

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

REGIONAL BENCH - COURT NO.I

Service Tax Appeal No.70126 of 2022

(Arising out of Order-in-Appeal No.329/ST/ALLD/2021 dated 17.11.2021
passed by Commissioner (Appeals) CGST & Central Excise, Allahabad)

M/s J. S. Communication,

.....Appellant

(Prop. Shri Sunil Juneja,
13/56, Govind Nagar, Kanpur)

VERSUS

**Commissioner of Central Excise &
CGST, Kanpur**

....Respondent

(38, M.G. Marg, Civil Lines, Allahabad)

APPEARANCE:

Shri Dharmendra Srivastava, Chartered Accountant for the Appellant
Shri A. K. Choudhary, Authorized Representative for the Respondent

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

FINAL ORDER NO.- 70770/2024

DATE OF HEARING : 18.11.2024
DATE OF DECISION : 18.11.2024

SANJIV SRIVASTAVA:

This appeal is directed against Order-in-Appeal No.329/ST/ALLD/2021 dated 17.11.2021 passed by Commissioner (Appeals) CGST & Central Excise, Allahabad. By the impugned order Commissioner (Appeals) has held as follows:-

*(i) Confirmation of demand of Service Tax (including Cesses)
is reduced to Rs.6,77,807/- along with interest;*

*(ii) Penalty imposed upon the appellant, under Section 78 of
the Act, is reduced to Rs.6,77,807/-;*

*(iii) Penalty imposed under Sections 77(1)(a), 77(1)(b),
77(1)(c) & 77(2) of the Act, shall remain unchanged;*

2.1 The Appellant is engaged in providing Cable Operator Service, taxable under Finance Act, 1994 but was not paying service tax as required.

2.2 Enquiry was initiated against the Appellant and it was observed that during the period April, 2014 to June, 2017 Appellant has short paid service tax amounting to Rs.10,32,091/- on the services provided by them. They had also not taken service tax registration in due time and also did not file any ST-3 returns during the said period.

2.3 A show cause notice dated 16.10.2019 was issued to the Appellant asking them as to why:-

- (a) *The amount of Rs.82,22,230/- charged & received by them should not be treated as gross value receipts of taxable service. Accordingly, total service tax amounting to Rs.10,32,091/- (Rupees Ten Lakhs Thirty Two Thousand and Ninety One only) (including Swach Bharat Cess and Krishi Kalyan Cess) as discussed above should not be demanded and recovered from them under proviso to Section 73(1) of the Finance Act, 1994 read with Section 174(2) of the CGST Act, 2017 invoking extended period of limitation to recover the amount of service tax for the period from 2013-14 to 2017-18 (up to June, 2017).*
- (b) *Interest should not be demanded/recovered from them under the provisions of Section 75 of the Finance Act, 1994 of the confirmed amount of service tax.*
- (c) *Penalty should not be imposed upon them under Section 78 of the Finance Act, 1994 for failure to pay Service Tax and for suppression of the value of taxable service with intent to evade payment of service tax.*
- (d) *Penalty should not be imposed upon them under the provisions of Section 77(1)(a), 77(1)(b), 77(1)(c) &*

77(2) of the Finance Act, 1994 for various violations as discussed above.

