CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH

REGIONAL BENCH - COURT NO. I

Service Tax Appeal No. 60226 of 2023

[Arising out of Order-in-Original No. 04/ST/COMMR/PKL/RD/2022-23 dated 16.01.2023 passed by the Commissioner (Appeals), CGST, Panchkula]

M/s KEC International **……Appellant**
Building No. 9A, DLF Cyber City, DLF Phase-2,
Sector-24, Gurugram, Haryana-122001

VERSUS

Commissioner of CGST & Central Excise, Panchkula **……Respondent**
SCO-407-408, Sector-8, Panchkula-134119

APPEARANCE:

Shri Bharat Raichandani and Shri Deepak Kumar Khokhar, Advocates for the Appellant
Shri Siddharth Jaiswal and Shri S.K. Meena, Authorized Representatives for the Respondent

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

FINAL ORDER NO. 61740/2025

DATE OF HEARING: 25.11.2025
DATE OF DECISION: 09.12.2025

P. ANJANI KUMAR:

M/s KEC International are engaged in executing various works contracts and employed in taxable and exempted services; the appellants have reversed pro rata/ proportionate CENVAT Credit in terms of the formula provided under Rule 6(3)(II) of the CENVAT

Credit Rules, 2004; while considering the reversible CENVAT Credit the appellant has taken into account only common input Service credit and not the total CENVAT Credit. Revenue found that the practice of the appellants was incorrect and they were required to take into account total input credit before 01.04.2016, when the word "common input"was introduced in the said rule (6). DGGI investigated the case and issued a show cause notice dated 28.09.2020; the proposal in the show cause notice were confirmed by the Order-in-original dated 16.01.2023 vide which demand of Rs. 18,95,15,237 was confirmed along with interest and equal penalty under Sec 78 of the Finance Act, 1994. Hence the appeal.

2. Shri Bharat Raichandani and Shri Deepak Kumar, advocates for the appellants submit that the issue is no longer *res integra* having been decided in the case of Reliance Industries 2019- TIOL-1593-CESTAT-Ahm. Wherein it was held that "*if the whole rule 6(1)(2)(3) is read harmoniously and conjointly, it is clear that "total CENVAT Credit" for the purpose of formula under Rule 6(3A) is only total CENVAT Credit on common input service and will not include the CENVAT Credit on input or input service exclusively used for the manufacture of duty of goods. If the interpretation of the revenue is accepted, then the CENVAT Credit of part of input service even though used in the manufacture of dutiable goods, shall stands disallowed, which is not provided under any of the rule of CENVAT Credit Rules, 2004.* He also submits that the decision as above was followed by the Tribunal in the following cases:

- Maliks India Pvt Ltd. 2019-TIOL-3205-CESTAST-Bang;

- Deepak Fertilizers and petrochemicals Corporation Ltd. 2020-TIOL-1310-CESTAT-Mum
- E-Connect Solutions (P) Ltd 2021 (376) ELT 678 (Tri. - Del.)
- M/s Toshiba JSW Power Systems Private Ltd. Service Tax Appeal No. 41580 of 2017 (order dated 08.06.2023 Chennai)
- M/s JSW Steel Limited Appeal No. 20290 of 2018 (order dated 04.01.2024 Bangalore),

3. Learned Counsel further submits that Rule 6 was substituted vide Notification No.13/2016-CE (NT) dated 01.03.2016; in the instant case, the Notification has substituted the reversal formula under rule 6(3A) of the CENVAT Credit Rules, 2004 in its entirety so as to bring about clarity in its interpretation; above amendment is clarificatory in nature. It is well settled legal position that the amendment which is clarificatory in nature is to be applied retrospectively, as held in Shamarao V. Parulekarv Vd the District Magistrate, Thana, Bombay & Others AIR 1952 SC 324.

4. Learned Counsel submits that the assumption of the department that services mentioned under section 66D (negative list of services) are exempt services is incorrect; Rule 2(e) of the CENVAT Credit Rules, 2004 defines the term ‘exempted service’ and the said rule does not state that services enlisted under section 66D would be exempt services; furthermore, all services are subject to service tax under section 66B of the Finance Act, 1994; the services which are excluded from the definition of the term ‘service’ as defined under section 65B(44) of the Finance Act, 1994 would be considered as ‘exempt’ for the purposes of Rule 6 and not the services enlisted under Section 66D of the Finance Act, 1994.

5. Learned Counsel further submits that “trade” is a transfer of ownership of goods and services from one person or entity to another by getting something in exchange from the buyer which is known as consideration amount and it is pure sale when the same relates to transfer of ownership of goods; the activity of the trading of goods is excluded from the scope of the service because the Constitution of India authorizes levy of sales tax on sale and purchase of goods and service tax on rendition of service; the distinction between the sale and purchase of goods and act of rendition of service is clearly brought out for the purpose of payment of tax; once the transaction of transfer of title in goods by way of sale is excluded from the definition of service, the same cannot be deemed to be a service for the purpose of section 66D of the Finance Act, 1994.

