

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD**

REGIONAL BENCH - COURT No. I

Excise Appeal No.70686 of 2021

(Arising out of Order-in-Appeal No. NOI-EXCUS-002-APP-32-2021-22 dated 31.05.2021 passed by Commissioner (Appeals) CGST, Noida)

M/s Triveni Engineering & Industries Ltd.,.....Appellant

(Karora, Khurja, Bulandshahr-203129)
VERSUS

Commissioner of Central Excise &

CGST, Noida

....Respondent

(C-56/42, Renu Tower, Sector-62, Noida-201301)

APPEARANCE:

Ms Aasmee Mangla, Chartered Accountant for the Appellant
Shri Sandeep Pandey, Authorised Representative for the Respondent

CORAM: HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO.70588/2024

DATE OF HEARING : 29 May, 2024
DATE OF PRONOUNCEMENT : 23 September, 2024

SANJIV SRIVASTAVA:

This appeal is directed against Order-in-Appeal No. NOI-EXCUS-002-APP-32-2021-22 dated 31.05.2021 of the Commissioner (Appeals), CGST, Noida. By the impugned order first appellate authority has upheld Order in Original No. 2/AC/DIV-BSR/GBN/2020-21 dated 29/07/2020 of Assistant Commissioner, Central Excise, CGST, Division Bulandshahr holding as follows:

"ORDER

- (i) *I confirm the demand of an amount of Rs. 25,00,590/-(Rupees Twenty Five Lakhs Five Hundred and Ninety only) and order to recover the same*

under Rule 14 of Cenvat Credit Rules, 2004 read with proviso to Section 73(2) of the Finance Act, 1994 read with Section 11A(4) of the Central Excise Act, 1944, from M/s Triveni Engineering & Industries Ltd., (Sugar Unit) Sabitgarh, Tehsil-Khurja, Distt-Bulandshahar

- (ii) I confirm the demand of interest as per applicable rate in terms of Rule 14 of Cenvat Credit Rules, 2004 read with Section 75 of the Finance Act, 1994 read with Section 11AA of the Central Excise Act, 1944.*
- (iii) I also impose a penalty of Rs. 25,00,590/- (Rupees Twenty Five Lakhs Five Hundred and Ninety only) upon M/s Triveni Engineering & Industries Ltd., (Sugar Unit) Sabitgarh, Tehsil-Khurja, Distt-Bulandshahar, under Rule 15 of the Cenvat Credit Rules, 2004, read with Section 78 of the Finance Act, 1994 read with section 11AC of the Central Excise Act, 1944."*

2.1 Appellant is manufacturer and also a service recipient and registered with department both as manufacturer and service recipient for payment of service tax on the specified services under reverse charge mechanism.

2.2 During course of audit it was observed that appellant has availed inadmissible CENVAT credit on-

- (i) invoices issued by the Merchant exporter to the tune of Rs 24,78,840/-, wherein particulars of service/ job is mentioned " Being export facilitation fee for mandatory export of minimum indicative export quota of sugar as per government notification F No 1 (1) SP-1 dated 18 Sept 2015" or "Being reimbursement of loss while facilitating utilization of minimum indicative export quota of sugar as per government notification F No 1 (1) SP-1 dated 18 Sept 2015"
- (ii) invoices issued by the U P Sugar Mills Coge Association (UPSMCA) to the tune of Rs 21,750/- for

contribution to install "gateway System". The "Gateway System" is installed at the gate of the manufacturing unit to provide real time power value(KW) to SLDC, Lucknow & Modipuram, via internet(by using mobile SIM. Telemetry System) used by SLDC(state load dispatch center) to ensure about the surplus power exported or imported by a unit over a period of time and linked to U.P. Sugar Mills cogen association communication Gateway system. The said Tool (Telemetry System Gateway system installed at the entrance/ gate of the unit) is used by the state load dispatch center(SLDC) to monitor power import & power banked of Electricity(exempted goods/services).