2.4 This show cause notice was adjudicated by the Original Authority vide Order dated 22.03.2021 holding as follows:-

ORDER

- (i) I order that the amount of Rs.82,22,230/- charged & received by M/s J.S. Communication, 13/56, Govind Nagar, Kanpur should be treated as gross value receipts of taxable service during the relevant period. Accordingly, I confirm the demand of service tax amounting to Rs.10,32,091/- (Rupees Ten Lakhs Thirty Two Thousand and Ninety One only) (including Swach Bharat Cess and Krishi Kalyan Cess) against M/s J.S. Communication, 13/56, Govind Nagar, Kanpur under the provisions of Section 73(2) of the Finance Act, `1994 read with Section 68 of Finance Act, 1994 & Rule 6 of Service Tax Rules, 1994 by way of invoking provisions of extended period of demand, read with Section 174(2) of the CGST Act, 2017 and order for its recovery from M/s J.S. Communication, 13/56, Govind Nagar, Kanpur;*
- (ii) I confirm recovery of interest on the amount of Service Tax not paid and order it to be demanded/recovered from M/s J.S. Communication, 13/56, Govind Nagar, Kanpur under the provisions of Section 75 of the Finance Act, 1994 on the confirmed amount of service tax;*
- (iii) I impose a Penalty of Rs.10,32,091/- (Rupees Ten Lakhs Thirty Two Thousand and Ninety One only) upon M/s J.S. Communication, 13/56, Govind Nagar, Kanpur under Section 78 of the Finance Act, 1994 for failure to pay Service Tax and for willful suppression of facts with the department including the value of taxable service with sole intent to evade payment to service tax. Further, I give an option to the party to pay 25% penalty of demand confirmed as provided in*

the Section 78 of the Act, if Service Tax and interest is paid with a period of 30 days of the date of receipt of this order. Further the benefit of reduced penalty shall be available only if the amount of such reduced penalty is also paid within 30 days;

- (iv) I impose a penalty of Rs.10,000/- (Rupees Ten Thousand only) upon M/s J.S. Communication, 13/56, Govind Nagar, Kanpur under Section 77(1)(a) of the Finance Act, 1994 for their failure to not registered with the service tax department;*
- (v) I impose a penalty of Rs.10,000/- (Rupees Ten Thousand only) upon M/s J.S. Communication, 13/56, Govind Nagar, Kanpur under Section 77(1)(b) of the Finance Act, 1994 for their failure to maintain books of accounts and other documents as required in accordance with the provision of Chapter V of the Finance Act and for not submit information/documents/records called by the officer of the department;*
- (vi) I impose a penalty of Rs.10,000/- (Rupees Ten Thousand only) upon M/s J.S. Communication, 13/56, Govind Nagar, Kanpur under Section 77(1)(c) of the Finance Act, 1994 for their failure to submit information/documents/records called by the officer of the department;*
- (vii) I impose a penalty of Rs.10,000/- (Rupees Ten Thousand only) upon M/s J.S. Communication, 13/56, Govind Nagar, Kanpur under Section 77 of the Finance Act, 1994 for contravention of the various provisions of Finance Act, 1994 read with provisions of Service Tax Rules, 1994 as discussed above.*

2.5 Aggrieved Appellant filed the appeal before the Commissioner (Appeals) who has vide the impugned order disposed of the appeal.

2.6 Aggrieved Appellant filed this appeal.

3.1 I have heard Shri Dharmendra Srivastava Chartered Accountant for the Appellant and Shri A. K. Choudhary, Authorized Representative for the Revenue.

3.2 Arguing counsel for the Appellant learned Chartered Accountant submits that in the present appeal only two issues are involved for consideration:-

- Whether the Appellant could be allowed the Cenvat credit on the invoices after the prescribed period as per the Rule 4(7) of the Cenvat Credit Rules.
- Whether the extended period of limitation could have been invoked for making this demand.
- In similar case of M/s Alpha Cable Network vs. Assistant Commissioner, CGST & Central Excise, Division-II, Kanpur [83-25/ST/ALLD/2019 dated 22.04.2019] the Commissioner (Appeals) as modified the order to the extent by setting aside demand for extended period of limitation and have allowed the benefit of CENVAT Credit. For holding so that the order relied upon the decision of Chandigarh Bench in case of M/s Blue Star Communication vs. CCE & ST, Ludhiana [Order No.A/60167-60171/2019 dated 22.02.2019].
- The same benefit should be allowed, as the facts of present case are exactly identical to the case decided by the Commissioner (Appeals) vide OIA dated 22.04.2019.
- Admittedly the Cenvat credit which the Appellant is claiming is for, in respect of invoices which were much prior to the date for claiming the credit as per the Rule 4(7) of Cenvat Credit Rules.

