

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
KOLKATA**

REGIONAL BENCH – COURT NO.1

Service Tax Appeal No.75848 of 2016

(On behalf of Appellant)

(Arising out of Order-in-Original No.45-46/Commr./ST-1/Kol/2015-16 dated 29.02.2016 passed by Principal Commissioner of Service Tax I, Kolkata)

M/s Eureka Stock and Share Broking Services Limited

Vill.-Paralsingha, Via-Kesinga, Dist.-Kalahandi

Appellant

VERSUS

Commissioner of Service Tax-I, Kolkata

180, Shantipally Rajdanga Main Road, Kolkata-700107

Respondent

APPEARANCE :

Shri Arun Agarwal, Chartered Accountant for the Appellant

Shri S.Mukhopadhyay, Authorized Representative for the Respondent

CORAM:

HON'BLE MR.ASHOK JINDAL, MEMBER (JUDICIAL)

HON'BLE MR.K.ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NO.76060/2024

DATE OF HEARING : 03 .06.2024

DATE OF PRONOUNCEMENT : **11.06.2024**

Per Ashok Jindal :

By way of this appeal, the appellant has challenged the demand of 5%/6% of the value of the exempted services provided by the appellant during the impugned period i.e. 2009-10 to 2013-14.

2. The facts of the case are that the appellant is engaged in providing "stock broking service" to their clients. The appellant also undertakes self-trading. Therefore, they maintained two separate sets of books of account by using two separate softwares for recording income and expenses accordingly. All the expenses pertaining to each

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vertical, stock broking and self-trading are recorded in their respective books of account. The taxes charged on input services availed in respect of stock broking services are taken as cenvat credit by the appellant whereas no cenvat credit was availed in respect of input services related to self-trading. The major expense incurred by the appellant is of transaction charge which is recognized as expense in both the sets of accounts. The taxes charged limited to transaction charges attributed to stock broking services are availed as cenvat credit by proportionate reversal of cenvat credit attributable to self-trading.

2.1 The facts that the appellants are maintaining separate books of accounts has been intimated by them to their jurisdictional authority in the year 2008.

2.2 In 2012, audit of their records was conducted by CERA, when the fact regarding maintenance of separate books of account for brokerage activity and self-jobbing activity were examined and only in respect of one input service i.e. "transaction charges" being a common input service, proportionate reversal was not done due to omission by the appellant, which was done during such audit by CERA.

2.3 Again in 2013, the appellant intimated to the Range Superintendent that the transaction charges introduced since 2009 was common and proportionate cenvat credit was reversed during CERA Audit. In case of all other input services, proportionate cenvat credit reversed regularly and found in order by CERA and Departmental audits in previous years.

2.4 In these set of facts, it was alleged that the appellant has taken cenvat credit on common input services used in exempted as well as

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taxable services and involving non-payment of claim at applicable rate of value on exempted services in terms of Rule 6 (3) and 6 (3B) of the said Rules. On scrutiny of ST-3 Returns as well as cenvat credit records, it revealed that the appellants have taken cenvat credit on common input services i.e. rent, banking, telephone, repair & maintenance, insurance, postage & courier, audit fees, internet broadband services, professional fee, software charges etc. These input services are used for providing output services, which are chargeable to tax as well as exempted services. During the said period, the appellant did not maintain separate account for receipt and use of input services for provision of such exempted service and for provision of taxable output service. Accordingly, in terms of Rule 6 (3) of the Cenvat Credit Rules, 2004, they are required to pay 5%/6% of the value of exempted services.

2.5 In these set of facts, two show-cause notices were issued to the appellant for payment of amount equal to 5%/6% of the value of exempted services.

2.6 The appellant contested the show-cause notices, but the adjudicating authority without examining the records and the facts of the case, passed the impugned order holding that the appellant is required to pay the amount equal to 5%/6% of the value of exempted services in terms of Rule 6 (3) of the Cenvat Credit Rules, 2004.

