# CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
**NEW DELHI**

PRINCIPAL BENCH – COURT NO. IV

## SERVICE TAX APPEAL No. 51453 of 2022

(Arising out of Order in Appeal No. RPR – EXCUS – 000 – APP – 115 – 21-22 dated 17.02.2022 passed by Commissioner (Appeals), Central Excise & Central Goods and Service Tax, Raipur)

**M/s. Sarda Energy & Minerals Ltd.** **...Appellant**

Industrial Growth Centre,
Phase – I, Siltara,
Raipur (C.G.) - 493111

**Versus**

**Commissioner of** **....Respondent**
**Central Excise, Customs & GST,**
Central GST Building, Tikarpara,
Dhamtari Road, Raipur, (C.G.) – 492 001

**APPEARANCE:**
Mr. J.M. Sharma & Ms. Pooja Aggarwal, Advocates for the Appellant
Mr.Mahesh Bhardwaj, Authorized Representative for the Respondent

**CORAM : HON'BLE DR.RACHNA GUPTA, MEMBER (JUDICIAL)**

Date of Hearing/ Decision: **24.08.2022**

## FINAL ORDER No. 50808/2022

**DR.RACHNA GUPTA**

The appellant herein is engaged in manufacture of Sponge Iron Billets, Wire Rods, Ferro Alloys, Fly Ash Bricks etc. and were availing Cenvat credit on inputs/input services / capital goods under the Cenvat Credit Rules, 2004. During the course of audit of appellants record and scrutiny of various invoices available in said record, department observed that with respect to 10 invoices, as mentioned in a table in the Show Cause Notice, the appellants have availed the Cenvat credit for such services, which were not received by the unit mentioned in those invoices. It was observed that the Cenvat Credit was availed against invoices issued by entities who has not provided input service to the appellants. Department therefore formed an opinion that the Cenvat Credit appears to have been availed in contravention to Rule 9 (1) of Cenvat Credit Rules, 2004 and as such is not admissible. With respect to one of the invoices therein about availing tour operator services (invoice No. 5 of the table in Show Cause Notice), the department formed an opinion that the services relates to personal consumption by the employees as were meant for their leisure/ vacations. The Cenvat Credit was found to be the inadmissible one.

2. Based on this observations that a Show Cause Notice No.4620 dated 3.9.2019 was issued proposing the recovery of inadmissible Cenvat Credit against the 10 invoices as given in the Show Cause Notice for an amount of Rs.42,92,019/- being the inadmissible Cenvat Credit on the ground that the service providers have not provided any input service to the appellant. The amount was proposed to be recovered alongwith the interest and the proportionate penalties. The said proposal was initially confirmed vide Order-in-Original No.28/2020 – 21 dated 30.12.2020. The appeal thereof has been rejected vide Order-in-Appeal bearing No.56/2021 dated 17.02.2020. Being aggrieved of the said order, the appellant is before this Tribunal.

3. I have heard Shri J.M. Sharma & Ms. Pooja Aggarwal, Authorised Representatives for the appellant and Shri Mahesh

Bhardwaj, ld. Departmental Representative for the Department/ respondent.

4. Ld. Authorised Representative for the appellant has mainly objected the invocation of extended period of limitation while issuing the Show Cause Notice. It is submitted that period of dispute is from 3.2.2015 to 28.07.2016. The Show Cause Notice was issued on 03.09.2019 and therefore was much beyond the normal period of limitation. It is submitted that the appellant had never resorted to any wilful misstatement nor had committed any suppression of facts that too with an intend to evade the payment of service tax. The extended period would not have been invoked by the Department while issuing the impugned Show Cause Notice. The order under challenge is liable to be set aside on this sole ground of limitation. Ld. Authorised Representative has further elaborated that the returns were regularly been filed by the appellants. Those returns have all details about availment of Cenvat Credit. The appellant was not under any other obligation to supply any such information which was otherwise not required to be supplied. The returns were filed in due formats as were meant for the purpose, duly reflecting the availment of Cenvat Credit on disputed services by the appellant. Revenue Authorities are not entitled to say that the fact of availment of credit on disputed services came to their notice only during audit or verification of the records. The imposition of penalty is also been objected on the same ground that since there is no element of any wilful misstatement or suppression of facts or fraud and there is no evasion of duty no question arises for imposition of penalty.