3.3 Learned Authorized Representative for the Revenue reiterated the findings recorded in the impugned order.

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

4.2 The impugned order records the findings as follows:-

"4.1 I have gone through the records of the case, the averments made at the time of the personal

hearing and all other material/documents available on record.

4.2 The appellant has contested that the entertainment tax collected and paid to the government will not be includable in the value of taxable service. I observe that in this case, Service Tax liability of the appellant has been determined on the basis of Entertainment Tax, I thus, find that the amount of such Entertainment Tax paid by the appellant, is not includible in the taxable value, as clarified by the Central Board of Excise & Customs under Para 5 of the Annexure-IX of the letter F. No.B.11/1/2002-TRU dated 01.08.2002, as under:-

"5. In some States, cable operators are also liable to pay entertainment tax. In such cases, a cable operator charges from his customer an amount inclusive of entertainment tax. A point has been raised as to whether the amount paid as entertainment tax is liable to be included in the value of taxable service. It is clarified that the entertainment tax collected and paid to the Government will not be includible in the value of taxable service, provided the cable operator clearly indicates the entertainment tax element in his bill to the customer."

4.2.1 I also find that Hon'ble CESTAT in the case of Universal Communication vs. Commr. of C. Ex. & S.T., Nagpur 206 (45) S.T.R. 80 (Tri.-Mumbai), inter alia, held, as under:-

Valuation (Service Tax) – Cable Operator Service – Deduction of Entertainment Tax – Notwithstanding that said Tax not shown separately in invoice as stipulation in C.B.E. & C. circular dated 1-8-2002, deduction of said tax from assessable value allowable if its payment otherwise established – In view of appellant submitting details of its payment to Government account through

banking channel, matter remanded to adjudicating authority to verify payment particulars and if found in order, not levy any Service Tax on it – Section 67 of Finance Act, 1994.

4.3 As regards the issue of admissibility of Cenvat credit of the service tax paid by the MSO i.e. M/s DEN, I find that the appellant has relied upon case of M/s Blue Star Communication & Others vs. CCE, Ludhiana wherein the CESTAT, Chandigarh in its Final Order No.-A/60167-60171/2019 dated 22.02.2019 held that – “We find that the out of total amount received by the appellants, some amounts of total subscriptions, the appellant are remitting to the MSO on which the MSO is paying service tax, therefore, the signals provided by the MSO to the appellants is an input services for the appellants. Therefore, the service tax paid by the MSO is available as Cenvat credit to the appellants.” Applying the ratio decided in the above decision of the Hon’ble CESTAT, I hold that the Cenvat credit of total service tax amount on input service used for providing taxable service during relevant financial years is allowed to the appellant subject to fulfillment of other such conditions as provided under the Cenvat Credit Rules, 2004 for the admissibility of the same. In the instant case appellant has neither registered with the department during relevant period nor filed statutory ST-3 returns showing availment/utilization of eligible CENVAT credit in the said returns. This it is evident that the appellant failed to avail CENVAT Credit on input services within prescribed limit of six months/one year thereby contravened the sixth proviso to the Rule 4(7) of the CENVAT Credit Rules, 2004. It is well settled principle that the claim of CENVAT Credit taken and/or utilized crystallizes only when the appellant has maintained CENVAT credit records & files statutory returns before the Department claiming the eligible CENVAT credit in the said returns.

Thus, the CENVAT Credit can only be availed by filing the statutory ST-3 return, if no return is filed, it cannot be presumed that appellant has legitimate credit available within the prescribed time limit & would be available for infinite period of time. The appellant has also failed to maintained/produced any CENVAT record for availment of CENVAT credit within prescribed time limit, therefore, contravened the provisions of Rule 9(6) & Rule 9(9) of the CENVAT Credit Rules, 2004. Therefore, I am of the considered opinion that the appellant is not eligible for CENVAT credit due to non-fulfillment of condition mentioned in the Rule 4(7), 9(6) & 9(9) of the CENVAT Credit Rules, 2004.

