

**Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad**

REGIONAL BENCH- COURT NO.3

Excise Appeal No. 11110 of 2015- DB

[E/EH/10233/23]

(Arising out of OIO-VLD-EXCUS-000-COM-0018-14-15 dated 24/03/2015 passed by Commissioner of Central Excise, Customs and Service Tax-Valsad)

Emami Limited

Plot No. 82,
N H No. 08, Gidc,
Vapi, Gujarat

.....Appellant

VERSUS

C.C.E & S.T.-Valsad

Third Floor, Adarashdham Building,
Vapi-Daman Road, Vapi, Gujarat
Gujarat-396191

.....Respondent

APPEARANCE:

Shri Ishan Bhatt, Advocate for the Appellant

Shri, Tara Prakash, Deputy Commisisoner(AR), for the Respondent

**CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. C L MAHAR**

Final Order No. 11791/2023

DATE OF HEARING: 31.07.2023

DATE OF DECISION: 25.08.2023

RAMESH NAIR

The appeal as well as early hearing application is listed today. It is observed that the appeal itself has come up for hearing in routine course. therefore, the early hearing application became infructuous and disposed of accordingly.

1.1 As regard the appeal, the brief facts of the case are that the appellant are engaged in the manufacture of dutiable as well as exempted goods. They are availing Cenvat credit in respect of input and input services. There are certain common services such as management consultant services, Chartered Accountant services, financial and accounting services, etc. are availed by the head office of the appellant, which is attributed to both

dutiable and exempted goods. During audit in the month of March 2013 to June 2013, it was observed that the appellant are engaged in the manufacture of dutiable as well as exempted goods from April-2009 to March- 2013 wherein exempted goods to the tune of Rs. 43,02,50,793/- were manufactured and sold.

1.2 It was further observed that the appellant had availed the Cenvat credit of input services to the amount of Rs. 56,52,957/- based on invoices issued by its head office as an ISD on services like management consultancy, CA service, etc. which were commonly used for dutiable as well as exempted goods. Thus it was observed by the audit officers that the appellant should reverse Cenvat credit availed on such common input/ input services based on ratio of exempted goods manufactured. Accordingly, the appellant were directed to reverse proportionate Cenvat credit of Rs 30,68,062/- within 10 days by letter dated 26.04.2013. Based on the said audit objection, the appellant in the months of May 2013 and July 2013 reversed the proportionate Cenvat credit of Rs. 30,68,062/- along with payment of interest of Rs. 8,01,333/- thereafter the appellant filed an intimation in terms of Section 11A (2B) of the Central Excise Act 1944 in form Annexure S dated 20.07.2013 submitting the payment details for reversal of credit of Rs. 30,68,062/- and interest of Rs. 8,01,333/- and requesting the commissioner to close the audit objection and not to issue any show cause notice for imposing penalty. However, the department issued a letter dated 19.09.2013 directing the appellants to pay penalty under the provisions of Section 11A (5) of the Central Excise Act 1944, for irregular availment of Cenvat credit of common input service for dutiable as well as exempted goods.

1.3 In the letter dated 19.09.2013 of the department, it is also observed that the appellants have already paid the duty amount and interest. Details are reproduce below:

<i>Period</i>	<i>Common ST Credits taken</i>	<i>Approx. of exempted category of goods.</i>	<i>Excess Credit involved</i>	<i>Interest</i>	<i>Remarks</i>
2009-10	810341/-	47.31%	383372/-	224041/-	Paid vide 3 challans in May 2013 & 2 challans in July 2013.
2010-11	679014/-	53.55%	363612/-	173713/-	
2011-12	1365659/-	57.40%	783888/-	254334/-	
2012-13	2797943/-	54.94%	1537190/-	149745/-	
<i>Total</i>	5652957/-		3068062/-	801833/-	Gr. Total Rs 3869895/-
<i>Duty amount involved in Para-1</i>			35660/-	19337/-	54997/-
<i>Gr. Total</i>			3103722/-	821170/-	3924892/-

<i>Sr. No.</i>	<i>Ch. No./Dated</i>	<i>Duty (+3% Cess)</i>	<i>Interest</i>	<i>Total Rs.</i>
1	1490/04.05.2013	723735/-	62324/-	786059/-
2	711/05.05.2013	723735/-	62324/-	786059/-
3	4/06.05.2013	723734/-	62324/-	786059/-
4	64/12.07.2013	520518/*	350466/-	870984/-
5	6/13.07.2013	412000/-	281415/-	693415/-
6	7/15.07.2013	0	2317/-	2317/-
<i>GRAND TOTAL RS.</i>		3103722/-	821170/-	3924892/-

However, despite the above stand of the appellant a show cause notice came to be issued, wherein it was proposed to demand an amount of Rs. 2,39,37,225/- i.e. 10%/6%/5% of the value of the exempted goods cleared during the relevant period and proposing to appropriate the credit of Rs. 30,68,062/- already reversed by the appellants. Show cause notice also

proposed to charge interest under Rule 14 of the Cenvat credit Rules, 2004 read with section 11AB of the Central Excise Act, 1944 and proposed to appropriate the interest of Rs. 8,01,333/- already paid by the appellant, the show cause notice also proposed to impose the penalty on the appellant under Rule 15(2) of Cenvat Credit Rules, 2004 read with Section 11AC of Central Excise Act, 1944. The said show cause notice was adjudicated by the Learned Commissioner of Central Excise, Valsad vide order dated 10.03.2015 confirming the entire demand as proposed in the show cause notice and appropriated the amount so reversed as well as the interest paid by the appellant, therefore the present appeal filed by the appellant.

2. Shri Ishan Bhatt, Learned Counsel, appearing on behalf of the appellant submits that the audit officers had directed the appellant to pay the proportionate credit. Accordingly, the appellant had paid the same along with the interest, thereafter there was no reason to issue the show cause notice.

2.1 Without prejudice he further submits that once the proportionate Cenvat credit is reversed along with interest, in case of any delay on such reversal, the demand of 10%/6%/5% under Rule 6(3) of Cenvat Credit Rules, 2004 cannot be sustainable.

2.2 He further submits that the demand is entirely time barred as there is no suppression of fact. He placed reliance on the following Judgments:

- PI Industries v. CCE 2023 (6) TMI 455 CESTAT
- Jost's Engineering Co. Ltd v. CCE 2015 (320) ELT 157 (T)
- Burn Standard Co. Ltd. v. CCE 2010 (262) ELT 786 (T)
- Swiss Parenterals Pvt. Ltd. v. CCE 2014 (308) ELT 81 (T)
- Tiara Advertising v. Union of India 2019 (30) GSTL 474 (Telangana HC)
- Star Agriwarehousing & Collateral Management Ltd. v. CCE, Jaipur- 2021 (44) G.S.T.L. 271 (Tri. - Del.)

