

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

REGIONAL BENCH - COURT NO.I

Service Tax Appeal No.70127 of 2022

(Arising out of Order-in-Appeal No.338/ST/ALLD/2021 dated 17.11.2021
passed by Commissioner (Appeals) CGST & Central Excise, Allahabad)

M/s Arif Cable,

(Prop. Shri Imran Khan,
88/200, Chaman Ganj, Kanpur)

.....Appellant

VERSUS

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

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

....Respondent

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.- 70771/2024

DATE OF HEARING : 18.11.2024
DATE OF DECISION : 18.11.2024

SANJIV SRIVASTAVA:

This appeal is directed against Order-in-Appeal No.338/ST/ALLD/2021 dated 17.11.2021 passed by Commissioner (Appeals) CGST & Central Excise, Allahabad. By the impugned order Commissioner (Appeals) has upheld Order-in-Original No.45/ST/ACK-II/2020-21 dated 10.03.2021 of the Deputy Commissioner CGST & Central Excise, Division-II Kanpur.

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, 2013 to June, 2017 Appellant has short paid service tax amounting to Rs.8,14,979/-

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 10.04.2019 was issued to the Appellant asking them as to why:-

(i) The Service Tax amounting to Rs.8,14,979/- (including S. Tax, Education Cess, Higher Education Cess, Swach Bharat Cess and Krishi Kalyan Cess), as discussed above, should not be demanded and recovered from them by invoking extended period under proviso to Section 73(1) of Finance Act, 1994 and Rule 6 of Service Tax Rules, 1994, as the Service Tax has not been paid with intent to evade payment of Service Tax by suppressing the facts from the department read with Section 174(2) of the CGST Act, 2017.

(ii) Interest should not be demanded/ recovered from them under the provisions of Section 75 of the Finance Act, 1994 on the confirmed amount of service tax.

(iii) 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 to service tax, thereby contravening the provisions of Section 68 of the Finance Act, 1994 read with Rule 6 of Service Tax (Determination of Value) Rules, 2006.

(iv) Penalty should not be imposed upon them under Section 77(1)(a), 77(1)(b), & 77(1)(c) of the Finance Act, 1994, for failure to take registration under the category of "Cable Operator Service" within time and manner as prescribed under Section 69 of the Finance Act, 1994 read with Rule 4 of the Service Tax Rules, 1994, failed to maintained books of accounts and other documents, failed to furnish information and produced documents called by the Department (as amended);

(v) Penalty should not be imposed upon them under Section 77(2) of the Chapter V of the Finance Act, 1994 for contravention of Section 70 of the Act ibid read with Rule 7 of the Rules ibid.

2.4 This show cause notice was adjudicated by the Original Authority vide Order dated 10.03.2021 holding as follows:-

ORDER

- (i) Against the demand of service tax of Rs.8,14,979/- proposed in the Show Cause Notice, I confirm the demand of Service Tax of Rs.5,18,394/- (including Cess), against M/s Arif Cable, 88/200, Chaman Ganj, Kanpur (Proprietor Shri Imran Khan) which is recoverable from him alongwith interest under Section 75 of the Finance Act, 1994. Remaining demand of service tax of Rs.2,96,585/- is hereby dropped.*
- (ii) I impose penalty of Rs.5,18,394/- under Section 78 of the Finance Act, 1994 upon M/s Arif Cable, 88/200, Chaman Ganj, Kanpur (Proprietor Shri Imran Khan).*
- (iii) I impose penalty of Rs.10,000/- each under Section 77(1)(a), 77(1)(b) & 77(1)(c) of the Finance Act, 1994 upon M/s Arif Cable, 88/200, Chaman Ganj, Kanpur (Proprietor Shri Imran Khan).*
- (iv) I impose penalty of Rs.10,000/- upon M/s Arif Cable, 88/200, Chaman Ganj, Kanpur (Proprietor Shri Imran Khan) under Section 77(2) of the Finance Act, 1994 for contravention of Section 70 of the Act ibid read with Rule 7 of the Rules ibid.*

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. The main issue that falls for consideration in this appeal is whether the appellant was eligible for the credit of Service Tax paid by

them, on the invoices /bills of M/s DEN, in accordance/compliance with the provisions of the CENVAT Credit Rules, 2004. I observe that vide Notification No.21/2014-CE(NT) dated 11.07.2014, after the fifth proviso in Rule 4(7) of the CENVAT Credit Rules, 2004, the following proviso was inserted for the first time to fix time limit to avail CENVAT credit w.e.f. 01.009.2014:-

"Provided also that the manufacturer or the provider of output service shall not take Cenvat Credit after six months of the date of issue of any of the documents specified in sub-rules(1) of rule 9".

Later on, the words 'six months' was substituted by words 'one year' in sixth proviso of Rule 4(7) of CENVAT Credit Rules, 2004 w.e.f. 01.03.2015 vide Notification No.6/2015-CE(NT) dated 1.3.2015.

A careful perusal of above proviso reveals that Cenvat credit of service tax in respect of input service shall not be allowed after the stipulated period of one year of the date of issue of duty paying document specified under Rule 9(1). Thus, appellant has to avail Cenvat credit within one year of the date of issue of duty paying document specified under Rule 9(1).

4.2 I also observe that the Rule 9(6) of the CENVAT Credit Rules 2004 provides that "the manufacturer of final products or the provider of output service shall maintain proper records for the receipt and consumption of the input services in which the relevant information regarding the value, tax paid, CENVAT credit taken and utilized, the person from whom the put service has been procured is recorded and the burden of proof regarding the admissibility of the CENVAT credit shall lie upon the manufacturer or provider of output service taking such credit" Further Rule 9(9) of the CENVAT Credit Rules 2004 stipulates that "the provider of output service availing CENVAT credit, shall submit a half yearly return in form specified, by notification, by the Board to the

Superintendent of Central Excise, by the end of the month following the particular quarter or half year".

4.3 I observe that in the instant case the adjudicating authority has confirmed the demand of service tax for the period 01.04.2013 to 30.06.2017 i.e. after introduction of time limit for availing CENVAT credit & during the relevant period the appellant was neither registered with the department nor filed statutory ST-3 returns showing availment /utilization of eligible CENVAT credit in the said returns. Thus, 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 28 of the impugned order, Rs.8,70,303/-, Rs.10,52,082/-, Rs.11,14,230/-, Rs.12,76,152/- & Rs.3,29,460/- during the F.Y. 2013-14, 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. 2012-13, therefore, the appellant is not entitled to threshold exemption of Rs. Ten Lakh in the F.Y. 2013-14 to 2017-18 in terms of Notification No.33/2012-ST, dated 20.06.2012 as amended.

4.5 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.

4.6 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, therefore, penalty of Rs.10,000/- imposed by the adjudicating authority under Section 77(1)(c) of the Act is 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