CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL AHMEDABAD
REGIONAL BENCH, COURT NO. 2

SERVICE TAX APPEAL NO. 13695 OF 2014- DB

(Arising out of OIO-AHM-SVTAX-000-COM-015-14-15 dated 26/08/2014 passed by Commissioner of Service Tax-Service Tax - Ahmedabad)

C D Integrated Services Ltd **........Appellant**
B-802, Premium House,
Opp Gandhigram Railway Station, Navrangpura,
Ahmedabad, Gujarat

VERSUS

C.S.T.-Service Tax - Ahmedabad **......Respondent**
7 th Floor, Central Excise Bhawan, Nr. Polytechnic
Central Excise Bhavan, Ambawadi,
Ahmedabad, Gujarat-380015

Appearance:
Present for the Appellant :Shri Jigar Shah, Advocate, Shri Amber Kumrawat, Advocate, Ms Raksha Bhandari, Advocate
Present for the Respondent: Shri Rajesh Nathan, Assistant Commissioner (AR)

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

Final Order No. 11533/2024

DATE OF HEARING: **20/03/2024**
DATE OF DECISION: **11.07.2024**

RAMESH NAIR

1. M/s. C D Integrated Services Ltd. (hereinafter referred to as "the Appellant") is inter alia engaged in provision of stock broker services and other banking and financial services.

2. The Appellant is a stock broker registered as an 'Authorized Agent' at the National Stock Exchange (for brevity "NSE"). Brokerage/Commission charged by the Appellant

3. Because, the investors cannot directly trade in securities, they enter into the transaction of sale and purchase of the securities through the Appellant. Accordingly, the Appellant is engaged in sale and purchase of shares (Cash

Segment/ F&O Segment) on behalf of the investors/clients as well. The Appellant also engages in such sale and purchase in its own PRO account.

4. In lieu of the services provided to the investors/ clients, the Appellant charges brokerage/commission from the investors. On the said brokerage/commission charged by the Appellant, the Appellant is duly discharging Service Tax. Stock Exchanges Service charges collected by the NSE.

5. Further, the NSE provides various services to the investors and against the services provided, NSE collects charges from the investors through the Appellant. The said charges are in the shape of turnover charges which are based on the total business of sale and purchase of the Appellant. On the aforesaid charges, NSE also recovers Service Tax from the Appellant under the category of 'Stock Exchange Service'.

6. Accordingly, the NSE raises monthly invoices on the Appellant on the basis of the monthly turnover of the Appellant and collects Service Tax on the same. However, the invoices raised by the NSE do not contain the breakup of the turnover pertaining to the sale and purchase carried by the Appellant on behalf of the investors/ clients and on behalf of itself, through its proprietary account.

7. On the service tax paid to the NSE, the Appellant availed Cenavt Credit since, the services provided by NSE were 'Input Services' for the business of the Appellant.

8. The Cenvat Credit availed by the Appellant was further utilized by the Appellant in discharging the Service Tax liability on the brokerage/ commission received by it since, the services provided by the Appellant to the investors/ client qualified as 'Output Services'.

9. Audits of the records of the Appellant was carried out by the Department on 17.10.2013 and 18.10.2012 for the period of 2007-08 to 2011-12 wherein the Audit officials were of the view that as far as the transaction with regard

to PRO account is concerned, no service portion was involved in the transaction and no service tax was payable on the same. Therefore, in such cases, the services provided by the NSE were not eligible as 'Input Services'. Thus, the Appellant was not eligible to avail Cenvat Credit on such portion.

10. During the course of the audit and in accordance with the objection raised by the Audit officials, the Appellant paid the Service Tax amount of Rs. 1,32,03,526/- along with interest of Rs. 57,15,347/- for the period of 2008-09 to 2011-12. This fact is not in dispute.

11. In furtherance of the above payment, the Audit officials asked the Appellant to furnish an undertaking stating that the Appellant wishes to conclude the proceedings and shall not file any refund or appeal against the above payments made. Further, the Audit officials also got a letter signed from the Appellant wherein it was stated that no Show Cause Notice may be issued and the benefit of Section 73(3) may be given to the Appellant.