- Chandrapur Magnet Wires (P) Ltd. v. CCE, Nagpur 1996 (81) EL.T. 3 (S.C.)
- Welspun Corp. Ltd. v. CCE, Kutch 2019 (368) EL.T. 179 (Tri. - Ahmd.)
- Mercedes Benz India (P) Ltd. v. CCE, Pune-1 2015 (40) S.T.R. 381 (Tri. - Mumbai)
- Jai Balaji Industries Ltd. v. CCE & ST, Raipur 2017 (352) E.L.T. 86 (Tri. - Del.)
- Affirmed by Hon'ble Chattisgarh High Court in 2017 (356) E.L.T. A48 (Chhattisgarh) and Affirmed by Hon'ble Supreme Court in 2018 (360) E.L.T. A121 (S.C.)
- The Oberoi Rajvillas v. CCE, Jaipur 2018 (5) TMI 1715 - CESTAT New Delhi
- Mangalore Refinery and Petrochemicals Ltd. v. CCE 2007-TIOL-1287-CESTAT-BANG
- CCE , Mumbai-I v. Bombay Dyeing & Mfg. Co. Ltd. 2007 (215) E.L.T. 3 (S.C.)
- Texmo Industries v. CCE, Coimbatore 2007 (208) E.L.T. 338 (Tri. L.B.)
- CCE, Trichy v. Tamilnadu Newsprint and Papers Ltd. 2014 (309) ELT 279 (Tri. Che.)
- Pushpam Pharmaceuticals Company v. CCE, Bombay 1995 (78) E.L.T. 401 (S.C.)
- Anand Nishikawa Co. Ltd. v. CCE 2005 (188) E.L.T. 149 (S.C.)
- M/s. Continental Foundation Joint Venture Holding v. CCE 2007 (216) E.L.T. 177 (S.C.)
- Unique Resin Industries v. CCE 1995 (75) E.L.T. 861 (Tri.)
- Apex Electricals Pvt. Ltd. v. Union of India 1992 (61) E.L.T. 413 (Guj.)
- Cadila Pharmaceutical Ltd. v. CCE 2017 (349) E.L.T. 694 (Guj.)
- Ranadey Micronutrients v. CCE 1996 (87) E.L.T. 19 (S.C.)
- Nizam Sugar Factory v. CCE, A.P. 2006 (197) E.L.T. 465 (S.C.)

3. Shri Tara Prakash, Learned Deputy Commissioner (AR), appearing on behalf of the revenue reiterates the findings of the impugned order.

4. On careful consideration of the submission made by both the sides and perusal of record, we find that limited issue to be decided is that once the appellant have reversed the proportionate Cenvat credit on common input

service attributed to the exempted final product, whether, the appellant are liable for payment of 10%/6%/5% of the value of such exempted goods. This issue is no longer res-Integra as even though the reversal was made on proportionate input service attributed to the exempted goods at a latest stage along with interest the situation became as if no Cenvat credit was availed. Consequently, the demand of 10%/6%/5% cannot be sustained, in this support some of the Judgments are reproduced below:

- In the case of Pi industries (Supra) this Tribunal has passed the following order:

4. He also submits that it is an accepted principle of law that reversal of Cenvat Credit attributable to exempted goods or service amount to not taking Cenvat credit at all. However, the Ld. Commissioner while appropriated entire amount of Cenvat credit along with interest attributable to common input services for the period April 2004 to June 2009, dropped demand only for the period April 2004 to March 2008 being covered under Rule 6 (7) of the Cenvat Credit Rules and confirmed the demand and recovery amounting to Rs. 1,26,19,534 along with interest for the period April 2008 to June 2009, which is bad in law. Appellant having reversed entire amount of Cenvat Credit availed on common input services related to SIAPTON, the demand is not sustainable. He placed reliance on the following judgments:-

(i) Welspun Corporation Ltd. vs. CCE – 2019(368)ELT 179(Tri.)

(ii) Star Agriwarehousing & Collateral Management Ltd. vs. CCE – 2021 (44) GSTL 271 ((Tri.)

(iii) Ahemdagar District Central C-op Bank Ltd. vs. CST - 2018(364)ELT 1098 (Tri.)

(iv) Reliance Life Insurance Co. Ltd. Vs. CST -2018(363)ELT 1050 (Tri.)

5. On the other hand, Shri Ganasyam Soni, Additional Commissioner (AR) reiterated the findings in the impugned order.

6. We have heard both the sides and perused the records. We noticed that in the present matter Ld. Commissioner confirmed the demand for the period April 2008 to June 2009 on the ground that the Appellant has availed the Service tax credit on Common input services used in the exempted products “Siapton 10L” without maintaining separate records in terms of Rule 6 of Cenvat Credit Rules, 2004. Ld. Commissioner held that this period is not covered under the retrospective amended vide Clause 73 of the Finance Act, 2010, thus the Appellant are not liable to pay 10% of the value of assessable value of exempted products. We find that that Rule 6 of the Cenvat Credit Rules, 2004 was amended benefiting the assessee under the Finance Act, 2010 and that the new sub-rule (7) inserted under Rule 6 ibid enables the appellant to claim the benefit with

retrospective effect. The provisions referred to by the learned commissioner reads as follows :

“(7). Where a dispute relating to adjusting of credit on inputs or input services used in or in relation to exempted final products relating to the period beginning on the 10th day of September, 2004 and ending with the 31st day of March 2008 (both days inclusive) is pending on the date on which the Finance Bill, 2010 receives the assent of the President, then notwithstanding anything contained in sub-rules (1) and (2) and clauses (a) and (b) of sub-rule (3), a manufacturer availing CENVAT credit in respect of any inputs of chargeable to duty and also other final products which are exempted goods may pay an amount equivalent to CENVAT credit attributable to the inputs or input services used in or in relation to the manufacture of exempted goods before or after the clearance of such goods.”

The procedure for claiming the benefit under sub-rule (7) of Rule 6 of the Cenvat Credit Rules, 2004 was also prescribed under the Finance Act, 2010 vide Section 73(2) (vide infra).

73. Amendment of rule 6 of CENVAT Credit Rules, 2004. –

(1)

(2) Where a person opts to pay the amount in accordance with the provisions as amended by sub-section (1), he shall pay the amount along with interest specified thereunder and make an application to the Commissioner of Central Excise along with documentary evidence and a certificate from a Chartered Accountant or a Cost Accountant, certifying the amount of input credit attributable to the inputs used in or in relation to the manufacture of exempted goods, within a period of six months from the date on which the Finance Bill, 2010 receives the assent of the President.

(3)

(4)

(5)

In the present matter Ld. Commissioner allowed the benefit to the appellant only pertaining to the period September 2004 to March 2008 and dropped the demand as per the above retrospective inserted sub-rule (7) of Rule 6 of Cenvat Credit Rules, 2004 but confirmed the demand for the period April 2008 to June 2009 on the ground that this period is not covered under the retrospective amendment.

7. We find that the case of the department is that since the assessee has availed the Cenvat credit in respect of common input service used in the manufacture of dutiable and exempted goods, the appellant is required to pay 10% of the value of the goods

cleared without payment of duty (exempted goods). From the facts it is undisputed that the appellant have been reversing Cenvat credit proportionate to the credit on input service used for exempted goods along with interest, therefore, first the credit though availed at the time of receipt of input service but after reversal thereof along with interest the position is as if credit was not availed. We are also of the view that Rule 6 of the Cenvat Credit Rules is not enacted to extract illegal amount from the assessee. The main objective of the Rule 6 is to ensure that the assessee should not avail the Cenvat Credit in respect of input or input services which are used in or in relation to the manufacture of the exempted goods or for exempted services. If this is the objective then at the most amount which is to be recovered shall not be in any case more than Cenvat Credit attributed to the input or input services used in the exempted goods. Moreover this issue has been consistently considered in various judgments wherein it was held that if the assessee reverse the Cenvat credit in respect of common input service used in the manufacture of exempted goods the demand equal to 10%/5% will not sustain. Therefore, we do not find any merits in the impugned order confirming demand for the period April 2008 to June 2009.

