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

REGIONAL BENCH - COURT NO.2

Service Tax Appeal No.75464 of 2016

(Arising out of Order-in-Original No.34/COMMR/ST/BOL/15 dated 22.12.2015 passed by Commissioner of Central Excise, Bolpur.)

M/s. Mining Associates Pvt.Ltd.
(Atwal Nagar, S.B. Goral Road, Asansol, Dist.Burdwan, West Bengal, Pin-713301.)
...Appellant

VERSUS

Commissioner, CGST & CX, Bolpur Commissionerate
.....Respondent
(Nanoor Chandidas Road, Sian, Bolpur, Dist: Birbhum, West Bengal, Pin-731204.)

APPEARANCE

Shri N.K.Chowdhury, Advocate for the Appellant (s)
Shri S.K.Singh, Authorized Representative for the Revenue

CORAM: HON'BLE SHRI R. MURALIDHAR, MEMBER(JUDICIAL)
HON'BLE SHRI RAJEEV TANDON, MEMBER(TECHNICAL)

FINAL ORDER NO. 76685/2025

DATE OF HEARING : 24.06.2025
DATE OF DECISION : 24.06.2025

Per : R. MURALIDHAR :

The Appellant is provider of service under the category of "Survey & Exploration of Mineral". In the course of their business transactions they have imported inputs viz. Rig Servicing CDR 700, Bit No.10, Bit No.STG-3, Kitseal, Tacker Unit etc. during the period from October 2007 to January 2012. At the time of imports the Appellants have paid the requisite Customs + Additional Duty of Customs (CVD) + Special Additional Duty (SAD). The Appellants have taken Cenvat credit in the CVD and SAD paid by them. In the course of audit taken up by CERA in the month of January 2012, it was pointed out vide Spot/CERA-

VIII/2011-12/Mining/SM/02 dt.31.01.2012 that the Appellant is taking ineligible credit of 4% of SAD. The relevant portion of this objection and reply of the Appellant is reproduced from the Appellant's letter dated 04.04.2012.

> *"The dispute has been raised with regard to availing of CENVAT credit on 4% SAD. In terms of the provisions of Rule 3(1)(viia) CENVAT credit is admissible on the additional duty leviable under Sub-section (5) of Section 3 of the Customs Tariff Act, 1975 by Notification No.15/2006-CE(NT) dated 01.05.05. The credit on SAD has been made admissible to CENVAT Credit Rules, 2004. Hence, according to us CENVAT credit is very much admissible on SAD."*

2. Since the Appellant was not agreeable to reverse the Cenvat credit already taken for the said SAD, a Show Cause Notice was issued on 19.03.2013 seeking to recover the Cenvat credit taken on the SAD during the period October 2007 to March 2012. After due process, the Adjudicating authority vide Order-in-Original No. COMMR/ST/BOL/15 dated 22.12.2015 has confirmed the demand along with interest and penalty.

3. Being aggrieved, the Appellant is before the Tribunal.

4. The Ld.Counsel appearing on behalf of the Appellant submits that in terms of Rule 3(1)(viia), the Additional Duty leviable under Sub-Section (5) of Section 3 of Customs Tariff Act (SAD) is eligible for Cenvat Credit. The proviso prohibiting such Cenvat credit was amended w.e.f. 01.07.2012. All the credits were taken before this date and therefore the Appellant was eligible to take the credit of the SAD prior to this date. The Ld.Counsel also points out that the impugned order was passed *ex parte* without the presence of the Appellant because of which the principles of natural justice were not followed.

5. Therefore, he submits that on merits, the Appeal may be allowed by setting aside the impugned order.

6. The Ld.Counsel takes the further stand that the Show Cause Notice was issued on 19.03.2013 for the Cenvat credits taken by them during the period October 2007 to January 2012. Since the taking of Cenvat credit was so reflected in the RG-23 records and the same were verified and checked by the Audit Team, the Appellant has not suppressed any fact and declared all the details in the statutory records. Therefore, the Department could not have invoked the extended period provisions to confirm the demand. He relies on the following case laws.:-

a) AMC Coated Fabrics Pvt.Ltd. v. CC(EP), Mumbai
[2007 (218) ELT 707 (Tri.-Mumbai)]
b) BCH Electric Ltd. v. CCE, Delhi-IV
[2013 (31) STR 68 (Tri.-Del.)]
c) CCE, NOIDA v. Accurate Chemical Industries
[2014 (314) ELT 441 (All.)]
d) Tally Solutions Pvt.Ltd. v. CCE, Bangalore
[2020 (41) GSTL 520 (Tri.-Bang.)]
e) Hawkins Cookers Ltd. v. CST, Mumbai-II
[2020 (43) GSTL 513 (Tri.-Mumbai)]
f) Uniflex Cables Ltd. v. CCE, Surat-II
[2011 (271) ELT 161 (SC)]