4.1 Ld. Authorised Representative for the appellant has relied upon the following case laws while praying for setting aside the impugned order under challenge for the sole ground of the Show Cause Notice being barred by time:-

1) Collector of Central Excise vs. H.M.M. Limited reported as 1995 (76) E.L.T. 497 (S.C.)
2) Raj Bahadur Narain Singh Sugar Mills Ltd. vs. Union of India reported as 1996 (88) E.L.T. 24 (S.C.)
3) Confident Dental Equipments Ltd. vs. C.C.E. & S.T., Bangalore-III reported in 2019 (370) ELT 362 (Tri. – Bang.)
4) Aditya College of Competitive Exam. Vs. C.C.E., Visakhapatnam reported as 2009 (16) S.T.R. 154 (Tri. – Bang.
5) Cambay Organics Pvt. Ltd. Vs. Commissioner of Central Excise, Vadodara reported in 2007 (217) E.L.T. 586 (Tri. – Ahmd.)

4.2 With respect to merits also Ld. Authorised Representative for the appellant has submitted that appellant has a strong case seen from the point of view of merits. It is submitted that appellants manufacturing unit is located at Siltara, Raipur. However, the appellant has got the Central Registration in favour of its headquarters at 73A Central Avenue, Nagpur. This registration covers the appellants captive mines also at Raigarh. The only object whereof is to supply coal to the appellants manufacturing unit, coal being main input in manufacture of final product of the appellant. The another unit being covered under the Centralized registration is appellant's own subsidiary as Sarda Energy and Minerals Hong Kong Limited. It is submitted that all accounts of the above all places were being maintained by the appellants only. The payment in respect of the disputed 10 invoices was also made by the appellants unit at Siltara only. The Cenvat Credit of said service tax paid is mentioned to have been taken by the appellant under the bonafide belief that being the input services utilized by the manufacturing unit and the appellant being centrally registered could avail the Cenvat credit of the service tax paid by the appellant. With these submissions, ld. Authorised Representative for the appellant has prayed for the findings on merit in Order-in-Appeal also be set aside and the impugned appeal to be allowed.

5. While rebutting these submissions, ld. D.R. has mentioned that the returns are being filed by the assessees cannot be the sole criteria to hold that assessee has not suppressed any fact. It is submitted that present is an era of self assessment and it is difficult for the Department to cross check all returns that too immediately after those have been filed. Ld. D.R. further impressed upon that had audit of records of appellant not being conducted the invoices as mentioned in the Show Cause Notice (10 in No.) could not have come to the notice of the Department. The perusal thereof makes it abundantly clear that the services with respect to invoice No. 1 to 4 and 6 to 10 have been availed by the other units than the appellants. The services under the invoices at Sl. No.5 in the table in the Show Cause Notice are the services towards the personal consumption of the employees of the appellant. No question of availing Cenvat credit on said services at

all arises. Ld. D.R. has impressed upon the correctness in the findings arrived at by Commissioner (Appeals) in para No.7 & 9. With these submissions, appeal is prayed to be dismissed.

6. Ld. Ld. Authorised Representative for the appellant while rebutting the submissions with respect to invoice No.5 has mentioned that the tour operator services were received for the sole objective of sending their employees for training programme. The employees were sent to Bangkok for attending a programme meant for enhancing human resources performance. The brochure of the programme is mentioned to have been the part of the present record.

7. Having heard the rival submissions and perusing the record, I observe and hold as follows:-

The demand i.e. recovery of Cenvant Credit availed by the appellant has been rejected on following three counts:-

a) The appellant availed ineligible CENVAT Credit of Service Tax on services not used by the appellant in manufacture of excisable goods.
b) That invoces were issued to other units and not to the appellant's unit.
c) The appellant resorted to suppression of facts, wilful misstatement in contravention of rules with the intent to evade payment of service tax.