8. In the present case since the Ld. Commissioner has demanded 10% of the value of exempted goods, he has not verified the correctness of actual Cenvat credit attributed to exempted goods as reversed by the assessee.

Therefore, only for the purpose of verification of such quantification of reversal, the matter is remanded to the adjudicating authority.

9. The appeal is disposed of by way of remand to the Adjudicating authority in the above terms for passing a fresh de novo order.

- In the case of Jost's Engineering Company Ltd (Supra), the Mumbai Tribunal's bench has passed the following order:

"5. We have carefully considered the rival submissions.

5.1 It will be relevant at this juncture to peruse the provisions of Rule 6 which is reproduced below :

"Rule 6. Obligation of manufacturer of dutiable and exempted goods and provider of taxable, and exempted services. - (1) The Cenvat credit shall not be allowed on such quantity of input or input service which is used in the manufacture of exempted goods or for provision of exempted services, except in the circumstances mentioned in sub-rule (2).

Provided that the Cenvat credit on inputs shall not be denied to job worker referred to in Rule 12AA of the Central Excise Rules, 2002, on the ground that the said inputs are used in the manufacture of goods cleared without payment of duty under the provisions of that rule.

(2) 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.

(3) Notwithstanding anything contained in sub-rules (1) and (2), the manufacturer of goods or the provider of output service, opting not to maintain, separate accounts, shall follow either of the following options, as applicable to him, namely :-

(i) the manufacturer of goods shall pay an amount equal to five per cent of value of the exempted goods and the provider of output service shall pay an amount equal to six per cent of value of the exempted services; or

(ii) the manufacturer of goods or the provider of output service shall pay an amount equivalent to the Cenvat credit attributable to inputs and input services used in, or in relation to, the manufacture of exempted goods or for provision of exempted services subject to the conditions and procedure specified in sub-rule (3A).

Explanation I. - If the manufacturer of goods or the provider of output service, avails any of the option under this sub-rule, he shall exercise such option for all exempted goods manufactured by him or, as the case may be, all exempted services provided by him, and such option shall not be withdrawn during the remaining part of the financial year.

Explanation II. - For removal of doubt, it is hereby clarified that the credit shall not be allowed on inputs and input services used exclusively for the manufacture of exempted goods or provision of exempted service.

(3A) For determination and payment of amount payable under clause (ii) of sub-rule (3), the manufacturer of goods or the provider of output service shall follow the following procedure and conditions.”

5.2 In the present case it is an admitted fact the appellant did not maintain separate accounts for the input services used in or in relation to the manufacture of product dutiable as well as exempted products even though they maintained such accounts in respect of inputs. Therefore, two options were available to them, i.e., either to pay 5%/10% of value of the exempted goods or pay an amount equal to the credit attributable to the input services used in or in relation to manufacture of exempted goods subject to the provisions of Sub-Rule (3A). When the mistake was pointed the appellant reversed not only the credit taken on input services used in the manufacture of exempted goods but also the credit taken on input services used in the manufacture of dutiable goods. In other words, the appellant reversed the entire credit taken along with interest thereon. Therefore, Rule 6(3)(i) will not have any application, when a credit is taken wrongly and the same is reversed along with interest as it tantamounts to non-taking of the credit. The Hon’ble High Court of Allahabad in the Hello Minerals. Water (P) Ltd. case cited supra clearly held that “reversal of Modvat credit amounts to non-taking of credit on the inputs and even if such reversal was done after the clearance of the

goods the said action amounts to non-availment of credit. The Hon'ble Apex Court in the case of Chandrapur Magnet Wires (P) Ltd. (supra) also held that reversal of Modvat Credit at the time of clearance of the goods amounts to non-availing of credit. All the judgments relied upon by the appellant also confirm the above position. The Hon'ble High Court of Karnataka in the case of Himalaya Drug Company held that the provisions of Rule 6(3)(i) of the Credit Rule, 2004 would not be attracted if reversal of credit is done in respect of inputs used in the manufacture of exempted final products. In view of these decisions, we are of the considered view that the reversal of credit by the appellant on the entire service tax taken along with interest thereon both in respect of dutiable goods as well as exempted goods amounts to non-availing of credit and, therefore, the provisions of Rule 6(3)(i) are not attracted and the confirmation of demand by the adjudicating authority directing the appellant to pay an amount at the rate of 5%/10% of the value of the exempted goods is not sustainable in law. Consequently, the imposition of penalties on the appellant and appellant firm and its manager are also not sustainable in law and accordingly, they are set aside. However, the appellant has initially availed credit and only on pointing out by the department they have reversed the credit and, therefore the appellant is liable to penalty under Rule 15(3) of the Cenvat Credit Rules, 2004 for contravention of the provisions of Cenvat Credit Rules. The maximum penalty imposable under the said Rule is Rs. 2000/- and accordingly the appellant is liable to pay penalty of Rs. 2000/- under Rule 15(3) of the Cenvat Credit Rules, 2004.

6. The appeal is disposed of in the above terms. “

- In the case of Burn Standard Company LTD. Chennai Tribunal has passed the following order:

2. The issue involved in this appeal is whether a demand of 10% of the sale value of exempted goods can be made on the ground that Furnace Oil was used as a fuel both for the manufacture of non-dutiable intermediate goods, namely, “Dead Burnt Magnesite” which was partly sold in the market and partly consumed in the manufacture of dutiable final products, namely, ‘refractory bricks’ and ‘ramming mass’. The period involved in the present case is Jan. to Mar.’ 08. No CENVAT credit was taken on Furnace Oil used for the manufacture of “Dead Burnt Magnesite” during the months of Jan. and Feb. ‘08. During the month of Mar. ‘08, although CENVAT credit was taken, proportionate credit was reversed on the basis of actual unit consumption of “Dead Burnt Magnesite”. With effect from 1-4-2008, the provisions of Rule 6 were amended providing an additional option to an assessee not maintaining separate accounts for common inputs, to reverse the credit attributable to the exempted goods on the basis of the formula set out under Rule 6(3A) which reads as under:-

“(3A) For determination and payment of amount payable under clause (ii) of sub-rule (3), the manufacturer of goods or the provider of output service shall follow the following procedure and conditions, namely :-

(a) while exercising this option, the manufacturer of goods or the provider of output service shall intimate in writing to the Superintendent of Central Excise giving the following particulars, namely :-

(i) name, address and registration No. of the manufacturer of goods or provider of output service;

(ii) date from which the option under this clause is exercised or proposed to be exercised;

(iii) description of dutiable goods or taxable services;

(iv) description of exempted goods or exempted services;

(v) CENVAT credit of inputs and input services lying in balance as on the date of exercising the option under this condition;

(b) the manufacturer of goods or the provider of output service shall, determine and pay, provisionally, for every month,-

(i) the amount equivalent to CENVAT credit attributable to inputs used in or in relation to manufacture of exempted goods, denoted as A;

