CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

NEW DELHI

PRINCIPAL BENCH – COURT NO. – IV

Service Tax Appeal No. 50721 of 2021 [DB]

[Arising out of Order-in-Appeal/Original No. 15/Commr/Del East/PV/2020 dated 09.03.2021 passed by the Commissioner of Central Tax, GST Delhi East, New Delhi]

M/s. Essjay Ericsson (P) Ltd. **...Appellant**
S-18E, School Block,
Shakarpur, New Delhi-110092
(Near Baba Balaknath Mandir)

VERSUS

Commissioner of CGST, Delhi East **...Respondent**
C.R. Building, IP Estate,
East Delhi, New Delhi-110002

APPEARANCE:
Mr. Pawan Arora and Ms. Akanksha Kumari, Advocates for the Appellant
Mr. Harshvardhan, Authorised Representative for the Respondent

CORAM : HON'BLE DR. RACHNA GUPTA, MEMBER (JUDICIAL)
HON'BLE MRS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

DATE OF HEARING: 18.04.2023
DATE OF DECISION: **05.07.2023**

FINAL ORDER No. 50828/2023

DR. RACHNA GUPTA

The appellant in the present case is registered under Service Tax for providing 'Maintenance and Repairing Services' and 'Renting of Immovable Property Services'. The tax audit of appellant was conducted on 24th July, 2018 for the period 2013-14 to 2017-18. During the course of audit, department observed that appellant had entered into an agreement with M/s. Ericsson India Private Limited for providing certain services. From the verification/scrutiny of the records of appellant, the following shortcomings were noticed:

(i) Wrong availment of Cenvat credit on Employee Insurance (Rs.1,59,52,509/-).

(ii) Non-reversal of Cenvat credit under Rule 6(3) of Cenvat Credit Rules, 2004 (Rs.1,18,66,102/-).

(iii) Non-payment of Service Tax under RCM on legal charges (Rs.35,203/-).

1.1 The said aforesaid amounts were accordingly prayed to be recovered from the appellant along with the proportionate interest and the appropriate penalties under Section 76, 77 and 78 of the Finance Act, 1994. The said proposal was initially confirmed vide Order-in-Original No. 15/2020 dated 09.03.2021. Being aggrieved the appellant is before this Tribunal.

2. We have heard Shri Pawan Arora and Ms. Akanksha Kumari, learned Advocates for the appellant and Shri Harshvardhan, learned Authorized Representative for the department.

3. Learned counsel for the appellant has mentioned that the availment of Cenvat credit on employee insurance has been denied based on exclusion clause of the definition of input services in Cenvat Credit Rules, 2004 (hereinafter referred as CCR, 2004). It is impressed upon that the exclusion of certain services from input services is only when such services are purely for personal use or consumption of any employee. The decision of M/s. **Rajratan Global Wire Ltd. Vs. Commissioner, Central Goods and Service Tax, Ujjain (MP) reported as 2021-TIOL-315-CESTAT-Delhi** is relied upon. It is submitted that the insurance

policy was obtained with respect to the employees who work on the site. Otherwise also, it was taken for the group of the employees and it was a statutory mandate, the availment has wrongly been refused. Learned Counsel has relied upon the decision of Hon'ble Madras High Court in the case of **M/s. Ganesan Builders Ltd. Vs. The Commissioner of Service Tax, Chennai reported as 2018-TIOL-2303-HC-MAD-ST.** With respect to the exercise of option under Rule 6(3) of CCR, 2004 and the non-reversal of Cenvat credit under the said rule, it is mentioned that no time limit has been provided for intimation to the department for the option to be exercised under Rule 6(3) of CCR, 2004. Otherwise also, the condition of filing the declaration is merely directory. Above all most of the requirements of Rule 6(3A) were already available in the records of Revenue. It is impressed upon that department cannot insit appellant to reverse Cenvat credit under Rule 6(3)(i) of the CCR, 2004 as default option. Learned counsel has relied upon the decision of this Tribunal, Mumbai Bench, in the case of **Mercedes Benz India (P) Ltd. Vs. Commissioner of C.Ex., Pune-I reported as 2015 (40) S.T.R. 381 (Tri.-Mumbai).** Learned counsel has also relied upon the decision of the Tribunal in the case of **Dalmia Bharat Sugar and Industries Ltd. and Dalmia Chini Mills Vs. Commissioner of Central Excise, Customs and Service Tax, New Delhi reported as 2017-TIOL-113-CESTAT-DEL.**

3.1 Learned counsel further submitted that the issue of levy of service tax on legal services is a question of law, still being pending adjudication. The questione of imposition of penalty in such

circumstances does not at all arise. The order under challenge is accordingly prayed to be set aside and appeal is prayed to be allowed.

