CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
<u>NEW DELHI</u>

PRINCIPAL BENCH – COURT NO. – III

Service Tax Appeal No. 50220 of 2024 [SM]

[Arising out of Order-in-Original No. 352(AK)ST/JDR/2023 dated 20.11.2023 passed by the Commissioner of Central Excise & Central Goods and Service Tax, Jodhpur]

M/s. Rajasthan Housing Board **...Appellant**
Division-Bhilwara
C-289-290, R.K. Colony,
Bhilwara – 311001 (Rajasthan)

VERSUS

Commissioner of Central Excise
and CGST – Udaipur **...Respondent**
NCR Building, 142-B,
Sector-11, Udaipur,
Rajasthan - 313002

<u>APPEARANCE:</u>
Shri M.B. Maheshwary, Chartered Accountant for the Appellant
Shri Rohit Issar, Authorized Representative for the Respondent

CORAM: HON'BLE MS. BINU TAMA, MEMBER (JUDICIAL)

DATE OF HEARING: 13.02.2025
DATE OF DECISION: **<u>20.02.2025</u>**

FINAL ORDER No. <u>50331/2025</u>

<u>BINU TAMTA</u>

1. Challenge in the present appeal is to the Order-in-Appeal No. 352(AK)ST/JDR/2023 dated 20.11.2023 confirming the demand under the show cause notice for wrongful availment of Cenvat Credit.

2. Rajasthan Housing Board, the appellant is an instrumentality of the State Government being an autonomous body and is registered with the service tax department under various categories of services provided by them as per the Finance Act,

1994[1]. During the course of audit of the records of the appellant, it was observed that they had provided construction of residential complex services to its customers and for that they had received services from various contractors under Work Contract Service[2]. The appellant is paying service tax on contract service under Reverse Charge Mechanism[3] through GAR-7 Challan and utilising the above input credit made available to them on the basis of GAR-7 Challan for discharging the service tax liability under construction of residential complex service, which is admissible as per the services taken by the appellant from the contractors under WCS is an input service but the appellant has made first payment of service tax under WCS GAR-7 Challan in the month of December 2013 whereas they utilised part of the above Credit made available to them on 9.12.2013 to discharge the service tax liability for the month of October and November 2013, which is inadmissible in terms of the provisions of the Cenvat Credit Rules, 2004. Show cause notice dated 18.04.2019 was issued as to why Cenvat credit amounting to ₹20,89,899 should not be recovered from them along with interest and penalty. The adjudicating Authority confirmed the demand. The appeal filed was dismissed by the Commissioner (Appeals) by the impugned order. Hence, the present appeal before this Tribunal.

3. Heard both sides. The preliminary issue raised is whether extended period of limitation under proviso to section 73 (1) of the Finance Act is invokable and on merits whether the appellant has

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1. the Act
2. WCS
3. RCM

wrongly availed the Cenvat credit amount which was before discharging the service tax liability.

4. The submission of the learned Counsel for the appellant is that Cenvat credit cannot be denied by the authorities once duty is paid by the appellant and therefore, it is a case of revenue neutral situation. He further submitted that the Service Tax Payment Challan is eligible document to claim Cenvat credit under reverse charge mechanism as per rule 9(1) of CCR. The learned counsel also challenged the invocation of the extended period of limitation and imposition of penalty as it being a government authority cannot be said to be indulging in suppression or misrepresentation of facts and figures. He submitted that the entire period in dispute is time barred.

5. In this regard, the submission of the learned AR is that the appellant had not disclosed the wrong availment of Cenvat Credit and the same came to the knowledge of the department only during the course of audit of the records of the assessee as per IAR No. 179/2018–19 dated 20.12 .2018 and if the audit had not been conducted, the said facts would have gone unnoticed by the department.

6. Before adverting to the merits of the matter, I may consider the preliminary issue of invocation of the extended period of limitation under section 73 of the Act as according to the learned Counsel the entire period involved is beyond the normal period of limitation and which is not justified in the present case.