6. Learned Counsel submits that "Goods" is defined under clause (25) of Section 65B of the Act means every kind of movable property other than actionable claim and money and includes securities, growing crops grass and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale; in the common parlance, trading is buying and selling of goods; if goods are bought and sold then sales tax is levied which later becomes value added tax and now being dealt under GST; the taxable event of service tax is the act of providing service while act of sale alone is covered under taxable event of sales tax; therefore, to call trade as service is conceptually improper. He relies on

- IG Petrochemicals 2018-TIOL-3528-CESTAT-MUM;
- Medisray laboratories Private limited 2019 (369) ELT 717 (Tri. Mumbai);
- Popular Caterers 2019 (27) GSTL 545.

6. Learned Counsel submits further, without prejudice to the above, that the value of goods exported should not be included in the value of exempted services in terms of Rule 6(6)(v) of the CENVAT Credit Rules, 2002. He relies on CBEC Circular No. 868/6/2008-CX dated 09.05.2008 and submits that the circular clarified that export of services without payment of service tax are not to be treated exempted services; it was held, in Drish Shoes Ltd. – 2010 (254) ELT 417 (HP),upheld by the Hon'ble Supreme Court in SLP No. 2887/2012, that manufactured goods chargeable to nil duty, are eligible to avail CENVAT credit paid on the inputs used in the manufacture of such goods, if the goods are exported as per clause to Rule 6(1), Rule 6(5)/Rule 6(6)of CENVAT Credit Rules, 2002/2004, thus, the intention of the legislature is clear, that whatever is exported, the export cannot be treated as exempted service. He relies on

- Drish Shoes Ltd. – 2010 (254) ELT 417 (HP),upheld by the Hon'ble Supreme Court in SLP No. 2887/2012.
- M/s Sri Velayuthaswamy Spinning Mills (P) Ltd. (Unit-II) 2019 (6) TMI 362-CESTAT Chennai,
- M/s Jolly Board Ltd.– 2017 (49) STR 620 (Tri. – Mum.).
- M/s GPI Textiles Ltd2017 (48) STR 172 (Tri. Chan.)
- M/s Lavino Kapur Cottons Pvt. Ltd2015 (39) STR 514 (Tri. Mum.)
- M/s. Sri Velayutham Spinning Mills (P) Ltd2024 (8) TMI 1207 – CESTAT Chennai

7. Learned Counsel for the appellants submits that the quantification of demand is incorrect; department has considered the value of trading of goods in the value of exempted services for the purpose

of computation of reversal of common input service credit; in so far as the CENVAT credit related to alleged trading of local goods, there would be requirement of reversal of CENVAT credit, if any, it would be Rs. 19,28,850; the appellant has revered credit in excess for the period 2017-18 (up to June 2017). Learned Counsel would submit that the demand is time barred; Show Cause Notice dated 28.09.2020 has been issued for the period 2014-15 to 2015-16, thus, the demand is barred by limitation (even if 18 months is taken as the normal period of limitation); extended period cannot be invoked for the following reasons.

- there was no suppression of facts with intent to evade payment of service tax; the appellant has been filing the returns regularly and showing the taking of the credit; regular audit and investigations were being conducted; department is very much aware about the activities carried out by the appellant company.
- the appellant made a categorical declaration in the returns that they have been reversing the proportionate credit as per Rule 6(3A).
- whether the value of trading of goods has to be included in the value of exempted goods is an interpretational issue; there are various decisions to the effect that the trading of goods cannot be termed as exempted service;
- the appellants are under bonafide belief that they are entitled to avail and utilize credit for the forging reasons.
- the revenue department has not brought forth any cogent evidence on record to establish the charge of wilful

suppression by the appellant to invoke extended period of limitation.

- sappellants rely upon decision of the Hon'ble Supreme Court in the case of Continental Foundation V/s CCE 2007 (216) ELT 177 (SC).

8. Shri S.K. Meena, learned Authorized Representative for the Department submits that the appellants were providing taxable as well as exempted services; exempted services included services provided in J & K, services exempted by Mega Exemption Notification, services to Railways and trading of the goods; before 01.04.2011, trading was neither goods nor services; w.e.f. 01.04.2011, trading was specifically treated as an exempted service; in the instant case, trading falls under the Negative List under Section 66D and therefore, the service of trading of goods do not qualify as export; therefore, the credit availed on such goods is liable for the restrictions under Rule 6; proportionate credit liable to be reversed is given in Rule 6(3A)(c)(iii); accordingly, demand has been correctly raised.

9.Learned Authorized Representative vide his additional submissions presented a chart showing the credit to be considered for the purpose of computing the amount of credit to be reversed on exempted services i.e. domestic trading of goods, trading of goods used in WCT Services, export trading of goods and services rendered in J & K and services rendered to Railways and thus, total exempted turn over in 2014-15 and 2015-16 comes to Rs. 2,11,39,36,896/- and Rs.2,44,67,66,603/-.

10. Learned Counsel for the appellants submits, in rebuttal, that the proposition of the learned Authorized Representative is incorrect as the trading is not an exempted service just for the reason that it is included in the Negative List under Section 66D; also, export trading and trading in respect of services rendered in J & K and to Railways do not constitute exempted services. He submits that, in fact, the appellants have reversed more amount than what is required. Therefore, the impugned order is liable to be set aside.