2.3 After completion of enquiry and investigations a show cause notice dated 04.10.2019 was issued to the appellant asking him to show casue as to why

- (i) *CENVAT credit amounting to Rs. 25,00,590/- i.e. Credit of Rs. Twenty Five Lakh Five Hundred & Ninety only) should not be denied and the same should not be demanded /recovered from them under Rule 14 of the Cenvat Credit Rules,2004, read with proviso to Section 73(1) of the Finance Act,1994 read with Section 11A (4) of the Central Excise Act, 1944.*
- (ii) *Interest leviabale thereon at the appropriate rate under Rule 14 of Cenvat Credit Rules, 2004 read with Section 75 of the Finance Act, 1994 read with Section 11AA of Central Excise Act, 1944.*
- (iii) *Penalty under Rule 15, ibid, read with Section 78 of the Finance Act, 1994 read with Section 11AC of Central Excise Act, 1994 should not be imposed upon them for the contravention of the various provisions of the said rules as mentioned above.*

2.4 The show cause notice has been adjudicated as per the order in original referred in para 1 above aggrieved appellant filed the appeal before Commissioner (Appeals).

2.5 By the impugned order appeal filed by the appellant before first appellate authority has been dismissed. Hence this appeal.

3.1 I have heard Ms Aasmee Mangla, Chartered Accountant for the appellant and Shri Sandeep Pandey, Authorized Representative for the revenue.

3.2 Arguing for the appellant learned chartered accountant submits that:

- Definitions of input service has been wrongly interpreted by the authorities below to hold that these services do not fall under the definition as contained in rule 2 (I) of the Cenvat Credit Rules, 2004;
- Authorities below have wrongly concluded that the activities undertaken by the appellant through the merchant exporter are more akin to trading of goods and hence covered by Negative List under Section 66 D (e) of the Finance Act, 1994
- The gateway system was used for monitoring of electricity supply which have been used by them in the process of manufacture. In case where the electricity was wheeled out they have reversed the proportionate credit.
- Denial of credit would result in cascading of taxes
- Extended period of limitation could not have been invoked.
- No penalty could have been imposed upon the appellant
- As demand itself is not sustainable so the demand of interest also need to be set aside.
- Reliance is placed on following decisions:
 - Ultratech Cement Limited, [2010 (260) ELT 369, (Bom)]
 - Stanzen Toyotesu India Private Limited, [2011 (23) STR 444 (Kar)]
 - Lupin Limited, [2012 (28) S.T.R. 291 (Tri-Mumbai)]
 - Mawana Sugars Ltd. [2015 (38) STR 424 (Tri.-Del)]
 - Coca Cola India Private Limited [2009 (242) ELT 168 (Bom)]

- Honda Cars India Ltd. [(2023) 10 Centax 317 (Tri.-All)]
- Maruti Suzuki Limited [2009 (240) ELT 641 (SC)]
- Zee Media Corporation Limited [2018 (18) GSTL 32 (All)]
- LG Electronics India Pvt Ltd [2024-VIL-424-CESTAT-ALH-ST]
- Progressive Stamping (P) Ltd [2024-VIL-394-CESTAT-ALH-ST]
- Circular No 120/01/2010-STdated 19th Januarv. 2010

3.3 Authorized Representative re-iterates the findings recorded in the impugned order.

4.1 I have considered the impugned order along with the submissions made in appeal and during the course of arguments.

4.2 Impugned order records following findings:

8. *I have carefully gone through the facts of the case, evidence available on record and submissions made by the appellant. The issue to be decided before me is whether the appellant is entitled to avail Cenvat Credit on the strength of invoices issued by Merchant Exporter M/s. Shri Dutt India Pvt. Ltd. in relation to services provided for fulfilment of Minimum Indicative Export Quota (MIEQ) on behalf of the appellant, as prescribed by the Department of Food & Public Distribution (DFPD), Govt. of India. Another issue is whether the appellant is entitled to avail Cenvat Credit on the invoices issued by the U.P. Sugar Mills Cogen Association for Contribution to install Gateway System' to ensure about the surplus power exported or imported by a unit over a period.*

