CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.I

Service Tax Appeal No.70502 of 2020

(Arising out of Order in Appeal - NOI-EXCUS-001-APP-017-20-21, dated - 14/05/2020passed by Commissioner (Appeals) CGST & Central Excise, Noida)

M/s New Spice Sales and Solutions Ltd……Appellant
(formerly Known As M/s Spice Retail Ltd)
19A & 19B, Sector-125,
Noida, Uttar Pradesh 201301)

VERSUS

Commissioner, CGST & Central Excise, ….Respondent Noida
4th Floor, C-56/42, Renu Tower,
Sector-62, Noida-201301

APPEARANCE:

ShriAtul Gupta, Advocate for the Appellant
ShriSantosh Kumar, Authorized Representative for the Respondent

CORAM: HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO.-70244/2025

DATE OF HEARING : 19.02.2025
DATE OF DECISION : 02.05.2025

P. ANJANI KUMAR:

The appellants, New Spice Sales & Solutions Ltd (Formerly known as M/s Spice Retail), challenge the Order-in- Appeal, dated 14.05.2020 passed by Commissioner (Appeals).

2. Briefly stated, the facts of the case are that the appellants are engaged providing various services such as Maintenance or Repair Services, Business Auxiliary Services, Business Support Services, Franchise Services etc. in connection with the retail business of trading in mobile handsets, mobile parts/ accessories

of multiple brands, through chain of retail outlets, under the name of 'Hotspot';Appellants absorbed M/s Spice Mobility Limited (device division), on 01.11.2013, the by way of a slump sale. Thereafter, the Appellant availed Cenvat credit of Service Tax paid on common input services on proportionate basis, by following the procedure prescribed under Rule 6(3)(ii) of Credit Rules; Department was aware of this fact as audit was conducted for the period of 01.04.2010 to 31.12.2012. Appellants, vide letter dated 31.03.2014, intimated Deputy Commissioner, Service Tax that during Financial Year 2013-14, they were following the procedure under Rule 6(3)(ii) of Credit Rules and hence were not maintaining any separate books of accounts for inputs/ input services used for taxable and exempted services; appellant further informed that with effect from 01.04.2014, that they will be opting for Rule 6(2) of the Credit Rules and accordingly would be maintaining separate books of accounts.

2.1. During the audit conducted for the period 01.01.2013 to 31.03.2014, revenue alleged that the Appellant had taken Cenvat credit of entire tax paid on common input services and as the appellant was not maintaining separate records for inputs used exclusively for exempted services, they would be liable to pay an amount calculated as per Rule 6(3)(i) of the Credit Rules i.e. amount equal to 5%/6% of the value of exempted goods or services; The appellants replied that they were following Rule 6(3)(ii) of the Credit Rules on the basis of which an amount of Rs. 2,21,12,575/- was reversed; hence, there was no

requirement of additional reversal in terms of Rule 6 (3)(i) of the CCR. Department vide letters, dated 13.07.2015, 24.07.2015, 03.08.2015 and 11.08.2015, directed the appellants to provide basis for reversal of Rs. 1,99,68,575 and month-wise details of Cenvat credit availed to the tune of Rs. 72,00,000/- as per Para 5 of the Audit Report. The Appellant vide letter dated 01.09.2015 informed the Department that they were following the procedure prescribed under Rule 6(3)(ii) of Credit Rules during the period 01.04.2011 to 31.03.2014; accordingly, the Appellant was eligible to avail Cenvat credit of Rs. 66,93,543; whereas only Rs. 58,50,576/- was availed; Rs. 70,56,200/- (i.e. stood reversed as a part of Rs. 1,99,68,575/- and remaining Rs. 1,44,000/- (i.e. 2.4% of Rs. 72,00,000/) was reversed during 01.01.2013 to 31.03.2014.

