

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
HYDERABAD**

REGIONAL BENCH – COURT NO – I

Service Tax Appeal No. 390 of 2009

(Arising out of Order-in-Original No. 10/2009 dated 29/01/2009 passed by Commissioner
of Central Excise Hyderabad)

Blue Star Ltd.,

Appellant

1-10-60 to 64 Ashoka Raghupati Chambers,
S.P. Road, Begumpet,
Hyderabad
Telangana-500016

VERSUS

Commissioner of Central Tax,

Respondent

Secunderabad GST

Secunderabad Commissionerate
Kendriya Shulk Bhavan,
L.B. Stadium road, Basheerbagh
Hyderabad
Telangana-500004

AND

Service Tax Appeal No. 1504 of 2010

(Arising out of Order-in-Original No. 11/2010-ST dated 26/03/2010 passed by
Commissioner of Central Excise Hyderabad)

Blue Star Ltd.,

Appellant

1-10-60 to 64 Ashoka Raghupati Chambers,
S.P. Road, Begumpet,
Hyderabad
Telangana-500016

VERSUS

Commissioner of Central Tax,

Respondent

Secunderabad GST

Secunderabad Commissionerate
Kendriya Shulk Bhavan,
L.B. Stadium road, Basheerbagh
Hyderabad
Telangana-500004

AND

Service Tax Appeal No. 3244 of 2012

(Arising out of Order-in-Original No. 17/2012-ST dated 18/07/2012 passed by
Commissioner of Central Excise Hyderabad)

Blue Star Ltd.,

Appellant

1-10-60 to 64 Ashoka Raghupati Chambers,
S.P. Road, Begumpet,
Hyderabad
Telangana-500016

VERSUS

Commissioner of Central Tax,

Respondent

Secunderabad GST

Secunderabad Commissionerate
Kendriya Shulk Bhavan,
L.B. Stadium road, Basheerbagh
Hyderabad
Telangana-500004

WITH

Service Tax Appeal No. 28182 of 2013

(Arising out of Order-in-Original No. 30/2013 dated 12/08/2013 passed by Commissioner
of Central Excise Hyderabad)

Blue Star Ltd.,

Appellant

1-10-60 to 64 Ashoka Raghupati Chambers,
S.P. Road, Begumpet,
Hyderabad
Telangana-500016

VERSUS

Commissioner of Central Tax,

Respondent

Secunderabad GST

Secunderabad Commissionerate
Kendriya Shulk Bhavan,
L.B. Stadium road, Basheerbagh
Hyderabad
Telangana-500004

APPEARANCE

Ms Radhika Chandrasekhar, Adv for the Appellant
Mr A.V.L.N. Chary, A.R. for the Respondent

CORAM: HON'BLE MR. S.S. GARG MEMBER (JUDICIAL)
HON'BLE MR. P. VENKATA SUBBA RAO, MEMBER
(TECHNICAL)

FINAL ORDER No. / 30722-30725/2019

DATE OF HEARING: 10.07.2019
DATE OF DECISION: 07/08/2019

[ORDER PER:P. VENKATA SUBBA RAO)

All these appeals involve the same issue in respect of the same appellant and hence are being disposed of together.

2. Heard both sides and perused the records. The appellant herein is a manufacturer of air conditioners and refrigeration products. They also undertake works contract service, erection commissioning and installation service, maintenance and repair service, business auxiliary services and goods transport agency services and have been registered with the service tax department. They availed CENVAT credit on various inputs, input services and capital goods. Some of these services are also used by them for trading activity. Apart from manufacture and the aforesaid services, the appellant also sells air conditioners and this trading activity was considered by the department as an exempted service. Since the appellant had availed CENVAT credit on input services which went into trading activity, the department raised demand on the appellant for various periods from September 2004 to March 2011 in four show-cause notices alleging that they have irregularly availed CENVAT credit in violation of Rule 6(3) of the CENVAT Credit Rules by using the CENVAT availed input services in rendering an exempted service namely trading.