9. *The DFPD, Govt. of India vide F. No. 1(10)/2015-SP-I dated 18-09- 2015, had allotted 8505.70 MT (Sugar) Export Quota to the appellant as Minimum Indicative Export Quota (MIEQ) as a part of total export quota of 40 Lakh Tons, which was pro-rated amongst all the sugar factories considering their average sugar production of last three years including the current (estimated/provisional) and last two sugar seasons. Further, as a trade facilitation, vide para 2 of the above circular, it was also permitted by the Government that the quotas could be made Tradable'*

among the sugar factories on mutually agreeable terms and conditions.

10. As allowed vide para 2 of the DFPD Circular dated 18/09/2015, for fulfilment of their export obligation of said 8505.70 MT MTEQ sugar quota, the appellant had signed/entered into a specific tripartite agreement dated 16/12/2015 with M/s. Shri Dutt India Pvt. Ltd., Mumbai, Maharashtra as a Merchant Exporter and M/s. Sahyadri SSK Ltd., as a sugar source mill. As per the tripartite Agreement, Merchant Exporter M/s. Shri Dutt India Pvt. Ltd., Mumbai agreed to procure 6786.00 MT raw/VHP brown sugar from Source Sugar Mill i.e., M/s. Shayadri SSK Ltd., to fulfill MIEQ sugar export quota allocated to the appellant. Further all the expenses/cost relating to transportation of sugar from Source Sugar Mill to the port of export and other expenses were born by the said M/s. Shri Dutt India Pvt. Ltd.

11. In the process, the third party, i.e., M/s.ShriDuttIndia Pvt. Ltd. raised bills on two counts charging service tax namely:- (a) 'export facilitation fee' equal to commission payable to the third party for finding importers abroad and facilitate in export related documents and (b) reimbursement of loss while fulfilling the export quota equal to the difference between the domestic price and the export price (which is lesser). The appellant pleaded that even if sugar is procured from other mills, as per govt. notification, it would be deemed that the sugar has been exported out of the quantity manufactured by the appellant and therefore the 'export facilitation fee' is an activity closely related to the "activities of business" and eligible for taking as Cenvat Credit. Moreover, under the tripartite agreement appellants have agreed to compensate the loss to the merchant exporter arising out of the fulfillment of the export quota fixed by the government and the service tax charged by the merchant exporter on such

reimbursement of loss incurred in export of sugar is relating to the 'activities of the business' of manufacture of sugar by the appellant and is also eligible for taking as Cenvat Credit.

12. I find the above contentions of the appellant are not at all tenable for the following reasons:-

(A) As a trade facilitation, the DFPD, GOI allowed the Minimum Indicative Export Quota to be made tradable among sugar factories on mutually agreeable terms and conditions. The said trade facility was extended to the sugar mills only as an alternative mode for fulfillment of export quota by undertaking trading activity of sugar by way of procuring sugar from third parties and also by exporting such procured sugar through merchant exporters as Part of fulfillment of MIEQ allotted to the appellant. However, in the Govt. Circular dated 18/09/2015, it was nowhere permitted to treat such traded quantity of sugar at par with sugar manufactured by the appellant in their factory premises in all respect and it was also nowhere permitted that all the benefits including input/input service credit which are available on sugar manufactured by the appellant in their own factory are also available to such quantity of traded sugar procured from other sources.

(B) Such above alternative activity, which was undertaken by the appellant only to fulfill their export obligation, was nothing but an activity of 'trading of goods' as also indicated in para 2 of the DFPD Circular. The activity of 'Trading of Goods' has been specifically included in the negative list under Section 66(D)(e) of the Finance Act 1994 for the purpose of levy of service tax and therefore, Cenvat Credit is not available of services used for 'Trading of Goods'.

