CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH, CHENNAI
COURT HALL No. III

DEFECT DIARY NO.41139/2023 (ST)

[Arising out of Order-in-Original No.2/2023 (C) dt. 09.01.2023 passed by Commissioner of GST & Central Excise, Chennai South, 692, M.H.U. Complex, 5th Floor, Anna Salai, Nandanam, Chennai 600 035].

M/s.Logical Logistics Private Limited .... Appellant
No.57/2, Sri Sai Subhodaya Apartments,
East Coast Road,
Thiruvanmiyur,
Chennai 600 041.

Versus

The Commissioner of GST & Central Excise, ...Respondent
Chennai South Commissionerate
692, M.H.U. Complex,
5th Floor, Anna Salai, Nandanam,
Chennai 600 035.

APPEARANCE :

Mr. G. Natarajan, Advocate
For the Appellant

Mr. M. Selvakumar, Assistant Commissioner (A.R)
For the Respondent

CORAM :

HON'BLE MS. SULEKHA BEEVI. C.S., MEMBER (JUDICIAL)
HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)

DATE OF HEARING : 14.02.2024
DATE OF DECISION :19.02.2024

INTERIM ORDER No.40027/2024

The above matter was heard on the defect noted by the Registry. As per Section 35F of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994, an appeal cannot be entertained by the Tribunal unless the appellant makes a predeposit. In the present case, the appellant did not make the predeposit. As per letter dt. 02.11.2023 submitted before the Registry the appellant stated that as per the ST-3 returns filed by them for the period April 2017 to June 2017, the appellant had a closing balance of cenvat credit of Rs.4,48,38,307/- as service tax and Rs.99,905/- as Krishi Kalyan Cess (KKC) ; that the said cenvat credit has not been carried forward into the GST regime and the amount is still lying in the cenvat credit account. It is requested that this cenvat credit may be considered as payment against the predeposit. Appellant has also filed an affidavit to the effect that cenvat credit balance will not be utilized during pendency of appeal. The Registry has thus listed the matter before the Bench.

2. The Ld. Counsel Sri G. Natarajan appeared and argued for the appellant. It is submitted that the appeal is filed against the order passed by the Commissioner who confirmed the demand of differential service tax of Rs.6,43,71,846/- for the period April 2015 to June 2017 under Section 73 (2) of the Finance Act, 1994. The adjudicating Commissioner confirmed the demand of interest on the above amount under Section 75 of the Finance Act, 1994 as well as late fee of Rs.68,600/- under Section 70 of the Finance Act, 1994 read with Rule 7 and 7C of the Service Tax

Rules, 1994. An equal penalty under Section 78 was imposed besides a penalty of Rs.10,000/- under Section 77 of the Finance Act, 1994 . As per Section 35F of Central Excise Act, 1944, the appellant is required to make predeposit of 7.5% of the tax confirmed. The total service tax confirmed being Rs.6,23,68,674/-, the predeposit required to be made by appellant would be only Rs.46,77,651/-. The appellant has a cenvat credit balance of Rs.4,47,39,002/- as on June 2017. Due to various reasons their operations were severely affected and during the relevant period, the cenvat credit balance could not be carried forward to GST regime by following the procedures prescribed under Rule 117 of the CGST Rules, 2017. It is submitted by the learned counsel that the said cenvat credit balance account cannot lapse and the same can be used to pay any service tax liability for the period upto June 2017. Hence the above said amount of cenvat credit lying in their cenvat account may be considered as payment towards the required predeposit. The Ld. Counsel adverted to the law contained in transitional provisions with regard to the cenvat credit in Section 140 of the GST Act, 2017. It is argued that as per Section 140 (1) *a registered person, other than a person opting to pay tax under section 10, shall be entitled to take, in his electronic credit ledger, amount of cenvat credit carried forward in the return relating to the period ending with the date immediately preceding the appointed day, furnished by him under the existing law in such manner as may be prescribed.*

Provided that the registered person shall not be allowed to take credit in the following circumstances namely :-

(i) where the said amount of credit is not permissible as input tax credit under this Act ; or

(ii) *where he has not furnished all the returns required under existing law for the period of six months immediately preceding appointed date ; or*

(iii) *whether the said amount as credit relates to goods manufactured and cleared such exemption notification as are notified by the Government*.

