

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH

Excise Appeal No. 53458 of 2018

[Arising out of Order-in-Appeal No. 779(CRM)ST/JDR/2018 dated 18.07.2018
passed by the Commissionerate of CE, Delhi-III, Gurgaon]

M/s E-Connect Solutions (P) Ltd.

Plot No. G-18-19-20, IT Park,
Madri Industrial Area, Udaipur

...Appellant

Versus

The Commissioner

Central Excise and Central Goods & Service Tax
142-B, Sector-11, Hiran Magri
Udaipur (Raj.)

...Respondent

APPEARANCE:

Shri B.L.Narasimhan and Ms. Sukriti Das, Advocates for the Appellant
Shri O.P. Bisht, Authorised Representative for the Department

CORAM:

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

DATE OF HEARING AND DECISION : 14.09.2020

FINAL ORDER No. 51579/2020

JUSTICE DILIP GUPTA

This appeal seeks the quashing of the order dated July 18, 2018 passed by the Commissioner (Appeals), by which the appeal filed by the appellant to assail the order dated January 30, 2017 passed by the Additional Commissioner, has been dismissed. The Additional Commissioner had confirmed the demand of Rs. 58,12,013/- with interest and penalty was also imposed upon the appellant.

2 The appellant has been rendering taxable services under the category of “management, maintenance or repair” services and “information technology software” services. It claims to have availed and utilised the CENVAT credit earned on input services for discharging its output tax liability in terms of the provisions of the “CENVAT Credit Rules, 2004¹”

3 The appellant is also engaged in trading of goods, which is an exempted service, and the appellant claims that for this reason it did not avail CENVAT credit on the input services used exclusively for trading activity.

4 However, certain input services, on which CENVAT credit was availed, namely, telephone & mobile services, banking & financial services, C&F agent services, annual maintenance services, legal & professional services, were used by the appellant for providing both taxable output services and exempted services.

5 The appellant claims that CENVAT Credit was availed by the appellant after following the procedure of proportionate reversal of CENVAT credit amount attributable to exempted service under rule 6(3A) of the Rules in accordance with the formula prescribed therein under intimation to the Service Tax Range Office.

6 During the audit conducted by the Department, it was noticed that the appellant, while reversing the proportionate credit under rule 6(3A) (b) (ii) & rule 6(3A) (c)(iii) of the Rules, had only considered the amount of CENVAT credit attributable to the common input services used both in taxable as well as exempted services, instead of accounting the total CENVAT credit taken on all input services, including the common input services, for the purpose of such reversal. Accordingly, a show cause notice dated October 20, 2016

¹ the Rules

was issued to the appellant proposing to recover the short paid amount of Rs. 58,12,013/- determined under rule 6(3A) of the Rules read with section 73 of the Finance Act, 1994² with interest under section 75 of the Finance Act. The demand was raised invoking the extended period of limitation contemplated under the proviso to section 73(1) of the Finance Act.

7. The appellant submitted a reply dated January 16, 2017 denying the charges levelled in the show cause notice. However, the Additional Commissioner, by order dated January 30, 2017, confirmed the demand raised in the show cause notice with interest and penalty under rule 15(3) of the Rules read with section 78 of the Finance Act.

8. Feeling aggrieved, the appellant filed an appeal before the Commissioner (Appeals). This appeal was dismissed by order dated July 18, 2017.