2.2. A Show Cause Notice dated 29.03.2016, was issued proposing to recover Cenvat Credit under Rule 6(3)(i) of the CCR on the ground that the Appellant failed to follow the procedure laid down under Rule 6(3)(ii).; in addition, Cenvat credit of Rs. 4,37,100/- availed against exempted service of selling of space of time slots for advertisements was also sought to be recovered. The Appellant was once again directed vide letter dated 11.04.2016, to submit invoice-wise details of Cenvat credit amounting to Rs. 72,00,000/- availed on input services namely advertisement, display/digital & event photography; the Appellant replied to the above, vide letter dated 27.04.2016, stating that no working/calculation had been provided by the Audit Officers in support of their claim; in the absence of which

Appellant could not provide requisite information and invoices; it was reiterated that Cenvat credit of Rs. 1,99,68,575/- stood reversed, which included credit availed on such inadmissible input services. The Show Cause Notice, dated 29.03.2016, was adjudicated vide Order-In-Original, dated 17.11.2017, by Learned Commissioner, CGST, dropping the demand of Rs. 24,90,48,925, for the period 01.01.2011 to 31.03.2014, on the basis that when total credit availed during the period was only Rs. 58,50,576/-, demand of Cenvat credit of Rs. 24,90,48,925/- is inappropriate. Learned Commissioner, CGST also appropriated and confirmed the Cenvat credit reversal amounting to Rs. 2,01,12,578/- on the basis that substantial part of Rule 6(3)(ii) of Credit Rules has been followed by the Appellant.

2.3. The Range Superintendent vide letter dated 09.02.2017 sought details of exempted services and directed the Appellant to explain as to how Housekeeping Services were treated as an input service; Appellant vide letter dated 21.02.2017 explained that such Housekeeping Services were used against trading of goods and selling of space or time slots for advertisement i.e. both taxable and exempted services and hence proportionate reversal was done by Appellant. A Show-cause Notice dated 07.04.2017 (impugned SHOW CAUSE NOTICE) was issued to Appellant denying the Cenvat Credit of Rs. 72,00,000/- on input services used exclusively for rendering exempted services.

2.4. The present Show-cause Notice, dated 07.04.2017, was adjudicated by Joint Commissioner, vide Order-in-Original, dated 15.02.2019, without taking into consideration the order passed

in favour of the Appellant vide Order-in-Original dated 17.11.2017 and confirmed the demand of Rs.72,00,000. Being aggrieved by the Order-in-Original, the Appellant preferred an appeal before the Commissioner (Appeals) who rejected the appeal, vide the Order-in-Appeal dated 14.05.2020, on the ground that it was time barred.Hence, the appeal.

3. ShriAtul Gupta, Learned Counsel for the appellants, submits that the Order-in-Originalwas received by the Appellant on 25.02.2019; accordingly, an appeal was required to be filed by 25.04.2019 i.e., within two months from the date of receipt of the OIO; however, due to certain circumstances, appeal was filed on 12.06.2019; thus, the appeal was preferred 48 days and 18 days after the condonable period. Learned Counsel submits that as per Section 35F of the Central Excise Act, the Appellant was required to make a pre-deposit of 7.5% of the demand confirmed; due to recession, the appellant suffered losses became a non-operating Company; they had to take several authorizations, from its Parent Company, to obtain authorisationswhich caused a delay in filing of the Appeal; delay was not intentional. He submits that Hon'ble High Court of Uttarakhand, in the case of Central Industries Security Force 2017 (6) GSTL 28 (Uttarakhand), condoned the delay, beyond the condonable period, taking in to account the financial difficulties in making mandatory pre-deposit; appeal filed before Commissioner (Appeals) belatedly. He further submits that CESTAT New Delhi, in the matter of JagdishIspat Pvt. Ltd2020-TIOL-819-CESTAT-DEL, held that the liberal approach is

adaptable for condonation of delay as a litigant does not stand to benefit by lodging an appeal late and refusal to condone the delay can result in a meritorious matter being thrown out at the very threshold and the cause of justice being defeated.

4. Learned Counsel submits also that the Show Cause Notice in the present case is vague to the core; it does not disclose the period during which demanded credit was taken so that relevant date could be decided; it is not known as to the source from where the figure of Rs.72,00,000/- was culled out; it is much more in excess of the amount retained by the Appellant after adjustment under Rule 6(3)(ii); demand cannot be in excess of the amount of credit taken; no details of input services of which such amount of credit was taken; the Show Cause Notice, dated 07.04.2017, was issued when another Show Cause Notice, dated 29.03.2016, was already issued, on the basis of very same objection, vide audit memo dated 21.08.2014,and decided; as facts were in the knowledge of the department, extended period of limitation cannot be invoked.

