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

APPEAL NO.ST/86814/2013 MUM

(Arising out of Order-in-Original No.16/ANS-16/Spice/Th-I/2012 dated 29.01.2013 passed by the Commissioner of Central Excise Thane – I,

M/s. Idea Cellular Ltd. : **Appellant**
5th Floor, Windsor, Off CST Road, Kalina,
Santacruz (East), Mumbai – 400 098

VS

The Commissioner of Central Excise, Thane - I : **Respondent**
4th Floor, Navprabhat Chambers, Ranade Road,
Dadar (W), Mumbai 400 028

Appearance

Shri S.S. Gupta, C.A. for Appellant

Shri R. Kapoor Commissioner (A.R) for Respondent

CORAM:

Hon'ble Dr. D.M. Misra, Member (Judicial)
Hon'ble Shri P Anjani Kumar, Member (Technical)

Date of hearing : 18.12.2018
Date of decision : 14.06.2019

ORDER NO. A/86112/2019

Per : **P Anjani Kumar, Member (Technical)**

Briefly stated the facts of the case are that the appellants, Idea Cellular Ltd, are engaged in the providing telecommunication services. The amount received for services of inter connectivity charges (IUC) did not attract tax. The definition of telecommunication services were amended from 01/06/2007, thereby the services of IUC also become taxable. The appellants had an unutilized Cenvat credit of Rs.10, 84, 53,929 as on 01/06/2007 and utilised the same afterwards. Revenue has issued an SCN, V(STC)15CE/Adj/62/09/104 dt.14.5.2010, alleging that these services were exempt services as defined under CENVAT Credit Rules and hence, unutilized Cenvat credit would lapse because of capping under the then existing Rule 6(3)(c) of the CENVAT Credit Rules, 2004. The Commissioner, vide OIO, 16/ANS-16/Spice/Th-I/2012 dated 29-1-2013, held that the balance 80% of the credit which is not utilisable prior to 01.06.2007 shall lapse. Commissioner relies upon judgment of Gujarat Narmada Fertilisers (2009) 240 ELT (661) and held that SC judgment will override the circular, F. No. 137/203/2007 CX-4 dated 01.10.2007, in view of Ratan Melting and Wire Industries reported in 2008 (231) ELT 22. Hence, this appeal.

2. Shri S.S. Gupta, Chartered Accountant, appearing for the Appellants, submits that Rule 6(1) of CCR, 2004 is substantive Rule and provides that the manufacturer or provider of output service is not entitled for the credit of such quantity of input or input services which is used in the manufacture of exempted goods or exempted service except in the circumstances mentioned in Sub-Rule (2) of said Rules. The said Sub-Rule (2) of Rule 6 provides for maintenance of separate records in respect of input, input services substantiating use of input and input services for taxable and exempted services. The Sub-Rule (3) of Rule 6 provides that in case separate accounts are not maintained the manufacturer or provider of services shall follow either of the conditions stipulated in Sub-Rule (3) of Rule 6. The sub-Rule (3) begins with *Non obstante* clause i.e the words *"**Notwithstanding** anything contained in Sub-Rules (1) and (2)'';* It has been consistently held that when a Rule begins with the words 'notwithstanding anything contained ...' referring to certain Rules, it overrides the provisions of the Rules which are mentioned therein. The appellants rely upon the following judgments:

(i). Union of India Vs G.M. Kokli & Others 1984 SCC 196

(ii). Justice G P Singh in 'Principles of Statutory Interpretation' (12th Edition, 2010 at page no. 364) explains that *A clause beginning with 'notwithstanding anything contained in this Act or in some particular provision in the Act or in some particular Act or in any law for the time being in force', is sometimes appended to a section in the beginning with a view to give the enacting part of the section in case of conflict* *an overriding effect over the provision or Act mentioned in the non obstante clause. It is equivalent to saying that in spite of the provision or Act mentioned in the non-obstante clause, the enactment following it will have its full operation or that the provisions embraced in the enactment. Thus a non-obstante clause will not be an impediment for the operation of the enactment. Thus a non-obstante clause may be used as a legislative device to modify the ambit of the provision or law mentioned in the non obstante clause or to override it in specified circumstances.*