7. He submits that in all the above cases, the Tribunal, Hon’ble High Courts and the Supreme Court have held that in case of the data has been recorded properly in the books of account and if it pertains to interpretation, the extended period provisions cannot be invoked and penalty cannot be imposed.

8. In view of these submissions he prays that the Appeal may be allowed even on account of limitation.

9. The Ld.AR for the Department takes us through to Para 3.1, 4.1 and 5.8. He submits that the Appellant did not file their reply to the

Show Cause Notice which was required to be done by them within thirty days from the date of receipt of the Show Cause Notice. The Show Cause Notice was issued on 19.03.2013 and the Appellant should have filed their reply by 18.04.2013. They did not do so. After waiting for more than one and half years, since no reply was filed by the Appellant, the Adjudicating authority granted personal hearing on 23.12.2014. No one attended this personal hearing. After this, one more personal hearing was granted on 23.02.2015 (after about two months). Even on this occasion the Appellant has not attended the personal hearing. After about 10 months, one more opportunity was given to attend the personal hearing on 15.12.2015. On finding that the Appellant did not attend on that day also one more opportunity was given on 21.12.2015 which again the Appellant failed to utilize. Thus on four different occasions, the Appellant was given enough opportunity to make their representations before the Adjudicating authority, which was not availed by them. In view of the same the Adjudicating authority had to pass the order *ex parte*. Since the Appellant had not filed the reply to the Show Cause Notice he had to pass the order based on the factual details available before him.

10. He further submits that in terms of proviso to Rule 3(1)(viia), there is absolute prohibition for the service provider to take the credit of SAD. He submits that the amendment brought out w.e.f. 01.07.2012 does not alter the situation since the Appellant was always providing "*taxable service*" which was mentioned in the proviso prior to this date. Therefore he submits that on merits the Appeal may be dismissed.

11. Coming to the stand taken by the Ld.Counsel on account of limitation, the Ld.AR for the Department submits that it is on record that the Appellant was pointed out way back on 31.01.2012, when the CERA audit was taken up, that they were taking the Cenvat credit of 4% SAD which was not admissible to them. In spite of the Spot Memo issued on 31.12.2012, the Appellant did not reverse the Cenvat credit

taken by them. After this, the Show Cause Notice was issued on 19.03.2013. He further relies on the detailed findings of the Adjudicating authority at para 5.8 wherein it is stated that the details were not mentioned in the ST-3 Returns and no other documents were submitted by the Appellant towards the Cenvat credit being taken by them. He also points out that the Appellants have been misleading by writing different letters on 04.04.2012, 17.12.2012 and 11.02.2013. They have also partly reversed the Cenvat credit to the extent of Rs.21,68,442/- along with interest of Rs.1,21,137/- knowing fully well that they are not eligible to take Cenvat credit and were required to reverse the same. But they did not reverse the entire amount of Cenvat credit taken by them. He submits that all these points that the Appellant was suppressing the facts and hence he justifies the extended period invoked and the demand confirmed for the extended period.

12. Heard both sides and perused the appeal papers and the synopsis submitted by the Ld.Counsel for the Appellant.

13. We first take up the issue on merits. We find that Rule 3(1) of Cenvat credit Rules, 2004 reads as under:-

> "3. (1) A manufacturer or producer of final products or a provider of output service shall be allowed to take credit (hereinafter referred to as the CENVAT Credit) of –
>
> (viiia) the additional duty leviable under sub-section (5) of section 3 of the Customs Tariff Act
>
> **Provided** that a <u>provider of output service shall not be eligible to take credit of such additional duty</u>;

14. The word "*output*" which has been inserted w.e.f. 01.07.2012 had substituted the earlier word "*taxable*". This means that earlier the proviso was in respect of provider of "taxable service". After the amendment any provider of output service irrespective of whether it is "taxable or exempt service" shall not be eligible to take the Cenvat

credit of SAD. Therefore, we do not find that this amendment comes to the rescue of the Appellant in any way. Admittedly during the period 2007 to 2012 the Appellant has been providing 'taxable service'. Therefore, in terms of proviso to Rule 3(1)(viia), the Appellant is not eligible to take the Cenvat credit of the SAD paid. Therefore, on merits we dismiss the Appeal filed by the Appellant by upholding the confirmed demand.