4. While rebutting these submissions, learned DR has conceded that the issue with respect to the premium for insurance services to be called as input service stands decided in favour of the assessee. However, with respect to the non-reversal of Cenvat credit under Rule 6(3) of CCR, 2004, the decision of this Tribunal, Chennai Bench, in the case of **Sify Technologies Ltd. Vs. Commissioner of GST & Central Excise, Chennai reported as MANU/CC/0021/2023 dated 27.02.2023 in Service Tax Appeal No. 689 of 2012,** it is mentioned that, hence, there is no infirmity as far as the non-reversal of Cenvat credit under Rule 6(3) of CCR, 2004 has been ordered. The order of imposition of penalty due to non-payment of service tax under Reverse Charge Mechanism on legal charges is also impressed as correct. The appeal in question is accordingly prayed to be decided in favour of Revenue at least for the two counts as mentioned above.

5. Having heard the rival contentions and perusing the records. We observe and hold as follows:

6. The three issues as were raised after the audit of the appellant are as follows:

(i) Cenvat credit availed by the company on Group Personal Accident Policy, Group Term Life Policy and Group Mediclaim Policy taken for employees.

(ii) Method/option of Cenvat credit reversal under Rule 6 of Cenvat Credit Rules pertaining to non-taxable service provided by the appellant in the state of Jammu & Kashmir.

(iii) Penalty on tax liability discharged under reverse charge on legal services.

7. As far as the first noticed shortcoming is concerned, we observe that the adjudicating authority has held that the Cenvat credit availed by the appellant on Group Personal Accident Policy, Group Term Life Policy and Group Mediclaim Policy taken for the employees does not appear to be admissible to the appellant as per the definition of input service under Rule 2(l) of CCR, 2004. The findings are alleged as wrong by the appellant. To adjudicate the same, foremost we need to look into the definition of input services. It reads as follows:

2(l) "input service" means any service,-

(i) used by a provider of output service for providing an output service; or

(ii) used by a manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products upto the place of removal, and includes services used in relation to modernisation, renovation or repairs of a factory, premises of provider of output service or an office relating to such factory or premises, advertisement or sales promotion, market research, storage upto the place of removal, procurement of inputs, accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry, security, business exhibition, legal services, inward transportation of inputs or capital goods and outward transportation upto the place of removal;

but excludes, -

(A) service portion in the execution of a works contract and construction services including service listed under clause (b) of section 66E of the Finance Act (hereinafter referred as specified services) in so far as they are used for –

(a) construction or execution of works contract of a building or a civil structure or a part thereof; or

(b) laying of foundation or making of structures for support of capital goods, except for the provision of one or more of the specified services; or

(B) services provided by way of renting of a motor vehicle, in so far as they relate to a motor vehicle which is not a capital goods; or

(BA) service of general insurance business, servicing, repair and maintenance, in so far as they relate to a motor vehicle which is not a capital goods, except when used by –

(a) a manufacturer of a motor vehicle in respect of a motor vehicle manufactured by such person; or
(b) an insurance company in respect of a motor vehicle insured or reinsured by such person; or

(C) such as those provided in relation to outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, membership of a club, health and fitness centre, life insurance, health insurance and travel benefits extended to employees on vacation such as Leave or Home Travel Concession, when such services are used primarily for personal use or consumption of any employee;

[Explanation. - For the purpose of this clause, sales promotion includes services by way of sale of dutiable goods on commission basis.]