2.1. Learned Chartered Accountant submits that in this case, Sub-Rule (3) of Rule 6 of CCR, 2004 begins with the words 'notwithstanding' and refers to Sub-Rules (1) and (2) of Rule 6 of CCR, 2004. Therefore, it is submitted that once the conditions stipulated in Sub-Rule (3) are complied with, the provisions of Sub-Rule (1) and (2) will not be applicable. The Sub-Rule (3) clearly provides that if the provider of output service does not opt to maintain separate accounts, then, he should comply with the provision of Rule 6(3)(c) of the said Rules. There is no dispute in this case that the appellant has complied with the provisions of Rule 6(3)(c). Therefore, once the conditions stipulated in Rule 6(3) has been complied with, provisions of Rules 6(1) & 6(2) will not apply. Similar view is taken by Tribunal in respect of Rule 6(5) of CCR, 2004 which also has a *non obstante* clause, in the case of

(i). CCE, Goa Vs V.M. Salgaonkar & Bros. Pvt Ltd. 2008 (10) STR 609 (Tri. - Mumbai)
(ii). Lemon Tree Hotels Pvt Ltd. Vs CST, Chennai 2018 (13) GSTL 305 (Tri. - Chennai)
(iii). Idea Cellular Ltd Vs CCE, Rohtak 2009 (16) STR 712 (Tri. - Del.)

This was clarified vide circular F. No. 137/203/2007 CX-4 dated 01.10.2007. The Bombay High Court in the case of CCE, Thane-I Vs Nicholas Piramal (India) Ltd. 2009 (244) ELT 321 (Bom.) while interpreting the provisions of Rule 6 has held that plain meaning of the language used in the Rule shall be adopted if the same is unambiguous.

2.2. Learned Chartered Accountant submits that the combined reading of Rule 3 and Rule 6 of Cenvat Credit Rule, 2004 ensures fulfillment of provisions of Section 94(eee) of Chapter V of Finance Act 1994. Rule 3 of Cenvat Credit Rules, 2004, provides for the eligibility and states that the manufacturer or provider of output service shall be allowed to take credit on any input or input services received by him. In this case, there is no dispute that the appellants have provided taxable output service. The Rule 6 provides the mechanism to offset the credit which has been used for provision of exempted service.

2.3. Learned Chartered Accountant submits that there is no provision of lapsing of credit in case of output service provider; the provision regarding availment of credit on input services and its utilization in payment of service tax on output service is contained in Cenvat Credit Rules, 2004; show cause notice itself admits that Rule 6(3)(c), at the relevant time i.e. up to June 07, provided for utilization of credit to the extent of 20% of service tax payable on output services; the appellant has also utilized the credit to this extent only which is not in dispute; the balance credit was allowed to be carried forward and there was no provision by which the credit which is attributable to use of input service in providing exempted service would lapse; in absence of any such provision, provider of output service will have right to carry forward the balance of credit on input services; therefore, there is no violation of Rule 6(3)(c) and hence, its utilization of credit made by the appellant is legal and proper.

2.4. The matter, whether this balance of unutilised credit, would lapse or the same should be allowed to be utilized for payment of service tax after 1-4-2008, was under the consideration of CBEC; CBEC clarified, vide Circular No. 137/72/2008-CX.4, dated 21-11-2008, that there are no lapsing provision and that the existing Rule 6(3) of the Cenvat Credit Rules does not explicitly bar the utilization of the accumulated credit; the department should not deny the utilization of such accumulated Cenvat credit by the taxpayer after 1-4-2008; further, it must be kept in mind that taking of credit and its utilization is a substantive right of a taxpayer under value added taxation scheme. It was categorically clarified that in the absence of a clear legal prohibition, this right cannot be denied. In fact in the case of ***Ratan Melting & Wire Industries 2008 (231) ELT 22 (S.C.)***, Supreme Court held that Circulars of Government Departments are binding on respective authorities and not on courts; only circular which are contrary to statutory provisions has no existence in law. Further in the case of ***Dhiren Chemical Industries: 2002 (139) ELT 3 (SC)***, Supreme Court has held that CBEC Circulars are binding on Revenue even if placing different interpretation by Court.