5. Learned Counsel submits further that Show Cause Notice cannot be issued on the basis of audit objections as held in Sharma Fabricators and Erectors Pvt Ltd2017-TIOL-3191-CESTAT-ALL (affirmed by the Hon'ble High Court 2019-TIOL-492-HC-ALL-CX) and in Shree Uma Foundries Pvt Ltd2008 (222) ELT 317; Show Cause Notice has to clearly bring out the case against Appellant and the onus to establish that an Assessee has short paid/ not paid/ evaded tax proper evidence, calculations and documents,is on the Department; in the present case, no

information, documents, working and evidence was brought out; it has been held, by Hon'ble Supreme Court, in a plethora of cases, that the Show Cause Notice is the foundation for judicial proceedings and the basic requirement to be followed is the principles of natural justice; an opportunity to defend is denied if the Show Cause Noticeis issued without reasoning or without specific grounds. He relies on the following decisions:

- *Brindavan Beverages P. Ltd. - 2007 (213) ELT 487 (SC)*
- *B.D. Gupta v. State of Haryana, (1973) 3 SCC 149: 1973 SCC*
- *Board of Technical Education, U.P. v. Dhanwantri Kumar, AIR 1991 SC 271*
- *S.C. Chakrabarty v. State of West Bengal, (1970) 3 SCC 548*

6. Learned Counsel submits further that the impugned order did not consider the OIO, dated 17.11.2017, passed by commissioner wherein a demand of Rs. 24,90,48,925, for the period 01.04.2011 to 31.03.2014, was dropped and demand of the Cenvat credit of Rs. 2,01,12,578 was confirmed observing that the stringency and mandatory nature of the requirement of Rule 6(3A) of CCR 2004 has been justified by the party by availing the CENVAT credit to the extent of the amount attributable to taxable output services only. He submits that the Appellant, vide letter dated 15.02.2018, submitted month-wise details of Cenvat credit availed on proportionate basis during 01.10.2012 to 31.03.2014; appellant reversed the Cenvat credit of Rs. 2,01,12,578 (Rs 1,95,55,021+1,44,000+ 4,13,557), confirmed by OIO dated 17.11.2017, on 04.07.2014; the

impugned orders failed to note that Cenvat credit amounting to 97.6% of Rs. 72,00,000/- already stands reversed as a part of Rs. 1,99,68,575/- during 01.01.2011 to 31.03.2014 and remaining 2.4% i.e. Rs. 1,44,000/- was reversed during 01.01.2013 to 31.03.2014 as clarified by the Appellant vide letter dated 01.09.2015; Department cannot take a contrary stand, in the present case, to the OIO dated 17.11.2017; confirming demand of Rs. 72,00,000/- when the total credit availed during 01.01.2013 to 31.03.2014 is only Rs. 27,51,181, is not only contrary to commissioner's order but also unjust and is liable to be set aside.

7. Learned Counsel submits further that extended period of limitation cannot be invoked as a Show Cause Notice, on the same issue, on the basis of same audit report No. 87/2014-15 dated 21.08.2014,has already been issued by invoking extended period of limitation;the records of the Appellant were time and again audited by the Department;facts have been acknowledged by the Commissioner in the OIO dated 17.11.2017; there has been continuous correspondence with the department; the Appellant has not committed any positive act to suppress information from the department with the *mala fide* intent; onus to prove suppression, etc is on the Department who alleges such *mala fide* intent entire demand is barred time as per Section 73 of the Act. He submits that in the facts and circumstances of the case, no penalty can be imposed. He relies on the following.

- ***M/s Anand Nishikawa Co Ltd 2005-TIOL-118-SC-CX***
- ***Ajay Mishra 2023 (386) E.L.T. 310 (Tri- Del.)***

- ***Arya Logistics 2024 (80) G.S.T.L. 108 (Tri-Ahmd.)***
- ***Continental Foundation J. Venture 2007(216) E.L.T. 177 (SC)***
- ***Nizam Sugar Factory 1999 2006 (197) E.L.T. 465 (S.C.)***
- ***Pushpam Pharmaceuticals Co 1995 Supp (3) SCC 462***
- ***PVR Ltd 2021 (55) G.S.T.L. 435 (Tri- Del.)***
- ***Uniworth Textiles Ltd 2013(288) ELT 161 (SC)***
- ***ShahnazAyurvedics 2004(173) ELT 337 (All.)***
- **H.M.M. Limited, 1995 (76) ELT 497 (SC)**
- Pratibha Processors 1996 (88) ELT 12 (SC)