(C) Under Rule 2(I) of CCR'04, "input service" means "any service used by a manufacturer, whether directly or indirectly, in or in relation to the manufacture of final

products and clearance of final products upto the place of removal, and includes services used in relation to modernisation, renovation or repairs of a factory, premises of provider of output service or an office relating to such factory or premises, advertisement or sales promotion, market research, storage upto the place of removal, procurement of inputs, accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry, security, business exhibition, legal services, inward transportation of inputs or capital goods and outward transportation upto the place of removal.” In the instant case, the service provided by the Merchant Exporter in course of trading of goods procured from third parties cannot, by any stretch of imagination, be treated as used by the appellant, directly or indirectly, in or in relation to manufacture of their own final products. Moreover, those services are also not appeared in the inclusive Part of the above definition of input services for the purpose of taking Cenvat Credit.

(D) The appellant contended that said export facilitation fee is an activity closely related to the "activities of business" and accordingly Cenvat Credit is available on it. However, it is to be noted here that the term "activities of business" has been removed from the inclusive part of the definition of 'input services' under Rule 2(I) of CCR'04 in the year 2011 by amendment in CCR'04. At present, in absence of any general space like "activities of business" in the definition of input service under Rule 2(1) of CCR'04, only the services used by the appellant manufacturer in or in relation to the manufacture of his final products and also the services defined in the inclusive part of the definition (excepting the services defined in exclusion clauses) are eligible to be qualified as input services for the purpose of taking Cenvat Credit. Therefore, the services provided by the merchant exporter in relation of the procurement and

export of trading goods procured from third party manufacturers are not qualified as input services for the appellant and Cenvat Credit availed on those services by the appellant is irregular and recoverable from them with interest.

(E) The appellant also submitted that nothing relating to availment of such Cenvat Credit was suppressed or mis-stated by them from the department as every record was maintained, returns were submitted and the issue is only of interpretation or of difference of opinion which has been detected at the time of audit after about four years of taking such credit and therefore, extended period of limitation cannot be invoked for issuance of demand in the instant case. However, I find that the services were unambiguously utilized by the appellant for procurement and export of trading goods manufactured by other sugar manufacturers and there was no scope of confusion or misinterpretation on part of the appellant regarding non-eligibility of such irregular Cenvat Credit. In spite of such clear debarment, the appellant with intention to avail such ineligible Cenvat Credit suppressed and mis-stated the facts before the department and extended period of limitation has been correctly invoked for raising the demand and imposition of penalty.

F All the case laws/judicial pronouncement cited by the appellant in support of their defence are relating to the Cenvat Credit availed on inputs/input services used in relation to goods manufactured by the person taking Credit. But in the instant case, the services were used in relation to traded goods not manufactured by the appellant in his factory and therefore all such relied upon case laws are not applicable in the instant case,

13. Relating to Cenvat Credit availed on the invoices issued by UP Sugar Mills Cogen Association for ' Contribution to install Gateway System", I find that such "Gateway

System" is installed at the gate of the manufacturing unit to provide real time power value (KW) to SLDC via internet (by using mobile SIM Telemetry System) used by SLDC (state load dispatch center) to ensure about the surplus power exported or imported by a unit over a period of time and linked to U.P. Sugar Mills Cogen Association Communication Gateway System. The said system installed at the entrance/gate of the unit is used by the state load dispatch center (SLDC) to monitor power import. All the above activities were performed in relation of monitoring surplus electricity generation and export/import thereof. As electricity itself is an exempted / non-excisable goods or service, no credit is available on such services of "Contribution for setting up Gateway System' provided by UP Sugar Mills Cogen Association."

4.3 The on the issue of the admissibility of credit in respect of the contribution made by the appellant for installation of the gateway system, I find the issue is squarely covered by the decision of Hon'ble Supreme Court in case of Maruti Suzuki Limited [2009 (240) ELT 641 (SC)] wherein following has been held:

"18. It may be noted from the CENVAT Credit Rules of 2004 vis-a-vis CENVAT Credit Rules of 2002 that the word "for" in the inclusive part after the words "steam used" is substituted by the words "used in or in relation to the manufacture of final products". In other words, the crucial requirement of the definition clause is restated by the Legislature. We may note that the CENVAT Credit Rules of 2004 came in force in September, 2004. In some of the cases in batch before us the show cause notice goes right up to January 2005, hence, CENVAT Credit Rules, 2004 also apply to those cases. In short, an item would fall within the category of "inputs" as defined only on compliance with all the three parts of the definition clause.

