

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

COURT NO. I

Excise Appeal No. 60289 of 2016

[Arising out of the Order-in-Original No. 04/MV/CCE/2016 dated 25/04/2016 passed by The Principal Commissioner of Central Excise, Gurgaon.]

M/s Asian Colour Coated Ispat Ltd.

Appellant

7-12, Sector – 6, Bawal,
Distt. Rewari, Haryana.

Versus

**The Commissioner of Central Excise
and Service Tax,**

Respondent

Plot No. 36-37, Sector – 32,
Near Medanta Hospital,
Gurgaon (Haryana).

APPEARANCE

Shri B.L. Narsimhan, Advocate – for the appellant.

Shri M.S. Dhindsa, Authorized Representative (DR) – for the Respondent.

CORAM: **HON'BLE SHRI ASHOK JINDAL, MEMBER (JUDICIAL)**
HON'BLE SHRI C.L. MAHAR, MEMBER (TECHNICAL)

FINAL ORDER NO. 61240/2019

DATE OF HEARING : 04/04/2019.
DATE OF DECISION : 04/04/2019.

C.L. MAHAR :-

The brief facts of the matter are that the appellant are engaged in the manufacture of HR slit and pickled, CR Coils and Sheets, CP Coils and Sheets, PPGI Coils and Sheets and other products falling under Central Excise Tariff Heading No. 72 of the Central Excise Tariff Act, 1985. The appellant have been availing Cenvat credit of central excise duty paid on inputs, capital goods and service tax paid on various services availed by them for undertaking manufacturing process of excisable products. The

Department during audit of the appellant's financial records has observed that the appellant has been procuring raw materials in addition to their actual requirements for manufacture of their final excisable product, the extra quantities of the various raw materials procured by the appellant were cleared as such on reversal of the equivalent amount of excise duty which were equivalent to the Cenvat credit availed during the time of the procurement. However, the appellant have not reversed the credits of the Cenvat credit taken of 'input services' used for procurement of the inputs, which have been cleared as such. It has also been observed that during the course of the audit of various financial statements and records of the assessee for the period 2012-2013 and 2013-2014, the assessee has shown huge income under the head "Other Income". On being asked to explain, the assessee has informed that besides manufacturing of excisable goods, they are also engaged in providing output services under the category "Business Auxiliary Services" and they have registered themselves under service tax Act in this regard. The assessee has further informed that they have been earning agency commission in providing sales and marketing services for booking project orders and professional and technical fees in developing various projects by arranging supply of plant, machineries and equipments and erection and commissioning thereof to various industrial units. They have also informed that they have not used any input or input services in providing the said output service. The assessee has submitted that they have been paying service tax on the services provided by them.

2. It is a matter of record that the assessee has been availing Cenvat credit of central excise duty paid on inputs and capital goods and service tax paid on input services which have been received in their factory for use in the manufacturing of excisable goods and the said credit has been utilized for payment of central excise duty on clearance of final products as well as on output services provided by them.

3. With regard to the issue whereunder Cenvat credit of Rs.17,41,41,056/- has been denied to the appellant on the ground that the Cenvat credit availed on the inputs have been utilized for payment of the service tax under Business Auxiliary Service and for renting of immovable property service. In this regard it has been the contention of learned Advocate appearing for the appellant that as per the provisions of Cenvat Credit Rules, 2004, the central excise duty and service tax paid on inputs and input services, the option has been given to the manufacturer or service provider to utilize such credits for payment of the central excise duty or/and service tax leviable on the goods manufactured or output service provided by them. Thus it has been emphasized that there is no restriction under the Cenvat Credit Rules for cross utilization of the input or input service credits for payment of central excise duty and/or service tax. The learned Advocate has relied on this Tribunal's decision in the case of **S.S. Engineers versus Commissioner of Central Excise, Pune – I** reported under **2015 (38) S.T.R. 614 (Tri. – Mumbai)** wherein this Tribunal has held that Rule 3 of Cenvat Credit Rules, 2004 does not stipulate maintaining separate account as a manufacturer and as a service provider. The third proviso to sub-Rule (iv) of Rule 4 of the Cenvat Credit Rules provides that no credit of the additional duty leviable under sub-Section (v) of Section 3 of Central Excise Tariff Act shall be utilized for payment of service tax on any output service. However, there is no restriction of the utilization of the other credits for payment of service tax on the output service. The learned Advocate has also relied upon the judgment of Hon'ble High Court of Mumbai in the case of **Commissioner of Central Excise, Pune – I versus S.S. Engineers** reported under **2016 (42) S.T.R. 3 (Bom.)**, whereunder the Hon'ble High Court has held that cross utilization of the input service and input credits is neither barred nor prohibited as per the provisions of Cenvat Credit Rules.