12 However, ignoring the payment made above and the request made by the Appellant for concluding the proceedings, the Department issued a Show Cause Notice dated 25.10.2013 wherein the Department alleged suppression of facts on the part of the Appellant and proposed to invoke the extended period of limitation.

13. Accordingly, vide the Show Cause Notice, the Department proposed to impose penalty under Rule 15(3) of the Cenvat Credit Rules, 2004 read with Section 78 of the Finance Act, 1994. The Department also proposed to appropriate the amount of service tax and interest already paid by the Appellant.

14. In response to the above Show Cause Notice, the Appellant furnished a reply vide letter dinted 22.07.2014 wherein it was submitted that since, the entire amount had already been paid by the Appellant with appropriate

interest, no Show Cause Notice should have been issued in terms of Section 73(3) of the Finance Act, 1994.

15. Further, the Appellant made detailed submissions stating that it has correctly availed Cenavt Credit and that it was under the bonafide belief that it was eligible to avail Cenvat Credit.

16. The above Show Cause Notice was adjudicated upon by the Ld. Commissioner of Service Tax, Ahmedabad (hereinafter referred to as "the Ld. Commissioner"). The Ld. Commissioner confirmed the the demand of cenvat credit, Interest and proposed penalty vide Order-in-Original No. AHM-SVTAX-000-COM-015-14-15 dated 26.08.2014 (hereinafter referred to as the "Impugned Order"). However, the demand and interest already paid by the Appellant were appropriated by the Ld. Commissioner against the proposed demand and interest amounts.

17. The Ld. Commissioner recorded that since, there was suppression of facts and wilful misstatement with regard to availment and utilization of Cenvat Credit, the Appellant cannot be given the benefit of Section 73(3) of the Finance Act, 1994 and on the same ground the Ld. Commissioner imposed the penalty.

18. Further, the Ld. Commissioner observed that though, it cannot be disputed that the service rendered by NSE to the Appellant is an input service for the Appellant; however, the same is only an input service to the extent further services were rendered to the clients. As far as transaction with respect to PRO Account is concerned, there was no service portion involved and therefore, to that extent no Cenavt Credit was available to the Appellant.

19. The Appellant, being aggrieved by the Impugned Order has preferred the present appeal on the detailed grounds raised in the appeal memo.

2. Shri Jigar Shah learned Counsel appearing on behalf of the appellant submits as under:-

A.4. The Appellant submits that no element of suppression of facts or fraud or wilful misstatement is present in the present case since, the Appellant has duly filed all the Returns on time and in accordance with law. To substantiate the same, the Appellant places reliance on the recent decision of the Hon'ble New Delhi Tribunal in the case of M/s GD Goenka Pvt. Ltd. v. Commissioner of CGST, 2023 (8) TMI 995- CESTAT NEW DELHI wherein it was categorically held that merely because the assessee is required to self- assess his tax liability and that the Department only came to know about the wrongful availment of Cenvat Credit during the course of audit, does not imply that the Appellant had the intention to evade tax liability. The Hon'ble Tribunal held that the obligation of the assessee is to file his Returns and thereafter it is the duty of the Department to scrutinize such Returns and assess the tax liability. If the Department fails to do so then, the responsibility of the same lies with the Department and not the assessee. The responsibility of the assessee is limited to the filing of his Return and nothing more is required of him. Therefore, in such cases, the Department cannot allege suppression of facts and invoke the extended period of limitation.

A.5. It is submitted that once the Appellant duly files the Returns, the onus is on the officers of the Department to scrutinize such Returns properly. The onus of any loss to the Revenue in such cases is upon the officers and not the Appellant because the Appellant is not an expert and merely because the tax paid is self-assessed does not mean that in case of any short- payment by the Appellant, the Department can allege suppression of facts. It is the Department's obligation to conduct deep scrutiny of the Returns. As per Para 1.2.1 of the Manual for Scrutiny of Service Tax Returns, the CEBC has clarified that the purpose of detailed scrutiny includes ensuring the correctness of the

Cenvat Credit on input, capital goods and input services in terms of the Cenvat Credit Rules, 2004.