7.1 With respect to the point No. (a) and (b) above, following are the observed admissions:-

1) That appellant is a manufacturing unit but is being spread at several places including the place of their captive mines.

2) All the several places of appellant have been registered under one common centralised registration except that mines have separate registration but against the same PAN No.

3) The services availed by either of the units including mines of the appellants qualify to be the eligible input services.

4) The invoices are in the name of the appellant at their registered address (the address registered is that of the head-quarter of the appellant whereas Sarda Energy and Minerals Ltd. exist at Siltara, Raipur).

7.2 These admissions when read with rule 3 of Cenvat Credit Rules makes it clear that the appellant was entitled to avail the Cenvat Credit. Since the violation of rule 9 (1) (f) of Cenvat Credit Rules, 2004 has been alleged by the Department for availing the impugned Cenvat credit, foremost, said rule 9 is looked into which reads as follows:-

> *(1) The Cenvat credit shall be taken by the manufacturer or the provider of output service or input service distributor, as the case may be, on the basis of any of the following document, namely:-*
>
> *(a (i) to (e) --------------------------*
>
> *(f) an invoice, a bill or challan issued by a provider of input service on or after the 10th day of September, 2004; or*
>
> *(fa) to (g) -----------------------------*
>
> ***Provided*** *that the credit of additional duty of customs levied under sub-section (5) of section 3 of the Customs Tariff Act, 1975 (51 of 1975) shall not be allowed if the invoice or the*

*supplementary invoice, as the case may be, bears an indication to the effect that no credit of the said additional duty shall be admissible;*

*(2) No CENVAT credit under sub-rule(1) shall be taken unless all the particulars as prescribed under the Central Excise Rules, 2002 or the Service Tax Rules, 1994, as the case may be, are contained in the said document:*

***Provided** that if the said document does not contain all the particulars but contains the details of duty or service tax payable, description of the goods or taxable service, assessable value, Central Excise or Service tax Registration number of the person issuing the invoice, as the case may be, name and address of the factory or warehouse or premises of first or second stage dealers or provider of taxable service, and the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, is satisfied that the goods or services covered by the said document have been received and accounted for in the books of the account of the receiver, he may allow the CENVAT credit;*

8. From the entire above provision and perusing the invoices at Sl. No.1 to 4 & 6 to 10 in the table of the impugned show cause notice, and the above mentioned admitted facts, it becomes clear that the appellants have availed the input services at their captive mines. Though the captive mines have separate registration but at the same PAN No. as that of the appellants and as such both are so associated that they have interest, directly or indirectly in the business of each other. Also for the reason that coal extracted in these Mines is the raw material for appellants to manufacture their final product. Moreover the captive use of coal has no where been denied. Further it is observed that appellants only have made the payment of service tax. The mention of the address of

headquarter in the said invoices does not make any difference. Accordingly, it is held that findings of Commissioner (Appeals) in para No.9 are absolutely wrong. The invoices are mentioning all the details as are required as per rule 9 (1)(f) of Cenvat Credit Rules. The case of appellant squarely gets covered under the purview of Rule 2 (l) of Cenvat Credit Rules and also under proviso to Rule 9(2) of CCR, 2004. Hence the findings that appellants case is not covered under 2 (l) of CCR are absolutely wrong. The findings of Commissioner (Appeals) are accordingly, held as being liable to be set aside.

9. With respect to invoice No.5 the tour operator services are observed to have been availed by the appellant. Department has alleged those services to have been personally consumed by the employees of the appellant, hence, were ineligible for Cenvat credit. But, as impressed upon by ld. Authorized Representatives of the appellant, about the object of the visit of the employees, it is perused from the impressed upon document that those services were availed for the employees of the appellants for going to Bangkok to attend a programme which was organized by the Association of Quality Control Headquarter of Thailand in cooperation with Department of Industrial Promotion, Ministry of Industry. The object of the programme was to enhance the human resources performance. The said bare perusal makes it clear that the visit of the employees was purely for enhancing their skills for the better output of the final product of the appellant. Hence, I am of the opinion that those services have wrongly been alleged to have been personally consumed services. I hold those services

also to be eligible input service for availment of Cenvat credit. With these observations all the findings of commissioner (Appeals) qua the merits of the impugned aforementioned (a) & (b) issue are held as liable to be set aside.