4. It has further been states by the learned Advocate that input services and input credits utilized for payment of service tax on renting of immovable property service tax has also been allowed by Hon'ble Andhra Pradesh High Court in the case of **Commissioner of Central Excise, Vishakhapatnam – II versus Sai Sahmita Storages (P) Ltd.** reported under **2011 (23) S.T.R. 341 (A.P.)** as well as **Commissioner of GST and Central Excise, Chennai versus Dymos India Automotive Pvt. Ltd.** reported under **2018 – TIOL – 1947 – H.C. – MADRAS – ST.** The learned Advocate has also contested that the demand is barred by the limitation as the no element of fraud, suppression, willful mis-statement with an intent to evade excise duty are present in their case. It has been stated that in their regular financial statements and returns filed by the appellant with the Department all the relevant details, such as, availment of the Cenvat credit on various inputs and input services as well as utilization of same on manufacturing of the excisable products as well as for payment of service tax on the output service have been provided in their statutory statements filed with the Department. It has further been states that apart from filing regular returns with the Department, the appellants are being regularly audited by the Department whereunder all the financial statements have been placed before the auditing officers for scrutiny by appellant. The learned Advocate has taken us through the various correspondences which have taken place between them and the auditing parties to support his claim that there is no ground of alleging suppression or mis-declaration on their part as all the statutory records have always been available with the Department for scrutiny. The learned Advocate has relied on the Hon'ble Supreme Court's decision in the case of **Pushpam Pharmaceuticals Company versus Collector of Central Excise, Bombay** reported under **1995 (78) E.L.T. 401 (S.C.)** and **Commissioner of Central Excise, Chandigarh versus**

Punjab Laminates Pvt. Ltd. reported under **2006 (202) E.L.T. 578 (S.C.)**.

5. On the basis of above arguments, the learned Advocate has vehemently appealed that order-in-original is without any merit and same deserves to be set aside.

6. We have also heard learned Departmental Representative who has reiterated the findings as given in order-in-original.

7. After hearing both the sides, we find force in the arguments submitted by the learned Advocate and also take note of the fact that most of the issues covered under the impugned order-in-original are no-longer res-integra as same has already been decided by this Tribunal vide its various decisions.

8. On the issue of non-reversal of the Cenvat credit on input services availed for procuring such inputs which have been cleared as such by the appellant during the period 2010-2015, we find that issue is squarely covered by the decision of Hon'ble Punjab & Haryana High Court in the case of **Commissioner versus Bassi Alloys Pvt. Ltd.** reported under **2011 (24) S.T.R. J174 (P&H)**. This decision has endorsed the findings given by the Tribunal's decision in the case of **Bassi Alloys P. Ltd. versus Commissioner of Central Excise, Chandigarh** reported under **2010 (19) S.T.R. 369 (Tri. – Del.)**. The relevant extract of the same is reproduced here below :-

"3. The appellant removed some quantities of inputs on which credit was taken after reversing the Cenvat credit availed on the said inputs in terms of Rule 3(5) of the Cenvat Credit Rules, 2004. The original authority held that while they received the inputs and took credit and not only they have taken credit of duty on the inputs received but also in respect of Service tax paid on input service namely GTA services which was utilised for bringing the said inputs. He ordered recovery of credit amounting to Rs. 1,05,708/- along with interest and imposed equal amount as penalty under Rule 15 of the Cenvat Credit Rules, 2004 read with Section 11AC of the Central Excise Act, 1944. On appeal, the Commissioner (Appeals) rejected the appeal of the party following his earlier decisions on identical issue in the cases of *M/s. Bansal Alloys & Metals Pvt. Ltd.* and *M/s. J.S. Khalsa Steel Pvt. Ltd.*

4. Learned Advocate for the appellants submits that the decision of the Commissioner (Appeals) in the case of *M/s. Bansal Alloys & Metals Pvt. Ltd.* stands set aside by the Tribunal vide Final Order No. 1213/09-SM(BR) dated 17-9-09 - [2010 \(250\) E.L.T. 529](#) (Tribunal) and the decision of the Commissioner (Appeals) in the case of *M/s. J.S. Khalsa Steel Pvt. Ltd.* stands set aside by Final Order No. 1264/09-SM(BR) dated 1st July, 2009 [[2010 \(17\) S.T.R. 517](#) (Tri.-Del.)]. He seeks setting aside the present impugned order as well. He also relies on the decision of the Tribunal in the case of *Chitrakoot Steel & Power Pvt. Ltd. v. CCE, Chennai* reported in [2008 \(10\) S.T.R. 118](#) (Tri.-Chennai).

5. Learned DR submits that in respect of input received, the assessee takes credit not only duty paid on the inputs but also on the Service tax paid on the goods transport services availed for bringing the said inputs to his factory and since the goods are removed subsequently, the credit on input service attributable to receipt of the said inputs should also be reversed.