(ii) the amount of CENVAT credit attributable to inputs used for provision of exempted services (provisional)-(B/C) multiplied by D, where B denotes the total value of exempted services provided during the preceding financial year, C denotes the total value of dutiable goods manufactured and removed plus the total value of taxable services provided plus the total value of exempted services provided, during the preceding financial year and D denotes total CENVAT credit taken on inputs during the month minus A;

(iii) the amount attributable to input services used in or in relation to manufacture of exempted goods or provision of exempted services (provisional) = (E/F) multiplied by G, where E denotes total value of exempted services provided plus the total value of exempted goods manufactured and removed during the preceding financial year, F denotes total value of taxable and exempted services provided, and total value of dutiable and exempted goods manufactured and removed during the preceding financial year, and G denotes total CENVAT credit taken on input services during the month;

(c) the manufacturer of goods or the provider of output service, shall determine finally the amount of CENVAT credit attributable to exempted goods and exempted services for the whole financial year in the following manner, namely :-

(i) the amount of CENVAT credit attributable to inputs used in or in relation to manufacture of exempted goods, on the basis of total quantity of inputs used in or in relation to manufacture of said exempted goods, denoted as H;

(ii) the amount of CENVAT credit attributable to inputs used for provision of exempted services = (J/K) multiplied by L, where J denotes the total value of exempted services provided during the financial year, K denotes the total value of dutiable goods manufactured and removed plus the total value of taxable services provided plus the total value of exempted services provided, during the financial year and L denotes total CENVAT credit taken on inputs during the financial year minus H;

(iii) the amount attributable to input services used in or in relation to manufacture of exempted goods or provision of exempted services = (M/N) multiplied by P , where M denotes total value of exempted services provided plus the total value of exempted goods manufactured and removed during the financial year, N denotes total value of taxable and exempted services provided, and total value of dutiable and exempted goods manufactured and removed, during the financial year, and P denotes total CENVAT credit taken on input services during the financial year;

(d) the manufacturer of goods or the provider of output service, shall pay an amount equal to the difference between the aggregate amount determined as per condition (c) and the aggregate amount determined and paid as per condition (b), on or before the 30th June of the succeeding financial year, where the amount determined as per condition (c) is more than the amount paid;

(e) the manufacturer of goods or the provider of output service, shall, in addition to the amount short-paid, be liable to pay interest at the rate of twenty-four per cent. per annum from the due date i.e., 30th June till the date of payment, where the amount short-paid is not paid within the said due date;

(f) where the amount determined as per condition (c) is less than the amount determined and paid as per condition (b), the said manufacturer of goods or the provider of output service may adjust the excess amount on his own, by taking credit of such amount;

(g) the manufacturer of goods or the provider of output service shall intimate to the jurisdictional Superintendent of Central Excise, within a period of fifteen days from the date of payment or adjustment, as per conditions (d) and (f) respectively, the following particulars, namely :-“

3. As per the decision of the Tribunal in *Foods, Fats & Fertilisers Ltd. v. Commissioner of Central Excise, Guntur* [[2009 \(247\) E.L.T. 209 \(Tri.-Bang.\)](#)], this amendment being procedural, is held to be retrospective in operation. Further, the Finance Act, 2010 has retrospectively amended Rule 6 of the CENVAT Credit Rules, whereby reversal/payment of proportionate credit attributable to inputs used in the manufacture of exempted goods, either before or after the clearance of such goods is an option available to a manufacturer not maintaining separate records for receipt, consumption and use of common inputs, taking credit on common inputs used for manufacture of dutiable and exempted final products.

4. The reversal of credit for the month of Mar. '08 is, therefore, required to be verified on the basis of the formula provided under Rule 6(3A). For this purpose, we set aside the impugned order and remit the case to the adjudicating authority for carrying out the above verification. He shall pass fresh orders after extending a reasonable opportunity to the assessee of being heard in their defence.

5. The appeal is thus allowed by way of remand.”

- In the case of Star Agriwarehousing & Collateral Management (supra) it was held as under:

“7. We have also heard Learned Departmental Representative who has generally supported the findings given in the order-in-original.

8. We have heard the rival contentions and are of the view that it is a matter of record that the appellant have been providing both taxable and exempted output services in respect of which they have been availing credit of common input services. It is also a matter of record that the appellant have fulfilled the requirement of Rule 6(3)(ii) of the Cenvat Credit Rules, 2004 read with Rule 6(3A) and have been reversing the amount of common Cenvat credits, proportionate to value of exempted output services. In this regard we take note of the fact that appellant have furnished Cenvat credit register for the period April, 2009 to June, 2012 which indicate that they have regularly been reversing the proportionate amount of the Cenvat credit taken on the common inputs which have gone into exempted output services. In this regard, we are of the view once the appropriate reversal have been made under Rule 6(3A) of the Cenvat Credit Rules any procedural violations of minor nature would be of in-consequential nature and will not disentitle the assessee from availing the Cenvat credit of the common inputs for which they have already been making a regular reversal of proportionate credits. We also take note of the fact that the Department has nowhere mentioned in entire proceedings that the amount of Cenvat credit reversed is not proportionate to the value of exempted services or not proper otherwise. The only ground that the appellant have not followed the laid down procedure of availing the option of Rule 6(3A) like not declaring value of turnover of exempted services in their periodic service tax return, etc., can be minor procedural lapses, but same cannot become ground for denying a substantial benefit to the appellant.

9. We are also of the view that once the proportionate reversal of the Cenvat credit has taken place, that tantamount to not availing of the input services credit of the common inputs which are going into the exempted services. While holding this view we take shelter of the decision of the Hon’ble Supreme Court in the case of Chandrapur Magnet Wires (P) Ltd. v. Collector of Central Excise, Nagpur - [1996 \(81\) E.L.T. 3](#) (S.C.).

10. We also take note of this Tribunal’s decision on the same issue in case of M/s. The Oberoi Rajvilas v. Commissioner of Central Excise, Jaipur reported under 2018 (5) TMI 1715 - CESTAT New Delhi, the relevant extract of same are reproduced here below :-

*“9. From the above, we note that the appellant has followed the proportionate method for availment of credit on common input services. It cannot be said that the appellant has availed any credit on input services used in providing exempted service. The reversal of credit as above satisfies the requirement of non-availment of credit laid down in the Notification No. 1/2006-S.T. *ibid*.*

10. It is a settled position of law that proportionate reversal at a later date will satisfy the requirement of non-availment of Cenvat credit. This view is supported by various decisions of the Supreme Court/High Courts and Tribunal, some of which have been cited by the appellant.

