IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI

APPEAL NO: E/724/2010

[Arising out of Order-in-Original No: 05/BR-05/Th-I/2010 dated 28th January 2010 passed by the Commissioner of Central Excise, Thane – I.]

For approval and signature:

Hon'ble Shri C J Mathew, Member (Technical)
Hon'ble Shri Ajay Sharma, Member (Judicial)

1.	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	:	Yes
2.	Whether it should be released under Rule 27 of CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	:	Yes
3.	Whether Their Lordships wish to see the fair copy of the Order?	:	Seen
4.	Whether Order is to be circulated to the Departmental authorities?	:	Yes

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Mirc Electronics Ltd … ***Appellant***

versus

Commissioner of Central Excise
Thane – I ***…Respondent***

Appearance:

Ms Padmavati Patil, Advocate for appellant

Shri S Hasija, Superintendent (AR) for respondent

CORAM:

Hon'ble Shri C J Mathew, Member (Technical)
Hon'ble Shri Ajay Sharma, Member (Judicial)

Date of hearing: 29/08/2018
Date of decision: 20/12/2018

ORDER NO: A/88162 / 2018

Per: C J Mathew

Appellant, M/s MIRC Electronics Limited, a manufacturer of various branded electronic goods, also trades in similar articles; however, for the purposes of the present dispute, the admitted trading in 'microwave ovens' and 'DVD players' would suffice to be taken on record. The appellant had, between 2004-05 and 2007-08, availed CENVAT credit of tax paid on services used in common for both manufacturing and trading activities without separate accountal of utilization stipulated in rule 6 of CENVAT Credit Rules, 2004 for exclusion from the prescribed payment on the value of traded goods. Commissioner of Central Excise, Thane-I has, in order in-original no. 05/BR-05/Th-I/2010 dated 28th January 2010, confirmed recovery of ₹ 1,02,91,108 under section 11A of Central Excise Act, 1944, along with interest of ₹ 19,97,462 under section 11AB of Central Excise Act, 1944, and imposed penalty of like amount under section 11AC of Central Excise Act, 1944 with the privilege of lesser penalty for

discharge of all dues within 30 days of the order.

2. There is no dispute on the ineligibility for availment of credit of tax paid on input services utilized for trading. It is submitted on behalf of the appellant that their country-wide 'SAP' system deployed for recording of availment, and apportionment thereof, may have been in error owing to human inputs but that all of these were rectified and that the demand arising from the irregular credit in the present dispute was a superfluous exercise as appropriate reversals had been effected in the CENVAT credit account. It is the contention of Revenue that it was only upon unearthing by Audit that restitution was made and, that too as late as between May and August 2008. Undisputedly, the reversal, along with interest, was discharged before the show cause notice was issued on 28th October 2009.

3. The limited aspect for resolution is the appropriateness of invoking section 11AC of Central Excise Act, 1944 in the circumstances of discharge of the liability, along with interest, before the issue of show cause notice.

4. According to Learned Counsel for appellant, it was only by an amendment, effective from 1st April 2011, that 'trading' was included in the definition of 'exempted service' and that, till then, it was not even considered to be a service let alone acknowledged as exempt. Contending that it was not possible, at the time of procurement, to

isolate the portion of service utilized toward trading, and the system relied upon could, conceivably, have blemishes, the ingredients precedent for invoking the penal provisions in Central Excise Act, 1944 are claimed to be absent for which Learned Counsel places reliance upon the decision of the Tribunal in *Commissioner of Service Tax, New Delhi v. AVL India Pvt Ltd [2017 (4) GSTL 59 (Tri-Del)]*, in *Gujarat Boron Derivatives P Ltd v. Commissioner of Central Excise, Customs & Service Tax (A), Vadodara-II [2017 (348) ELT 105 (Tri-Ahmd)]* and in *Commissioner of Central Excise, Ghaziabad v. Avon International Pvt Ltd [2017 (5) GSTL 376 (Tri-All)]* as precedents in which penalty was not imposed in these very same circumstances.

5. Learned Authorised Representative relies upon the decision of the Hon'ble High Court of Bombay in *Mercedes Benz India Pvt Ltd v. Commissioner of Central Excise, Pune-I [2016 (41) STR 577 (Bom)]* to emphasise that it was apparent, even before the amendment to the definition of 'exempted service', that 'input services' used for trading was never intended to be immune from cascading effect and that of the Hon'ble Supreme Court in *Union of India v. Rajasthan Spinning & Weaving Mills [2009 (238) ELT 3 (SC)]* to establish that imposition of penalty under section 11AC of Central Excise Act, 1944 goes hand-in-hand with confirmation of recovery under section 11A of Central Excise Act, 1944. Citing the decision of the Hon'ble High Court of Madras in *Ruchika Global Interlinks v. CESTAT, Chennai [2017 (5)*

GSTL 225 (Mad)], Learned Authorised Representative submits that the insertion of *Explanation* in rule 2(e) of CENVAT Credit Rules, 2004 in 2011 was nothing but clarificatory.

6. Admittedly, the ineligible credit had been reversed, along with payment of interest, by the appellant well before the issue of show cause notice. In *re Ruchika Global Interlinks*, the Hon'ble High Court of Madras was dealing with the claim of the appellant against disproportionate attribution of taxes on input services used for activities on which no tax was, admittedly, payable and, in that context, it was held that, even in the absence of *Explanation*, credit of tax paid on input services used in relation to activities that were not taxable should not have been claimed. Such a situation does not obtain in the present dispute where the wrong availment is claimed to have had its genesis in human interface with the SAP system. As the incorrect availment is not disputed and was reversed, the ratio of the decision in *re Rajasthan Spinning & Weaving Mills*, which relates to deliberate evasion of duty with attendant discontinuance of documentation whereas the present dispute pertains to a temporary recording of credit which is, primarily, a book entry, is not a precedent. Furthermore, it is worthwhile noting that the said decision was rendered in the context of the observation that

> *'2..... We completely fail to see how payment of the differential duty, whether before or after the show cause*

> *notices issued, can alter the liability for penalty, the conditions of which are clearly spelt out in Section 11 AC of the Act.'*

and the evasion of duty pertaining to a show cause notice issued in 2001. Even the Central Excise Act, 1944 has since incorporated a specific provision for dropping further proceedings, in certain circumstances, upon discharge of duty liability along with interest; the observations *supra* of Hon'ble Supreme Court would appear to have been related to periods prior to the incorporation of the said provision. In *re Mercedes Benz India Pvt Ltd*, the Hon'ble High Court of Bombay made the observation cited by Learned Authorised Representative in the context of a conclusion by the Tribunal that there appears to be an intent to encourage trading of goods rather than manufacturing which the Hon'ble High Court found to be repugnant. Undoubtedly, all three decisions point to the non-eligibility of 'input services' used for exempted services, including trading, to be entitled to CENVAT credit. That is an admitted position on the part of the appellant here.

7. In view of the consistent stand of the Tribunal on the test of evidence for pre-supposing intent to evade duty, the circumstances pertaining to impugned availment of credit of tax paid on input services used for exempted activities, such as trading, in the various decisions cited by Learned Counsel and the specific circumstances in

which the High Courts and Hon'ble Supreme Court has enforced the penal provisions, we set aside the penalty imposed in the impugned order. The appeal is allowed to that limited extent.

(Pronounced in Court on 20/12/2018)

(Ajay Sharma)
Member (Judicial)

(C J Mathew)
Member (Technical)

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