CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH

SERVICE TAX APPEAL NO. 55602 OF 2014

(Arising out of Order-in-Original No. Commissioner/RPR/ST/33/2014 dated 07/08/2014 passed by the Commissioner of Central Excise and Customs, Raipur Central Excise Bhawan, Dhamtari Road, Raipur-492001)

M/s R. K. Transport Company .... **Appellant**
Navkar Parisar,
Pulgaon Naka,
Durg C.G.

VERSUS

Commissioner of Central Excise and Customs, Raipur ..... **Respondent**
Central Excise Bhawan,
Dhamtari Road,
Raipur-492001

APPEARANCE:

Shri B.L. Narasimhan, Advocate for the Appellant
Shri R.K. Manjhi, Authorized Representative of the Department

CORAM : HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. C.L. MAHAR, MEMBER (TECHNICAL)

FINAL ORDER NO. 50854/2020

DATE OF HEARING/DECISION: September 22, 2020

JUSTICE DILIP GUPTA

The order dated August 7, 2014 passed by the Commissioner of Central Excise and Customs Raipur[1] has been assailed in this Appeal.

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1 the Commissioner

2. The demand confirmed, the penalty imposed and interest directed to be recovered are as follows:-

Demand	Rs.14,07,98,655/-(service tax) & Rs. 94,96,679/-(Cenvat Credit)
Penalty	Rs. 15,03,00,334/-: (i) Rs. 14,07,98,655 under section 78 of Finance Act,1994 (ii) Rs.5000/- under section 77(2) of the Finance Act, 1994 (iii) Rs. 94,96,679/- under Rule 15(3) of the CENVAT Credit Rules, 2004
Interest	(i) Interest under section 75 of the Finance Act, 1994 along with Rule 14 of the CENVAT credit Rules, 2004 on the demand confirmed. (ii) Rs. 6,53,650/- under Rule 14 of the CENVAT Credit Rules, 2004.

3. Three issues arise for consideration in this Appeal and they are as follows:-

(i) Includability of diesel, explosives etc. supplied free of cost, in the value of taxable services provided by the Appellant;

(ii) Denial of CENVAT credit on two counts, namely excess availment of credit in the absence of bills/challans and non-reversal of credit availed on 'tippers'; and

(iii) Demand of interest on suo-moto reversal of credit by the Appellant.

4. The Appellant is engaged in providing site formation and clearance, excavation, earth moving and demolition services as also mining services. It claims that it availed CENVAT credit on inputs, capital goods and input services under the provisions of the CENVAT Credit Rules 2004[2]. The records indicate that a contract was executed between the Appellant and M/s Singareni Collieries

2 the Credit Rules

Company Limited[3] for blasting, hole drilling, controlled blasting with shock tube initiation, excavation, loading and transportation and dumping. According to the Appellant, the contract stipulated that the explosives, accessories, diesel required for the job of drilling, blasting, transportation were required to be supplied free of cost to the Appellant by SCCL.

5. During the course of scrutiny of the records of the Appellant, the Department raised the following objections for the financial years 2008-2009 and 2009-2010.

(i) The Appellant had not paid service tax on the value of diesel, explosives, accessories etc., supplied free of cost by SCCL to the Appellant. The Department believed that in terms of rule 5(1) of the Service Tax (Determination of Value) Rules, 2006[4]**,** any expenditure/cost incurred by the service provider in the course of taxable service shall be treated as consideration of taxable service;

(ii) The Appellant had availed excess CENVAT credit amounting to Rs. 30,05,484/- by showing more opening balance of credit in the month of October, 2009 as compared to the closing balance of the month of September, 2009. While the closing balance for the month of September, 2009 was Rs. 64,97,643/-, the opening balance for the month of October, 2009 was Rs. 95,03,127/- and, therefore, excess credit had been availed without proper bills/challans;

(iii) The Appellant had availed inadmissible credit on 'tippers', inasmuch as credit on such goods was made admissible only w.e.f. June 22, 2010 by specific inclusion by

3. SCCL
4. the Valuation Rules

insertion of clause (C) by Notification dated June 22, 2016; and

(iv) The Appellant was liable to pay interest amounting to Rs. 6,53,650/- on suo-moto reversal of credit without utilization thereof.