2.7 Aggrieved from the said order, the appellant is before us.

3. The Id.Chartered Accountant appearing on behalf of the appellant, submits that in February, 2012, CERA was conducted and it was found that the appellant is maintaining separate books of account for taxable

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as well as exempted services. Further, vide letter dated 21.03.2012, a spot memo for reversal of common cenvat credit availed by the appellant, which the appellant received and reversed the cenvat credit on common input services in the year 2010-11, 2011-12 & 2012-13 of Rs.28,37,981/-. It is his submission that the appellant further reversed the cenvat credit on transaction charges for the year 2013-14 of Rs.5,56,575/- and the same was intimated separately on 25.05.2015. He also submits that these facts have been recorded by the adjudicating authority in the impugned order, but the adjudicating authority held that the appellant has availed cenvat credit on input services for providing taxable services as well as exempted services. Therefore, in terms of Rule 6 (3) of the Cenvat Credit Rules, 2004, they are liable to pay 5%/6% of the value of the exempted goods if the separate accounts is not maintained. It is his submission that as the proportionate cenvat credit has already been reversed by the appellant, the same shall be deemed as the appellant has not availed cenvat credit on exempted services. In that circumstances, no demand is sustainable against the appellant on account of non-maintenance of separate account in terms of Rule 6 (3) of the Cenvat Credit Rule, 2004. He further submits that as the CERA audit was conducted and the discrepancy has been pointed out, the first show-cause notice was not required to be issued by extending period of limitation, accordingly, the same is not sustainable.

4. On the other hand, the Id.A.R. for the Revenue supported the impugned order and submitted that it is an admitted fact that the appellant was availing cenvat credit on common input services for

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providing exempted as well as taxable services. Therefore, the impugned order is to be confirmed.

5. Heard both the parties and considered the submissions.

6. In that case, the issue is whether the appellant is liable to pay the amount equal to 5%/6% of the value of exempted services for maintenance of separate account for common input services.

7. We find that although the appellant is maintaining separate account for exempted as well as taxable services and reversed the proportionate cenvat credit attributable to the exempted services. For transaction charge services, the service tax paid by the appellant was not proportionately reversed by the appellant. But on pointing out by CERA audit, the appellant has reversed the same. The same has been recorded by the adjudicating authority in the impugned order, which is reproduced below :

"The Noticee further contended that the same issue has already been dealt with by the CERA audit and a spot memo bearing no.CERA-II/Eureka/2011-12/02 dated 21.03.2012 was issued in this regard. The Assessee duly replied to the above spot memo and confirmed a reversal of Rs.12,66,993/- from its cenvat credit balance for the FY 2010-11. They have further reversed Cenvat Credit of Rs.9,62,192/- for the period 2011-12 and Rs.6,08,796/- for the period 2012-13 on the issue. They have also reversed Cenvat Credit of Rs.4,56,575/- for the financial year 2013-14."

As the fact of proportionate reversal of cenvat credit is on record and no credence was done by the adjudicating authority to the said fact, therefore, the impugned order is not sustainable in the eyes of law.

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8. Further, we find that as the appellant has already reversed the proportionate cenvat credit attributable to exempted services, in that circumstances, the appellant is not required to pay any amount equal to 5%/6% of the value of the exempted services. The same view has been taken by this Tribunal in the case of M/s Chryso India Private Limited Vs. Commissioner of CGST & Central Excise, Kolkata North reported in 2023 (5) TMI 596-CESTAT-Kolkata, wherein this Tribunal has observed as under :

"7. Admittedly the Appellant has filed the option letter belated by opting to reverse proportionate Cenvat on common inputs used. During the period under consideration, the Tribunals have been taking a liberal view that on account of the mistake of non-filing of the option letter which is only a procedural condition, the assessee should not be made to suffer by making huge payments in terms of 5%/6% of the value of the exempted services. In the case of Mercedes Benz India (P) Ltd. Vs. CCE-Pune, 2015 (40) STR 381 (Tri.-Mum.), Mumbai Tribunal has held as under:-

5.4 We find that the appellant admittedly paid an amount of Rs. 4,06,785/- plus interest, this is not under dispute. Therefore in our view, the appellant have complied with the condition prescribed under Rule 6(3)(ii) read with sub-rule (3A) of Rule 6 of Cenvat Credit Rules, therefore demand of huge amount of Rs. 24,71,93,529/- of the total value of the vehicle amounting to. Rs. 494,38,70,577/- sold in the market cannot be demanded. We are also of the view that Rule 6 of the Cenvat Credit Rules is not enacted to extract illegal amount from the assessee. [emphasis supplied]