8. The bare perusal of this definition as reproduced above shows that it would mean any service used by the manufacturer/the service provider whether directly or indirectly, in or in relation to the manufacture of final product and include services used in relation to the activities relating to business or capital goods. That apart, the definition of input services is too broad. It is inclusive also in definition what is contained in the definition is only illustrative in nature. However, holding that the activities relation to business and any services rendered in connection therewith would form the part of input services. The Hon'ble High Court of Bombay in the case of **Coca Cola (I) Pvt. Ltd. Vs. CCE. Pune-III reported as 2009 (242) E.L.T. 168 (Bom.)** has held that expression 'means and includes' is exhaustive and expression 'business' is an integrated/continued activity and is not confined or restricted to mere manufacture of the product. Therefore, activities in relation to business can cover all activities that are related to the functioning of the business. It was held as follows:

> *"39. The definition of input service which has been reproduced earlier, can be effectively divided into the following five categories, in so far as a manufacturer is concerned :*
>
> *(i) Any service used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products*
>
> *(ii) Any service used by the manufacturer whether directly or indirectly, in or in relation to clearance of final products from the place of removal*
>
> *(iii) Services used in relation to setting up, modernization, renovation or repairs of a factory, or an office relating to such factory,*
>
> *(iv) Services used in relation to advertisement or sales promotion, market research, storage upto the place of removal, procurement of inputs,*
>
> *(v) Services used in relation to activities relating to business and outward transportation upto the place of removal.*

> *Each limb of the definition of input service can be considered as an independent benefit or concession exemption. If an assessee can satisfy any one of the limbs of the above benefit, exemption or concession, then credit of the input service would be available. This would be so even if the assessee does not satisfy other limb/limbs of the above definition. To illustrate, input services used in relation to setting up, modernization, renovation or repairs of a factory will be allowed as credit, even if they are assumed as not an activity relating to business as long as they are associated directly or indirectly in relation to manufacture of final products and transportation of final products upto the place of removal."*

The Hon'ble High Court also held that once the cost incurred by the service has to be added to the cost, and is so assessed, it is a recognition by Revenue for the services having a connection with the manufacture of the final product.

9. While holding this the decision of Hon'ble High Court of Karnataka in the case of **Commissioner of C.Ex. Bangalore-II Vs. Millipore India Pvt. Ltd. reported as 2012 (26) S.T.R. 514 (Kar.)** was relied upon, wherein it was held that all factors have to be taken into consideration while fixing the cost of final product. It was observed as an undisputed fact in the said case that the premium so paid has formed part of the cost of excisable goods on which the excise duty has been paid on removal. Therefore, the assessee is entitled to avail Cenvat credit for the insurance premium paid in respect of the group insurance/insurance of employees including retired employees/mediclaim as these are covered under the definition of input services having nexus to the business of the assessee. The Hon'ble Bombay High Court reiterated this decision subsequently in the case of **Commissioner of C. Ex., Nagpur Vs. Ultratech Cement Ltd. reported as 2010 (20) S.T.R. 577 (Bom.).** All these decisions have been considered by the Larger Bench of this Tribunal while deciding the case of **Reliance Industries Ltd. Vs. Commr. of C. Ex. & S.T.**

(LTU), Mumbai reported as 2022 (60) G.S.T.L. 442 (Tri.-LB), wherein it was held as follows:

> *"34. It needs be noted here that though the Bombay High Court in Ultratech Cement categorised 'input service' into three categories, as against five categories by the Bombay High Court in Coca Cola India, there is actually no difference between the two judgments as the third category in Ultratech Cement covers the last three of the five categories mentioned in Coca Cola India.*
>
> *35. The following two principles from the aforesaid two judgments of the Bombay High Court would be of relevance to the present dispute:*
>
> *(a) The definition of "input service" is of wide import and covers not only input services which have a nexus with the manufacture of the final product (covered by the first limb), but also other input services, which do not have such a nexus, and are covered by the other limbs of the definition. Each limb of the definition is independent and, therefore, if an assessee can satisfy any one of the limbs, the benefit of Cenvat credit would be available, even if the assessee does not satisfy the other limbs of the definition; and*
>
> *(b) Insofar as the first limb is concerned, the requirement of establishing a nexus between the input service and the process of manufacture is to be regarded as 'satisfied if the expenditure incurred for the input service forms part of the cost of production/value of the final product, on which duty of excise is levied."*