6. The Appellant submitted a reply to the aforesaid objections stating therein that it was not liable to pay service tax on the material supplied free of cost and that the audit objection relating to availment of excess credit of Rs. 30,05,478/- was not correct since the difference had arisen only on account of a clerical error inasmuch as instead of showing Rs. 95,03,127/- as the closing balance for the month of September, 2019, the Appellant had inadvertently shown the same as Rs. 65,78,628/-. The Appellant also reversed credit of Rs. 36,76,920/- availed on 'tippers' and by a letter dated December 20, 2011, informed the Department that with respect to the demand of interest on 100 per cent availment of capital goods, instead of 50 per cent, the Appellant had already deposited interest amounting to Rs. 3,25,483/- for the financial year 2008-2009 and Rs. 7,28,883/- for the financial year 2009-2010. In regard to the interest liability of Rs. 6,53,650/-, the Appellant submitted that by letter dated December 20, 2011 it had already paid interest amount of Rs. 2,46,561/- on the suo-moto reversal of credit, computed from date of availment of credit to the date of reversal.

7. However, a show cause notice dated October 23, 2019 was issued to the Appellant proposing to recover service tax amounting to Rs. 14,07,98,655/- on the value of diesel, explosives etc, received by the Appellant free of cost, under section 68 of the

Finance Act,1994[5]. Further, credit of Rs. 30,05,484/- was proposed to be disallowed by alleging excess availment of CENVAT credit. A demand of CENVAT credit amounting to Rs. 64,91,195/- was also proposed on the ground that since credit on 'tippers' was made admissible w.e.f. June 22, 2010, credit availed by the Appellant on 'tippers' received prior to such date was inadmissible. The show cause notice also proposed to demand interest of Rs. 6,53,650/- on the suo-moto reversal of credit.

8. The Appellant submitted a detailed reply to the show cause notice stating therein that none of the demands proposed in the show cause notice were sustainable and, therefore, they should be dropped.

9. The Commissioner, by order dated August 1, 2014, however confirmed the demand for following reasons:

(i) The materials (diesel/explosives etc.) received free of cost by the Appellant were nothing but consideration from the service provider, and therefore, the value of such materials have to be included in the taxable value of services provided by the Appellant, as clarified in rule 5(1) of the Valuation Rules. Since the services could not have been provided by the Appellant without such material, in case the service provider was not providing such material free of cost, the Appellant would be required to compulsorily purchase such material from elsewhere. Therefore, the value of such free of cost material is liable to be included in the value of taxable services;

(ii) There was a difference of Rs. 30,05,484/-, between the closing balance of the return filed by the Appellant in

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5. the Finance Act

September, 2009 and the opening balance in October, 2009 and since the invoices submitted by the Appellant did not add up to the amount of credit claimed to have been availed till September, 2009, the Appellant had availed inadmissible excess credit;

(iii) Credit on 'tippers' was admissible only w.e.f. June 22, 2010, and, therefore, the credit of Rs.64,91,195/- availed by them was inadmissible. The credit amounting to Rs. 36,76,920/- already reversed by the Appellant, was, therefore, liable to be appropriated; and

(iv) The verification report of the Assistant Commissioner dated July 9, 2012 shows that as against the demand of interest of Rs. 6,53,650/- on the suo-moto reversal of credit, the Appellant had only paid Rs.3,25,483/- and therefore, the balance amount was recoverable from the Appellant.

10. This Appeal has, accordingly, been filed to assail the order passed by the Commissioner.

11. Shri B.L. Narasimhan, learned Counsel appearing for the Appellant made the following submissions.

(i) The material received free of cost by the Appellant is not includible in the taxable value of services. In support of this submission learned Counsel placed reliance upon the decision of Supreme Court in **Commissioner of Service Tax v/s Bhayana Builders (P) Ltd**.[6];

(ii) The demand of service tax on value of free materials/goods was raised by relying upon rule 5(1) of Valuation Rules but rule 5(1) of the Valuation Rules has been struck down by the Supreme Court in **Union of**

6 2018 (10) GSTL 118 (S.C.)