A.6. Further, similar finding was given by the Hon'ble Chandigarh Tribunal in case of CCE & ST v. M/s. Himachal Futuristic Communication Ltd., 2023-VIL-1245-CESTAT-CHD- ST.

A.7. Therefore, in view of the above decisions, it is submitted that no allegation of suppression of facts with the intention to evade tax can be made in the present case and accordingly, it is submitted that the Department has erred invoking Section 73(4) of the Act.

A.8. Further, since the payment of Cenvat Credit along with interest has already been made before issuance of the Show Cause Notice, the benefit of Section 73(3) of the Act should be extended to the Appellant. In this regard, the Appellant places reliance on the decision of the Hon'ble Ahmedabad Tribunal in the case of Gujarat Ambuja Export Ltd. v. CCE, 2014 (34) STR 445 (T), wherein the Hon'ble Tribunal in view of the clear and unambiguous provisions of Section 73(3) of the Act held that in absence of any circumstances justifying exclusion of this provision and invocation of Section 73(4) of the Act, initiation of proceedings for imposition of penalties is unwarranted.

A.9. Furthermore, the Board's Circular No. 137/167/2006-CX-4 dated 03.10.2007 clarified that as per the provisions contained in Section 73(3) of the Act, in case of payment of service tax and interest before the issuance of Show Cause Notice, the entire adjudication proceedings stand concluded.

A.10. It is submitted that the judicial position stands settled in favour of the Appellant and therefore, in view of the same the Appellant's case is fit for applicability of Section 73(3) of the Act. Hence, the Impugned Order is liable to be set aside on this ground alone.

B. The Appellant submits that the services by it from NSE qualify as 'Input Services' as the activity is related to business.

B.1. It is submitted that the Department has wrongly alleged that the services received by the Appellant from NSE do not qualify as 'input services' to the extent the same are related to sale and purchase of shares from the Appellant's PRO account. It is submitted that the invoices issued by the NSE charging service tax on the basis of monthly turnover did not contain the bifurcation of the turnover pertaining to the Appellant's own proprietary account and on behalf of the clients.

B.2. The Department while issuing the Show Cause Notice has restricted itself to denial of Credit attributable to the alleged trading activity undertaken by the Appellant on its own behalf. The proportion attributable to services of Appellant as stock broker is not in dispute. It is submitted that there is no mechanism provided for such action proposed by the Department.

B.3. Apart from the above, it is submitted that Rule 3(1) of the Cenvat Credit Rules, 2004 (hereinafter refined to as "the Rules") provides that a provider of output service shall be allowed credit of the service tax paid on input services. Further, Rule 3(4) of the said Rules provides that the Cenvat Credit may be utilized for payment of excise duty on final products or service tax on any output service.

B.4. It is submitted that the as per the definition of the term 'input service' as defined under Rule 2(1) of the Rules, 'input service' includes 'activities relating to business' provided it is received by the provider of output service. In the instant case, the services received from NSE have been used in relation to the business of the Appellant company. Thus, the definition of the 'input service' is very wide, it not only includes the services used in providing output service but, also includes the services used in relation to the business.

B.5. Hence, all the services used for the purposes of business and are necessary for the Appellant's business; therefore, it cannot be disputed that the services were not input service. On this ground alone, the Impugned Order is liable to be set aside.

C.1. It is submitted that the Explanation added to the definition of 'exempted service' on 01.04.2011, wherein it has been stated that the exempted service includes trading, is prospective in nature. Therefore, prior to the said amendment, trading cannot be considered as a service or an exempted service. The same has been held by the Hon'ble Ahmedabad Tribunal in the case of Orion Appliances Ltd. v. CST, 2010 (19) STR 205 (Tri.- Ahmd.) and Mercedes Benz India Pvt. Ltd. v. CCE, 2014-TIOL-476-CESTAT-MUM.