19. The question which still remains to be answered is : whether an assessee would be entitled to claim CENVAT credit in cases where it sells electricity outside the factory to the joint ventures, vendors or gives it to the grid for distribution? In the case of *Collector of Central Excise v. Rajasthan State Chemical Works* reported in 1991 (55) E.L.T. 444 (S.C.) the test laid down by this Court is whether the process and the use are integrally connected. As stated above, electricity generation is more of a process having its own economics. Applying the said test, we hold that when the electricity generation is a captive arrangement and the requirement is for carrying out the manufacturing activity, the electricity generation also forms part of the manufacturing activity and the "input" used in that electricity generation is an "input used in the manufacture" of final product. However, to the extent the excess electricity is cleared to the grid for distribution or to the joint ventures, vendors, and that too for a price (sale) the "process and the use test" fails. In such a case, the nexus between the process and the use gets disconnected. In such a case, it cannot be said that electricity generated is "used in or in relation to the manufacture of final product, within the factory". Therefore, to the extent of the clearance of excess electricity outside the factory to the joint ventures, vendors, grid etc. would not be admissible for CENVAT credit as such wheeled out electricity, cleared for a price, would not fall within the definition of "input" in Rule 2(g) of the CENVAT Credit Rules, 2002. This view is also expressed in para 9 of the judgment of this Court in the case of *Collector of Central Excise v. Solaris Chemtech Limited* - 2007 (214) E.L.T. 481 (S.C.). Further, our view is supported by the observations of this Court in the case of *Vikram Cement v. Commnr. of Central Excise, Indore* - 2006 (194) E.L.T. 3 (S.C.) which is quoted below :-

"It appears to us on a plain reading of the clause that the phrase "within the factory of production" means only such

generation of electricity or steam which is used within the factory would qualify as an immediate product. The utilization of inputs in the generation of steam or electricity not being qualified by the phrase "within the factory of production" could be outside the factory. Therefore, whatever goes into generation of electricity or steam which is used within the factory would be an input for the purposes of obtaining credit on the duty payable thereon."

20. To sum up, we hold that the definition of "input" brings within its fold, inputs used for generation of electricity or steam, provided such electricity or steam is used within the factory of production for manufacture of final products or for any other purpose. The important point to be noted is that, in the present case, excess electricity has been cleared by the assessee at the agreed rate from time to time in favour of its joint ventures, vendors etc. for a price and has also cleared such electricity in favour of the grid for distribution. To that extent, in our view, assessee was not entitled to CENVAT credit. In short, assessee is entitled to credit on the eligible inputs utilized in the generation of electricity to the extent to which they are using the produced electricity within their factory (for captive consumption). They are not entitled to CENVAT credit to the extent of the excess electricity cleared at the contractual rates in favour of joint ventures, vendors etc., which is sold at a price."

In light of the claim made by the appellant that they are reversing the credit on proportionate basis in respect of electricity wheeled out by them I do not find any merits in the impugned order to the extent it is in respect of denial of credit on this account

4.4 As far as the claim to credit in respect of service received from the merchant exporter, I am inclined to agree with the findings recorded in the impugned order to the effect that these services had no relationship howsoever negligible with manufacturing activities undertaken by the appellant.