India v/s Intercontinental Consultants and Technocrats Pvt. Ltd.[7]**;**

(iii) During the adjudication proceedings, the Appellant had placed reliance on the decision of the Tribunal in **Karamjeet Singh & Co. Ltd. v. Commissioner of Central Excise, Raipur**[8]**,** wherein it was held that the value of free of cost diesel supplied by the service recipient shall not be includible in the taxable value of services. However, the Commissioner distinguished the aforesaid decision on the ground that the Department had filed an appeal against the decision of the Tribunal. This finding of the Commissioner is unsustainable on two accounts. Firstly, the appeal preferred by the Department (C.A. 2452-2455/2014) had been disposed of by the Supreme Court by Judgment dated February 19, 2018, while deciding **Bhayana Builders**; and secondly, it is an established law, that a binding precedent cannot be distinguished merely on the ground that the Department had preferred an appeal against such a decision before an appellate forum;

(iv) Disallowance of CENVAT credit amounting to Rs. 30,05,484/-, on account of alleged excess availment of credit is factually incorrect and unsustainable. The difference of Rs. 30,05,484/- had arisen due to an inadvertent clerical error in the filing of the returns. The Appellant had inadvertently recorded the closing balance of September, 2009 as Rs. 64,97,643/-, instead of recording the correct closing balance as Rs. 95,03,124/-.

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7 2018 (10) GSTL 401 (SC)
8 2013 (32) STR 740 (Tri.- Del.)

The Appellant had rectified such an error in the return filed for the next quarter i.e. October, 2009 to March, 2010, wherein it showed the correct amount of Rs. 95,03,124/- as the opening balance ;

(v) Credit is admissible on 'tippers' as 'inputs' under Rule 2(k) of the Credit Rules. Thus, disallowance of CENVAT credit of Rs. 64,91,195/- is improper. To support this contention reliance has been placed on the decision of the Tribunal in **Soumya Mining Ltd. v. Commissioner of Central Excise, Raipur**[9], wherein the Tribunal held that for the period prior to June 22, 2010, credit is admissible on 'tippers' as 'inputs' used by service provider in providing output services;

(vi) The demand of interest amounting to Rs. 6,53,650/- was raised on the basis of an audit objection raised by the Department. Upon becoming aware of this fact, the Appellant computed the interest liability from the date of availment of such credit to the date of reversal, which came to Rs. 2,46,561/- and paid the same. Such factum of payment of interest, along with its computation was intimated to the Department by a letter dated December 20, 2011 ; and

(vii) The extended period of limitation could not have been invoked nor penalty could have been imposed.

12. Shri R.K. Manjhi, learned Authorized Representative of the Department, however, supported the impugned order and made the following submissions:-

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9 2017 (6) TMI 1071-CESTAT, New Delhi

(i) A perusal of the agreement executed between the Appellant and SCCL would indicate that material was not received by the Appellant free of cost but for consideration and, therefore, the value of such materials was required to be included in the taxable value of services provided by the Appellant; and

(ii) The finding of the Commissioner that the Appellant had taken excess CENVAT credit on Rs. 30,05,484/- by showing more opening balance of CENVAT credit in the month of October, 2009 then the closing balance shown in the month of September, 2009 is correct and the extended period of limitation was correctly invoked.

13. The submissions advanced by the learned Counsel for the Appellant and the learned Authorized Representative of the Department have been considered.

14. The **first issue** that arises for consideration is regarding the includability of diesel, explosives supplied free of cost in the value of taxable services provided by the Appellant.