2.5. Learned Chartered Accountant submits also that the issue is settled by Mumbai bench of the tribunal in the case of ***DHL Logistics Pvt Ltd 2015 (38) STR 620(Tri- Mumbai)***; it was held that Prior to 1-4-2008, restriction was only utilization of credit and not taking of credit per se; credit taken could be carried forward and accumulated; unutilised credit on account of restriction on utilisation under Rule 6(3)(c) of the Cenvat credit Rules, 2004 will not lapse and further after removal of cap of 20% w.e.f. 1-4-2008, appellant eligible to utilize the credit. In the following cases also, Tribunal held that accumulated unutilised credit on account of restriction on utilisation under Rule 6(3)(c) of the Cenvat credit Rules, 2004 will not lapse.

- ***Mumbai International Airport Pvt Ltd 2014 (33) STR 308 (Tri - Mumbai)***
- ***Federal Express Corporation 2014 (36) STR 375 (Tri – Mumbai)***

Thus, once the appellant started to provide all the taxable services from 01.06.2007, restriction under Rule 6(3)(c) relating to utilisation will not apply. Tribunal in the case of ***Grasim Industries: 2007 (208) E.L.T. 336 (Tri. - LB)*** has held that the credit is not required to be reversed unless specifically provided by law.

2.6. Learned Chartered Accountant further submits that Supreme Court and High Courts held that unutilised credit will not lapse as accrued/vested rights cannot lapse/be taken away.

(i). Tata Engineering & Locomotive Co Ltd 2003 (159) ELT129 (Bom)

(ii). Omkar Textile Mills Pvt Ltd 2010 (262) ELT 115 (Guj).

(iii). Eicher Motors v. Union of India reported in 1999 (106) ELT 3 (SC)

(iv). Samtel India Ltd 2003 (155) ELT. 14 (SC)

The above cited circular is in line with the ratio laid down as above.

2.7. Learned Chartered Accountant further submits that Judgment in the case of Gujarat Narmada Fertilizers Co Ltd. is not applicable to the present case. GNFC is the manufacture of the goods and not service provider; the dispute in the above case was availment of credit of inputs (fuel) used in the manufacture of exempted goods; Rule 6 of CENVAT Credit Rules, 2004 was in dispute; at the relevant time, the manufacturer has the option either not to avail the credit or to pay specified % of value of exempted goods. As far as output service provider is concerned, during the period up to 01.04.2008 there was no specific provision for output service provider in Rule 6 except under Rule 6(3)(c), wherein there was restriction only for utilisation of the credit and not for either availment of credit or lapsing of balance credit.

2.8. Learned Chartered Accountant also submits that the period of dispute is June 2007, whereas SCN has been issued on 14.05.2010. The Commissioner's observation (at Para 39) that the ST-3 returns filled by the appellant do not indicate such unrestricted use of accumulated credit; the fact of the utilisation of the CENVAT credit came to knowledge only after audit by the department and therefore invoked the extended period of limitation. The said observation is factually incorrect; appellant clearly indicated the payment of service tax in cash and credit in the ST-3 returns; fact of utilization of the Credit from the accumulated credit was indicated in the opening balance of Cenvat credit & freshly availed credit was indicated in the ST-3 returns for the period April 2007 to September 2007 and October 2007 to March 2008. Thus, the credit utilization was also known to the department. Moreover, Tribunal, in the case of ***Chhattisgarh State Industrial Development Corporation Ltd: 2016 (44) STR 642 (Tri - Del)***, held that mere non-disclosure of facts to department is not misstatement. Burden is on Revenue to prove allegation of wilful misstatement; onus is not on assessee to prove its bona fides. Further Supreme Court held, in the case of ***Continental Foundation Joint Venture: 2007 (216) ELT 177 (SC)***, that mere omission to give correct information is not suppression of facts unless it was deliberate to stop the payment of duty. The appellant was under *bona fide* belief that when there is no lapsing provisions in the Rules, appellant can carry forward and utilised the credit in full in view of ratio of cases cited above and the CBEC circular dated 21.11.2008. As there was no *mala fide* intention, extended period of limitation not invokable in view of the ***Cosmic Dye Chemical: 1995 (75) ELT 721 (SC)*** and ***Chemphar Drug and Liniments: 1989(40) ELT 276 (SC)***.

