENVAT credit for payment of Service tax on GTA service. As far as decision of the Hon'ble High Court of Punjab and Haryana in the case of *Nahar International Enterprises* (supra) is concerned I find force in the contention of the learned JDR, that period involved in the said case was prior to 19-4-2006. Hence the same is not relevant to this case. As regard single member of this Tribunal in the case of *Gimatex Industries Pvt. Ltd.* is concerned

the decisions of Tribunal in the case of *ITC Ltd.* and *Iswari Spinning Mills* (supra) were not before him.

**7.** In view of the above, I do not find any infirmity with the lower authorities concurrent findings regarding confirmation of demand and interest against the appellants. However, considering the dispute and the various conflicting decisions on the issue, imposition of penalty is not justifiable in this case. Appeals are disposed of in the above terms.

(Dictated in Court)

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