3. It is submitted that the above provision granted an option for an assessee to carry forward the said cenvat credit in his electronic credit ledger by filing GST TRAN-1. However, the appellant was not able to take steps to carry forward to the GST regime. Even after the extension of time by the decision of the Hon'ble Supreme Court, the appellant has not carried forward the old balance of cenvat credit into the GST credit ledger and the cenvat credit is still lying unutilized. If the credit is carried forward the appellant cannot request for refund. This is because as per clause (a) of sub-section (6) of Section 142, no refund shall be allowed of any amount of cenvat credit where the balance of said amount as on the appointed day has been carried forward under the CGST Act. The appellant has not neither carried forward nor applied for any refund and the amount is still lying as balance in his cenvat credit account. Clause (b) of sub-section (6) states that *every proceeding of appeal , review or reference relating to recovery of cenvat credit initiated whether before, on or <u>after the appointed day under the existing law</u> shall be disposed of in accordance with the provisions of the existing law. If any amount of credit becomes recoverable as a result of such appeal, review or reference, the same shall, <u>unless recovered under the existing law, be recovered as an arrear of tax under the CGST Act</u> and the amount so recovered shall not be permissible as input tax credit under the CGST Act*

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4. Clause (a) sub-section (7) of Section 142 provides that *every proceeding of appeal, review or reference relating to any output duty or tax liability initiated whether before, on or after the appointed day under the existing law, shall be disposed of in accordance with the provisions of the existing law, and if any amount becomes recoverable as a result of such appeal, review or reference, the same shall, unless recovered under the existing law, be recovered as arrear of duty, tax under the CGST Act and the amount so recovered shall not be permissible as input tax credit under the Act.*

5. It is argued by the Ld. counsel that present demand has been adjudicated under the existing law (the erstwhile Service Tax law) and the same has been confirmed and become recoverable against which the present appeal has been filed. Since the demand has been adjudicated and confirmed under the erstwhile Service Tax law, the balance of cenvat credit which was availed under the erstwhile Service Tax law is eligible for adjustment towards the demand confirmed in the impugned order.

6. The provisions contained in Rule 15 of CCR 2017 was also adverted to by the Ld. Counsel to argue that the said rule states that *a person registered under the C.G.S.T Act, 2017 shall transfer the entire cenvat credit available under the CCR, 2004 relating to the period ending with the day immediately preceding the 1st day of July 2017 in his electronic credit ledger as per C.G.S.T Act, 2017 and any cenvat credit which is not eligible for such transfer shall not be retained as cenvat credit unless eligible under these rules*. The Ld. Counsel submitted that the above rule does not prohibit retaining eligible cenvat credit. So also, there is no provision for lapse of the unutilized cenvat credit lying in their balance

prior to 1.7.2017. The cenvat credit being a substantive right, the appellant is eligible for adjustment of the amount towards the demand confirmed.

7. It is prayed by the Ld. Counsel that cenvat credit having been availed under the erstwhile service tax law and now lying as unutilized balance in their cenvat credit account may be considered as sufficient predeposit for the compliance of provisions of Section 35F of the Central Excise Act, 1944 read with Section 83 of Finance Act, 1994 and prayed appeal may be admitted.

8. The Ld. A.R Sri M. Selvakumar appeared for the Department. It is submitted that on perusal of the CBIC-AIO Portal, it is seen that the appellant has not filed Form GST TRAN-1 and therefore has not carried forward the closing balance of the cenvat credit to GST TRAN-1. The CBIC vide circular No.172/04/2022-GST dt. 6.7.2022, vide Sl.No.6, in respect of the issue as to whether the amount available in the electronic credit ledger can be used for making payment of any tax under the GST law, has clarified that any payment towards output tax, whether self-assessed in the return or payable as a consequence of any proceeding instituted under the provisions of GST laws, can be made by utilization of the amount available in the electronic ledger of the assessee. Thus, the amount available in the electronic ledger can be used only for the payments related to the proceedings initiated under the provisions of GST law. In the present case, the amount is not available in electronic credit ledger. The appellant's contention that the cenvat credit lying as unutilized should be adjusted towards the demand confirmed cannot be accepted for the reasons that the said cenvat credit account has become

non-operational after the shift to the GST regime with effect from 1.7.2017. It is prayed that the appellant may be directed to make payment of predeposit without adjustment from the cenvat credit account.

9. Heard both sides.

10. The Ld. Counsel has stressed that there is no bar in the transitional provisions of C.G.S.T. Act, 2017 for adjustment of cenvat credit which is lying unutilized towards predeposit. The main argument is that for a demand which has been confirmed as per the proceedings initiated under the erstwhile Service Tax law the adjustment from cenvat credit has to be allowed as this cenvat credit was availed as per erstwhile service tax law. Section 140, 142 of the C.G.S.T. Act, 2017 makes it clear that the assessee has to file Form GST-TRAN-1 to carry forward the cenvat credit to the GST regime. There was much issue due to the difficulties faced by assessees in not being able to carry forward the credit lying in their cenvat credit account within the prescribed time period. The matter reached the Hon'ble Supreme Court and the time was extended for filing Form GST TRAN-1 to carry forward the unutilized cenvat credit to the electronic credit ledger of the GST regime. In spite of such extension of time, the appellant has not taken steps to carry forward the unutilized credit to the GST regime. It is now the contention of the appellant that the credit which is lying unutilized has to be adjusted towards the demand of service tax.

