CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.I

Service Tax Appeal No.70100 of 2022

(Arising out of Order-in-Appeal No.236-ST-Alld-2021, dated -13/08/2021 passed by Commissioner (Appeals) CGST & Central Excise, Allahabad)

M/s Aman Vision **.....Appellant**
((Proprietor Ranjeet Kaur)
38/131, 85, Gandhi Gram, Krishna Nagar,
Kanpur, Uttar Pradesh 208001)

VERSUS

Commissioner, CGST & Central Excise, Kanpur
....Respondent
(Kanpur)

APPEARANCE:

Request for adjournment for the Appellant
Shri Santosh Kumar, Authorized Representative for the Respondent

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

FINAL ORDER NO.-70774/2024

DATE OF HEARING : 20.11.2024
DATE OF DECISION : 20.11.2024

SANIV SRIVASTAVA:

This appeal is directed against Order-in-Appeal No.236-ST-Alld-2021, dated-13/08/2021 passed by Commissioner (Appeals), CGST & Central Excise, Allahabad. By the impugned order Commissioner (Appeals) has held as follows:-

"4.10 In view of the above, I modify the impugned Order dated 29.10.2020, as under:

(i) Confirmation of demand of Service Tax (including Cesses) is reduced to Rs.6,34,313/- along with interest;

(ii) Penalty imposed upon the appellant, under Section 78 of the Act, is reduced to Rs.6,34,313/-; and

(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, 2013 to June, 2017 Appellant has short paid service tax amounting to Rs.11,61,686/- 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 15.04.2019 was issued to the Appellant asking them as to why:-

"17. Now, therefore, M/s Aman Vision, (Proprietor Shri Ranjeet Kaur), 38/131, 85, Gandhi Gram, Krishna Nagar, Kanpur is hereby required to show cause to the Deputy/Assistant Commissioner, Central Goods & Service Tax, Division-II, 117/7. Sarvodaya Nagar, Kanpur, as to why

(i) The Service Tax amounting to Rs.11,61,686/- (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 read with Section 68 of the 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 the 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 **29.10.2020** holding as follows:-

"i. Against the demand of service tax of Rs.11,61,686/- (including Cess) proposed in the Show Cause Notice, I confirm the demand of Service Tax of Rs. 7,64,747/- (including Cess), against M/s. Aman Vision, 38/131, 85, Gandhi Gram, Krishna Nagar, Kanpur (Proprietor Shri Ranjeet Kaur) under proviso of Section 73(1) of the Finance Act, 1994 read with Section 174(2) of the CGST Act, 2017, which is recoverable from them alongwith Interest under Section 75 of the Finance Act, 1994. Remaining demand of service tax of Rs. 3,96,939/- is hereby dropped.

ii. I impose penalty of Rs. 7,64,747/-under Section 78 of the Finance Act, 1994 upon M/s. Aman Vision, 38/131, 85, Gandhi Gram, Krishna Nagar, Kanpur (Proprietor Shri Ranjeet Kaur).

iii. I impose penalty of Rs. 10,000/- each under Section 77(1)(a), 77(1)(b), 77(1)(c), & 77(2) of the Finance Act, 1994 upon M/s. Aman Vision, 38/131, 85, Gandhi Gram, Krishna Nagar, Kanpur (Proprietor Shri Ranjeet Kaur)."

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 Counsel for the Appellant has requested for an adjournment. I have heard Shri Santosh Kumar, Authorized Representative for the Revenue.

3.2 As matter is in very narrow compass and has been settled decided in similar cases number of times, the request for adjournment made is not accepted and matter is considered on the basis of the available records.

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 during the personal hearing and all other documents/material available on records.*
>
> *4.2 I take up the issues one by one for decision. Firstly, the core issue of taxability on account of "Cable Operators under tile category of "Cable Services needs to be discussed. I observe that the Cable Operators Service provided by Cable Operators was first time brought under the ambit of Service Tax vide Notification No. 08/2002-ST dated 01.08.2002 and as per Section 65/21) of the Finance Act, 1994, "Cable operator has the meaning assigned to it in clause (aa) of Section 2 of the Cable Television Networks (Regulation) Act, 1995 (7 of 1995) and as per Section 65(22) of the Act, "Cable Service" shall have the meaning assigned to it in clause (b) of Section 2 of the Cable Television Networks (Regulation) Act, 1995 (7 of 1995). Further, as per Section 2(aa) of the Cable Television Networks (Regulation) Act, 1995 (7 of 1995) (here-in-after*