11. *The procedure prescribed in Rule 6(3A) of the [Cenvat] Credit Rules is only to make the provisions of Rule 3 workable. By means of proportionate reversal the requirement of Rule 6(3) has been substantially satisfied. This is also provided in Rule 6(3D) of the Cenvat Credit Rules which was introduced at a later date”.*

11. *In view of above discussion, we find no merit in the order-in-original. Accordingly, we set aside the same and allow the appeal.”*

- In the case of Chandrapur Magnet Wires P. Ltd. (Supra) the Hon’ble Supreme Court has passed the following decision:

3. *The case of the appellants is that if a manufacturer clears various final products utilising duty paid inputs, according to Central Excise Rules, he was entitled to the benefit of MODVAT scheme and was entitled to get credit for the duty of excise paid on the inputs which were utilised for manufacture of final product. The credit amounts were adjusted against the duty leviable on the final product. As soon as the inputs were purchased, the duty paid on the inputs were entered in a register which had to be maintained statutorily recording the amount of credit allowable to the manufacturer.*

4. *The problem in this case arose because, some of the goods manufactured by the appellants were exempted from duty by Notification No. 69/86-C.E., dated 10th February, 1986. This notification was amended by a further notification No. 106/88, dated 1st March, 1988 by which copper winding wires were exempted from payment of the whole of the duty subject to the condition that the final products were manufactured from copper wire bars of over 6 mm and also subject to the stipulation that -*

“(b) No credit of the duty paid on goods (a) (ii) above, used in their manufacture, has been taken under Rule 57A of the said Rules.”

There is no dispute that the inputs which were utilised in the manufacture of the copper wires were duty paid and that the amount of duty paid on the inputs had been entered by the appellants to their credit in the ledger which has to be maintained under the Excise Rules. The credit amount can be utilised by the manufacturer towards payment of duty of excise leviable on the final products. Since the copper wires manufactured by the appellants had become duty free, there was no question of any adjustment of the credit amount against the duty payable on these copper wires. Moreover, Rule 57C specifically provides that credit of duty cannot be allowed if final products were exempt from payment of excise duty. Faced with this situation, the appellants reversed the credit entries of duty paid on inputs which were utilised for manufacture of the duty free copper wires.

5. *The case of the Excise Department is that the reversal of credit entries are not permitted by the rules. The assessee is not entitled to remove the copper wires without payment of duty since credit of the duty paid on the inputs used in the manufacture of copper wire had already been taken in accordance with Rule 57A. Once appropriate entries have been made in the register, there is no rule under which the process could be reversed. Since the credit has been taken for the duty paid on the inputs in the ledger*

maintained by the assessee, the assessee cannot be heard to say that no credit of the duty has been taken by it under Rule 57A.

6. It is true that the assessee has not maintained separate accounts or segregated the inputs utilised for manufacture of dutiable goods and duty free goods, as should have been done. The contention of the Department that in this situation, the assessee is not entitled to reverse the entries and get the benefit of the tax exemption is a question which merits serious consideration. There is no doubt that the assessee should have maintained separate accounts for duty free goods and the goods on which duty has to be paid. But our attention was drawn to a departmental circular letter on this problem in which it has been clarified by the Ministry of Finance as under :-

“3. The credit account under MODVAT rules may be maintained chapterwise, MODVAT credit is not available if the final products are exempt or are chargeable to nil rate of duty. However, where a manufacturer produces along with dutiable final products, final products which would be exempt from duty by a notification (e.g. an end use notification) and in respect of which it is not reasonably possible to segregate the inputs, the manufacturer may be allowed to take credit of duty paid on all inputs used in the manufacture of the final products, provided that credit of duty paid on the inputs used in such exempted products is debited in the credit account before the removal of such exempted final products.”

This circular deals with a case where the manufacturer produces dutiable final products and also final products which are exempt from duty and it is not reasonably possible to segregate inputs utilised in manufacture of the dutiable final products from the final products which are exempt from duty. In such a case, the manufacturer may take credit of duty paid on all the inputs used in the manufacture of final products on which duty will have to be paid. This can be done only if the credit of duty paid on the inputs used in the exempted products is debited in the credit account before the removal of the exempted final products.

7. In view of the aforesaid clarification by the Department, we see no reason why the assessee cannot make a debit entry in the credit account before removal of the exempted final product. If this debit entry is permissible to be made, credit entry for the duties paid on the inputs utilised in manufacture of the final exempted product will stand deleted in the accounts of the assessee. In such a situation, it cannot be said that the assessee has taken credit for the duty paid on the inputs utilised in the manufacture of the final exempted product under Rule 57A. In other words, the claim for exemption of duty on the disputed goods cannot be denied on the plea that the assessee has taken credit of the duty paid on the inputs used in manufacture of these goods.

8. The appeal is therefore, allowed. The order of the Customs, Excise and Gold (Control) Appellate Tribunal dated 17th May, 1995 is set aside. There will be no order as to costs.

- In the case of Welspun Corp. Ltd. this Tribunal has passed following decision:

“6. We have carefully considered the submissions made by both the sides and perused the records. The limited issue to be decided by us is that in a case where at the time of receipt of input services, the appellant availed Cenvat credit on the entire service and on pointing out by the audit party they reversed the Cenvat credit in respect of input services attributed to the exempted goods/non-excisable goods along with interest, whether the demand confirmed by the Revenue under Rule 6(3) i.e. 5%/10% on value of exempted goods is legal and proper. The appellant is not disputing that the Cenvat credit in respect of input services attributed to exempted goods namely Steam, Fly-Ash and non-excisable goods i.e. electricity sold outside their factory, is not admissible and they have admittedly reversed the proportionate Cenvat credit and also paid the interest from the date of taking credit till the date of reversal. For ease of reference, we reproduce below the Rule 6(3) of Cenvat Credit Rules, 2004 :

(3) Notwithstanding anything contained in sub-rules (1) and (2), the manufacturer of goods or the provider of output service, opting not to maintain separate accounts, shall follow either of the following options, as applicable to him, namely :-

(i) the manufacturer of goods shall pay an amount equal to five per cent. of value of the exempted goods and the provider of output service shall pay an amount equal to six per cent. of value of the exempted services; or

(ii) the manufacturer of goods or the provider of output service shall pay an amount equivalent to the Cenvat credit attributable to inputs and input services used in, or in relation to, the manufacture of exempted goods or for provision of exempted services subject to the conditions and procedure specified in sub-rule (3A).

Explanation I. - If the manufacturer of goods or the provider of output service, avails any of the option under this sub-rule, he shall exercise such option for all exempted goods manufactured by him or, as the case may be, all exempted services provided by him, and such option shall not be withdrawn during the remaining part of the financial year.

Explanation II. - For removal of doubt, it is hereby clarified that the credit shall not be allowed on inputs and input services used exclusively for the manufacture of exempted goods or provision of exempted service.

From the plain reading of the Rule 6(3), it can be seen that the law provided three options to the assessee (I), (II) accordingly the assessee has option either to pay 5%/10% of value of exempted goods or pay an amount determined under sub-rule (3A) i.e. proportionate credit attributed to the exempted goods. The appellant rightly availed the option of sub-rule (3A) of Rule 6 of CCR, 2004, the only lapse on the part of the appellant is that the payment of Cenvat credit was made belatedly, however the appellant have paid interest for the period right from availing the Cenvat credit till the payment/reversal of proportionate Cenvat credit which create a position as if the appellant have not availed Cenvat credit right from the date when Cenvat credit was availed. Therefore there is no reason for imposing option under Clause (i) of Rule 6(3) i.e. payment of 5%/10% of the value of exempted goods. This issue has been considered by this Tribunal time and again, though the appellant have relied upon almost 20 judgments on this issue

which are directly applicable. However, we are referring some of the judgments as under :

- The Hon'ble Tribunal in the case of Jay Balaji Industries Ltd. - [2017 \(352\) E.L.T. 86](#) (T) held in para 5 that :

"5. The Hon'ble Supreme Court in the case of Chandrapur Magnet Wires (P) Ltd. v. CCE, Nagpur - [1996 \(81\) E.L.T. 3](#) (S.C.) which has been followed in many other decisions of the High Court as well as the Tribunal has held that once Cenvat credit is reversed, it is to be considered ab initio not availed. In the light of this judgment of the Hon'ble Supreme Court, the reversal of Cenvat credit already made by the appellant is to be considered as not taken ab initio.