4.4 Now, I take the issue whether the appellant is providing branded service or not. I observe that in this case, the appellant is cable operator and providing cable services to the subscribers on the basis of signals received from the MSO i.e. M/s DEN. The subscriber has not asked for any brand for providing the said services. In fact, the appellant is also not providing any branded service as M/s DEN is supplying signal to the appellant which has been transmitted to the subscribers, in that circumstances, there is no relation of brand name to the ultimate customers. Therefore, I hold that the appellant is not providing any branded service to the subscribers; therefore, the appellant is entitled to avail the benefit of exemption Notification No.33/2012-ST dated 20.06.2012 subject to fulfillment of conditions mentioned in the said exemption notification.

4.4.1 I observe that the Notification No.33/2012-ST, dated 20.06.2012 exempts taxable services of aggregate value not exceeding Ten Lakh rupees in any financial year from the whole of the service tax leviable thereon under section 66B of the Finance Act, 1994, provided the aggregate value of taxable services rendered by a provider of taxable service does not

exceed Ten Lakh rupees in the preceding financial year. Since in the instant case the appellant has received gross amount, as mentioned in Para 27 of the impugned order, Rs.15,21,750/-, Rs.15,64,194/-, Rs.18,70,245/-, & Rs.5,24,235/- during the F.Y. 2014-15, 2015-16, 2016-17 & 2017-18 respectively and appellant has not produced any evidence/documents which shows that they have received taxable value below Rs. Ten Lakh during the F.Y. 2013-14, therefore, the appellant is not entitled to threshold exemption of Rs. Ten Lakh in the F.Y. 2014-15 to 2017-18 in terms of Notification No.33/2012-ST, dated 20.06.2012 as amended.

4.5 Regarding the submission of the appellant for extended them the cum-tax benefit as per Section 67(2) of the Act, it is observed that the demand of Service Tax is based on entertainment tax paid by the appellant and also it is not the case of the Department that the appellant had charged & collected Service Tax from the service recipient, without depositing the same in the Government's account. Thus, I find the appellant are eligible for the cum-tax benefit in terms of Section 67(2) of the Act.

4.6 In view of the above discussion & findings, I hereby determine the service tax liability after excluding the entertainment tax from the taxable value and allowing cum-tax benefit, as under:-

Period	Value excluding entertainment tax	Rate of S. Tax	Taxable value after allowing cum tax value	Service Tax payable
2014-15	1521750	12.36	1354352	167398
2015-16	1564194	14.50	1366108	198086
2016-17	1870245	15.00	1626300	243945
2017-2018(upto June'17)	524235	15.00	455857	68378
Total	5480424		4802617	677807

4.7 It is observed that under the self-assessment procedure specified in the statute, the appellant was required to assess & pay their Service Tax liability correctly, on their own. The non- payment of Service Tax could be detected only during the course of enquiry conducted by the Department. Thus, it is a clear case of suppression of facts and contravention of the statutory provisions, with intent to evade payment of Service Tax. Thus, I find that extended period of limitation has been rightly invoked in this case for confirming the demand of Service Tax and imposing penalty under Section 78 of the Act.

4.8 As regards to penalties imposed under section 77(1)(a) of the Finance Act 1994, I observe that Section 77(1)(a) of the Act provides that "any person who is liable to pay service tax or required to take registration, fails to take registration in accordance with the provisions of section 69 or rules made under this Chapter shall be liable to a penalty which may extend to ten thousand rupees. Since the appellant failed to take service tax registration during the relevant period, therefore, penalty amounting to Rs.10,000/- imposed by the adjudicating authority under Section 77(1)(a) of the Act is justified. I further observe that the Section 77(2) of the Act provides that "any person who contravenes any of the provisions of this Chapter or any rules made there under for which no penalty is separately provided in this Chapter, shall be liable to a penalty which may extend to ten thousand rupees" in the instant case appellant failed to furnish ST-3 returns thereby contravene the provisions of Section 70(1) of the Act read with Rule 7 of the Service Tax Rules, 1994, therefore, penalty amounting to Rs.10,000/- imposed by the adjudicating authority Section 77(2) of the Act is justified. The appellant has not produced information/documents called for by the department

during the enquiry proceedings & also not maintained books & accounts properly, therefore, penalty of Rs.10,000/- each imposed by the adjudicating authority under Section 77(1)(c) & 77(1)(b) of the Act are also justified."