6. I have carefully considered the submissions from both sides. Commissioner (Appeals) has relied on his earlier decisions in respect of *M/s. Bansal Alloys & Metals Pvt. Ltd.* and *M/s. J.S. Khalsa Steel Pvt. Ltd.* while passing the impugned order. Both these decisions have been set aside by the Tribunal as mentioned above holding that in such a situation in the absence of express provisions for reversing the credit of Service tax attributable to input services associated with the inputs, the question of reversal of credit of Service tax did not arise. It has not been shown that the said orders of the Tribunal have been appealed against and that any stay has been obtained".

* Since this issue has already acquired finality by endorsement of above decision by the Hon'ble Punjab and Haryana High Court in case law cited supra and facts of the matter being identical we don't find any material in the findings of the order-in-original and set aside the same.

9. With regard to the issue of Cenvat credit availed on inadmissible input services such as installation, repair and maintenance of air conditioning unit at places other than production area and work contract service related to electrical fitting etc. We find that as a matter of record that the appellant have reversed the Cenvat credit alongwith the interest on this count much before the issue of the show cause notice still the Adjudicating Authority has proceeded in imposing the penalty on the appellant. We find that as per the provisions of the law under provisions of Rule 15 readwith Section 11AC if the appellant on its own has reversed back the Cenvat credit alongwith the interest there was no cause for Adjudicating Authority to impose

penalty on the same issue and, therefore, we hold that the imposing penalty on this count is legally not sustainable and we set aside the same.

10. Now coming to the issue pertaining to cross utilization of the Cenvat credit of inputs and input services for payment of the service tax on output services such as Business Auxiliary Service and renting of immovable property service. On this issue also we are in agreement with the submissions made by learned Advocate for the appellant and find that the issue on this count also is no longer res-integra as the matter has already been decided in the case of **S.S. Engineers versus Commissioner of Central Excise, Pune – I** reported under **2015 (38) S.T.R. 614 (Tri. – Mumbai)** which has also been endorsed by Hon'ble High Court of Mumbai in its decision in the case of **Commissioner of Central Excise, Pune – I versus S.S. Engineers** reported under **2016 (42) S.T.R. 3 (Bom.)**. The relevant extract of the decision of this Tribunal is reproduced here below :-

"5. We have considered the rival submissions. We have gone through the Cenvat Credit Rules. We find that Rule 2 defines input, input services, capital goods etc. Before availing Cenvat credit, a manufacturer or service provider has to satisfy the definitions provided under the said Rules. Rule 3(1) of the Cenvat Credit Rules states that a manufacturer or producer of final products or provider of taxable service shall be allowed to take credit of various duties specified in various sub-clauses therein. The specified duties among various duties include duty of excise specified in the First Schedule to the Excise Tariff leviable under the Excise Act as also Service Tax leviable under different Sections of the Finance Act, 1994. Sub-rule (4) of Rule 3 provides that Cenvat credit may be utilized for payment of various liabilities and includes any duty of excise on any final product as also Service Tax on any output service (other situations also covered under the said sub-rule, which are not relevant in the present case). Thus, we find that Rule 3 of the Cenvat Credit Rules, 2004 does not stipulate maintaining separate account as a manufacturer and as a service provider. Third proviso to sub-rule (4) of Rule 3, provides that no credit of the additional duty leviable under sub-section (5) of Section 3 of the Customs Tariff Act, shall be utilized for payment of Service Tax on any output service. Similar restrictions are in other proviso. We also note that there are certain restrictions on the utilization of particular type of duties which are elaborated in sub-rule (b) of Rule 7 of the Cenvat Credit Rules. These restrictions do not cover cross utilization of credit of Excise and Service Tax, as a general proposition.

6. We have also gone through the various case laws quoted by the learned Counsel for the appellant and we note that in the case of *CCE, Pune v. Lakshmi Technology and Engineering Industries Ltd.* (supra) in para 6 has observed as under :