C.2. Since, trading was a part of the Appellant's business and the definition of 'input service as it stood during the relevant time included activities relating to business, the Appellant is entitled to take credit of any service used in connection of its business. The fact that trading was not a 'service' prior to the amendment and that input services were used in connection to the business of the Appellant, the Appellant is entitled to take credit of the common input services and therefore, was not required to reverse any part of the said credit.

C.3. It is submitted that above Explanation was introduced on 01.03.2011 vide Notification No. 3/11-CE (NT) and though the Explanation was introduced as a clarification, the Notification itself states that the said provision will come into force from 01.04.2011. therefore, the same cannot be given a retrospective effect.

C.4. In this regard, the Appellant place reliance on the decision of this Hon'ble Tribunal in the matter of Infinium Motors Guj Pvt Ltd. v. CST-Service Tax-Ahmedabad, 2022 (11) TMI 948- CESTAT AHMEDABAD wherein the Hon'ble Tribunal had held that trading activity under Rule 6(3) was only made an exempt service only w.e.f. 01.04.2011 by insertion of explanation under Rule

2(e) by notification No. 3/2011 - CE(NT) dated 01.03.2011. In view of this amendment, it is clear that the trading activity was not defined as exempted service prior to 01.04.2011. Thus, Rule 6(3) cannot be made applicable prior 01.04.2011. The Hon'ble Tribunal held that it is a settled law that any statutory amendment cannot be made applicable retrospectively unless the effect of retrospective is enacted by the parliament. Therefore, the Appellant submits that the activity of trading cannot be considered as an exempt service for the purposes of demand prior to 01.04.2011. Hence, the present demand is unsustainable.

CS. Without prejudice, even if the credit of common input services is considered to be not covered by the definition of input services, in that event their liability to reverse the credit should be determined in terms of clause (c) to Explanation 1 after Rule 6(3D), even though the said explanation is introduced w.e.f. 1.4.2011. The said explanation has been introduced with effect from 1.4.2011 keeping in view the fact that in trading, the value addition by the Appellant is only the difference between the sale and purchase price of the goods. Within this difference, the Appellant has to incur all expenditures relating to marketing, sales, transportation, servicing etc. and also make profit and the said explanation is very well-thought of principle and the same should be applied for calculating their liability right from 2005 onwards. The said explanation should be given retrospective effect, since this is only procedural and is not substantive. In support of the same, reliance is placed on the decision judgment in the case of Commissioner of Central Excise & Customs vs First National Bank of Chicago, Judgment of the Court (Fifth Chamber) dated 14.7.1998 in Case C-172/96 and Commissioner of Wealth v. Sharvan Kumar Swarup & Sons (1994) 6 SCC 623).

C.6. Further, the Ld. Commissioner has given a finding that Rule 6 of the Rules, 2004 will have no application. It is submitted that the denial and recovery of credit are enshrined under Rule 6 only and therefore, as per the finding of the Ld. Commissioner, there arises no question of denying credit of service tax paid on the input services, to the Appellant. Also, Rule 14 does not contain any provision allowing recovery of the credit of service tax paid on input services used in relation to the business of the assessee nor does it contain any provision allowing recovery of any credit of service paid on input services proportionately to the extent it is allegedly used in trading activity.

C.7. Thus, as per Rule 3 of the Rules, 2004, the Appellant being an output service provider can take credit of all the input services received by it and there is no prohibition on availment on Cenvat Credit. The Impugned Order is liable to be set aside on this ground.

D.1. If at all any restriction exists, the same is under Rule 6(1), (2) & (3) of the Rules, 2004; therefore, it is very much necessary to discuss the provision of Rule 6 of the Rules, 2004; however, the Ld. Commissioner recorded that the Appellant's reliance on Rule 6 is baseless and erroneous.

D.2. Rule 6(1) provides that Cenvat Credit shall not be allowed on such quantity of input or input services used in the manufacture of exempted goods or provision of exempted services.

D.3. Further, as per Rule 6(2) if the service provider takes Cenvat Credit on inputs and input services and provides both taxable and exempted services, then the output service provider shall maintain separate accounts in respect of receipt, consumption and inventory of inputs and input services meant for use in providing exempted service and taxable services. In such cases, credit will be available only in respect of the inputs or input services used in provision of taxable services.