Interpreting the definition of "input services" as it existed then Hon'ble Gujarat High Court has in case of Cadila Healthcare Ltd. [2013 (30) STR 3 (GUJ)] held as follows:

"5.1

(xvi) Input service has been defined under Rule 2(I) of the Rules and as it stood at the relevant time reads thus :

(I) "input service" means any service,

(i) used by a provider of taxable service for providing an output service; or

(ii) used by a manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products upto the place of removal,

and includes services used in relation to setting up, modernisation, renovation or repairs of a factory, premises of provider of output service or an office relating to such factory or premises, advertisement or sales promotion, market research, storage up to the place of removal, procurement of inputs, activities relating to business such as accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry and security, inward transportation of inputs or capital goods and outward transportation up to the place of removal;

(xvii) Before adverting to the merits of the issue, reference may be made to various decisions rendered in the context of the expression input service as defined under Rule 2(I) of the Rules. This court in the case of Parth Poly Wooven Pvt. Ltd. (supra) has, after referring to various decisions on the question of interpretation of the said rule as well as interpretation of statutory provisions, held that to qualify for input service, such service should have been used for the manufacture of the final products or in relation to the

manufacture of final product or even in the clearance of the final product from the place of removal.

It has been held in the impugned order that the definition of input service was amended in 2011 to delete "*activities relating to business*" from the inclusive part of definition. Thus the definition has become more restrictive than what was interpreted by the Hon'ble High Court. As no sort of nexus can be shown between the services received by the appellant from the Merchant Exporter, for fulfillment of export quota, by procuring and exporting the sugar of other manufacturers I do not find any merits in the contentions raised by the appellant on the ground of admissibility of this credit. I find these activities are more akin to trading of goods for export as have been held by the impugned order.

4.5 None of the decision relied upon by the appellant support the case of the appellant as these decisions have been rendered in the afcts of those case and are in respect of the services received by the appellant which would have some relationship with the manufacture and clearance of the goods.

4.6 I also do not find much merits in the submissions of the appellant on the issue of limitation. The bonafide belief pleaded by the appellant need to be established and cannot be said to exist in isolation. The fact that appellant has been availing the CENVAT Credit against the invoices of the Merchant Exporter was never disclosed to the department, nor the tripartite agreement dated 16.12.2015 between the appellant, Merchant Exporter and M/s Shayadri SSK Ltd., Yeshwantnagar, Distt Satara, Maharashtra was ever disclosed. These facts and agreement came to light only during the course of audit undertaken by the department. In the ER-1 return filed by the appellant for the period November, 2015, February 2016 & March 2016 the entire credit has been reflected under the head "Credit Taken on Input Services" without specifying the documents against which the credit has been taken or the nature of services. Thus the fact that appellant has taken credit against the invoices of Merchant

Exporter in respect of invoices which were in respect of services which were in no way related to the manufacturing activities of the appellant was never disclosed to the department and suppressed from the departmental authorities at the time of filing the return. It has been held that the discovery of certain facts during the course of audit which are not available on the returns is an act of suppression for invoking the extended period of limitation. In para 12 (E) of the impugned order specific findings have been recorded for invoking the extended period of limitation.

4.7 In case of Applied Solar Technologies (India) Pvt. Ltd. [2023 (70) G.S.T.L. 378 (Tri. - Del.)] delhi bench has observed as follows:

"24. The third issue that arises for consideration is regarding the invocation of the extended period of limitation in the show cause notice. The relevant portion of the show cause notice invoking the extended period of limitation is reproduced below :

Whereas, from the facts discussed above, it further appears that "8. the assessee, by doing so, had intentionally and wilfully suppressed the details of providing/receiving that impugned taxable services and did not file prescribed ST-3 Returns containing the details correctly therein with the intention to short payment/non-payment of the applicable Service Tax on such services. Agreements were never shared by the assessee with the Department so that the nature of these advances could be ascertained from the agreements. Thus there is a clear case of suppression on the part of the assessee. The assessee was aware about the nature of such advances as he had entered into different types of agreements for different kinds of advances/security deposits but he has shown under a single heading in his Balance Sheet which reflects his intention to evade the Service Tax. These acts of omission and commission on the part of the assessee resulted in short payment/non-

payment of Service Tax as discussed under aforesaid paras."