2.9. Learned Chartered Accountant also submits, without prejudice to the issues raised above, issue relates to the interpretation of provisions and therefore extended period of limitation should not be invoked. Appellant relies upon the following judgments.

(i). Continental Foundation Joint Venture 2007 (216) ELT 177 (SC)

(ii). Lanxess Abs Ltd. 2011 (22) STR. 587 (Tri - Ahmd)

(iii). ITW India Ltd 2009 (14) STR 826 (T)

3. Shri Roopam Kapoor, Principal Commissioner, Learned Authorised Representative for the department, submitted that a conjoint reading of Section 94(eee) of the Finance Act, 1994 and Rule 2(l) of the Cenvat Credit Rules, 2004, clearly establishes that the credit of input service can only be used by a provider of taxable service for providing an output service defined in Rule 2(p) of the CCR,2004. Input credit can only be availed for providing a 'taxable service' which is defined in Section 65(105) which contains the details of all the services which are covered within the scope of Section 65(105) of the Finance Act 1994. Coming to the argument of the appellants that any proviso cannot go beyond the scope of the Rules prescribed in that context and that in any case the Rule cannot travel beyond the powers which have been given under the statute, he submits that Finance Act 1994 as well as Rules made thereunder, including the Cenvat Credit Rules 2004 only permit credit of input service which is used for providing taxable service; Rule 3(1) of the Cenvat Credit Rules which permits the manufacturer or provider of final product or a provider of taxable service to take credit of tax paid on any input service received by the manufacturer of final product or by the <u>provider of output service;</u> output service only means the taxable service at the relevant time;

any service provider who was providing both taxable service as well as non-taxable service was not permitted to take credit of taxes paid on input /input service which was not covered within the scope of output (taxable) service. Accordingly, Rule 6(1) of the Cenvat Credit Rules prescribes the condition under which provider of taxable and exempt service can take credit. It is important to note that Rule 6(1) of the Cenvat Credit Rules clearly states:-

Rule 6(1) "The Cenvat Credit shall not be allowed on such quantity of inputs which is used in the manufacture of exempted goods or exempted services, except in the circumstances mentioned in Sub-Rule (2):

> *Provided the CENVAT credit on inputs shall not be denied to job worker referred to in Rule 12B of the Central Excise Rules, 2002 on the ground that the said inputs are used in the manufacture of goods cleared without payment of duty under the provisions of that Rule."*

3.1. Learned AR further submits that Rule 6(1) clearly prescribes that such credit cannot be allowed as has been used for providing exempt services. Rule 6(2) of the Cenvat Credit Rules accordingly prescribes that separate account should be maintained for the quantity of input and input service meant for use in providing output service and exempt service. **It clearly prescribes that credit only of the input used for providing output service on which service tax is payable can be availed.**

However, it was submitted, that there may be conditions where it was practically not possible for a manufacturer or a provider of taxable service to maintain separate accounts. Accordingly, a procedural facility has been granted under Rule 6(3) of the Cenvat Credit Rules where it was not possible for manufacturers / service providers to maintain separate accounts and reverse actual amount used for providing exempt services / exempt goods. A detailed reading of Rule 6(3) reveals that it provides that in respect of certain goods, Cenvat credit was required to be reversed. Rule 6(3)(b) provided that the manufacturer shall "pay an amount equal to 10% of the total price." It was submitted that as the mode rate of exempt duty was 14% in the relevant years, a payment of 10% of the total price of the goods essentially meant that a manufacturer could avail only 25% of total credit in case where he was manufacturing both exempt as well as dutiable goods, and opted not to maintain separate accounts.