9. This appeal has, accordingly, been filed to assail the order passed by the Commissioner (Appeals).

10. Shri B.L. Narasimhan, learned counsel appearing for the appellant made the following submissions:

- (i) The availment of common input service credit and its reversal on proportionate basis has been correctly determined by the appellant under rule 6(3A) of the Rules. The appellant maintained separate records/accounts of input services which were exclusively used for rendering taxable services and thus credit has been availed only to that extent;
- (ii) For the input services which were utilized by the appellant for providing both taxable as well as exempted services, no separate accounts were maintained and thus the appellant reversed the credit on proportionate basis in terms of the formula prescribed in rule 6 (3A) of the Rules, under intimation to the Service Tax Department;

² Finance Act

- (ii) The Department has raised the dispute interpreting the term "total CENVAT credit" provided in the formula under rule 6(3A)(b)(ii) to include even those services which were also exclusively used in taxable services, including the common services. Such an approach by the Department is incorrect and is violative of the principles of rule 6(1) of the Rules. Once the identified input services has been exclusively used in taxable service, there is no requirement to reverse any portion of the credit on basis of proportion of trading activity to the total turnover or even for exempted services;
- (iv) The "total CENVAT credit taken on input services" should include only common input services and services used in exempted services and not the services used exclusively in rendering taxable output service;
- (v) In order to bring parity with the underlying objective of rule 6, rule 6(3A) of the Rules was amended by Notification dated March 1, 2016 effective from April 1, 2016 by substituting rule 6(3A)(b)(ii) of the Rules, to consider only common input services and not total input service credit, for the purpose of computing the amount of reversal. In this connection reliance has been placed on the decision of the Tribunal in **Commissioner of Central Excise & ST, Rajkot v. Reliance Industries Ltd., CESTAT Ahmedabad**³;
- (vi) Reliance placed by the Commissioner (Appeals) on an interim order passed by the Tribunal **Thyssenkrupp Industries (I) Pvt. Ltd. Vs. Commissioner of C. Ex., Pune (Tri. Mumbai)**⁴ is not justified; and
- (vii) The extended period of limitation could not have been invoked nor penalty could be imposed nor interest recovered.

³ 2019 (3) TMI 784

⁴ 2014 (310) ELT 317

11. Shri Bisht, learned Representative of the Department has, however, supported the impugned order and has extensively referred to the findings contained therein.

12. The submissions advanced by learned counsel for the appellant and the learned Authorised Representative of the Department have been considered.

13. As noticed above, the appellant renders taxable services under the category of “management, maintenance or repair” services and “information technology software” services. It availed and utilised the CENVAT credit earned on input services for discharging its output tax liability. The appellant is also engaged in trading of goods, which is an exempted service and the appellant claims that it has not availed CENVAT credit on the output services utilised exclusively for trading activity. However, certain input services, on which CENVAT credit was availed by the appellant, were utilised by the appellant for providing both taxable output services and exempted services.

14. The issue that arises for consideration in this appeal is regarding the manner of computation of proportionate reversal of credit determined under rule 6(3A) of the Rules. The contention of the Department is that for the purpose of reversal, the total CENVAT credit taken on input services, including the common input services should be considered while the contention of the appellant is that “total CENVAT credit taken on input services” should include only common input services and services used in exempted services and not the services used exclusively in rendering taxable output services.

15. In order to appreciate contentions, it will be appropriate to refer to the relevant provisions of Rule 6 of the Rules and it is as follows:

"Rule 6 Obligation of a manufacturer or producer of final products and a provider of taxable service.

(1) The CENVAT credit shall not be allowed on such quantity of input used in or in relation to the manufacture of exempted goods or for provision of exempted services, or input service used in or in relation to the manufacturer of exempted goods and their clearance upto the place of removal or for provision of exempted services except in the circumstances mentioned in sub-rule(2).

Provided that the CENVAT credit on inputs shall not be denied to job worker referred to in rule 12AA of the Central Excise Rules, 2002, on the ground that the said inputs are used in the manufacture of goods cleared without payment of duty under the provisions of that rule.

