

**2010-TIOL-752-CESTAT-AHM**

**( Also see analysis of the Order )**

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL  
WEST ZONAL BENCH AT AHMEDABAD  
COURT-II**

**Appeal No.ST/120/09**

Arising out of OIA No.166/2008(STC)LMR/Commr.(A)/Ahd, Dated: 12.12.08  
Passed by Commissioner of Central Excise (Appeals), Ahmedabad

**Date of Decision:07.05.2010**

**M/s ORION APPLIANCES LTD**

**Vs**

**CST, AHMEDABAD**

**Appellant Rep by:** Shri Uday Joshi, Adv.

**Respondent Rep by:** Shri J S Negi, SDR

**CORAM:** B S V Murthy, Member (T)

**Trading activity is not an exempted service – rule 6 of the CCR, 2004 does not apply – there is no provision in the Cenvat Credit Rules, 2004 to cover such situations - only obvious solution which is legally correct is to ensure that once in a quarter or once in a six months, the quantum of input service tax credit attributed to trading activities according to standard accounting principles is deducted – Matter remanded for quantification**

**ORDER No. A/465/WZB/AHD/2010**

**Per: B S V Murthy:**

Appellant is engaged in providing maintenance and repair services and commissioning and installation service of "RO" systems. During the course of scrutiny of the ST-3 returns filed by the appellants for the period from October 2004 to March 2005, it was observed that the amount of service tax payable was Rs.33,474/- + 669/- and the appellants adjusted the said amount against the cenvat credit. Similarly in the ST-3 returns filed by the appellants for the period from April 2004 to September 2004, the amount of service tax payable was Rs.25,256/- + 107/- and the appellants adjusted the said amount against the cenvat credit. As per the cenvat credit return filed along with the ST-3 returns, it was observed that the appellants were availing the credit on advertising, security, courier, telephone and banking services. These services were not entirely used in providing Maintenance and Repair services but also used in trading activity. Credit of input services, which were entirely used in trading activity, was not available to the appellants for payment of service tax. The total service tax payable for the half year ending March 2005 was Rs.34,143/-. As per Rule 6(3) of the Cenvat Credit Rules, 2004 the total cenvat credit available to the appellants was Rs.6,828/- (20% of Rs.34,143/-) only and rest of the amount i.e. Rs.27,315/- was to be paid by the appellants in cash only. The appellants had adjusted the service tax amount fully from cenvat credit and had availed the excess cenvat credit of Rs.27,315/- which was not

admissible to the appellants. Further it was observed that the total service tax payable for the half year ending September 2004 was Rs.25,363/-. As per Rule 3(5) of the Service Tax Credit Rules, 2002 the total service tax credit available to the appellants was Rs.8,877/- (35% of Rs.25,363/-) only and rest of the amount i.e. Rs.16,486/- was to be paid in cash only. The appellants had adjusted the service tax amount fully from cenvat credit and had availed the excess cenvat credit of Rs.16,486/- which was not admissible to the appellants. Accordingly, the appellants had wrongly availed/utilized the cenvat credit amounting to Rs.43,801/-.

2. The lower authorities have taken a view that in view of the provisions of Rule 3 and Rule 6 of Cenvat Credit Rules, the appellant should have maintained separate accounts in respect of input services used for trading activity and other services which are liable to service tax. Accordingly the cenvat credit of Rs.43,801/- availed by the appellant was demanded.

3. The learned counsel for the appellants submitted that trading activity is not at all a service. According to Rule 6(2) of Cenvat Credit Rules, the appellant is required to maintain separate account only in respect of exempted service and dutiable service. Since trading activity cannot be considered a service at all, the question of maintenance of separate accounts does not arise. Further, he also submits that services such as advertisement, security, courier, telephone, banking and professional charges are used commonly for trading activity as well as maintenance and repair, commissioning and installation services. It is not correct to say that these services are not required or have not been utilized for trading activity also. He submits that entire credit has been disallowed without taking this aspect into account even though it had been submitted by the appellant that these services had been used for both the activities. On the other hand learned DR would submit that the lower authorities after verifying the records have come to the conclusion that these services have not been utilized for trading activity. Further, he also submits that duty demand has been made as per Rule 3 of Service Tax Credit Rules, 2002. It is his contention that since trading activity is not at all a service, the provisions of Rule 6 of Cenvat Credit Rules and provisions of Service Tax Credit Rules cannot be applied.