The Government has introduced the facility of proportionate reversal w.e.f. 1-4-2008 to mitigate the difficulties faced by manufacturers to maintain separate accounts for inputs/input services as well as when the same are commonly used for dutiable as well as exempted products/services. Though detailed procedure starting with an option to be exercised by manufacturer has been prescribed, in the present case, the appellant has not followed the same. However, it is on record that they have already reversed an amount claimed to be proportionate. It is also pertinent to record that this has been done by the appellant even before the issue of the show cause notice in this case. We are of the considered view that the failure of the appellant to follow the procedure perfectly should not come in the way of extending the substantial benefit of proportionate reversal. However, we find that in the order passed by the lower authority, he has not given any finding as to whether the reversal already made satisfies the test of proportionate reversal in terms of quantum of reversal. Hence, we are of the considered opinion that the matter is to be remanded to the original adjudicating authority to verify whether the amount of Cenvat credit already reversed along with interest satisfies the requirement of proportionate reversal. We also make it clear that there is no justification for demand of the amount equivalent to 10%/5% of the value of electricity wheeled out. The appellant should be given an opportunity to argue their case before the original adjudicating authority who is directed to pass order expeditiously within a period of three months of the date of receipt of this order."

- The Hon'ble Tribunal in the case of Swiss Parental Pvt. Ltd. - [2014 \(308\) E.L.T. 81](#) (T) held in para 7.3 that :

"7.3 We find that the ratio of the above case laws is squarely applicable to the appellant's case. We, therefore, hold that if Cenvat credit attributable to inputs used in the manufacture of exempted final products is reversed along with interest subsequent to removal of exempted final products, then the appellant cannot be said to have taken credit of inputs used in or in relation to the manufacture of exempted final products, and they need not pay an amount @ 8% or 10% of the sale price of exempted final products. The adjudicating authority has worked out the demand of Rs. 88,41,543/- on the basis of 8% or 10% of the sale price of exempted final products cleared by the appellant during the material period, while the respondent claims that the input credit attributable to manufacture of exempted final products is only Rs. 7,85,573/-,

which they have reversed. In the present case we observed from the case records that the appellant has furnished relevant data/documents available at pages 372 to 396 of the appeal papers filed in Appeal No. E/449/2011 showing Cenvat credit reversed/required to be reversed on inputs used in the manufacture of exempted final products during the material period. The appellant has also placed on record copies of 21 invoices at pages 349 to 370 of the appeal papers of Appeal No. E/449/2011 showing receipt of exempted input (Alpha Beta Arteether) of value of about three crore rupees during the material period, for which no Cenvat credit could be taken. In view of these facts on record, we find that the method adopted by the adjudicating authority for working out of the demand of Rs. 88,41,543/-, on the basis of 8% or 10% of the sale price of dutiable and exempted final products, is not maintainable. We, therefore, remand the matter to the adjudicating authority for proper verification of appellant's claim of reversal of Cenvat credit on inputs attributable to manufacture of exempted final products on the basis of appellant's records after affording opportunity to the appellant to explain their case before deciding the issue of quantum of Cenvat credit in remand proceedings."

- *The Hon'ble Supreme Court in the case of Bombay Dyeing & Mfg. Co. Ltd. - [2007 \(215\) E.L.T. 3](#) held in para 8 that :*

"8. There is no merit in this civil appeal. Under the notification, mode of payment has not been prescribed. Further, exemption is given to the final product, namely, grey fabric under the Central Excise Act, 1944, levy is on manufacture but payment is at the time of clearance. Under the Act, payment of duty on yarn had to be at the spindle stage. However, when we come to the Exemption Notification No. 14/2002-C.E., the requirement was that exemption on grey fabrics was admissible subject to the assessee paying duty on yarn before claiming exemption and subject to the assessee not claiming Cenvat credit before claiming exemption. The question of exemption from payment of duty on grey fabrics arose on satisfaction of the said two conditions. In this case, payment of duty on yarn on deferred basis took place before clearance of grey fabrics on which exemption was claimed. Therefore, payment was made before the stage of exemption. Similarly, on payment of duty on the input (yarn) the assessee got the credit which was never utilized. That before utilization, the entry has been reversed which amounts to not taking credit. Hence, in this case, both the conditions are satisfied. Hence item no. 1 of the table to Notification No. 14/2002-C.E. would apply and accordingly the grey fabrics would attract nil rate of duty."

- *In the case of Aster Pvt. Ltd. - [2016 \(43\) S.T.R. 411](#), it was held that :*

"The above Rule 6(3A) states that while exercising the option, the manufacturer of goods or the provider of output service shall intimate in writing the department regarding the option exercised. In the present case, admittedly there is no intimation given by the appellant informing his exercise of option. The contention of the department is that when the appellant has not intimated his option in writing then the appellant is bound to pay the duty amount calculated under the first option. I am afraid I cannot endorse this contention. The said rule

does not say that on failure to intimate, the manufacturer/service provider would lose his choice to avail second option of reversing the proportionate credit. Rule 6(3A), as seen expressly stated is nothing but a procedure contemplated for application of Rule 6(3). Therefore, the argument of the Revenue that the requirement to intimate the department about the option exercised, is mandatory and that on failure, the appellant has no other option but to accept and comply Rule 6(3)(i) and make payment of 5%/10% of sale price of exempted goods/value of exempted services is not acceptable or convincing. The Rule does not lay down any such restriction. The procedure and conditions laid in Rule 6(3A) is intended to make Rule 6(3) workable and not to take away the option available to the assessee. In any case, at no stretch of imagination can it be said that on failure to intimate the department, Rule 6(3)(i) would automatically come into application.”

- The Hon’ble Tribunal in the case of *Cranes & Structural Engineers* - [2017 \(347\) E.L.T. 112](#) (T) held in para 4.1 that :

“4.1 On analysis of Rule 6(3A), I find that while exercising the option, the manufacturer of goods or the provider of output service shall intimate in writing to the Department regarding the option exercised. In the present case, admittedly there is no intimation given by the appellant informing the exercise of his option. The argument of the Department is that when the appellant has not intimated his option in writing then the appellant is bound to pay the duty amount calculating under the first option. According to me, this argument is devoid of merit, because the said Rule does not say anywhere that on failure to intimate, the manufacturer/service provider would lose his right to avail second option of reversing the proportionate credit. Sub-rule (3A) of Rule 6 is only a procedure contemplated for application of Rule 6(3). Consequently, the argument of Revenue is that the appellants exercising option is mandatory and on its failure, the appellant has no other option but to accept and apply Rule 6(3)(i) and make payment of 5%/10% of the sale price of the exempted goods or exempted services is not acceptable, because the Rule does not lay down any such restriction and this has been held in the judgments cited supra. It has been held in the judgment cited supra that the condition in Rule 6(3A) to intimate the Department is only a procedural one and that such procedural lapse is condonable and denial of substantive right on such procedural failure is unjustified. Therefore, keeping in view the facts and evidence on record, the demand raised by the Revenue is not legal and proper. Moreover, the demand raised by the Revenue is also hit by limitation as the appellant reversed the pro rata credit with interest on 31-7-2010 itself and communicated to the Department whereas the show cause notice was issued only on 13-3-2012 which is beyond the period of one year and the allegation of the Department regarding suppression of fact is also not tenable because the appellant has disclosed these facts in their periodical ER1 returns filed by them. Therefore, the impugned order is not sustainable on merit as well as on limitation and therefore, I set aside the impugned order by allowing the appeal of the appellant with consequential relief, if any.”