4.3 I take note of the order of the Commissioner (Appeals) in the case of Alpha Cable Network wherein following has been held:-

"4.2.6 I also find that Hon'ble CESTAT in the case of Universal Communication vs. Commr. of C. Ex., Cus, & S.T., Nagpur 2016 (45) S.T.R. 80 (Tri.-Mumbai), inter alia, held, as under:-

Valuation (Service Tax) – Cable Operator Service – Deduction of Entertainment Tax – Notwithstanding that said Tax not shown separately in invoice as stipulated in C.B.E. & C. circular dated 1-8-2002, deduction of said tax from assessable value allowable if its payment otherwise established – in view of appellant submitting details of its payment to Government account through banking channel, matter remanded to adjudicating authority to verify payment particulars and if found in order, not levy any Service Tax on it – Section 67 of Finance Act, 1994.

4.3 Regarding the submission of the appellants for extending the benefit of cum-tax value, it is observed that it is not the case of the Department that the appellants had charged & collected Service Tax, from their customers, on the amount worked out on the basis of Entertainment Tax, without depositing such service tax in the Government account. Thus, I find that in this case, the appellants are entitled for the benefit of cum-tax value as per Section 67(2) of the Act.

4.4 As regards to the submission of the appellants that they are eligible for the benefit of threshold exemption of Rs. Ten lakh specified under the small service provider exemption Notifications No.06/2005-ST dated 01.03.2005 & 33/2012-ST dated 20.06.2012. It is observed that the Hon'ble CESTAT,

Chandigarh in the case of M/s Blue Star Communication vs. Commissioner of C.Ex. & S. Tax, Ludhiana, vide the Final Order No.A/60167-60171/2019 dated 22.02.2019, has, inter alia, held that the local cable operators providing cable service to the subscribers, on the basis of transmission signal received from the MSO, are not providing any branded service and thus, they are eligible for the benefit of the aforesaid notifications.

4.4.1 Thus, applying the aforesaid Final Order dated 22.02.2019 of the Hon'ble CESTAT, Chandigarh, to these appeals, I find that the appellants did not provide any branded service and as such, they are entitled for the benefit of the aforesaid notifications.

4.5 Regarding the submission of the appellants that the demands of Service Tax have been wrongly computed by applying the rate of Service Tax (including Cesses) as 14.5% for the whole year 2015-16 & as 15% for the whole 2016-17, it is observed that the rate of Service Tax was 12.36% till 31.05.2015, 14% from 01.06.2015 to 14.11.2015, 14.5% from 11.2015 to 31.05.2016 and 15% w.e.f. 01.06.2016. Thus, I find merit in the submission of the appellants.

4.6 So far as the submissions of the appellants about invocation of extended period of limitation and imposition of penalties are concerned, it is observed that the Hon'ble CESTAT, Chandigarh, vide the aforesaid Final Order dated 22.02.2019, has held that extended period of limitation was not invocable and no penalty was imposable, as the appellants were under bona fide belief that they were not liable to pay Service Tax and there was confusion in the industry.

4.6.1 Thus, applying the aforesaid Final Order dated 22.02.2019 of the Hon'ble CESTAT, Chandigarh, to these appeals, I find that extended period of limitation is not invocable and ne penalty is imposable upon the appellants."

4.4 I find that Chandigarh Bench has in the order relied upon in the case of Alpha Cable Network (Supra) held that extended

period could not have been invoked. As facts of the present case are exactly identical to the case of Alpha Cable Network(Supra) or that decided by the Chandigarh Bench, I do not find any merits in the impugned order to the effect it upheld the demand for extended period of limitation. The demand should be restricted to normal period of limitation. Thus the matter needs to be remanded to the Original Authority for determination of the quantum of taxes for normal period.