(2)*****

(3) Notwithstanding anything contained in sub-rules (1) and (2), the manufacturer of goods or the provider of output service, opting not to maintain separate accounts, shall follow any one of the following options, as applicable to him, namely:--

(i) pay an amount equal to six percent of value of the exempted goods and exempted services; or

(ii) pay an amount as determined under sub-rule (3 A); or

(iii) maintain separate accounts for the receipt, consumption and inventory of inputs as provided for in clause (a) of sub-rule (2), take CENVAT credit only on inputs under subclauses (ii) and (iv) of said clause (a) and pay an amount as determined under sub-rule (3A) in respect of input services. The provisions of sub-clauses (i) and (ii) of clause (b) and subclauses (i) and (ii) of clause (c) of sub-rule (3A) shall not apply for such payment:

Provided that if any duty of excise is paid on the exempted goods, the same shall be reduced from the amount payable under clause (i):

Provided further that if any part of the value of a taxable service has been exempted on the condition that no CENVAT credit of inputs and input services, used for providing such taxable service, shall be taken then the amount specified in clause (i) shall be six per cent. of the value so exempted.

Explanation I.- If the manufacturer of goods or the provider of output service, avails any of the option under this sub-rule, he shall exercise such option for all exempted goods manufactured by him or, as the case may be, all exempted services provided by him, and such option shall not be withdrawn during the remaining part of the financial year.

Explanation II.- For removal of doubt, it is hereby clarified that the credit shall not be allowed on inputs used

exclusively in or in relation to the manufacture of exempted goods or for provision of exempted services and on input services used exclusively in or in relation to the manufacture of exempted goods and their clearance upto the place of removal or for provision of exempted services.

Explanation III.- No CENVAT credit shall be taken on the duty or tax paid on any goods and services that are not inputs or input services.

(3A) For determination and payment of amount payable under clause (ii) of sub-rule (3), the manufacturer of goods or the provider of output service shall follow the following procedure and conditions, namely:-

(a) while exercising this option, the manufacturer of goods or the provider of output service shall intimate in writing to the Superintendent of Central Excise giving the following particulars, namely:-

(i) name, address and registration No. of the manufacturer of goods or provider of output service;

(ii) date from which the option under this clause is exercised or proposed to be exercised;

(iii) description of dutiable goods or output services;

(iv) description of exempted goods or exempted services;

(v) CENVAT credit of inputs and input services lying in balance as on the date of exercising the option under this condition;

(b) the manufacturer of goods or the provider of output service shall, determine and pay provisionally, for every month,

(i) the amount equivalent to CENVAT credit attributable to inputs used in or relation to manufacture of exempted goods, denoted as A;

(ii) the amount of CENVAT credit attributable to inputs used for provision of exempted services (provisional) = (B/C) multiplied by D, where B denotes the total value of exempted services provided during the preceding financial year, C denotes the total value of dutiable goods manufactured and removed plus the total value of output services provided plus the total value of exempted services provided, during the preceding financial year and D denotes total CENVAT credit taken on inputs during the month minus A;

(iii) the amount attributable to input services used in or in relation to manufacture of exempted goods and their clearance upto the place of removal or provision of exempted services (provisional) = (E/F) multiplied by G, where E denotes total value of exempted services provided plus the total value of exempted goods manufactured and removed during the preceding financial year, F denotes total value of output and exempted services provided, and total value of dutiable and exempted goods manufactured and removed, during the preceding financial year, and G denotes total CENVAT credit taken on input services during the month."

16. Rule 6(1) of the Rules curtails the service provider from availing CENVAT credit on input services used for exempted services.

This clearly means that credit is allowed to be taken only on input services pertaining to taxable services. In other words, wherever exempted services are rendered, the credit pertaining to such exempted service is not admissible and is required to be reversed. Rule 6(2) provides that wherever exempted service is rendered, then such service provider has to maintain separate accounts for receipt, consumption and inventory of various input services used for rendering such service and that CENVAT credit should be availed only in respect of input services used in rendering taxable service. Rule 6(3) provides an elaborate procedure for reversal of credit on a proportionate basis in respect of those service providers opting not to maintain separate accounts. Rule 6(3A) provides for a procedure for calculating proportionate credit admissible to an assessee. A service provider can avail the entire credit of input services and at the end of every month reverse a provisional amount of credit based on the preceding financial year's turnover for different services, but at the end of the year, the service provider is required to calculate final credit based on the current year's actual turnover figures and make the adjustments. What transpires, therefore, is that in terms of rule 6(3A), a provider of output service can take only proportionate credit that is attributable to the taxable service.