3.2. Learned Commissioner AR further submits that in view of the above, none of the provisions permitted availment of full credit to a manufacturer or a service provider who was manufacturing dutiable as well as exempt goods or service provider who was providing both exempt as well as taxable service. Therefore, Viewed in this context the provision of Rule 6(3)(c) that *"(c) the provider of output service shall utilize credit only to the extent of an amount not exceeding twenty per cent of the amount of service tax payable on taxable output service."* has to be considered in the context of legal provisions as provided in section 94(eee) as well as Cenvat Credit Rule 3(1) and the various definitions highlighted above. Therefore, it is clear that **a manufacturer or a service provider cannot avail of cenvat credit on inputs or input service which have been used for providing a non taxable service or an exempt service.** If there was no availability of the same, there was no possibility of availing the same and rolling it over a long period. It was submitted that the principle of equivalence prescribes that the same tax payers cannot be treated differently. As such the manufacturer or service provider who opts to maintain accounts separately cannot be put on a disadvantageous position vis-à-vis the manufacturer or a service provider who does not opt to do the same. A manufacturer or a service provider opting to maintain separate accounts cannot either avail or utilize Cenvat credit on input or input service used for providing exempt or non-taxable service. Even the subsequent Rules do not permit full availment of credit to a service provider providing taxable as well as exempt services.

3.3. Learned Commissioner AR also submits that it is well established law that subsequent amendments can be used to arrive at the intent of the legislature. Hon'ble Supreme Court, in the case of British Airways PLC Vs UOI [2002(139) ELT 6 (SC)], had held (at Para 8) that.

> ***"8.*** *While interpreting a statute the court should try to sustain its validity and give such meaning to the provisions which advance the object sought to be achieved by the enactment. The court cannot approach the enactment with a view to pick holes or to search for defects of drafting which make its*

> *working impossible. It is a cardinal principle of construction of a statute that effort should be made in construing the different provisions so that each provision will have its play and in the event of any conflict a harmonious construction should be given. The well-known principle of harmonious construction is that effect shall be given to all the provisions and for that any provision of the statute should be construed with reference to the other provisions so as to make it workable. A particular provision cannot be picked up and interpreted to defeat another provision made in that behalf under the statute"*

Similarly, Hon'ble Supreme Court, in the case of ***UOI Vs. Intercontinental Consultants and Technocrats Pvt Ltd. [2018(10) GSTL 401(SC)***], held (para 26, 27, 28) that

> ***"26.*** *It is trite that Rules cannot go beyond the statute. In Babaji Kondaji Garad, this Rule was enunciated in the following manner:*
>
> *"Now if there is any conflict between a statute and the subordinate legislation, it does not require elaborate reasoning to firmly state that the statute prevails over subordinate legislation and the byelaw, if not in conformity with the statute in order to give effect to the statutory provision the Rule or bye-law has to be ignored. The statutory provision has precedence and must be complied with."*
>
> ***27.*** *The aforesaid principle is reiterated in Chenniappa Mudaliar holding that a Rule which comes in conflict with the main enactment has to give way to the provisions of the Act.*
>
> ***28.*** *It is also well established principle that Rules are framed for achieving the purpose behind the provisions of the Act, as held in Taj Mahal Hotel :*
>
> *"the Rules were meant only for the purpose of carrying out the provisions of the Act and they could not take away what was conferred by the Act or whittle down its effect."*

In view of the same, it is submitted that the provisions of law had to be read in light of what is prescribed in the statute.

3.4. Learned Commissioner AR also submits that various judgments of the Hon'ble Tribunal have held that a manufacturer or service provider is not eligible for the entire credit availed on common input service. In the case of, Ruchika Global Interlinks Vs. CST Chennai [2017-TIOL-1235-HC-MAD-ST], **Hon'ble High Court did not allow the availment of credit even though in Rule 6(3)(c) the word 'utilised' has been used.** Circumstances of the case are similar as in the instant case.