7. From the records of the case, I find that the appellant had filed the service tax returns for the period, October 2013 to March 2014, on 25.04.2014 wherein it was categorically mentioned that for the month of October and November, he had paid the service tax by Cenvat Credit of ₹11,88,452/- and 8,40,575/- respectively. Relevant part of STR-3 is set out below:

PART – D	**SERVICE TAX PAID IN CASH AND THROUGH CENVAT CREDIT**							
Service Tax, Education Cess, Secondary & Higher Education Cess and other amounts paid (To be filed by a person liable to pay Service Tax and not to be filled by and Input Service Distributor)								
S.No.	**Month**	**Oct**	**Nov**	**Dec**	**Jan**	**Feb**	**Mar**	**Total**
1.	**By Cenvat Credit (not applicable where the Service Tax is liable to be paid by the recipient of service)**	**1188452**	**840575**	**1118464**	**1382016**	**1066319**	**499298**	**6095124**

8. The appellant having disclosed the availment of the Cenvat Credit for the month of October and November in the ST3 returns cannot be held liable for concealment of suppression of facts and therefore the extended period of limitation cannot be invoked. In view thereof it is wrong on the part of the revenue to say that the appellant had wilfully suppressed the material facts from the department with intent to wrongly avail Cenvat credit. As per the provisions of the Finance Act, the liability of the appellant was to file the STRs within the stipulated time disclosing the true facts and it is not the case of the revenue that they had not filed the STRs or had not disclosed the availment of Cenvat Credit. Hence, it is not a case of wilful suppression of material facts.

9. It is a settled principle of law that for invoking the extended period of limitation, the ingredients specified in the provisions as contained in proviso to section 73 (1) needs to be satisfied by the

revenue, which I find are absent in the present case. There is no averment in the show cause notice with reference to the factual matrix of the instant case, satisfying the presence of the ingredients of fraud, collusion, wilful misstatement, suppression of facts, or contravention of any of the provisions of this chapter or of the rules made thereunder with intent to evade payment of service tax. The burden is on the revenue which they have failed to discharge. The allegation of the revenue that the appellant had availed the Cenvat credit in contravention of the provisions of rule 4(7) is not sufficient to invoke the extended period as the violation has to be with reference to the intent to evade payment of duty.

10. Reliance is placed on the decision in **Tamil Nadu Housing Board versus Collector of Central Excise[4],** where the Apex Court held that extended period is invocable only if both the situations, suppression, fraud, collusion, etc. and intent to evade payment of duty is proved. Initial burden is on the department.

11. Also, in the case of **Uniworth Textiles Ltd. versus Commissioner Central Excise, Raipur[5],** the Apex Court while considering the invocation of extended period under section 28 of the Customs Act was pleased to observe as under:

> "19. Thus, Section 28 of the Act clearly contemplates two situations, viz. inadvertent non-payment and deliberate default. The former is canvassed in the main body of Section 28 of the Act and is met with a limitation period of six months, whereas the latter, finds abode in the proviso to the section and faces a limitation period of

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4. 1994(74) ELT9(S.C.)
5. 2013 (288) ELT 161 (S.C.)

five year. For the operation of the proviso, the intention to deliberately default is a mandatory prerequisite."

Even if we hold that there was an error on the part of the appellant in availing the credit, however the error was inadvertent as they were registered only in the month of September 2013 and therefore, the extended period invoked by the department is not justified. The principle enunciated in various decisions is that the proviso to section 73 (1) would be applicable on account of misstatement or suppression of facts only if the same was deliberate and for the purpose of evading payment of duty, **Bharat Hotels Ltd. Vs. Commissioner of Central Excise (Adj.)**[6]

12. The learned AR has relied on the decision of the Tribunal in the case of **Commissioner of C EX & ST–LTU, Delhi versus Gas Authority of India Ltd**[7]**,** to emphasise the plea that merely because the appellant is a public sector undertaking does not mean that mandatory penalty cannot be imposed once the invocation of the extended time limit has been upheld. Since I have already held that extended period of limitation cannot be invoked in the present case in the absence of the ingredients specified under section 73 of the Act, consequently, the penalty also cannot be imposed. Moreover, the facts in the said case are distinguishable from the present one, where the findings were to the effect that the appellant mis-classified the product as Naptha, on which much lesser excise duty was payable and therefore mis-declaration was held to be a strategy for tax evasion, and further the exemption

6. 2018 (12) GSTL 368 (Del.)
7. 2019(366) ELT 941

claimed on the mis-declared product was held to be a positive act of misrepresentation of the facts. It was, therefore held that merely because the assessee is PSU is not sufficient to set aside the show cause notice as being barred by time.

13. Since the entire demand is beyond the normal period of limitation and I have held that the extended period is not invocable, the entire demand needs to be set aside on this ground alone. It is, therefore not necessary for me to further go into the merits of the matter. The question on merits is left open.

14. The impugned order, is therefore set aside, and the appeal is accordingly allowed in view of the findings arrived at above.

[Order pronounced in the open court on **20.02.2025**]

(BINU TAMTA)
MEMBER (JUDICIAL)

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