10. The Larger Bench has discussed that the decision of Hon'ble Bombay High Court in the case of **Central Excise, Nagpur Vs. Manikgarh Cement reported as 2010 (20) S.T.R. 456 (Bom.)**is not applicable for the reason that the decision of **Coca Cola (I) Pvt. Ltd. (supra)**was not brought to the notice of the Bench in the said case. It has been concluded by the said Larger Bench that the definition would cover not only 'input services' which have a nexus with the manufacture of the final product (covered by

the first limb in the definition), but also other 'input services', which do not have such a nexus but are covered by either of the other four limbs of the definition. Each limb of the definition is independent and benefit of Cenvat credit would be available even if any one of them is satisfied. So far as the first limb is concerned, the requirement of establishing a nexus between the 'input services' and the process of manufacture would stand satisfied if the expenditure incurred for the 'input service' forms part of the cost of production/value of the final product on which duty of the excise is levied. In this view of the matter, the appellant would be entitled to avail Cenvat credit on the service tax paid on insurance premium for employees who had opted for the 'Voluntary Separation Scheme. The interpretation of Rule 2(l) of the 2004 Rules has been conclusively settled by the Hon'ble Bombay High Court in **Coca Cola India and Ultratech Cement (supra)**.It has also been consistently so held in **Principal Commissioner Vs. Essar Oil Ltd. reported as 2016 (41) S.T.R. 389 (Guj.), Commr. of S.T., Mumbai-II Vs. Willis Processing Services (India) Pvt. Ltd. reported as 2017 (7) G.S.T.L. 12 (Bom.) and Commr. of C. Ex. & Service Tax Vs. Tata Consultancy Services Ltd. reported as 2018 (362) E.L.T. 777 (Bom.).**

11. This Tribunal also in the case of **M/s. Rajratan Global Wire Ltd. (supra)**has held that once there is no evidence that the insurance service was obtained for the personal use of the employee of assessee, it is definitely an eligible input service for which the assessee is entitled to claim the Cenvat credit. Above all, department has conceded for this issue to no more *res integra* and

to have been decided in favour of the assessee. We hold that the Cenvat credit availed by the appellant on the various insurance policies taken for its employee were eligible for availment is permissible. The order of reversing/disallowing the same is therefore liable to be set aside.

12. Coming to the objection about methodology adopted by the appellant under Rule 6 of CCR, 2004, we observe that the adjudication authority has held that appellant is required to reverse the Cenvat credit on common input services on the ground that the appellant has also provided non-taxable services in the State of Jammu & Kashmir. Since, there is no denial that appellant was providing taxable as well as non-taxable services, the proportionate reversal of Cenvat credit has to be done in accordance of Rule 6(3) of CCR, 2004. This section reads as follows:

> *RULE 6. Obligation of a manufacturer or producer of final products and a provider of output 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 manufacture 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):*
>
> *(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 five percent of value of the exempted goods and exempted services; or*
> >
> > *(ii) pay an amount as determined under sub-rule (3A); 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 sub-clauses (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 sub-clauses (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.

Provided also that in case of transportation of goods or passengers by rail the amount required to be paid under clause (i) shall be an amount equal to 2 per cent of value of the exempted services.

Explanation 1. - 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.

13. We observe, from the bare perusal, that for the said proportionate reversal of Cenvat credit, Rule 6(3) provides either of the following options to a provider of output service that he shall either:

(a) Pay an amount of equal to 5 per cent of the value of exempted service or pay an amount equal to proportionate turnover of the exempted services provided.

OR

shall determine and pay, provisionally for every month, the amount equivalent to CENVAT Credit attributable to inputs used for provisions of exempted service.

OR

shall determine finally the amount of CENVAT Credit attributable to the exempted goods or services for the whole financial year.

OR

shall pay an amount equal to the difference between the aggregate amount determined as per condition (c) and the aggregate amount determined and paid as per condition (b), on or before 30th June of the succeeding financial year.