3.5. Learned Commissioner AR further submits, Countering the reliance placed by the Advocate of the appellants on (i) DHL Logistics

Pvt. Ltd. , (ii) Mumbai International Airport Pvt. Ltd., (iii) Federal Express Corporation, that in some of these cases the facts were totally different than the instant case; all these cases had been set aside by relying on a purported Circular No. 137/72/2008-CX4 dated 21.11.2008; the above said purported Circular submitted by the Advocate has been taken from a private website and is not admissible unless it is established to be correct. Accordingly, a list of all Circulars issued by CBIC was taken from the website of CBIC and was submitted to the Hon'ble Bench. It was submitted that the Circulars are issued in a series and a serial number is given to each the circular. A list of circulars, serial number wise, was submitted which does not reflect the said purported circular as having been issued by CBIC. In any case the said purported circular could not have been a circular as it seems to be answering a query raised by a field formation, and it is not known as to who had approved the issuance of the said purported circular. It appears to be just a letter and not a circular duly approved by the Government. It was further submitted that to establish the veracity of the said purported circular, a reference was sent to the Commissioner Service Tax, CBIC and Under Secretary, **CBIC vide their letter dated 28..12.2018 informed that as the above said file is not traceable the authenticity of the subject letter cannot be confirmed by them. It is pertinent to note that the letter from CBIC refers to the said communication as a letter and not as a circular.** He therefore submits that the case laws relied upon by the appellants are *per in curium* as they have not considered the relevant provisions of law but had solely relied upon the purported circular issued by CBIC. As submitted above the authenticity of the letter, which is referred to as circular in the judgment, could not be established. In view of the same it is submitted that reliance cannot be placed on the case cited by the appellants and they will not have any precedence value. Accordingly, the appellants are eligible to avail cannot have 20% of the available credit but not in full.

3.6. Learned Principal Commissioner (AR) submits the appellants had, at no stage, declared to the Department that they were availing full CENVAT and not 20% of the CENVAT as prescribed in the legal provisions. Further, a simple reading of the ST-3 returns does not reveal to the Department whether the CENVAT credit is availed. He placed reliance on the following cases.

(i) M/s. FL Smidth Pvt Ltd 2014-TIOL-2186 (HC-MAD-CX)

(ii) CCE Ghaziabad Vs Rathi Steel & Power Ltd 2015 (321) ELT 200 (All.)

(iii) Merck Specialities Pvt Ltd 2018-TIOL-1757-(CESTAT-BAN)

4. Shri S.S. Gupta, Chartered Accountant, appearing for the Appellants countered the argument of the Commissioner AR as follows. He submits that Ruchika Global Interlinks (supra) cannot be followed as Hon'ble Bombay High Court in the case of ***Industrial Credit and Investment Corporation:2000 (001) CLC-0317-BOM*** held that minimum requirements in following the ratio of a case are that (i) the matter was directly at issue; the issue needs to have been decided and the matter has been decided by giving reasons. Supreme Court in the case of ***Delhi Administration vs. Manohar Lal [2002] 7 SCC 222*** held that the High Court or other court before applying the decision of Supreme Court must find out the ratio of the decision and then consider its applicability. In the case of ***Ruchika Global Interlinks***, the question before the Madras High Court was to decide whether trading in an exempted service prior to 1-4-2011 and if trading is not service what quantum of reversal of credit on input services is required to be made. The issue utilization of credit balance as on 1-4-2008 was neither a question before the High Court nor they gave any finding on it.

4.1. Chartered Accountant, appearing for the Appellants further submits that there is no prohibition to utilize the credit available with the provider of service prior to 1-4-2008 or from 1-6-2007. It must be mentioned due to amendment in the definition of telecommunication service, all services provided by appellant became taxable from 1-6-07. Therefore, the appellant can utilize the entire credit. The restriction placed under Rule 6(3)(c) for utilizing only 20% of the credit for payment of output service was removed from 1-4-08. Even after 1-4-08, no amendment was made in rule 3(4) restricting utilization of credit of opening balance as on 31-03-2008.