D.4. As per Rule 6(3) where such manufacturer opted not to maintain separate accounts, the said manufacturer had to pay an amount equal to five percent of the value of the exempted goods or should pay an amount equivalent to the Cenvat Credit attributable to the exempted service subject to the conditions and procedure specified in sub-rule (3A). Further, as per the Explanation I to the Rule 6(3) where a manufacturer opted not to maintain separate accounts and to follow any of the two options available under Rule 6(3) then he had to follow the said option in respect of all the exempted service provided by him. Explanation-II to Rule 6(3) provided that the credit on input services exclusively used in or in relation to provision of exempted service shall not be allowed.

D.5. Accordingly, as per Rule 6, a restriction has been imposed on availment of Cenvat Credit. However, if the finding given by the Ld. Commissioner that provisions of Rule 6 are not applicable to the present case is correct, then there would be no case of the Department and the Appellant would be eligible to take Credit without any restrictions.

D.6. Therefore, if provisions of Rule 6 are not applicable to the facts of the present case, then there cannot be any prohibition on availment of Cenvat Credit. Therefore, on this ground alone, the Impugned Order is liable to be set aside.

E.1. It is submitted that there is no provision in the Rules, 2004 which even remotely allows denial of credit of service paid on inputs services used in relation to sale and purchase activities.

Further, Rule 6(1) only deals with manufacture of exempted goods or provision of exempted service and does not deal with purchase/sale activities. Thus, in the absence of any specific bar, the manufacturer cum trader would be entitled to avail credit of entire service tax paid on input services commonly used for manufacturing and purchase/sale activities without any restrictions. There is no such provision which denies credit of service tax paid on common input services used for manufacture and sale and purchase and sale. Hence, the show cause notice itself is void ab initio. Thus, the Show Cause Notice is liable to be dropped herewith.

F. Prior to 2011, there was no specific formula for reversal of Cenvat Credit availed on common input services used in relation to trading activity.

F.1. Rule 6 of the Rules, 2004 was amended in 2011 by way of which sub-rule (3B) was inserted. Vide the said amendment, formula for deriving value for the purpose of sub-rule (3) and (3A) in case of trading, was introduced. Accordingly, prior to 01.04.2011, there was no specific method for deriving at the value of the trading of the goods for reversal of the Cenvat Credit of the input services used for trading of goods.

F.2. Thus, since, the provision itself was absent, the Appellant cannot be held liable for non- reversal of Cenvat Credit to the extent services are used for trading of the goods.

F.3. The Appellant places reliance upon the decision of the Apex court in the case of B.C. Srinivasan Shetty, (1981) 128 FTR 294 (SC), wherein the Hon'ble Supreme Court has held that none of the provisions pertaining to the head "Capital gains" suggest that they include an asset in the acquisition of which no cost at all can be conceived. Since, it is not possible to determine the cost of acquisition of the goodwill generated in a new business under of the provision of the Income Tax Act, the goodwill generated in a newly commenced business cannot be described as an "asset" within the terms of Section 45 and, therefore, its transfer is not subject to income-tax under the head "Capital gains.

F.4. Thus, in the light of the above submission, the entire proceedings are liable to be set aside.

G. Extended period of limitation is not invokable as there is no suppression of facts on the part of the Appellant as alleged by the Department. It is submitted that there is no statutory obligation that the Appellant is liable to intimate the Department that it has been availing credit of the service tax paid by it on the input services. The Appellant had declared the details of credit taken by it on various input services during the period in dispute in compliance with the statutory requirement of filing monthly return. There is no other provision requiring the Appellant to declare credit taken on service tax paid on input services.

G.2. Non-disclosure of a fact, which is not statutorily required to be disclosed, does not amount to mis-declaration or suppression of facts. Hence, the extended period of limitation cannot be invoked.