OR

shall, in addition to the amount short paid, be liable to pay interest @ 24% per annum from the due date i.e. in from 30th June till the date of payment.

OR

where the amount equivalent to Cenvat credit attributable to exempted goods or exempted services cannot be determined provisionally, as prescribed in condition

(b) due to reasons that no dutiable goods/taxable services were provided in the preceding financial year, then such manufacturer or provider of service is not required to determine and pay such amount provisionally for each month, but shall determine the CENVAT Credit attributable to exempted goods or exempted services for the whole year as prescribed in condition (c) and pay the amount so calculated on or before 30th June of the succeeding financial year.

14. Clause (i) further provides that if the amount so determined is not paid within the due date i.e. 30th June then in addition to the said amount, the assessee shall be able to pay interest @24% per annum to the due date till the date of payment. Thus, it is evident that the condition of filing the declaration is only directory and not mandatory. In case, a particular option is not opted by the output service provider, we are of the opinion that Revenue cannot insist assessee to a avail particular option. We draw our support from the decision in the case of **Mercedes Benz India (P) Ltd. (supra).** Further, most of the requirements under Rule 6(3A) like, name, address and registration no. of the assessee, description of taxable services and exempted services, CENVAT Credit of inputs and input services lying in balance as on the date of exercising option, are already available in the records of the Revenue. We further find it is an admitted fact that the assessee herein have calculated the CENVAT Credit in terms of clause (c) read with clause (h) and have deposited the amount so determined, by 30th June in the succeeding financial year as prescribed. We draw our support from the decision in the case of **M/s. Tata Technologies Ltd. Vs. Commissioner of Central Excise, Pune-I reported as 2016-TIOL-272- CESTAT-MUM.**

15. We are also of the opinion that Rule 6 cannot be used as tool of oppression to extract the amount which is much beyond the remedial measure and what cannot be collected directly and cannot be collected indirectly, as well. Accordingly, we hold that in case of substantive compliance made by the assessee i.e. calculation of the amount of Cenvat credit proportionate reversal on annual basis and

payment of the amount before the prescribed date, substantial benefit cannot be denied as it tantamount to not availing of input service credit on common inputs which are going into exempted services. We rely upon the decision of Hon'ble Supreme Court in the case of **Chandrapur Magnet Wires (P) Ltd. Vs. Collector of C. Excise, Nagpur reported as 1996 (81) E.L.T 3 (SC)**. In light of the above discussion, we hold that reversal of Cenvat credit on common input services has wrongly been ordered by the adjudicating authority below.

16. Coming to the third shortcoming noticed by the department i.e. with respect to the penalty of tax liability discharged under Reverse Charge Mechanism on legal services. We observe that the adjudicating authority has held that the service recipient is liable to pay 100 per cent service tax. We observe that the said findings are based upon Notification No. 30/2012-ST dated 20.06.2012. We further observe that the service recipient who is located in the taxable territory is made liable to pay 100 per cent service tax. In the present case, the appellant as service provider was liable under Reverse Charge Mechanism to discharge the said liability, the recipient in the present case being situated in non taxable territory. Apparently and admittedly, the liability on this count stands already discharged by the appellant. The adjudicating authority has still made appellant liable for payment of interest. But we are of opinion that there is no evidence on record about the discharge of said liability beyond the reasonable time. The question of payment of interest does not at all arises. We also observe that the issue of levy of service tax on legal services is undisputedly a question of

law pending consideration before the Hon'ble High Court of Delhi. Imposition of penalty in these circumstances, does not at all arises. Otherwise also, there is no evidence of any positive act on the part of the appellant proving that appellant had intention to evade the payment of duty. In these circumstances, the order of imposition of penalty is held unreasonable.

17. As a consequence of entire above discussion, it is held that there was no shortcoming as were pointed out against the appellant (3 in number). The order confirming the demand based on alleged said short comings is therefore not sustainable. Same is accordingly, hereby set aside. Resultantly, the appeal stands allowed.

[Order pronounced in the open Court on **05.07.2023**]

(DR. RACHNA GUPTA)
MEMBER (JUDICIAL)

(HEMAMBIKA R. PRIYA)
MEMBER (TECHNICAL)

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