PROPER DESK FOR PROPER APPEAL!

By

Vidyadhar S. Apte

ADVOCATE

Vidyadhar Apte

Many entrepreneurs tried their level best to adjust themselves with Central Excise as well as Service Tax procedures. Knowing that Central Excise is such a kind of procedural law which changes frequently, still they have no complaints. Even if, without providing any taxable service when Central Government compels them to pay Service Tax as a service recipient for particular services, they never say NO.

The Central Government took a good step by allowing Cenvat credit of Service Tax paid on input service by the manufacturer and Central Excise duty paid on inputs/capital goods by the Service Provider for their duty or tax liability respectively. In other words, cross utilization of Excise duty and Service Tax is allowed to the manufacturers and service providers for their duty on finished goods and tax on output service payments.

Naturally, the assessee feels happy and full breath that at least now they can reduce the cost of expenses, by way of availing the Cenvat credit either on inputs, capital goods and input services also.

The hot and horror area of payment of Service Tax as a service recipient in case of 'Transportation of goods by Road' was like caves of chaos. The Department issued so many show cause notices on the issue of availment of Cenvat credit by the assessee against the Service Tax paid on the freight of inputs and freight of delivery of finished goods treating it as 'output service'.

At last, the disputes get resolved by the Board Circular dated 23-8-2007 and two Hon'ble High Court decisions.

The Central Government while introducing the Cenvat Credit Rules, 2004 has not directed anywhere that the Appeals, which are the outcome of disputes related to Cenvat credit either by assessee or by Government should be filed either as Excise Appeal or Service Tax Appeal.

They have not even directed also that if the disputed Cenvat credit is in respect of Service Tax then the appeal should be filed as if it is Service Tax Appeal and if Cenvat credit is in respect of Central Excise then the appeal should be filed as if it is Excise Appeal.

They have not even directed as the end use of Cenvat credit would be decided by the nature and type of Appeal, such as if the disputed Cenvat credit is utilized for Service Tax then Service Tax Appeal and if utilized for Excise duty then Excise appeal.

In nut shell, there are no directions issued related to filing of Appeal either as Excise or Service Tax when the dispute is related to availment and utilisation of Cenvat Credit Rules, 2004.

This article is born after hearing both side arguments of the assessee and Government disputing the period of limitation for filing the Appeal on the issue of Cenvat credit.

This is now known to all that Cenvat Credit Rules, 2004 is common for Central Excise as well as Service Tax and it hardly matters that in disputes whether you called it Excise Appeal or Service Tax Appeal, only the thing is, it should be heard and decided on merits.

The question arises while calculating the time-limit to file the appeal be-

fore Appellate Commissioner because as per Section 35 of Central Excise Act, 1944 the normal time-limit to file the appeal is 60 days from the date of receipt of order and further 30 days can be condoned by the Appellate Commissioner, if he deems fit. The Apex Court of India strictly directed that Appellate Commissioner has no powers to condone such delay beyond 30 days. The appeals of Service Tax calculates the time-limit for filing as per Section 85 of Finance Act, 1994 is 90 days from the date of receipt of order and further 90 days can be condoned by the Appellate Commissioner, if he deems fit.

In short, for Excise Appeal time-limit prescribed and allowed is 60 + 30 = say 90 days and for Service Tax Appeal time-limit prescribed and allowed is 90 + 90 = say 180 days.

Case study

X is a manufacturer alleged in SCN for wrongful availment of Cenvat credit against input services which was used for payment of Central Excise duty. The reply was filed and accordingly order passed by lower adjudicating authority confirming the demand. Aggrieved against the said Order X has decided to file an appeal. Now whether X should apply and exercise the Excise Appeal under Section 35 of CEA, 1944 or Service Tax Appeal under Section 85 of Finance Act, 1994?

X has filed appeal in ST-4 form after prescribed time-limit of 90 days but well within the condonable period of further 90 days. The Appellate Commissioner condoned the delay and proceeds with merits of the case. The order has been passed by him by disallowing the Appeal on merits.

X filed an appeal before CESTAT in ST-5 form, but directed by registry to file the Appeal in EA-3 form. The rectification is made by X and filed EA-3.

The stay application was heard and accordingly case came up for Final Hearing (Regular matters). At the time of hearing before the Hon'ble Court the DR pointed out that Commissioner (Appeals) crossed the scope of delay condonation period which he can condone only up to further 30 days because this appeal was Excise and not Service Tax. Therefore, the delay condoned by Commissioner (Appeals) beyond 30 days under Section 35 was wrong and invalid.

Now the arguments by both the parties turned on whether the said Appeal before Commissioner (Appeals) was of Excise or of Service Tax?

If the said Appeal was likely to be treated as Excise then the Appeal filed by X was beyond the 60 + 30 days *i.e.* filed even after the condonable period and on this count alone likely to be time-barred.

If the said Appeal was likely to be treated as Service Tax then the Appeal filed by X was within the further 90 days of condonable period.

The DR was strong enough to explain that the said Appeal was of Excise even if Cenvat credit is common for Central Excise and Service Tax both. Whereas X was also on strong footing that for Central Excise and Service Tax both Cenvat Credit Rules, 2004 is common and the credit taken against input service and therefore to be treated as Service Tax Appeal. X further pointed out that the DR was present at the time of hearing before Commissioner (Appeals) then why he has not pointed out the same at that stage and therefore it was accepted by the department that the said appeal was nothing but the Service Tax Appeal only.

We all knew the outcome and also feel that lack of clear provisions in Cenvat Credit Rules, 2004 about whether to treat the Appeals out of Cenvat question under Central Excise or Service Tax may always lead into confusion.

Since, the utilisation of availed credit is for payment of duty and therefore to be treated as Excise appeal is not convincing but need to digest anyhow.

We as honest law followers should exercise, till any clarification is issued by Board, trial and error method for filing the Appeal, if it crosses the prescribed time-limit for filing the Appeal.