**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL**
**EASTERN ZONAL BENCH : KOLKATA**

REGIONAL BENCH – COURT NO. 1

**Service Tax Appeal No. 178 of 2012**

(Arising out of Order-in-Original No. 72/Commr/ST/Kol/2011-12 dated 03.02.2012 passed by the Commissioner of Service Tax, Kendriya Utpad Shulk Bhawan, 3rd Floor, 180, Santipally, Rajdanga Main Road, Kolkata – 700 107)

**M/s. Williamson Magor & Co. Limited** **: Appellant**
Four Mangoe Lane, Surendra Mohan Ghosh Sarani,
Kolkata – 700 001 (West Bengal)

**VERSUS**

**Commissioner of Service Tax** **: Respondent**
Kendriya Utpad Shulk Bhawan, 3rd Floor,
180, Santipally, Rajdanga Main Road, Kolkata – 700 107

**APPEARANCE:**

None for the Appellant

Shri S.S. Chattopadhyay, Authorized Representative for the Respondent

**CORAM:**

**HON'BLE SHRI ASHOK JINDAL, MEMBER (JUDICIAL)**
**HON'BLE SHRI K. ANPAZHAKAN, MEMBER (TECHNICAL)**

**FINAL ORDER NO. 75414 / 2024**

DATE OF HEARING / DECISION: 28.02.2024

**Order : [Per Shri K. Anpazhakan]**

The present appeal has been filed against the Order-in-Original No. 72/Commr/ST/Kol/2011-12 dated 03.02.2012 passed by the Commissioner of Service Tax, Kolkata, wherein the Ld. Commissioner has confirmed the demand of Rs.69,11,316/- and 4,14,516/-along with interest and imposed penalty of Rs.73,25,832/-. Aggrieved against the confirmation of these demands, the Appellant has filed this appeal.

2. Briefly stated facts of the case are that a Show Cause Notice dated 12.10.2012 was issued to the Appellant on three issues. The adjudicating authority has adjudicated the Notice and confirmed the demand in respect of two issues and dropped the demand in respect of one issue. The Appellant has filed appeal against the two issues where the demand has been confirmed.

2.1. The two issues where the demand has been confirmed in this case, are furnished below:

(i) The Appellant has received a consideration of Rs.5,64,65,000/- from M/s. Flender Limited for non-compete agreement for a period of 3 years. The Revenue considered this amount received as taxable amount under the category of 'Business Auxiliary Service'. Accordingly, a Show Cause Notice dated 12.10.2010 was issued proposing to levy service tax on the Non-Competence fees collected by the Appellant under the category of 'Business Auxiliary Service' and the Ld. Commissioner has confirmed service tax of Rs.69,11,316/- under the category of "Business Auxiliary Service', along with interest and penalty.

(ii) The Appellant has availed CENVAT Credit on certain input services and utilised 100% of the said credit while providing output services. The Revenue was of the view that the Appellant is entitled to use only 20% of the common input services Credit availed to pay service tax on the output services. As the Appellant has used 100% of the common input services credit, the demand of Rs.4,14,516/-was raised in the Notice and the same was confirmed in the impugned order along with interest and penalty.

3. None appeared for the Appellant. Heard the Ld. Authorized Representative appearing on behalf of the respondent-Revenue. As the appeal pertains to the year 2012, in the interest of justice, we decided to take up the appeal for final disposal with the assistance of the Ld. Authorized Representative for the Revenue