15. Now we come to the detailed and vehement arguments of the Ld.Counsel appearing for the Appellant on account of limitation. We find that the very first initial issue raised by the Department was by way of Spot Memo issued on 31.01.2012 directing them to reverse the Cenvat credit taken by them for availing Cenvat credit on SAD. Since there was no response from the Appellant, one more letter was sent by the Department on 15.03.2012 for which the Appellant has replied as per the reproduced paragraph given above. This shows that the Appellant was adamant on the ground that they were not required to reverse the Cenvat credit taken. After the show cause notice was issued, the Appellant has not filed their reply to the Show Cause Notice which is the first available opportunity given to the Appellant for proper defence.

16. We reproduce the relevant paragraphs of the Order-in-Original.

> *"3.1 The said Noticee did not submit any reply to the notice within the stipulated time of 30 days from the SCN was communicated to them <u>nor did they submit any reply till personal hearings were fixed for four occasions.</u> They are yet to communicate any written submission in reply to the SCN till date.*
>
> *4.1 The case was posted for personal hearing on <u>23.12.2014, 23.02.2015, 15.12.2015 and on 21.12.2015. Even after four occasions of fixing the personal hearing, the said Noticee not only failed to appear but also did not let this office know particularly when they would be able to appear, rather they preferred to send exactly the same letter</u>*

requesting for adjournment of the case citing the reason as "this is to inform you that our Shri B.N.Chattopadhyay, Consultant is looking after the case and due to some unavoidable circumstance he is out of station and as such he will not be in a position to appear before your make submission". Whenever the case is posted for personal hearing, the said Noticee submitted exactly the same letter in entirety. This showed reluctance on the part of the said Noticee to cooperate in disposing the case. As such there is no alternative but to adjudicate the case ex-parte on the basis of available records.

5.7 After the wrong-doing committed by the said Noticee was detected, in response to the query of the jurisdictional Range Officer, Hirapur Range, Asansol-I Division, regarding utilization of Credit on SAD from October, 2007, the Noticee declared in their submission dated 17/12/2012 and dated 11/02/2013 that they have reversed and paid the credit of SAD, taken and utilized during the period from April, 2011 to January, 2012, along with interest and Service Tax amount of Rs.21,68,442/- have been deposited by them as reversal of the said credit along with interest of Rs.1,21,137/-. They have reversed and paid the amount on two dates, viz. Rs.3,67,840/- of SAD credit on 05/12/2011 vide challan nos. 11604 and 11591, alongwith some other reversal of wrongly availed credits. (Annexure-C to the SCN) and Rs.18,00,602/- of SAD credit and interest of Rs.1,21,137/- on 21/02/2012 vide Challan nos. 00073 and 00074 both dated 21.02.2012 (Annexure-D to the SCN). But the said Noticee did not reverse and pay the irregular credit of SAD taken and utilized by them during the earlier period.

5.8 From the available records it is clear that the said Noticee never maintained any statutory records or revealed the fact of availment of such irregular credit on Special Additional Duty leviable under sub-section (5) of Section 3 of the Customs Tariff Act, 1975, to the department. The fact of availing such credit was never mentioned in either the statutory ST-3 Returns or in any other documents submitted by them to the Department. This is a clear case of suppression of facts and I hold that such suppression would have remained unearthed had *the same not been detected by the Audit Officers during verification of their records. The said Noticee also tried to mislead the department a number of times presenting wrong facts and submissions. Once the said Noticee on 04/04/2012 denied reversing the said wrongly availed credit, but again in their letter dated 17/12/2012 and 11/02/2013 they stated that they had reversed and paid a part of the said credit with interest in December, 2011 and February, 2012, much before their aforesaid submission dated 04/04/2012. Thus the said Noticee, having agreed in principle about the non-eligibility of such SAD credit, intentionally submitted the contradictory facts to keep the department I dilemma and to suppress their misdeed with intent to avail wrong credit on SAD. Accordingly, for recovery of the aforementioned amount of irregular credit of SAD, extended period of time limit in terms of proviso to Section 73(1) is rightly invokable in the instant case."*