7. In view of the above, the issue is no longer *res integra*, therefore, the demand confirmed equal to 5%/10% of value of the exempted goods is not sustainable. As regard the submission of Ld. Counsel regarding the limitation, we find that firstly, the appellant had not utilized the Cenvat credit attributed to the exempted goods, secondly the fact regarding the availment of credit and manufacture and clearance of exempted and non-excisable goods are very much on record, therefore, the suppression of fact cannot be attributed on the part of the appellant. We also find that since the issue regarding reversal of Cenvat credit under Rule 6(3) is contentious and various cases on the same issue have been made out which can be seen from such of judgment given above, therefore, on the issue related to Rule 6(3) particularly in the facts of the present case it cannot be said that the appellant had mala fide intention to evade payment of duty. Therefore, demand for the extended period is also hit by limitation for the same reason the penalties imposed are also unsustainable.

8. As per our above discussion, we hold that proportionate credit paid by the appellant along with interest is sufficient compliance under Rule 6(3), accordingly the same is maintained. The demand under Rule 6(3)(i) i.e. 5%/10% of value of the exempted goods and all the penalties are set aside. The appeal is allowed in the above terms. “

- In the case of Mercedes Benz India (P) Ltd (supra) the Mumbai bench has passed the following decision:

“5. We have considered the submissions made by both sides. From the facts and circumstances of the case and arguments put forth by rivals, we find that the issue to be decided by us is whether appellant is required to pay 5% of total sale value of the goods traded by them in terms of Rule 6(3)(i) when the appellant paid the actual credit attributed to the quantum trading sale in terms of Rule 6(3A) alongwith interest following the option available under Rule 6(3)(ii). Provisions for payment of 5% of the sale value of exempted goods is provided as one of the option given in Rule 6(3) of Cenvat credit Rules which is reproduced below :-

RULE 6. Obligation of a manufacturer or producer of final products and a [provider of output service. - (1) The CENVAT credit shall not be allowed on such quantity of [input used in or in relation to the manufacture of exempted goods or for provision of exempted services, or input service used in or in relation to the manufacture of exempted goods and their clearance upto the place of removal or for provision of exempted services], except in the circumstances mentioned in sub-rule (2) :

Provided that the CENVAT credit on inputs shall not be denied to job worker referred to in rule 12AA of the Central Excise Rules, 2002, on the ground that the said inputs are used in the manufacture of goods cleared without payment of duty under the provisions of that rule.

Explanation 1. - For the purposes of this rule, exempted goods or final products as defined in clauses (d) and (h) of Rule 2 shall include non-excisable goods cleared for a consideration from the factory.

Explanation 2. - Value of non-excisable goods for the purposes of this rule, shall be the invoice value and where such invoice value is not available, such value shall be determined by using reasonable means consistent with the principles of valuation contained in the Excise Act and the rules made thereunder.

(2) 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 -

(a) the receipt, consumption and inventory of inputs used –

(i) in or in relation to the manufacture of exempted goods;

(ii) in or in relation to the manufacture of dutiable final products excluding exempted goods;

(iii) for the provision of exempted services;

(iv) for the provision of output services excluding exempted services; and

(b) the receipt and use of input services -

(i) in or in relation to the manufacture of exempted goods and their clearance upto the place of removal;

(ii) in or in relation to the manufacture of dutiable final products, excluding exempted goods, and their clearance upto the place of removal;

(iii) for the provision of exempted services; and

(iv) for the provision of output services excluding exempted services,

and shall take CENVAT credit only on inputs under sub-clauses (ii) and (iv) of clause (a) and input services under sub-clauses (ii) and (iv) of clause (b).

(3) Notwithstanding anything contained in sub-rules (1) and (2), the manufacturer of goods or the provider of output service, opting not to maintain separate accounts, shall follow [any one] of the following options, as applicable to him, namely :-

(i) pay an amount equal to five percent of value of the exempted goods and exempted services; or

(ii) pay an amount as determined under sub-rule (3A); or

(iii) maintain separate accounts for the receipt, consumption and inventory of inputs as provided for in clause (a) of sub-rule (2), take CENVAT credit only on inputs under sub-clauses (ii) and (iv) of said clause (a) and pay an amount as determined under sub-rule (3A) in respect of input services. The provisions of sub-

clauses (i) and (ii) of clause (b) and sub-clauses (i) and (ii) of clause (c) of sub-rule (3A) shall not apply for such payment :

Provided that if any duty of excise is paid on the exempted goods, the same shall be reduced from the amount payable under clause (i) :

Provided further that if any part of the value of a taxable service has been exempted on the condition that no CENVAT credit of inputs and input services, used for providing such taxable service, shall be taken then the amount specified in clause (i) shall be [six per cent.] of the value so exempted.

Provided also that in case of transportation of goods or passengers by rail the amount required to be paid under clause (i) shall be an amount equal to 2 per cent. of value of the exempted services.

Explanation I. - If the manufacturer of goods or the provider of output service, avails any of the option under this sub-rule, he shall exercise such option for all exempted goods manufactured by him or, as the case may be, all exempted services provided by him, and such option shall not be withdrawn during the remaining part of the financial year.

Ld. Adjudicating Authority demanded 5% of the total sale of the trading turnover of goods on the ground that option provided under Rule 6(3)(i) is applicable on the ground that claim of the appellant on the option provided under Rule 6(3)(ii) is not available for the reason that appellant has not complied with condition provided under sub Rule (3A) of Rule 6 which provides that manufacturers of the goods shall follow certain procedure and conditions as provided under sub-rule (3A)(a)(i) to (iv) inasmuch as the appellant have not given said information in writing to the Jurisdictional Superintendent of Central Excise. Secondly the appellant, as provided under Claus (b) of sub-rule (3A) have not paid the amount of Cenvat on monthly basis and paid after almost 11 months.

5.1 We have observed that in Rule 6(3) prevalent at the relevant time, two options have been provided :-

(i) Payment of 5% on value of exempted services.

(ii) Payment of an amount equal to the Cenvat Credit amount attributed to input services used in or in relation to manufacture of exempted goods or provision of exempted services as provided under sub rule (3A)(b).