4. The issue is to be decided in this case are:

(i) Whether trading activity can be called a service.

(ii) Whether Rule 6 of Cenvat Credit Rules, 2002 and Service Tax Credit Rules, 2002 would be applicable when input services are used in respect of trading activity as well as taxable services.

(iii) if Cenvat Credit Rules and Service Tax Credit Rules are not applicable, the procedure to be followed by the assessee for availing input service tax credit.

5. As regards the issue as to whether trading activity can be called a service, it is quite clear that since trading activity is nothing but purchase and sales and is covered under sales tax law, it may not be appropriate to call it a service. Therefore it has to be held that trading activity cannot be called a service and therefore it cannot be considered as an exempted service also.

6. The next question that arises is whether Cenvat Credit Rules and Service Tax Credit Rules would be applicable. Rule 6(2) of Cenvat Credit Rules is reproduced below:

"Where a manufacturer or provider of output service avails of *CENVAT CREDIT* in respect of any inputs or input services, [\*\*\*], and manufactures such final products or provides such output service which are chargeable to duty or tax as well as exempted goods or

services, then, the manufacturer or provider of output service shall maintain separate accounts for receipt, consumption and inventory of input and input service meant for use in the manufacture of dutiable final products or in providing output service and the quantity of input meant for use in the manufacture of exempted goods or services and take *CENVAT credit* only on that quantity of input or input service which is intended for use in the manufacture of dutiable goods or in providing output service on which service tax is payable."

7. Sub Rule 3 of Rule 6 provides that where output service provider does not maintain separate account, he has to follow the procedure or avail the options available under that Rule. But this rule is applicable only when the output service provider is providing services which are chargeable to service tax and as well as exempted services. Similar is the situation when we examine Rule 3 of Service Tax Credit Rules, 2002. Both these rules clearly speak of exempted services. Rule 3 of Service Tax Credit Rules also covers non taxable services. Since trading activity is not at all a service, it is not correct to apply these provisions.

8. Then the question arises as to whether the appellant would be eligible for the full amount of service tax credit taken by them on input services can be used for payment of service on output service provided the input services have been used for providing the output services. No doubt there is no one to one correlation required. This is the reason why provisions have been made in Cenvat Credit Rules and Service Tax Credit Rules to cover such situations where an assessee is providing both exempted and taxable services. In cases where an assessee is undertaking activities which cannot be called a service or which cannot be called manufacture, that activity goes out of the purview of both Central Excise Act as well as Finance Act, 1994. Therefore, we have a situation where an assessee would not be eligible to take input service tax credit on an output which is neither a service nor excisable goods and at the same time there is no provision to cover situations where an assessee is providing a taxable service and is undertaking another activity which is neither a service nor manufacture. In such a situation the only correct legal position appears to be that it is for the appellant to choose and segregate the quantum of input service attributable to trading activity and exclude the same from the records maintained for availment of credit. Naturally this cannot be done in advance since it may not be possible to forecast what would be the quantum of trading activity and other activity which is liable to service tax. The only obvious solution which would be legally correct appears to be to ensure that once in a quarter or once in a six months, the quantum of input service tax credit attributed to trading activities according to standard accounting principles is deducted and the balance only availed for the purpose of payment of service tax of output service. This proposition is not against the law in view of the fact that there are several decisions of various High Courts and also of the Tribunal wherein a view has been taken that subsequent reversal of credit amounts to non availment of credit.

9. I am conscious of the fact that the decision or the conclusion reached by me above is not what was proposed in the show cause notice or what was desired by the appellants. But here I find that the procedure adopted by the department is also not correct and at the same time as per law assessee is not eligible for service tax paid on input services attributable to trading activity. Obviously, the only solution that could be thought of what has been discussed above. In view of the above discussion, the matter is remanded to the Original Adjudicating Authority before whom the appellants shall present the details relating to service tax paid on input services attributable to trading activity and other services separately and after verification if felt necessary, the adjudicating authority shall quantify the amount to be reversed or payable by the appellant. It is made clear that if the Original Adjudicating Authority is not satisfied with the report given by the appellants and proposes any revision, such revision shall be made only after giving an opportunity to the appellants.

(Dictated & Pronounced in Court)

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