8. The CESTAT, Hyderabad in the case of Aster Pvt. Ltd. Vs. CCEHyd-III, 2016 (43) STR 411 (Tri.-Hyd.) has held as under:-

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The above Rule 6(3A) states that while exercising the option, the manufacturer of goods or the provider of output service shall intimate in writing the department regarding the option exercised. In the present case, admittedly there is no intimation given by the appellant informing his exercise of option. The contention of the department is that when the appellant has not intimated his option in writing then the appellant is bound to pay the duty amount calculated under the first option. I am afraid I cannot endorse this contention. The said rule does not say that on failure to intimate, the manufacturer/service provider would lose his choice to avail second option of reversing the proportionate credit. Rule 6(3A), as seen expressly stated is nothing but a procedure contemplated for application of Rule 6(3). Therefore, the argument of the Revenue that the requirement to intimate the department about the option exercised, is mandatory and that on failure, the appellant has no other option but to accept and comply Rule 6(3)(i) and make payment of 5%/10% of sale price of exempted goods/value of exempted services is not acceptable or convincing. The Rule does not lay down any such restriction. The procedure and conditions laid in Rule 6(3A) is intended to make Rule 6(3) workable and not to take away the option available to the assessee. In any case, at no stretch of imagination can it be said that on failure to intimate the department, Rule 6(3)(i) would automatically come into application. [emphasis supplied]

9. *In the case of Cranes & Structural Engineers, V. CCE-Bangalore-I, 2017 (347) E. L. T. 112 (Tri.-Bang.), Bangalore Tribunal has held as under:-*

4.1 *On analysis of Rule 6(3A), I find that while exercising the option, the manufacturer of goods or the provider of output service shall intimate in writing to the Department regarding the option exercised. In the present case, admittedly there is no intimation given by the appellant informing the exercise of his option. The argument of the Department is that when the*

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appellant has not intimated his option in writing then the appellant is bound to pay the duty amount calculating under the first option. According to me, this argument is devoid of merit, because the said Rule does not say anywhere that on failure to intimate, the manufacturer/service provider would lose his right to avail second option of reversing the proportionate credit. Sub-rule (3A) of Rule 6 is only a procedure contemplated for application of Rule 6(3). Consequently, the argument of Revenue is that the appellants exercising option is mandatory and on its failure, the appellant has no other option but to accept and apply Rule 6(3)(i) and make payment of 5%/10% of the sale price of the exempted goods or exempted services is not acceptable, because the Rule does not lay down any such restriction and this has been held in the judgments cited supra. [emphasis supplied]

10. *From the above decisions of the Tribunals, it is seen that even prior to Rule 6 (3AA) coming into effect from 01/4/2016, they have been taking the view that mere non filing of the option letter should not be used to deprive the assessee from reversing the proportionate Cenvat Credit. The very fact that the Rule 6 (3AA) has been brought into effect from 1/04/2016 wherein the Adjudicating Authority is empowered to allow the assessee to reverse the Cenvat on proportionate basis on being pointed out, shows the legislative intent to allow the assessee to pay proportionate Cenvat Credit as the first option.*

11. *Relying on the cited case law, I hold that the demand confirmed for Rs.2,52,853/- in terms of Rule 6(3)(i), i.e. on 5%/6% of value of exempted goods is not sustainable and the same is set aside."*

9. In view of the above discussion, we hold that as the appellant has already reversed the proportionate input cenvat credit attributable to exempted services, in that circumstances, the appellant is not liable to pay an amount equal to 5%/6% of the value of the exempted services.

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10. As no demand is sustainable against the appellant, no penalty is imposable on the appellant.

11. In view of this, we set aside the impugned order and allow the appeal with consequential relief, if any.

(Pronounced in the open court on **11.06.2024**)

Sd/
(Ashok Jindal)
Member (Judicial)

Sd/
(K.Anpazhakan)
Member (Technical)

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