G.3. Further, it is submitted that the onus is on the Department to prove that the Appellant has wilfully suppressed the facts with the intention to evade payment of duty; however, the Show Cause Notice failed to prove any mala fide intent on the part of the Appellant.

G.4. Without prejudice to the above submissions, every suppression of fact or omission is not sufficient to invoke larger period of limitation. Only wilful suppression with an intention to evade payment of duty will enable the Revenue to invoke larger period. Omission which is wilful in nature with an intention to evade payment of duty only can lead to invocation of extended period of limitation. In the present case, the wilful nature of the omission is not established. Therefore, the demand beyond the normal period of limitation is not sustainable.

G.5. The Appellant further states and submits that in any case the matter involves interpretation of the statutory provisions. It is well settled that in a case involving interpretation of law, suppression cannot be alleged.

3. On the other hand Shri Rajesh Nathan, Assistant Commissioner (AR) appearing on behalf of the Revenue reiterates the finding of the impugned order.

4. We have carefully considered the submission made by both sides and perused the records. We find that the issue to be decided in the present case is that whether the appellant is entitled for CENVAT Credit on the input service

which is attributed to output service that is stock broker services and other banking and financial services. The case of the department is that since the appellant, apart from providing service to their client also carrying out the activity of trading for themselves appellant did not entitle for CENVAT Credit.

4.1. We find that the demand of CENVAT Credit was raised under Rule 14 of CENVAT Credit Rules, 2004 which reads as under:-

> *"RULE 14. Recovery of CENVAT credit wrongly taken or erroneously refunded. Where the CENVAT credit has been taken or utilized wrongly or has been erroneously refunded, the same along with interest shall be recovered from the manufacturer or the provider of the output service and the provisions of sections 11A and 11AB of the Excise Act or sections 73 and 75 of the Finance Act, shall apply mutatis mutandis for effecting such recoveries."*

On the plain reading of the above Rule 14, it is clear that the CENVAT Credit can be recovered under Rule 14 of CENVAT Credit Rules only in case where such CENVAT Credit was availed wrongly. In the present case undisputedly the appellant is engaged in providing the output service that is stock brokerage service and other financial service. Therefore, the appellant's output service is taxable service which is provided on payment of Service Tax. As regards the activity of the appellant that is stock trading for their own the same is not output service as this activity is not carried out for any other person. It is also observed that assesse is allowed to avail the CENVAT Credit on all the input and input services at the time of receipt thereafter if any part of service is attributed to the exempted output service than the recovery mechanism is provided under Rule 6(3) CENVAT Credit Rule, 2004. In the present case admittedly the provisions of Rule 6(3) was neither invoked in the show cause notice nor invoked for the recovery of the CENVAT Credit under Rule 6 (3) of CENVAT Credit Rules therefore since the availment of credit is in is in order. In the peculiar facts of the present case, there is no machinery provision for recovery of CENVAT Credit, hence the demand of CENVAT Credit is not tenable.

Moreover, demand is for the period 2008-2009 to 2011-2012 whereas the show cause notice was issued on 25.10.2013 that is beyond the normal period of limitation. The fact which is not under dispute reveals the act of the appellant and the appellant had declared the details of credit taken by them on various input services during the period in dispute in compliance of the statutory requirement of filing monthly return. It is also on record that the appellant are providing output service to their client as well as the transaction with regard to PRO account where under no service exists, therefore both type of activities are known from the record. It is also observed that as discussed above on merit the eligibility of CENVAT Credit even when the appellant provide the taxable output service or activity which is for themselves under which no Service Tax was paid is highly debatable, particularly when the Department has not invoked Rule 6(3) for recovery of CENVAT Credit, no suppression of fact can be attributed towards the appellant. Therefore, the demand is also not sustainable on the ground of time bar. As per our discussion made here in above and detail finding, the recovery of CENVAT Credit in the present case is not tenable.

5. Hence, the impugned order is set aside. Appeal is allowed with the consequential relief.

(Pronounced in the open court on **11.07.2024** *)*

(RAMESH NAIR)
MEMBER (JUDICIAL)

(C L MAHAR)
MEMBER (TECHNICAL)

AD