referred to as "CTN Act'), "cable operator" means any person who provides cable service through a cable television network or otherwise controls or is responsible for the management and operation of a cable television network and fulfills the prescribed eligibility criteria and conditions. Also, Section 2(b) of the CTN Act, "cable service" means the transmission by cables of programmes including re-transmission by cables of any broadcast television signals. Further, "the cable television network is defined as per Section 2(c) of the CTN Act to mean any system consisting of a set of closed transmission paths and associated signal generation, control and distribution equipment, designed to provide cable service for reception by multiple subscribers. "Subscriber is defined as per Section 2(i) of the CTN Act to mean any individual or association of individuals or a company or any other organization or body who receives the signals of cable television network at a place indicated by him or it to the Cable Operator without further transmitting it to any other person. The definition of the cable services under the Act was amended w.e.f. 10.9.2004 as "Taxable services" means any service provided to any person by a cable operator including a MSO in relation to cable service. Subsequently, w.e.f. 16.6.2005 the definition of taxable service was amended as Taxable service means any service provided or to be provided to any person by a cable operator including MSO in relation to cable service. So the services provided by both cable operator and MSO continued to be taxable within the scope of definition of 'service' and taxable service' given under Section 65B (44) of the Act which emphasized that "service" means any activity carried out by a person for another for consideration, and includes a declared service after introduction of negative tax regime w.e.f 01.07.2012.

4.3 I further observe that the CBEC vide Circular No. 80/10/2004-ST dated 17.09.2004, explained the changes made in the budget for 2004-05 as under: 17.09.20% of service tax on cable operators to Multi system operators (MSOs): In cable TV senises, broadcast channels transmit television signals to multi system operators (MSO) who *further send them to the cable operator. The services provided by the MSOs to the cable operators have been made taxable".*

4.3.1 Furthermore, CBEC vide circular No F.No.B11/6/12005-TRU dated explained the changes in the budget for 2005-06 as under: 27.07.2005,

"In the case of radio or TV broadcasting services, the services are subject to tax where the services are effectively used and enjoyed. Multi System Operators (MSOs) are permitted to receive signals from the broadcasting agencies on payment of prescribed amount. Cable operators transmit programmes to customers through cable network after receiving signals from the multisystem operators (MSOs). Prior to 16.06.2005, service tax was leviable on services provided by cable operators to their customers and multisystem operators to cable operators. In this year's budget, the charges recovered by the broadcasting agencies from the multisystem operator for providing the signals have been specifically made liable to service tax. This completes the service tax chain from the customer to the broadcaster."

4.3.2 I observe that the MSO's received the TV signals from the broadcasters/aggregators. They entered into agreements with the broadcasters who provide the integrated receiver decoder boxes (IRD) to receive the signals in the encrypted form. These boxes were installed by the MSO. The MSO then transmits the signals either through the LCO or directly to the subscribers. When the MSO provides the service through the local cable operator who would then re-transmit the broadcast television signals by the cable to the last mile subscriber, then such a LCO is the cable operator. The definition of the cable operator as per Section 2(aa) of the CTN Act states that a "cable operator means any person who provides cable service through a Cable Television Network or otherwise controls or is responsible for management and operation of Cable Television Network and fulfills the prescribed eligibility criteria and conditions. The "Cable Television Network" as per section 2(c) of the CTN on other hand means any system consisting of a set of closed *transmission paths and associated signal generation, control and distribution equipment designed to provide cable service for reception by multiple subscribers. Hence there are two main ingredients in the definition of the Cable Television Network, one is cable service and the other is subscribers. The "Cable Service" is defined in Section 2(b) of the CTN Act to mean Cransmission by cables of programmes including re-transmission by cables of any broadcast television signals while "Subscriber" has been defined in Section 2(f) of the CTN Act to mean any individual or association of individual or a company or any other organization or body who receives the signals of cable television network at a place indicated by him from MSO or the cable operator, without further transmitting it to any other person. In view of these definitions it is clear that LCO is the cable operator when he re-transmits the TV signal as he fulfills the definition of the term Cable Operator when he provides cable service to the last mile subscriber.*

4.3.3 The same view has been taken by the Hon'ble High Court of Delhi in its judgment dated 09.03.2017 in the case of M/s Siti Cable Networks Limited vs Govt. of NCT of Delhi & ORS. [W.P. (C) 427/2014 & CM No. 851/2014)], Hon'ble Tribunal in the case of Krishna Satellite Cable Network vs CCE, Jaipur reported in 2008 (12) S.T.R. 605 (Tri. Del) and CESTAT, Chandigarh in its Final Order No- A/60167-60171/2019 dated 22.2.2019 pronounced in the case of M/s Blue Star Communication & others Vs CCE, Ludhiana.

4.4 From the above discussion, it is clear that as the MSO had provided the service through the LCOs, the individual LCOs having their own subscription network were regarded as the cable operators and were liable to pay the service tax. Thus, the contention of the appellant that since MSO has already paid service tax, therefore, they are not liable to pay service tax is devoid of merit.