4. Regarding the demand of service tax of Rs.69,11,316/-confirmed in the impugned order, we observe that the service tax was demanded on the consideration of Rs.5,64,65,000/- received by the Appellant from M/s. Flender Limited for non-compete agreement for a period of 3 years. In their written submission, the Appellant stated that 'Protection of goodwill, confidential information and employee base' for which the non-competent fee was paid is not covered by any of the clauses listed under the definition of 'Business Auxiliary Service'. In the impugned order, the adjudicating authority observed that by not competing and/or not letting the restricted persons to compete, the Appellant is indirectly promoting the business of M/s. Flender. We observe that that there is no room for any assumption or presumption in a taxing statute. In order to bring any service within the scope of 'Business Auxiliary Service' the promotion of client's business must be direct. We have perused the provisions of the agreement. We find that there is no clause in the agreement which promotes the business of Flender. In this regard, the Appellant cited the decision of the Tribunal, in the case of *M/s. Jetlite (India) Limited vs CCE [2010-TIOL-1715-CESTAT]*, wherein it has been held that the onus is on the Department to establish the taxability of the

service. We find that the Revenue has not discharged this responsibility. In the instant case, it has not been spelt out in the Notice under which sub-clause of the ‘Business Auxiliary Service’ the activity of the Appellant can be classified. In the case of *M/s. Amrit Foods Vs CCE [2005 (190) E.L.T. 433]* relied upon by the appellant, the Hon'ble Supreme Court has held that Notice must contain the exact nature of contravention. In the absence of the same, the demand is liable to be set aside. As the Notice has not specified the specific sub-clause in the definition of 'Business Auxiliary Service' where the services rendered by the Appellant can be classified, we hold that that the demand confirmed in the impugned order under the category of 'Business Auxiliary Service' is not sustainable.

5. Regarding the demand of service tax of Rs.4,14,516/-, we observe that the restriction of utilization of CENVAT Credit availed on common input services over and above 20% has been prescribed in Rule 6(3) of the CENVAT Credit Rules, 2004. However, in respect of the services specified in Rule 6(5) of the CENVAT Credit Rules, 2004, there is no such restriction.

5.1 For the sake of ready reference, the provisions of Rule 6(5) of the CENVAT Credit Rules are reproduced below:

> *“(5) Notwithstanding anything contained in sub-rules (1), (2) and (3), credit of the whole of service tax paid on taxable service as specified in sub-clause (g), (p), (q), (r), (v), (w), (za), (zm), (zp), (zy), (zzd), (zzg), (zzh), (zzi), (zzk), (zzq) and (zzr) of clause (105) of section 65 of the Finance Act shall be allowed unless such service is used exclusively in or in relation to the manufacture of exempted goods or providing exempted services”*

From the above, we observe that Rule 6(5) is an exception to the other provisions of Rule 6. Full credit can be availed and utilized in respect of the common input services specified in Rule 6(5) of the CENVAT Credit Rules, 2004. The only condition is that the said input services should not be exclusively used in the manufacture of exempted goods or providing exempted services. In the present case, we observe that the Appellant has been providing output services such as 'Business Auxiliary service', Storage and Warehousing Service', and 'Maintenance and Repair Service' and paying service tax on them. Thus, it is evident that the credit availed on the input services have not been used exclusively for providing any exempted output service. We also find this is not the allegation in the Notice. The Notice generally alleges that the Appellant cannot use CENVAT Credit availed on common input services over and above 20% as prescribed in Rule 6(3) of the CENVAT Credit Rules, totally ignoring the provisions of Rule 6(5) which allows full credit in respect of the services specified therein. Since the Appellant has utilised full credit only in respect of those input services specified in Rule 6(5) of CCR 2004, we hold that the Appellant has rightly availed and utilized the CENVAT Credit as provided under Rule 6(3)(c) and Rule 6(5) of the CENVAT Credit Rules, 2004. Accordingly, we hold that the demand confirmed in the impugned order on this count is not sustainable.

6. Since the demand of service tax confirmed in the impugned order as mentioned in paragraph 2.1 *(supra)* is not sustainable, the question of demanding interest and imposing penalty does not arise. Accordingly, we set aside the same.

7. In view of the above discussion, we set aside the impugned order and allow the appeal filed by the Appellant.

(Operative part of the order was pronounced in open court)

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| Sd/- | Sd/- |
| **(K. ANPAZHAKAN)** | **(ASHOK JINDAL)** |
| MEMBER (TECHNICAL) | MEMBER (JUDICIAL) |

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