11. The intention of payment of predeposit is to secure the interest of the Revenue in recovering the amount. Prior to the introduction of Section

35F which mandates payment of predepoist, an application for stay of recovery of the impugned demand was preferred before the Tribunal. The Tribunal would then pass interim order for payment of predeposit after considering the aspect as to how much predeposit is required to be made to secure the interest of Revenue on the basis of preliminary findings on merits of the case. The predeposit varied from case to case and the Tribunal could also waive the requirement to make predeposit in deserving cases. However, after the introduction of Section 35F w.e.f 6.8.2014, there is no power to waive the predeposit. So also, the amount to be deposited is fixed and prescribed by the statute. The payment of predeposit being mandated by the statute, the appeal cannot be entertained/admitted without predeposit.

12. In the pre-GST regime, the cenvat credit could be adjusted for payment of predeposit. However, after the introduction of GST, the cenvat credit Rules 2004 itself has been superseded by Cenvat Credit Rules, 2017 which has come into effect on 1.7.2017. Rule 15 of Cenvat Credit Rules, 2017 reads as under :

> **"RULE 15. Transitional Provisions**. — (1) A person registered under the Central Goods and Services Tax Act, 2017 (12 of 2017) shall transfer the entire CENVAT credit available under the CENVAT Credit Rules, 2004 relating to the period ending with the day immediately preceding the 1st day of July, 2017 in his electronic credit ledger as per Chapter XX of the Central Goods and Services Tax Act, 2017 (12 of 2017) and the rules made thereunder, and any CENVAT credit which is not eligible for such transfer shall not be retained as CENVAT credit unless eligible under these rules.
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> (2)(a) Notwithstanding anything contained in these rules, a person registered under the Central Goods and Services Tax Act, 2017 (12 of 2017), who was not required to register under the Excise Act shall be deemed to be in possession of a document evidencing payment of duty, if the manufacturer of the specified goods on which duty of Central Excise was leviable has issued a credit transfer document to him, in relation to such specified goods held in stock by him on 1st of July, 2017, for which he was not in a possession of invoice evidencing payment of duty.

> (b) The credit transfer document under clause (a) shall be issued by the manufacturer of specified goods subject to such conditions, procedures and safeguards as may be notified by the Central Government.
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> ***Explanation.*** - "Specified goods" for the purpose of sub-rule (2) shall mean such goods which have a value more than rupees twenty five thousand per piece and bear the brand name of the manufacturer or the principal manufacturer and are identifiable by a distinct number such as chassis or engine number of a car.

13. The above provision states that a person registered under the C.G.S.T. Act, 2017 shall transfer the entire cenvat credit available under CCR 2004 immediately by filing Form TRAN-1 to his electronic credit ledger under GST regime. The said rule does not provide that the appellant can retain some balance and that the unutilised balance can be used for payment of duty or tax for the demands confirmed under the erstwhile law. It requires to be stressed that the credit so transferred to electronic credit ledger of GST regime can be used to pay GST as well as excise duty and service tax. In other words, the credit amount lying unutilized cannot be used to pay GST or excise duty or service tax. The argument of Ld. A.R that with effect from 1.7.2017 the cenvat credit account that was maintained by appellant has become non-operational is not without substance. Sub-section (1) of Rule 15 as above states that the cenvat credit which is not eligible for such transfer shall not be retained as cenvat credit unless eligible under these rules. At the time of availing the credit under the erstwhile law, the credit was eligible. However, w.e.f. 1.7.2017, when CCR 2017 has superseded CCR 2004, wherein it is specifically provided that the cenvat credit which was not eligible for transfer cannot be retained as cenvat credit, unless eligible under CCR 2017. The credit balance lying in the appellant's cenvat credit account was availed under CCR 2004 and not under CCR 2017. We

therefore do not find that such adjustment of cenvat credit is permissible. As already stated, the requirement to make predeposit is to protect the interest of Revenue for ease of recovery. In case this appeal proceedings culminate against the assessee, a claim may be put forward that part payment has already been made which is not correct. The request for adjustment of the final demand towards this cenvat credit account can only be considered after Final hearing of the matter. Section 35F mandates payment of predeposit before hearing of the appeal. Even though there is no express provision that the cenvat credit availed during the erstwhile law would lapse, such adjustment cannot be allowed as the law does not give any express provision for such adjustment after 1.7.2017. In the result, we hold that the appellant has to make predeposit and the adjustment from cenvat credit account cannot be allowed. However, in the interest of justice, the appellant is granted one month time to make compliance of the predeposit. List the case for reporting compliance on **28.03.2024**.

(pronounced in court on 19.02.2024)

sd/-

(VASA SESHAGIRI RAO)
Member (Technical)

sd/-

(SULEKHA BEEVI. C.S.)
Member (Judicial)

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