7. Learned Authorised Representative for the Revenue, reiterates the findings of the impugned orders.

8. Heard both sides and perused the records of the case. The impugned order rejected the appeal filed by the appellants on the grounds of delay. The appellant submits that theimpugned order was received 25.02.2019. accordingly, appeal was required to be filed by 25.04.2019; there was a delay in arranging the finances by the appellant; the appeal was filed on 12.06.2019 after paying mandatory deposit; thus, a delay of 48 days, 18 days in addition to the period of 30 days that could be condoned by the first appellate authority); the appeal came to be rejected. We find that it was held, in Central Industries Security Force and inJagdishIspatPvt Ltd (both supra) that the liberal approach is adaptable for condonation of delay; a litigant does not stand to benefit by lodging an appeal late and refusal to condone the delay can result in a meritorious matter being thrown out at the very threshold cause of justice being defeated. We find that the

delay caused is not intentional and the appellant does not gain anything by delaying the filing of appeal. Therefore, we find that the delay is condonable.

9. Learned Counsel submits that even otherwise, the impugned Show Cause Notice and Order-in-Original are not maintainable on various grounds as follows.

- Show Cause Notice is vague to the core and thus, issued in violation of the principles of natural justice; details like the input service on which credit was wrongly taken, the period for which the notice was given, the source for computation of duty, etc are mentioned in the Notice; there was no way the appellants could file a suitable reply in defence; the demand cannot be in excess of the amount of credit taken.
- This is the second Show cause Notice issued on the basis of an audit memo 21.08.2014; extended period was invoked even when facts were in the knowledge of the department when the first Show Cause Notice, dated 29.03.2016, which was subsequently dropped by OIO dated 17.11.2017, was issued; it is just a pure harassment by the department.
- As the Appellant has not committed any positive act to suppress information from the department with a malafide intent to evade payment of duty, extended period cannot be invoked; further, extended period can not be invoked in the subsequent show cause notice.

10. In view of the above, we find that the Show Cause notice, being vague and not clear on facts, is not maintainable as held in Brindavan Beverages (supra). Further, two show Cause Notices have been issued on the basis of audit objections. It has been held in several cases that extended period cannot be invoked, if the show cause notice is issued on the basis of an audit objection. Further, extended period was invoked in both the Show Cause Notices. Extended period cannot be in any way, in the subsequent show Cause Notice as held in Nizam Sugar Factory (supra). We find that Commissioner himself held, vide OIO dated 17.11.2017, adjudicating the first Show Cause Notice, that extended period cannot be invoked. Therefore, it is certain that extended period cannot be invoked in the subsequent Show Cause Notice. Learned Commissioner finds that

> 6.11 I further find that, the demand in the present case is for the period 2011-12 to 2013-14 and the impugned show cause notice was issued on 29.03.2016 however, the facts were known to the department during the earlier audit conducted in February 2013. I do not find any gravity in the allegation made in the show cause notice that "the said evasion was unearthed by the department during the course of audit of the records of the party". In fact, the procedural lapse had already been observed and recorded in the earlier audit report dated 20.05.2013.
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> 6.12 Further, the party vide its letter dated 31.03.2014 has informed the department as under-
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> Since, we had opted for the option available under clause (ii) of sub-rule (3) of rule 6 of CENVAT Credit

> Rules, 2004. However, from 01.04.2014, we have continued this practice and have started maintaining separate set of books".
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> In such circumstances, I hold that the extended period of limitation under Section 73(1) has been wrongly invoked and the impugned demand is not sustainable and is time barred on this ground also."

11. In view of the above, we are of the considered opinion that the Show cause Notice is not maintainable on limitation. Taking in to account other factors that the Show Cause Notice is vague and Non-specific, the same does not have any chance of survival. As such, remitting the matter back to the Commissioner (Appeals) is not going to serve any fruitful purpose. On the contrary, it would continue the litigation endlessly, without a reason. Therefore, we are of the considered opinion that the impugned Show Cause Notice is liable to be set aside. Therefore, the impugned OIO and OIA are not maintainable. The only way left for us, in the interest of Justice, is to allow the appeal. We do so.

(Pronounced in open court on **02.05.2025**)

(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)