25.*The Commissioner has recorded a finding that though the Agreement referred to the amount as advance but still the appellant made an attempt to treat it as a security deposit, which clearly shows that there was suppression of facts with an intent to evade payment of tax.*

26.*There is no error in the finding recorded by the Commissioner in this regard, as indeed the appellant did try to evade payment of service tax by treating the amount as a security deposit when in fact it was clearly an advance, which fact was very specifically mentioned in the Agreement. The intention to evade payment of service tax by suppression of material facts is writ large."*

4.8 In case of Lally Automobiles [2018 (17) G.S.T.L. 422 (Del)] affirmed by Hon'ble Supreme Court as reported at [2019 (24) G.S.T.L. 1115 (S.C.)], Hon'ble Delhi High Court observed as follows:

"16. *Therefore, the issue is whether the assessee could claim the credit on input which were not services. Input credits can be used for payment of service on output service provided such services are used to provide output services. Undoubtedly, there cannot be an exact correlation between one kind of input and corresponding. That is the reason the Rules cover situations where assessee provide both exempted and taxable services. Wherever someone undertakes activities that cannot be called a service or which is not "manufacture", that activity goes out of the purview of both Central Excise Act as well as Finance Act, 1994. In such cases, an assessee would be ineligible for claiming input-service tax credit on an output which is neither a service nor excisable goods. There is no provision to cover situations where an assessee is providing a taxable service and is undertaking another activity which is neither a service nor manufacture. In such a situation, the only*

correct legal position appears to be that it is for the assessee to segregate the quantum of input service attributable to trading activity and exclude the same from the records maintained for availing credit. This cannot be done in advance as it may not be possible to foretell the quantum of trading activity as compared with taxable activity. The obvious solution would be to ensure that once in a quarter or once in a six months, the quantum of input service tax credit attributed to trading activities according to standard accounting principles is deducted and the balance only availed for the purpose of payment of Service tax of output service.

17.

18.

19.

20. *This Court is also of the opinion that the invocation of the extended period of limitation was warranted in the circumstances of the case. Being conscious of its trading activity and that it was not liable to service tax (since it did not include the amounts earned from that business, in its returns) meant that the assessee was aware of what it was doing. It cannot now take shelter under the plea that non-trading activity was expressly exempt from claiming credit, in 2011. That amendment made no difference, given that trading was never taxable under the Finance Act, 1994. In these circumstances, the Revenue was justified in invoking the extended period of limitation in this case."*

4.9 In case of Kuttukaran Trading Ventures [2014 (35) S.T.R. 481 (Ker.)] affirmed by Hon'ble Supreme Court as reported at [2015 (40) S.T.R. 1187 (S.C.)], Hon'ble Kerala High Court has held as follows:

25. Adjudicating authority found that the assessee has not furnished all material details in their ST-3 returns and such details came to be disclosed only as a result of audit

conducted by the department. This is a finding of fact, which we do not think can be ignored and there is no material to come to a different finding. In that view of the matter, we are of the view that the department was justified in invoking the extended period of limitation.

4.10 In case of Vimko Auto Industries Ltd [2017 (358) E.L.T. 419 (Tri. - Chan.)], Chandigarh bench observed as follows:

"5.4 As for the plea that penalty in excess of 50% was not imposable, I find that the appellants never disclosed to the department that they are taking Cenvat credit of Service Tax on the invoices issued in the name of the other party and never supplied the original records till the time show cause notice was issued. The appellants were repeatedly requested by the Range Office through numerous letters in 2011 to deposit the wrongly availed cenvat credit of Service Tax and to supply the original invoices for verification. The same was not done in respect of contested Cenvat credit amount and this way there was clearly suppression with an intent to Service Tax. Hence penalty as well as extended period have been rightly applied. In a similar situation where inadmissible credit was detected in Audit scrutiny CCE, Ghaziabad v. Rathi Steel & Power Ltd., 2015 (321) E.L.T. 200 (All.), the Hon'ble High Court of Allahabad held as under :-

"32. We further find that under Rules, 2004, a burden is cast upon the manufacturer to ensure that Cenvat credit is correctly claimed by them and proper records are maintained in that regard.