10. Coming to the ground (c) as mentioned above, I observe that the Show Cause Notice has been issued based upon the scrutiny of appellant's own document maintained by them in their regular course of business (the documents were in the form of invoices duly entered in appellants record). There is also no denial for the regular filing of the returns by the appellant. It becomes clear that there is no suppression of facts as is alleged by the Department. Hon'ble Apex Court in the case of **Collector of Central Excise vs. HMM Ltd reported as 1995 (76) ELT 497** has held that inference of intention to evade payment of duty is not drawable automatically. It was held that the Show Cause Notice must contain an averment to that effect pointing out specifically as to which of the various commissions or omissions stated in the proviso to section 11 A (1) of Central Excise Act, 1944 had been committed by the assessee and adjudicating authority is held to must have specifically dealt with assessees contention in rebuttal thereof.

11. In the present case I observe that the Show Cause Notice has not specified any commission or omission which may reveal intention to evade the payment of duty. The only allegation is that had the Department not conducted audit, the appellant would have succeeded to defraud the Government Exchequer.

12. I further observe that these submissions about Show Cause Notice being barred by time were raised before original adjudication authority also as is apparent from para E of the reply given to Show Cause Notice but the authority has not given any speaking finding identifying and specifying the acts of omission and commission with supporting evidence warranting invocation of extended period of limitation.

13. On the contrary the Show Cause Notice is observed to be based on the appellant's own document i.e. invoices as were maintained by them in regular course of business. The returns were admittedly been filed in time mentioning required details about availment of credit. There is nothing found on record which may be the proof for alleged suppression or misconduct. In a decision of **Raj Bahadur Narayan** (supra), Hon'ble Apex Court has held as follows:-

> ***9.*** *We have set out the relevant parts of the show cause notice. It speaks of an erroneously granted rebate. There is no mention in it of any collusion, wilful mis-statement or suppression of fact by the appellants for the purposes of availing of the larger period of five years for the issuance of a notice under Rule 10. The party to whom a show cause notice under Rule 10 is issued must be made aware that the allegation against him is of collusion or wilful mis-statement or suppression of fact. This is a requirement of natural justice. It is also the law, laid down by this Court in Collector of Central Excise v. H.M.M. Limited - 1995 (76) E.L.T. 497. It has been said there with reference to Section 11A of the Central Excises and Salt Act, 1944, which replaced Rule 10, that if the authorities propose to invoke the proviso to Section 11A(1), the show cause notice must*

> *put the assessee to notice which of the various commissions and omissions stated in the proviso is committed to extend the period from six months to five years. Unless the assessee is put to notice, the assessee would have no opportunity to meet the case of the authorities. The defaults enumerated in the proviso were more than one and if the authorities placed reliance on the proviso, it had to be specifically stated in the show cause notice which was the allegation against the assessee falling within the four corners of the said proviso.*

14. Relying upon this decision and the observations as above, I hold that department had no reason to invoke the extended period of limitation while issuing the impugned Show Cause Notice. Accordingly, it is held that Show Cause Notice is not sustainable being barred by limitation.

15. In view of the entire above discussion, I hold that three of the grounds for rejecting availment of Cenvat credit, as mentioned above (ground No. (a), (b) & (c) are wrongly raised. The adjudication has failed on merits as well as on point of limitation The findings are therefore hereby set aside. Otherwise also the appellant is held to have rightly availed the Cenvat Credit of eligible input services. Consequent thereto, the appeal stands allowed.

[Order dictated & pronounced in the open Court]

**(DR.RACHNA GUPTA)**
**MEMBER (JUDICIAL)**

Anita