4.5 As observed by in the impugned order Appellant is claiming Cenvat credit in respect of documents which are much older than period prescribed for availing the credit as per Rule 4 (7) of the CENVAT Credit Rules, 2004. I do not find that this issue was considered by the Commissioner (Appeals) in case of Alpha Cable Network(Supra) or the Chandigarh Bench in case of Blue Star. Rule 4 (7) of CENVAT Credit Rules is reproduced below:

(7) The CENVAT credit in respect of input service shall be allowed, on or after the day on which the invoice, bill or, as the case may be, challan referred to in rule 9 is received:

....

Provided also that the manufacturer or the provider of output service shall not take CENVAT credit after one year of the date of issue of any of the documents specified in sub-rule (1) of rule 9, except in case of services provided by Government, local authority or any other person, by way of assignment of right to use any natural resource:

4.6 This proviso to Rule 4 (7) is parimateria to the proviso to Rule 57 G (2) of the Central Excise Rules, 1944 which was inserted by Notification No. 28/95-CE (NT) dated 28.06.1995. The said proviso is reproduced below:

"Provided further that the manufacturer shall not take credit after six months from the date of issue of any of the documents specified in the First proviso to this Sub-Rule."

This proviso was considered by the larger bench of CESTAT in the case of Kusum Ingots & Alloys Ltd. [2000 (120) E.L.T. 214 (Tri.-LB.)]. Larger Bench held as follows:-

"11. *The contention of the appellant is that some reasonable period should have been given to the manufacturer who were having duty paying documents which were more than six months old on the date of amendment and no credit was taken on them, to take credit on such documents, the appellant replied upon the Hon'ble Supreme Court case Union of India v. Harnam Singh (Supra). We find that Hon'ble Supreme Court in the case of Miles India Limited v. Assistant Collector of Customs, reported in [1987 \(30\) E.L.T. 641](#) (S.C.) and in the case of Collector of Central Excise, Chandigarh v. Doaba Co-operative Sugar Mills, reported in [1988 \(37\) E.L.T. 478](#) (S.C.) held that authorities functioning under the Act are bound by the provisions of the Act. If the proceedings are taken under the Act by the department, the provisions of limitation, prescribed in the Act will prevail. We find no such provisions under the Central Excise Act or under the Rules where the Tribunal can issue such directions as given by the Hon'ble Supreme Court in the case of Union of India v. Harnam Singh (Supra). Therefore there is no merit in this plea of the appellants. The appellants also relied upon the decision of the Hon'ble Supreme Court in the case of Eicher Motors Ltd. v. Union of India, reported in [1999 \(106\) E.L.T. 3](#) (S.C.) = 1999 (30) RLT 829 (S.C.) to say that Section 37 of Central Excise Act does not empower the Revenue to make such rule, as the Clause XVI (a) of Sub-Section 2 of Section 37, only enable the Government to make rules which provides for credit of duty paid on the goods in or in relation to the Excise Rules.*

12. *We find that after the decision of the Hon'ble Supreme Court in the case of Eicher Motors Ltd. v. Union of India (Supra), Sub-Section XXVIII is introduced in Section 37 to provide for Rules which empower the Government to make rules for not allowing credit to be*

*utilised for payment of duty on excisable goods, by Section 131 of Finance Act, 1999. Therefore, after this amendment reliance by the appellants on the decision in the case of Eicher Motors Ltd. v. Union of India will not help them. If a manufacturer wants to avail the benefit of Modvat credit in respect of inputs used in or in relation to the manufacture of final product on payment of duty on such final products under Rule 57A of the Central Excise Rules, he should follow the procedure laid down under the Modvat Scheme. The contention of the appellants is that if on the inputs the manufacturer had already paid the duty on the basis that when the goods are utilised in the manufacture of final product then tax on these goods are to be adjusted and this right accrued to the manufacturer on the date when they paid the tax on the inputs. The right will continue till the facility is available. A manufacturer who is working under the Modvat Scheme can certainly utilise the credit of the duty paid on the inputs used in or in relation to the manufacture of final product for payment of duty on such final product; **but he has to take credit on such inputs within six months from the date of issue of the duty paying documents. After the amendment credit cannot be taken on duty paying documents which are more than 6 months old.**"*