17. The dispute in the appeal is regarding the interpretation of the term **total CENVAT credit** provided in the formula in rule 6 (3A)(b)(ii). According to the Department, the **total CENVAT credit** should include even those services used exclusively in taxable services, including the common service while according to the appellant it should include only common input services and services used in exempted services and not the services used exclusively in rendering taxable output service.

18 It would be clear from a conjoint reading of sub-rule 6(1), (2) and (3) of rule 6 that the **total CENVAT credit** for the purpose of formula under rule 6(3A) is only **total CENVAT credit** of common input service and cannot include CENVAT credit on input service exclusively used for the manufacture of dutiable goods.

19. This position is also clear from the underlying object of the amendment made in rule 6(3A) of the Rules by Notification dated March 1, 2016, to consider only common input services and not total input service credit, for the purpose of computing the amount of reversal.

20. Such amendment was also clarified by the Tax Research Unit Circular dated February 29, 2016 to apply retrospectively in as much as the clarification clearly mentions that the provisions of rule 6 providing for reversal of credit in respect of input services used in exempted services, is being redrafted with the objective to simplify and rationalize the same without altering the established principles of reversal of such credit. It has been further clarified at paragraph (iv) of the Circular that the purpose of the rule is to deny credit of such part of the total credit taken, as is attributable to the exempted services and under no circumstances this part can be greater than the whole credit.

21. In this connection, reference can be made to the decision of the Tribunal in **Reliance Industries**, wherein while dealing with a similar issue, the Tribunal held that the term **total CENVAT credit** taken on input services in the pre-amended rule is only **total CENVAT credit** of common service and will not include the CENVAT credit on input/input services exclusively used for the manufacture of dutiable goods. The relevant portion of the decision is reproduced below:

"7. We have carefully considered the submissions made by both the sides and perused the record. The limited issue to be decided in this case is that for the purpose of calculating the CENVAT credit for reversal in terms of rule 6(3A) as per of formula given therein, whether the total Cenvat credit means it is including the Cenvat credit of input services exclusively used for dutiable product should be taken or total Cenvat credit of only common input service should be taken. Before proceeding, it is necessary to read the relevant Rule 6(1)(2)(3) pre and post amendment notification.

10. From the above it can be seen that when anomaly was noticed, the Government has substituted the sub-rule (3A). The legislators very consciously substituted the Rule with intention to give a clarificatory nature to the provision of sub-rule (3A) so as to make it applicable retrospectively. It was all along not the intention of the Government to deny Cenvat credit on the input/input service even though used in the dutiable goods. Keeping the said view in mind, the substitution in sub Rule (3A) of Rule 6 was made. Therefore, the substituted provision of sub-Rule (3A) shall have retrospective effect being clarificatory."

22. The Commissioner (Appeals) has placed reliance upon an interim order passed by a Tribunal in **Thyssenkrupp Industries (I) Pvt. Ltd. Vs. Commissioner of C.Ex., Pune** ⁵ for upholding the demand. Only a prima facie case is expressed in an interim order and observations made therein have no precedent value. In fact, as noticed above, the issue is covered by the decision of the Tribunal in **Reliance Industries.**

23. The confirmation of demand, therefore, cannot be sustained. It is, therefore, not necessary to examine the remaining contentions advanced by learned Counsel for the appellant.

24. Thus, for all the reasons stated above, the impugned order dated July 18, 2018 passed by the Commissioner (Appeals) is set aside. The appeal is, accordingly, **allowed.**

(JUSTICE DILIP GUPTA)
PRESIDENT

(C.L. MAHAR)
MEMBER (TECHNICAL)

Babita