17. From the above, we find that the Appellant never bothered to file a proper reply making their submissions in their defence. After this when the case was posted for personal hearing on three different occasions they did not attend the personal hearings. These are the opportunities which are required to be taken by the assessee to defend their case properly. If the assessee is negligent and never bothered to file their reply the Adjudicating authority cannot be faulted for passing the order *ex parte.* He has to pass the order based on the available records which is based on the audit report and the correspondence with the Appellant. The Appellant has flatly refused to reverse the Cenvat credit taken. They have also utilized the Cenvat credit taken. Therefore, we do not find any merit in the submission made by the Ld.Counsel that the appellant was prejudiced as the issue was decided *ex parte.* This is not a case where *ex parte* order was passed without following the principles of natural justice. The very fact that the Adjudicating authority has given multiple personal hearings chances in the course of more than one year shows that he has been very patient and has followed the principles of natural justice clearly.

18. Coming to the case laws cited by the Appellant in the case of **AMC Coated Fabrics Pvt.Ltd.**, cited supra,. It is clearly stated that the "MODVAT Credit was initially taken, but reversed vide RG-23A Part-II entry No.868 dated 31.03.1995, while the show cause notice is dated 29.01.1999". This shows that the Show Cause Notice was issued much later after the reversal done. Therefore, this case does not come to the rescue of the Appellant. In the case of **BCH Electric Ltd.**, cited supra, the Para 8 of the Order specifically states "it is also not denied that the appellant were regularly submitting ER-1 returns and the jurisdictional Central Excise Officers were well within their powers to call for records and examine the same". In the present case, we have seen that the Adjudicating authority has taken a stand that the ST-3 Returns were not filed regularly. On the other hand, the Appellant was given opportunity to file their reply or appear for the personal hearing. They never brought out the fact that they have filed the Returns properly.

19. In the case of **Commissioner of Central Excise, Noida v. Accurate Chemical Industries**, cited supra, again it is a case where ER-1 Returns were being filed properly. This was taken into account without the decision was passed by the Hon'ble High Court.

20. The case of **Tally Solutions Pvt.Ltd.**, cited supra, deals with the fact that they were filing timely Returns and these were showing huge accumulated credits for the units, which were not being questioned by the Department on a timely basis.

21. In the case of **Hawkins Cookers Ltd.**, since the issue was that of interpretation, the extended period cannot be invoked. In the present case there is nothing to interpret when the proviso to Rule 3(1)(viia) is properly read. There was no confusion prior to the amendment or even subsequent to the amendment.

22. Similarly, in the case of **Uniflex Cables Ltd.**, the Hon'ble Supreme Court has held that in case of interpretation the extended period cannot be invoked, but we have already held that there is no issue about 'interpretation' in this case.

23. In view of the above observations none of the judgements cited by the Ld.Counsel for the Appellant, come to the rescue of the Appellant.

24. On the other hand, we find that the Appellant has misled the Department on various occasions and also has partly reversed the amount of Rs..21,68,448/- along with interest, but failed to do so for the other portion. It has been noted that the appellant has also utilized the Cenvat credit taken by them on account of SAD. Therefore, we find that the Department was fully justified in invoking the extended period provisions and confirming the demand. Therefore the time bar pleadings of the Appellant is rejected.

25. We find that the Appellant has already paid Rs.21,68,442/- prior to the issue of Show Cause Notice along with interest. This amount is required to be appropriated against the confirmed demand. No penalty is imposable on the amount of Rs.21,68,442/-. Accordingly, the penalty of Rs.74,16,390/- imposed stands reduced by Rs.21,68,442/-, and the balance penalty of Rs.52,47,948/- is payable by the Appellant..

26. The Appeal stands disposed off as for the above terms.

(Dictated and pronounced in the open Court.)

Sd/	Sd/
(RAJEEV TANDON)	**(R. MURALIDHAR)**
MEMBER (TECHNICAL)	**MEMBER (JUDICIAL)**

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