It is observed that the appellant has availed the option provided under sub-rule (3)(ii) of Rule 6 and paid an amount as per sub-rule (3A) along with interest and intimated the same to the jurisdictional superintendent in writing vide letter dated 14-3-2012. From the perusal of the said letter, we observed that the appellant categorically stated in the said letter that payment of Cenvat Credit, which they have made alongwith interest is in accordance with Rule 6 (3A) of Cenvat Credit Rules. With this act of the appellant, it is clear that the appellant opted for the option as provided under Rule 6(3)(ii) of the Cenvat Credit Rules, 2004, in accordance to which, the appellant are supposed to an amount equivalent to Cenvat Credit on input service attributed to the exempted service in terms

of Rule 6(3A). In the present case, the appellant has availed Cenvat credit in respect of common input services, which has been used in relation to the manufacture of the final product as well as for trading of bought out cars. Therefore they are supposed to pay an amount equivalent to Cenvat credit which is attributed to the input service used for exempted service i.e. sale of car. In our view, three options have been provided under Rule 6(3) and it is up to the assessee that which option has to be availed. Revenue could not insist the appellant to avail a particular option. In the present case the appellant have admittedly availed option as provided under Rule 6(3)(ii) and paid an amount as required under sub-rule (3A) of Rule 6. As regard the compliance of the procedure and conditions as laid down for availing option as provided under sub-rule (3)(ii), we find that foremost condition is that the appellant is required to pay an amount as per the formula provided under sub-rule (3A) on monthly basis. However, we find that as per the provision, payment on monthly basis is provisional basis, therefore it is not mandatory that whole amount or part of the amount was required to be paid on every month. The appellant though belatedly calculated the amount required to be paid in terms provided under sub-rule (3A) of Rule 6, therefore to fulfill the condition, assessee should pay the said amount, which has been complied by the appellant.

5.2 As regard the delay in payment, if any, the appellant have discharged the interest liability on such delay. Regarding the compliance as provided under Clause (a) of sub-rule (3A) of Rule 6 the appellant while exercising this option is required to intimate in writing to the Jurisdictional Superintendent, Central Excise, the following particulars namely :

- (i) Name, address and registration No. of the manufacturer of goods or provider of output service;
- (ii) Date from which the option under this clause is exercised or proposed to be exercised;
- (iii) Description of dutiable goods or taxable services;
- (iv) Description of exempted goods or exempted services;
- (v) Cenvat credit of inputs and input services lying in balance as on the date of exercising the option under this condition.

As per the submission of the appellant and perusal of their letter along with enclosed details, it is found that more or less all these particulars were intimated to the Jurisdictional Superintendent. The appellant has been filing their returns regularly on monthly basis to the department. On perusal of the copies of the such return submitted along with appeal papers, it is observed that the particulars, as required under clause (a) of sub-rule (3A) of Rule 6 has been produced to the range superintendent. Therefore all the particulars which are required to be intimated to the Jurisdictional superintendent while exercising option stand produced. Though these particulars have not been submitted specifically under a particular letter, but since these particulars otherwise by way of return and some of the information under their letters has admittedly been submitted, we are of the view, as regard this compliance of Rule 6(3A), it stood made.

5.3 As regard the contention of the adjudicating authority that this option should be given in beginning and before exercising such option, we are of the view that though

there is no such time limit provided for exercising such option in the rules but it is a common sense that intention of any option should be expressed before exercising the option, however the delay can be taken as procedural lapse. We also note that trading of goods was considered as exempted service from 2011 only, thus it was initial period. We are also of the view that there is no condition provided in the rule that if a particular option, out of three options are not opted, then only option of payment of 5% provided under Rule 6(3)(i) shall be compulsorily made applicable, therefore we are of the view that Revenue could not insist the appellant to avail a particular option. In the present case admittedly it is appellant who have on their own opted for option provided under Rule 6(3)(ii). The meaning of the option as argued by the Ld. Sr. Counsel is that "option of right of choosing, something that may be or is chosen, choice, the act of choosing". From the said meaning of the term 'option', it is clear that it is the appellant who have liberty to decide which option to be exercised and not the Revenue to decide the same.

5.4 We find that the appellant admittedly paid an amount of Rs. 4,06,785/- plus interest, this is not under dispute. Therefore in our view, the appellant have complied with the condition prescribed under Rule 6(3)(ii) read with sub-rule (3A) of Rule 6 of Cenvat Credit Rules, therefore demand of huge amount of Rs. 24,71,93,529/- of the total value of the vehicle amounting to. Rs. 494,38,70,577/- sold in the market cannot be demanded. We are also of the view that Rule 6 of the Cenvat Credit Rules is not enacted to extract illegal amount from the assessee. The main objective of the Rule 6 is to ensure that the assessee should not avail the Cenvat Credit in respect of input or input services which are used in or in relation to the manufacture of the exempted goods or for exempted services. If this is the objective then at the most amount which is to be recovered shall not be in any case more than Cenvat Credit attributed to the input or input services used in the exempted goods. It is also observed that in either of the three options given in sub-rule (3) of Rule 6, there is no provisions that if the assessee does not opt any of the option at a particular time, then option of payment of 5% will automatically be applied. Therefore we do not understand that when the appellant have categorically by way of their intimation opted for option provided under sub-rule (3)(ii), how Revenue can insist that option (3)(i) under Rule 6 should be followed by the assessee.

5.5 As discussed above and in the facts of the case that actual Cenvat credit attributed to the exempted services used towards sale of the bought out cars in terms of Rule 6(3A) comes to Rs. 4,06,785/- where as adjudicating authority demanded an amount of Rs. 24,71,93,529/-. In our view, any amount, over and above Rs. 4,06,785/- is not the part of the Cenvat Credit, which required to be reversed. The legislator has not enacted any provision by which Cenvat credit, which is other than the credit attributed to input services used in exempted goods or services; can be recovered from the assessee.

5.6 We have gone through judgments relied upon by the Ld. A.R. In the arguments, we found that as regards the judgments on the issue of availment of Cenvat credit on the input or input services used in dutiable and exempted goods, the provision involved in the present case i.e. Rule 6(3) (i) (ii) (3A) has not been considered in the relied upon judgments, therefore the same are not applicable. As regard the other judgments, all these judgments having different facts and dealing with other provisions such as SSI exemption, exemption notification, etc., which are not identical to the fact of the present case, Moreover, in the present case the substantive provisions under Rule 6(3)(ii) and sub

rule (3A) i.e. payment of equivalent to the Cenvat credit, which the appellant have complied with and if at all there is delay, the required interest has also been paid, therefore in the present case, there is no case of noncompliance of procedure and condition. Therefore the judgments cited by the Id. A.R. are not applicable.

6.1 In view of these observations, we are of the considered view that demand confirmed by the adjudicating authority has no legs and therefore the same cannot be sustained. The impugned order is set aside and Appeal is allowed.”

In view of the above catena of judgments and many more judgments cited by the Learned Counsel, the issue is no longer res-Integra as in a case where assessee avails the Cenvat credit on common input service and the same is used for exempted as well as dutiable goods and even at a later stage the assessee reverse the proportionate credit with payment of interest, if there is any delay in reversal of such credit the demand of 10%/6%/5% shall not sustain. Therefore, following the aforesaid judgments we are of the considered view that the appellant are not liable for payment of an amount equal to 10%/6%/5% of the value of the exempted goods. Hence the same is set aside. However, the reversal of the proportionate credit along with interest paid by the appellant is correct and the same is maintained.

5. The impugned order is modified to the above extent. The appeal is allowed in the above terms.

(Pronounced in the open court on 25.08.2023)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(C L MAHAR)
MEMBER (TECHNICAL)