4.5 The appellant has also contested that in the present case the MSO were paying service tax on the same transmission received by them from the Television Channels and the cable operators again being asked to pay the service tax on the *same transmission received from Television Channels leads to the double taxation on the same service. The appellant has relied upon the judgment of Hon'ble High Court of Punjab & Hariyana given in the case of M/s Aameet Puri Vs Union of India [2007 (5) STR 188 (P & H)]. I observe that in the said case the Hon'ble High Court has held that the in view of clear definition of "service" as "service to any person" by a cable operator including "a Multi System Operator", contention raised on behalf of the petitioners that Multi System Operator was not liable to pay service tax, unless service was rendered to a viewer or consumer, has no merit. Similarly, contention that service tax is required to be paid twice on the same service is also without any merit". Thus, it is evident that the appellant has misconstrued the said judgment of the Hon'ble High Court of Punjab & Haryana. Relevant portion of the judgment is as under:*

7. In the reply find on behalf of the Commissioner Central Excise Service Tax, it is submitted that since w.e.f 10-9-2004, "taxable service" has been re-defined to mean service provided to "any person", it was not necessary that the cable operator must be providing provided to any customer. Definition of "cable service" under Section 65(22) is as per definition under Section 2(b) of the Cable Television Networks (Regulation) Act, 1995 which is

"cable service' means transmission by cables of programmes including re-transmission by cable of any broadcast Television signals."

7.1 Thus, the said definition also includes services provided by "Multi System Operator". It is further pointed out that there is no system of double burden as Cenvat Credit Rules have been applicable to give credit of the amount of service tax on the input by MSO which can be utilised on output services by cable service providers to the viewers.

8. We have considered the rival submissions and perused the record.

9. In view of clear definition of "service" as "service to any person" by a cable operator including "a Multi System Operator", contention raised on behalf of the petitioners that

Multi System Operator was not liable to pay service tax, unless service was rendered to a viewer or consumer, has no merit. Similarly, contention that service tax is required to be paid twice on the same service is also without any merit, in view of the stand taken on behalf of the State in the written statement to the effect that in terms of Cenvat Credit Rules, 2004, credit of the service tax paid on input services is available while paying service tax on output services. The same is also supported by Circular No. F. No. 82/8/2004-TRU dated 10-9- 2004, para 29.

10. Accordingly, both the writ petitions are dismissed".

4.6 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. 33/2012-8T dated 20.06.2012 subject to fulfilment of conditions mentioned in the said exemption notification.

4.6.1 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 Rs. 12,03,090/-, Rs. 14,20,359/- Rs. 22,35,750/- during the F.Y 2013-14, F.Y 2014-15 & F.Y 2016-17 respectively, therefore, the appellant is not entitled to threshold exemption of Rs. 10 lakh in the F.Y. 2014-15, 2015-16 & 2017-18 in terms of

Notification No. 33/2012-ST, dated 20.06.2012 as amended. The appellant has not produced any evidence that taxable value received during the F.Y 2012-13 was less than Ten Lakh, therefore, threshold exemption of Rs. 10 lakh in the F.Y. 2013-14 could not be extended to the appellant in terms of Notification No. 33/2012-ST, dated 20.06.2012 as amended. However, the appellant is eligible for threshold exemption of Ten Lakh during the F.Y 2016-17 since taxable value received during the F.Y 2015-16 was Rs. 9,08,868/-.

4.7 As regard the issue of admissibility of Cenvat credit of the service tax paid by the MSO i.e M/s DEN, I find that the matter has been decided by the CESTAT, Chandigarh in its Final Order No- A/60167-60171/2019 dated 22.2.2019 in the case of M/s Blue Star Communication & others Vs CCE, Ludhiana by observing 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. 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 statuary returns before the Department claiming the eligible CENVAT credit in *the said returns. Thus, the CENVAT Credit can only be availed by filing the statuary 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.*

4.8 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 the benefit of threshold exemption & cum-tax benefit, as under:

Period	Value excluding entertainment tax	Threshold exemption	Taxable value after allowing cum tax value& Threshold exemption	Rate of S Tax	Service Tax payable
2013-14	1203090	0	1070746	12.36%	132344
2014-15	1420359	0	1264114	12.36%	156245
2015-16	908868	0	793771	14.50%	115097
2016-17	2235750	1000000	1074565	15.00%	161185
2017-18 (upto June'17)	532386	0	462944	15.00%	69442
Total	6300453	1000000	4666140		634313

4.9 It is observed that appellant has neither taken service tax registration nor filed any ST-3 returns, whereas under the self-assessment procedure specified in the statute, they were 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.

Further, I also observe that the appellant has failed to take service tax registration in due time, failed to maintained proper records & also failed to furnish the information/documents to the department, therefore, penalties imposed by the adjudicating authority under Sections 77(1)(a), 77(1)(b) & 77(1)(c) of the Act are justified. The appellant has never filed ST-3 returns, therefore, penalty imposed by the adjudicating authority for non-filing of ST-3 returns for the period April 2013 to June 2017 under section 77(2) 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 [Order in Appeal No [83-25/ST/ALLD/2019 dated 22.04.2019] 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 invokable 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 invokable 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 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)

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