15. In this connection, it would be pertinent to refer to the order dated September 26, 2008 issued by SCCL (the company) in favour of the Appellant (the contractor). The relevant clauses of the work order are reproduced below:-

> "With reference to the above, it is to inform that your offer has been accepted and the subject work is awarded to you for execution, as per the scope, terms and conditions, details, etc, furnished hereunder.
>
> **Note**: In this order the word 'CONTRACTOR' means 'R.K. Transport Co.' and the word 'COMPANY' means 'The Singareni Collieries Company Limited'
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> **1. Scope of Work**
>
> Blast hole drilling, controlled blasting with shock tube initiation, excavation, loading, transportation and dumping etc. of over burden.

Explosives & accessories and diesel would be supplied by SCCL.

b) Blasting

i) The contractor shall carryout controlled blasting with shock tube initiation by the explosives and accessories supplied by SCCL.

Wherever the term "explosive" is used in the document, it includes "explosives and accessories"

ii) SCCL shall supply SMS system explosives, NONELS and cetonators per BMC per details given below.

c) Oils & Lubricants

xxxxxxxxx

i) SCCL shall supply bench-wise quantities of diesel per BCM to the contractor as per details given below. xxxxxxxx

ii) SCCL will supply agreed bench-wise quantity of diesel from the vendors supplying diesel to different areas of SCCL from time to time. The diesel will be made available to the contractor at the project site. The contractor shall arrange for unloading and storing of diesel and also ensures receipt of quantity as per invoice. Payment to the supplier of diesel shall be made by SCCL on certification by the contractor. "

16. The aforesaid terms of the work order leave no manner of doubt that explosives and accessories and diesel would be supplied by SCCL.

17. Learned Counsel for the Appellant is, therefore, justified in asserting that the explosives and diesel were received by the Appellant free of cost and the learned Authorized Representative of the Department is not justified in asserting that the agreement would indicate that the said materials were received cost by the Appellant but for a consideration and not free of cost.

18. This issue that has arisen for consideration has been settled by the Supreme Court in **Bhayana Builders**. The Supreme Court categorically held that in a case where the service provider receives free of cost goods/material from the service recipient, no amount is charged towards such goods/material and, therefore, the value of such goods/materials cannot be said to be included in the gross amount charged by the service provider for such service

provided or to be provided by him under section 67 of the Finance Act and consequently, cannot be included in the value of taxable services. Thus, the confirmation of demand of Rs. 14,07,98,655/- cannot be sustained.

19. What also needs to be noted is that the said demand was raised by placing reliance upon rule 5(1) of the Valuation Rules. This rule 5(1) of the Valuation Rules was struck down by the Supreme Court in **Intercontinental Consultancy**.

20. It also needs to be noted that during the adjudication proceedings, the Appellant had placed reliance in support of this issue on a decision of the Tribunal in **Karanjeet Singh,** wherein it was held that the value of free cost of supply by the service recipient shall not be included in the taxable value of services. The only ground mentioned by the Commissioner for not following this decision is that the Department had filed an Appeal against the decision of the Tribunal. It was not open to the Commissioner to refrain from following this decision merely because the Department had preferred an Appeal against such decision.

21. The **second issue** that arises for consideration is regarding the disallowance of CENVAT credit amounting to Rs. 30,05,484/- on account of excess availment of credit. The Commissioner has disallowed this amount of CENVAT credit for the reason that there was a difference between the closing balance of the CENVAT credit in the return filed by the Appellant in September, 2009 and the opening balance in October 2009. According to the Appellant, the difference had arisen on account of an inadvertent clerical error in the filing of the returns, wherein the Appellant had recorded the closing balance of September, 2009 as Rs. 64,97,643/- instead of Rs. 95,03,124/-. It has been pointed out by the Appellant that

such clerical mistake was rectified in the return filed for the next quarter i.e. October, 2009 to March, 2010, wherein the opening balance was shown as Rs. 95,03,124/-. Reliance in this connection has also been placed on the CENVAT register maintained by the Appellant, wherein closing balance on September, 2009 was shows as Rs. 95,03,124/-.