11. Heard both sides and perused the records of the case. Before going into the merits of the case, we would take up the issue regarding the limitation. We find that it has been held in many cases that the conditions for invoking the extended period as given under Section 11A of the Central Excise Act ,1944 are specific and put heavy burden on the revenue; "Fraud" and "collusion" denote a deliberate deception or a secret agreement to defraud the exchequer, implying a high degree of culpability and a concerted effort to mislead; "Willful misstatement" refers to a deliberate and intentional false statement made with the knowledge of its untruth, or with reckless disregard for its veracity, specifically aimed at evading duty; an incorrect statement, if made without such deliberate intent, does not automatically constitute a wilful misstatement. "Suppression of facts" the most frequently litigated ground, implies a deliberate failure to disclose full and correct information with the specific intent to evade payment of duty; crucially, mere omission, negligence, or inadvertence, without this underlying intent, does not constitute suppression. Lastly,

"contravention with intent to evade duty" is a broader category encompassing any violation of the Act or Rules, but it is the accompanying intent to evade duty that is paramount for the extended period to apply.

12. We further find that it was held that *mens rea* is central to all grounds for invoking the extended period; a consistent judicial and strict stance has been taken in interpretation of the *mens rea* to prevent the authorities from invoking extended period as a default for any non-declaration. It has been consistently held that to establish *'mens rea'* the assessee must have actively concealed, misrepresented, or taken affirmative steps to hide facts, rather than just failing to declare something they might have genuinely overlooked or misunderstood. Hon'ble Supreme Court has repeatedly held that mere negligence, bona fide mistakes, or divergent interpretations of law are insufficient grounds for invoking the extended period, a deliberate intent to evade duty must be conclusively proven by the revenue. One of the foundational judgments is Pushpam Pharmaceuticals Company vs. Collector of Central Excise, Bombay 1995 (78) E.L.T. 401 (S.C.) which has been instrumental in defining "suppression of facts" and "wilful misstatement" demanding deliberate intent and positive acts of evasion and placing the burden to prove the satisfaction of these pre-conditions. We find that another predominant theme emerging from the jurisprudence is that prior knowledge on part of the department, or the department's capacity to acquire such relevant

knowledge (e.g., through audits, filed returns, or site visits), effectively negates any allegation of suppression.

13. We find that learned Commissioner finds that the noticee failed to disclose to the Department the fact that they were calculating the amount by considering the amount of common credit in the formula instead of total credit and only after investigation, the short-payment has come to notice. We find that the logic given by the learned Commissioner is not acceptable inasmuch as when the appellants have been filing the Returns showing the amount reversed by them, the veracity of the calculation could have been verified if need be by calling for information from the appellants. Just because the Revenue missed that opportunity by not scrutinizing the Returns filed by the appellants. We find that it was held, in a number of cases that extended period cannot be invoked in the absence of any positive act with intention to evade payment of duty on the part of the appellants. We find that the Principal Bench in the case of G.D. Goenka vide Final Order No. 51088 /2023 dated 21.08.2023 has held that:

> 25. …….
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> a) The appellant assessee was required to file the ST 3 Returns which it did. Unless the Central Excise officer calls for documents, etc., it is not required to provide them or disclose anything else.
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> b) It is the responsibility of the Central Excise Officer with whom the Returns are filed to scrutinize them and if necessary, make the best judgment assessment under section 72 and issue an SCN under Section 73 within the time limit. If the officer does not do so, and any tax escapes assessment, the responsibility for it rests on the officer.
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> c) Although the Central Excise Officer is empowered to scrutinize all the Returns call for records and if necessary, make the best judgment assessment, if as per the instructions of CBIC, the officer does not conduct a detailed

scrutiny of same Returns and as a result is unable to discover any short payment of tax within the period of limitation, neither the assessee nor the officer is responsible for such loss of revenue. Such a loss of Revenue is the risk taken by the Board as a matter of policy.

d) Extended period of limitation cannot be invoked unless there is evidence of fraud or collusion or willful misstatement or suppression of facts or violation of the provisions of Act or Rules with an intent.

e) Intentional and wilful suppression of facts cannot be presumed because (a) the appellant was operating under self-assessment or (b) because the appellant did not agree with the audit and claimed that CENVAT credit was admissible; or (c) because the appellant did not seek any clarification from the Revenue; or (d) because the officer did not conduct a detailed scrutiny of the Returns and the availment of CENVAT credit which is alleged to be inadmissible and was discovered only during audit.

14. In view of the above, we find that Revenue has not made any case for invoking the extended period. We find that, on this count alone, the impugned order is liable to be set aside. Learned Counsel for the appellants has given elaborate submissions stating that the issue is covered in their favour on merits also. However, as we find that impugned order does not stand the test of limitation, we need not go into the merits of the case. Hence, the appeal is allowed with consequential relief, if any, as per law.

(Order pronounced in the open court on 09.12 .2025)

(S. S. GARG)
MEMBER (JUDICIAL)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

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