33. The assessee, in response to the show cause notice had stated that there is no provision in Central Excise Law to disclose the details of the credit or to submit the duty paying documents, which in our opinion is false and an attempt to deliberately contravene the provisions of the

Act, 1944 and the rules made thereunder with an intent to evade the duty.

34. In our opinion, the facts of the present case clearly suggest willful suppression of material facts by the assessee as well as contravention of the provisions of the Act and rules framed thereunder with an intent to evade the demand of duty as would be covered by Clauses IV and V of Section 11A(1) of the Act, 1944. Therefore, the invocation of the extended period of limitation in the facts of the present case is fully justified.”

Applying the ratio of the above High Court judgment, I find that the extended period has rightly been invoked and penalty has rightly been imposed in this case.”

4.11 Appellant has relied upon the decisions as follows, to submit that extended period could not have been invoked:

- A. Zee Media Corporation Limited [2018 (18) GSTL 32 (ALL).
- B. L G Electronics India Pvt Ltd [2024-VIL-424-CESTAT-ALH-ST]
- C. Progressive Stampings (P) Ltd. [2024-VIL-394-CESTAT-ALH-ST]

On going through the said decisions I find that these decisions were rendered when the Court and the benches have concluded that the relevant facts were declared by the appellant to the department authorities in normal course and this fact has been established on perusal of returns etc. The same is not the case in the facts of present case and the said decisions are distinguishable. In view of findings recorded in the previous paragraphs and decisions referred I concur with the findings recorded in the impugned order for invoking the extended period of limitation.

4.12 As I find that extended period has been correctly invoked the penalty imposed under Rule 15 of CENVAT Credit Rules,

2004 read with Section 78 of Finance Act, 1994 and Section 11AC of the Central Excise Act, 1944 to the extent it is in respect of this demand cannot be faulted with. In case of Rajasthan Spinning and Weaving Mills [2009 (238) ELT 3 (SC)] Hon'ble Supreme Court has held as follows:

"17. *The main body of Section 11AC lays down the conditions and circumstances that would attract penalty and the various provisos enumerate the conditions, subject to which and the extent to which the penalty may be reduced.*

18. *One cannot fail to notice that both the proviso to sub-section 1 of Section 11A and Section 11AC use the same expressions : "...by reasons of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty,...". In other words the conditions that would extend the normal period of one year to five years would also attract the imposition of penalty. It, therefore, follows that if the notice under Section 11A(1) states that the escaped duty was the result of any conscious and deliberate wrong doing and in the order passed under Section 11A(2) there is a legally tenable finding to that effect then the provision of Section 11AC would also get attracted. The converse of this, equally true, is that in the absence of such an allegation in the notice the period for which the escaped duty may be reclaimed would be confined to one year and in the absence of such a finding in the order passed under Section 11A(2) there would be no application of the penalty provision in Section 11AC of the Act. On behalf of the assesseees it was also submitted that Sections 11A and 11AC not only operate in different fields but the two provisions are also separated by time. The penalty provision of Section 11AC would come into play only after an order is passed under Section 11A(2) with the finding that the escaped duty was the result of*

deception by the assessee by adopting a means as indicated in Section 11AC.

19. *From the aforesaid discussion it is clear that penalty under Section 11AC, as the word suggests, is punishment for an act of deliberate deception by the assessee with the intent to evade duty by adopting any of the means mentioned in the section."*

4.13 As the demand in respect of wrongly availed CENVAT Credit against the invoices of Merchant Exporters is upheld the demand of interest follows and cannot be faulted with.

4.14 Summarizing the findings recorded-

- a. **Demand of CENVAT Credit in respect of the services of "Contribution for setting up Gateway System" provided by UP Sugar Mills Cogen Association, along with associated interest and penalty is set aside.**
- b. **Demand of CENVAT Credit in respect of the services of Merchant Exporter, along with associated interest and penalty is upheld.**

5.1 Appeal partly allowed as indicated in para 4.14 above.

(Pronounced in open court on-23 September, 2024)

**(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)**