4.7 The decision in case of Osram Surya (P) Ltd. which was approved by the Larger Bench has been affirmed by the Hon'ble Supreme Court reported as 2002 (142) E.L.T. 5 (S.C.) observed as follows:-

"7. Having heard the arguments of the parties and after considering the rule in question, we think that by introducing the limitation in the said proviso to the rule, the statute has not taken away any of the vested rights which had accrued to the manufacturers under the Scheme of Modvat. That vested right continues to be in existence and what is restricted is the time within which the manufacturer has to enforce that right. The appellants, however,

contended that imposition of a limitation is as good as taking away the vested right. In support of their argument, they have placed reliance on a judgment of this Court in *Eicher Motors Ltd. v. Union of India* [[1999 \(106\) E.L.T. 3](#) (S.C.)] wherein this Court had held that a right accrued to an assessee on the date when it paid the tax on the raw-materials or the inputs would continue until the facility available thereto gets worked out or until those goods existed. In that background, this Court held that by Section 37 of the Act, the authorities concerned cannot make a rule which could take away the said right on goods manufactured prior to the date specified in the concerned rule. In the facts of *Eicher's case (supra)*, it is seen that by introduction of Rule 57F(4A) to the Rules, a credit which was lying unutilized on 16-3-1995 with the manufacturer was held to have lapsed. Therefore, that was a case wherein by introduction of the rule a credit which was in the account of the manufacturer was held not to be available on the coming into force of that rule, by that the right to credit itself was taken away, whereas in the instant case by the introduction of the second proviso to Rule 57G, the credit in the account of a manufacturer was not taken away but only the manner and the time within which the said credit was to be taken or utilized alone was stipulated. It is to be noted at this juncture that the substantive right has not been taken away by the introduction of the proviso to the rule in question but a procedural restriction was introduced which, in our opinion, is permissible in law. Therefore, in our opinion, the law laid down by this Court in *Eicher's case (supra)* does not apply to the facts of these cases. This is also the position with regard to the judgment of this Court in *Collector of Central Excise, Pune & Ors. v. Dai Ichi Karkaria Ltd. & Ors.* [1999 (7) SCC 448].

8. It is vehemently argued on behalf of the appellants that in effect by introduction of this rule, a manufacturer in whose account certain credit existed, would be denied of the right to take such credit consequently, as in the case of *Eicher (supra)*, a manufacturer's vested right is taken away, therefore, the rule in question should be interpreted in such a manner that it did not apply to cases where credit in question had accrued prior to the date of introduction of this proviso. In our opinion, this argument is not available to the appellants because none has questioned the legality, or the validity of the rule in question, therefore, any argument which in effect

questions the validity of the rule, cannot be permitted to be raised. The argument of the appellants that there was no time whatsoever given to some of the manufacturers to avail the credit after the introduction of the rule also is based on arbitrariness of the rule, and the same also will have to be rejected on the ground that there is no challenge to the validity of the rule."

4.8 In view of the above discussions, I do not find much merit in the submissions to the effect that Cenvat credit in respect of these documents should be allowed for computation of the demand. However in the remand proceedings while working out the demand for normal period Adjudicating Authority should take into consideration if any document against which the credit has been claimed was within the period as prescribed by proviso to Rule 4(7) of the Cenvat Credit Rules, 2004 as amended from time to time.

5.1 Appeal partly allowed in above terms matter remanded to the Original Authority as per for computation of the demand for the normal period of limitation after taking note of observations made in para 4.8 above.

5.2 Matter being substantially old to be decided within three months from the date of receipt of this order.

(Dictated and pronounced in open court)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

LKS