3. During the relevant period, any person availing input and input services used for manufacture of dutiable and exempted final products to provide taxable as well as exempted services had the following options:

- i. Under Rule 6(1) they could not avail CENVAT credit on the inputs or input services which are used in manufacture of exempted goods or for providing input services.
- ii. Under Rule 6(2) where a manufacturer or provider of output services availed CENVAT credit in respect of any inputs or input services and manufactures final products or provides services which are chargeable to duty or tax as well as exempted, then the manufacturer or provider of output service had to maintain separate accounts for receipt, consumption and inventory of inputs and input services meant for use in the manufacture of dutiable final products or in providing taxable output services and the quantity of inputs for use in manufacture of exempted goods or services and take CENVAT credit only on that quantity of inputs or input services which are intended for use in the manufacture of dutiable goods or in providing taxable output services.
- iii. If the manufacturer/service provider is neither able to follow Rule 6(1) or Rule 6(2) then under Rule 6(3) they had an option which states that "notwithstanding anything contained in sub-rule (1) and (2), a manufacturer or the provider of output service opting not to maintain separate accounts shall follow either of the following conditions as applicable to him namely:
 - (a)....
 - (b)....
 - (c) The provider of output service shall utilise credit only to the extent of an amount not exceeding 20% of the amount of service tax payable on taxable output services. Subsequently, by Notification No.

13/2016 dated 1st March 2016 explanation 3 has been inserted in Rule 6(1) as follows:-

“For the purposes of this rule, exempted services as defined in clause(e) of rule 2 shall include an activity, which is not a ‘service’ as defined in section 65B(44) of the Finance Act, 1994”

4. It is undisputed in this case that the appellant has been manufacturing air conditioners and providing services and that the input/input services on which CENVAT credit has been availed has been utilised for trading as well. It is also not in dispute that Rule 6(1) and 6(2) do not apply to the appellant because they have neither avoided taking credit on input services used in trading nor have they maintained separate accounts. Learned counsel for the appellant however submits that explanation (3) to Rule 6 (1) introduced by Notification No. 13/2016-CE(NT) dated 01.03.2016 does not have retrospective effect. Therefore, prior to the introduction of this explanation, trading cannot be considered a service at all, let alone being considered as an exempted service. Therefore as per CENVAT Credit Rules during the relevant period they were not required to follow Rule 6(3) and restrict their CENVAT credit utilisation to 20% of the service tax amount. On this point, learned A.R. submits that this issue is no longer *res integra* as it has been settled both by the Hon’ble High Court of Madras and by the Hon’ble Apex court. In the case of Ruchika Global Interlinks [2017 (5) GSTL 225 (Mad)], the Hon’ble High Court of Madras has categorically held that trading activity both before and after the amendment shall be exempted service and since assessee was not paying service tax on trading activity during the relevant period in that case, they were not entitled to credit of input services and they had to follow the formula prescribed under Rule 6(3)(c). On the same issue in the case of Lally Automobiles Pvt Ltd Vs CST

Delhi, the principal bench of the Tribunal, as reported in 2018 (10)GSTL 310 (Tri-Del)], has held that trading being not a taxable service is not covered under the scope of CENVAT Credit Rules 2004 and therefore credit needs to be reversed as per Rule 6(3). The assessee's appeal against this order has been rejected by the Hon'ble High Court of Delhi as reported in 2018(17)GSTL 422. Further, the civil appeal filed by the assessee in that case was dismissed by the Hon'ble Apex Court as reported in 2019(24)GSTL J 115 (SC). Thus, it has been well settled that trading is an exempted service and Rule 6(3) applies in case credit has been taken on the input/input services used in trading activity. Learned A.R. also submit that on the same issue this very bench in the case of ECIL Rapiscan Ltd as reported in [2018(2)TMI 940] held that trading activity is an exempted service and Rule 6(3) applies. After examining the above judgements we find that the issue is no longer *res integra* and trading activity is an exempted service to which Rule 6(3) applies. This position has not changed with the introduction of explanation (3) to Rule 6(1) discussed above. Trading activity has always been an exempted service both prior to and after introduction of this explanation. Accordingly, the assessee is not entitled to CENVAT credit to that extent.