22. The Commissioner has, however, concluded that the invoices furnished by the appellant did not add up to the amount of credit claimed to have been availed in September, 2009. This, according to the Appellant, was an absolutely presumptive and inconsequential finding since the Department had disputed the credit only for the reason that there was a difference between the opening stock and the closing stock. The order passed by the Commissioner does not take into consideration the explanation offered by the Appellant and only some invoices were examined by the Commissioner.

23. It would, therefore, be appropriate, in the facts and circumstances of the case, to remit the matter to the Commissioner to determine this particular issue afresh in the light of the charge leveled in the show cause notice and the explanation offered by the Appellant.

24. The **third issue** that arises for consideration is whether credit is admissible 'tippers' as inputs under rule 2(k) of the Credit Rules. The show cause notice proposed to disallow credit for the reason that credit could be availed on 'tippers' only after June 22, 2010, when an amendment was made. The Appellant had reversed credit amounting to Rs. 37,76,920/- which has been appropriated in the impugned order.

25. The contention of the Appellant is credit availed on 'tippers' is admissible even as 'input' under rule 2(k) of the Credit Rules and, therefore, no credit was liable to be reversed. In **Sumya Mining Ltd**., the Tribunal held that even for the period prior to June, 2010 credit was admissible on 'tippers' as 'inputs' used by the service provider in providing output services. This view was followed by the Tribunal in **Commissioner of Central Excise v/s Brahmaputra Infrastructures Ltd.,**[10]

26**.** Thus, credit had been correctly availed by the Appellant as 'tippers' qualify as 'input' under rule 2(k) of the Credit Rules. The demand that has been confirmed cannot, therefore, be sustained and is liable to be set aside.

27. The **fourth issue** that arises for consideration is whether the demand of interest of Rs. 6,53,650/- is sustainable. The moment the audit objection was raised that the opening balance shown by the Appellant for April, 2009 was Rs. 1,88,00,727/- lesser than the closing balance of March, 2009, which meant suo moto reversal of credit for which the Appellant was liable to pay interest, the Appellant computed the interest liability from the date of availment of such credit to the date of reversal and, accordingly paid Rs. 2,46,561/-.

28. Thus, when credit was reversed by the Appellant without utilization, no interest can be recovered from the Appellant. This view has been consistently taken by the Tribunal and reference can be made to the following decisions:

(i) Commissioner of Central Excise & Service Tax LTU, Bangalore v/s Bill Forge Pvt. Ltd.[11]**;**

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10. 2018 (7) TMI 438 CESTAT New Delhi.
11. 2012 (279) ELT 209 (Kar.)

(ii) Jaypee Greens v/s Commissioner Customs, Central Excise & Service Tax, Noida[12];

(iii) M/s H.E.G. Limited v/s Commissioner of Central Excise, Bhopal[13];

(iv) Siddapur Distilleries Ltd. v/s Commissioner of Central Excise, Customs & Service Tax, Belgaum[14]; and

(v) JK Tyre & Industries Ltd. v/s Commissioner of Central Excise & Service Tax[15]

29. In view of the aforesaid, it is not necessary to examine the contention raised by the Appellant that the extended period of limitation could not have been invoked.

30. Thus, for all the reasons stated above the demand confirmed by the Commissioner in the impugned order, except the demand relating to disallowance of CENVAT credit amounting to Rs. 30,05,484/-, are set aside. The issue relating to disallowance of CENVAT credit amounting to Rs. 30,05,484/- is remitted to the Commissioner for recording a fresh finding in accordance with the observations made above. The Appeal is allowed to the extent indicated above.

(Order pronounced in the open Court)

(JUSTICE DILIP GUPTA)
PRESIDENT

(C.L. MAHAR)
MEMBER (TECHNICAL)

Rekha

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12. 2019 (11) TMI 437-CESTAT Allahabad
13. 2017 (5) TMI 1247-CESTAT New Delhi
14. 2019- TIOL-2520-CESTAT-BANG
15. 2016 (340) E.L.T.193 (Tri.- LB)