6. I have carefully considered the submissions from both sides and perused the records. Rule 3(1) of the Cenvat Credit Rules permits credit to a manufacturer of final product or a service provider of taxable service. If a person manufactures only excisable goods, he is entitled to take credit of not only Excise Duties paid on capital goods and inputs but also additional duty of Customs paid under the Customs Tariff Act in respect of imported inputs and capital goods and also Service Tax paid on the input services utilized in or in relation to the manufacture of the excisable goods. In other words, a manufacturer of excisable goods is entitled to use the credit from a common pool to which different categories of specified Excise Duties, Customs Duty and Service Tax are allowed to be taken as credit. Similarly, a provider of taxable service is also entitled to take credit of specified Excise Duty, additional duty of Customs and Service Tax in respect of input services and utilize the credit from all these sources for the purpose of paying Service Tax. The objection by the Department is that the respondent who is both a service provider and a manufacturer should maintain two separate accounts one in respect of credit attributable to inputs, capital goods and services meant for excisable goods and credit attributable to capital goods, inputs and services attributable to the service provided by them. Common Cenvat Credit Rules have been framed in terms of powers conferred by Section 37 of the Central Excise Act, 1944 and Section 94 of the Finance Act, 1994. Rule 3(1) enables a 'manufacturer' or a 'provider of taxable service' to take credit of specified duties and utilize them to discharge duty liability under Rule 3(4) of the Cenvat Credit Rules. A credit can be utilized for payment of any duty of Excise on any final product or for payment of Service Tax on any output service. The respondent is undisputedly registered as a service provider for providing the services of renting of immovable property. The credit taken by them as manufacturer/service provider has been used both for paying Excise Duty and for paying Service Tax. The rules permit taking of credit under a common pool and permit use of the credit from the common pool for different purposes and there is no restriction placed to the effect that credit accounts should be maintained for use for manufacture of excisable goods and for use for providing services. Therefore, the view taken by the Commissioner (Appeals) cannot be faulted. The clarification sought to be relied upon by the Department that input credit service taken only if the output is a service liable to Service Tax has no relevance to the present case. Undisputedly, the respondents have registered themselves as service provider of service of renting of immovable property and paying Service Tax as provider of output service and therefore the utilization of credit taken by them is valid.

7. In addition to above, we have also gone through the format of ER-1 return and ST-3 return. Sr. No. 8 and the Table details the Cenvat credit taken and utilized. In ER-1 return, in Table at Sr. No. 8, in column (9), details about Service Tax are specifically listed. On

Careful analysis of the said format, the intention appears to be to permit cross utilization of the credit of Excise Duty and Service Tax".

11. With regard to the utilization of the input Cenvat credit and input service credits for payment of service tax pertaining to renting of the immovable property is concerned, the issue is also settled in the case of **Commissioner of GST and Central Excise, Chennai versus Dymos India Automotive Pvt. Ltd.** reported under **2018 – TIOL – 1947 – H.C. – MADRAS – ST.** The relevant extract of this decision is reproduced here below :-

"9. The Tribunal took note of the allegations in the said show cause notice i.e. the assessee was not eligible for input service credit availed under the head 'commercial or industrial construction activities' during the period 2008-09. The Tribunal, after referring to the definition 'input service' as it stood at the material time under Rule 2(3) of the said Rules, pointed out that the first limb of the definition made it clear that in the case of service provider, the Service Tax paid would be eligible input service, if the service is used for providing output service. The assessee contended that they were both manufacturer and provider of output service, that for the portion of the building used for manufacturing activity, the appellant was eligible for credit of Service Tax paid on construction services, that there was no dispute on this credit and that the dispute was confined to the quantum of credit availed on construction services on that portion of the building leased out to the HLIPL.

10. The Tribunal also referred to the decision in the case of *CCE, Coimbatore v. Lakshmi Technology & Engineering Indus Ltd.* [reported in [2011 \(23\) S.T.R. 265](#) (Tri.-Chennai)] and also the decision in the case of *Navaratna S.G. Highway Property Private Limited v. CST* [reported in [2012 \(28\) S.T.R. 166](#) (Tri.-Ahmd.)] and held that without construction of the building, the renting of immovable property services cannot be provided and that therefore, construction service is an eligible service for credit for providing output service of renting of immovable property.

11. In our considered view, the conclusion of the Tribunal is well founded, as construction service is an eligible service for credit for providing output service of renting of immovable property and without construction of the building, the renting of immovable property cannot be provided. We are also of the opinion that there is no error in the decision taken by the Tribunal.

12. For the above reasons, the above civil miscellaneous appeal is dismissed and the substantial questions of law framed are answered against the Revenue. Consequently, the connected CMP is also dismissed".

12. We also find that the appellant were being regularly audited by the Department and all the details regarding availment and

utilization of the Cenvat credit has been before them in their monthly returns as well as during the periodical audits undertaken by the Department of the appellant. We find that there is no element of fraud, suppression, mis-declaration with an intent to evade tax. Thus, we are of the opinion that invoking of the extended time proviso under Section 11AA read with Rule 14 of the Cenvat Credit Rules is legally not sustainable. In view of entire above discussion and the decisions cited in the preceding paragraphs, we find that impugned order-in-original is without any merit and therefore deserves to be set aside and accordingly we set aside the same.

13. Appeal is accordingly allowed.

(Operative part of the order pronounced in the open court.)

(Ashok Jindal)
Member (Judicial)

(C.L. Mahar)
Member (Technical)

PK