5. The appellant's second point or argument is that even if reversal of credit is required, it is only with respect to the common credit to be reversed. A plain reading of Rule 6(3)(c) discussed above shows that the restriction on utilisation of CENVAT under Rule 6(3)(c) is not confined to any form of CENVAT credit but is related to the value of output taxable services rendered by the appellant. The credit cannot be utilised in excess of 20% of the amount of service tax payable on taxable output services. Therefore, if

service tax is paid utilising the CENVAT, it does not amount to paying service tax and service tax can be demanded.

6. Assessee's third line of argument was that in terms of Rule 6 (5) of CENVAT Credit Rules 2004 notwithstanding anything contained in sub-rules 1, 2 & 3, credit of the whole of service tax paid on taxable services as specified in sub-clauses (g), (p), (q), (r), (v) (wza), (zm), (zp), (zy), (zzd), (zzg), (zzh), (zzi), (zzk), (zzq) and (zzr) of clause 105 of Section 65 shall be allowed unless such service is used exclusively in or in relation to manufacturing of exempted goods or providing exempted services, Learned counsel would submit that the credit on banking and financial services, insurance/auxiliary services and security agency services availed by them are covered by Rule 6(5) and therefore they are entitled to the full credit to that extent. We find on a plain reading of Rule 6(5) shows that exception has been made with respect to some services in it and if the services on which the appellant claimed credit are covered by Rule 6(5), they are entitled to full credit to that extent.

7. The learned counsel's next point of argument is that extended period of limitation cannot be invoked in the first show cause notice for the period September 2004 to March 2008 issued on 20.10.2008. Extended period of limitation has been invoked by the department on the ground that there is suppression by the appellant and they did not intimate the department the fact that they were using credit on common input/input services which were used for providing both taxable and exempted services. He would submit that the department themselves have conducted an audit for the period July 2004 to November 2005 and raised some objections which have been replied to. All their records were available to the department. In view of the above, the allegation of suppression of facts does not stand. Considering

this fact and that the assessee was not required in their ST-3 returns to declare the breakup of the CENVAT credit availed by them, we find force in the argument of the learned counsel that extended period of limitation cannot be invoked in their case.

8. On the question of penalty, she would argue that the entire question is one of interpretation as to whether trading is to be treated as an exempted service or not. Therefore the appellant had a bonafide belief that they are entitled to the benefit of CENVAT credit even if it is decided against them in the current proceedings therefore the penalty imposed upon them under Sections 76 & 78 may be set aside. We find force in the argument of the learned counsel that they had a reasonable cause for their failure in over-using CENVAT credit in violation of Rule 6(3) and thereby not discharging full amount of service tax.

9. In view of the above these appeals are disposed of as under:

1. Appellant is covered by Rule 6(3)(c) of CENVAT Credit rules 2004 and therefore is not entitled to utilise CENVAT in excess of 20% of the service tax payable on the taxable output services. The demand on this count stands.
2. Appellant's claim that some of the services on which they have availed CENVAT credit are covered by Rule 6(5) of CENVAT Credit Rules 2004 and hence excluded from Rule 6(3) needs to be examined on facts and if so they are entitled to full CENVAT Credit to that extent.
3. The extended period of limitation invoked in the show-cause notice No. OR 66/2008 dated 10.10.2008 and confirmed vide order-in-original No. 10/2009 dated 29.01.2009 is set aside. The demand within the normal period is only upheld.

4. The demand for subsequent periods in Appeals No. ST/1504/2010, ST/3244/2012, ST/28182/2013 are upheld subject to verification and requantification of the credit eligible to the appellant under Rule 6(5) as above.
5. The interest on the demands gets modified accordingly. The penalties imposed upon the appellant are set aside invoking Section 80 of the Finance Act 1994. The appeals are disposed of as herein above.

(Order pronounced in the open court on 07/08/2019)

(S.S.GARG)
MEMBER (JUDICIAL)

(P. VENKATA SUBBA RAO)
MEMBER (TECHNICAL)