4.2. Chartered Accountant, appearing for the Appellants also submits that the copy of the circular as extracted from the website of www.taxmanagmentindia.com is attached; it is evident from the said circular that it is issued by Shri Gautam Bhattacharya, Commissioner of Service Tax; this circular bears instruction No .F. No.137/172/2008-CX.4 issued from file F. No. 137/172/2008-CX.4 dated 21-11-2008; Madurai Commissionerate has issued Trade Notice No. 14/2009 dated 13-3-2009, Service Tax No. 6/2009 based on the said instruction; the said circular also relies upon the Boards letter/ instruction F. No.137/72/2008-CX.4; if such instruction/circular did not exist, Madurai Commissionerate could not have issued a trade notice. In view of Supreme Court's interpretation of provisions of section 119 of Income Tax Act, 1961, in the case of ***Azadi Bachao Andolan And Anr. 2004-(091)-AIR-1107-(SC)***, any order/instruction/letter/directions issued by CBEC is considered as in compliance with the provisions of section 37B of Central Excise Act, 1944. This circular has been followed in ***Mumbai International Airport Ltd 2004 (33) STR 308 (Tri. Mumbai) and Federal Express Corporation 2014 (36) STR 375 (Tri. Mumbai)***.

4.3. Chartered Accountant, appearing for the Appellants submits that the Tribunal, in the case of DHL Logistics Pvt Ltd. 2015 (38) STR 620 (Tri. Mumbai), has independently decided the issue holding that prior to 1-4-2008 restriction was placed only on utilization of credit and not on taking per se. The credit would be utilized after the cap has been removed. (Para 5.1). Tribunal has first decided the issue and then has taken the help of circular to reinforce the decision. Therefore, it is submitted that the ratio of the circular shall be followed.

4.4. Chartered Accountant, appearing for the Appellants, further submits that the amendment in Rule 6(3) made in 2008 has no retrospective effect; the amendment in Rule provided for reversal of credit of amount equivalent to Cenvat Credit attributable to input or input services used in or in relation to provision of exempted service. The formula for computing the proportionate amount of credit required to be reversed was also prescribed under rule 6(3A). This Rule was amended by notification No.10/2008-CE (NT) and this notification specifically provided that they shall come into force on the 1st day of April, 2008; department intends to retrospectively apply the said Rule from the period 10-9-2004 onwards and seeks to reversal of credit which is based on the said formula; provision of amended Rule cannot be applied for a period prior to 1-4-2008.

4.5. Chartered Accountant, appearing for the Appellants, also submits that the statute cannot presume balance of the credit is towards exempted service; even after 1-4-2008, no presumption was made but specific formula was provided for reversal of credit; therefore, presumption that balance credit relates to exempted service is totally erroneous and should not be sustained; assuming, without admitting, that the credit relates to exempted service and is required to be reversed, it should be done on a proportionate basis as per formula given in rule 6(3A); the department cannot deny entire balance of credit as on 1-6-2007; this submission is made without prejudice to earlier submission that balance credit, as on 1-6-2007, is not required to be reversed as the appellants have complied with the provisions of Rule 6(3). He further submits that if the intention of the legislature was to disallow the credit attributable to exempted service from 10-9-2004, then they would have provided the same as they did after 1-4-2008; it cannot be presumed that the legislature was not aware of the fact that balance credit will be utilized by the service provider. Even w.e.f. 1-4-2008, no provision was bought for lapsing of credit which remained as balance with service provider as on 1-4-2008.

4.6. Whether the appellant could avail of the full Cenvat, and utilize 20% of the same while carrying forward the balance 80%, under erstwhile Rule 6(3)(c) of Cenvat Credit Rules, even though they were providing both taxable as well as exempted services. The submission of the appellants is that they were entitled to avail of the full Cenvat and the restriction was only on utilization of the same to the extent of 20% of the Cenvat Credit availed. It is not in dispute that M/s. Idea Cellular were providing taxable as well as exempt / non-taxable service during the relevant period. The compilation of the case laws relied upon by the Department has already been submitted.

5. Heard both sides and perused the records of the case. Brief issue that requires consideration in the instant case is whether the appellants, while providing both taxable and exempted services, can avail full CENVAT credit on inputs, utilised 20% of the same and forward the balance of 80%. The appellants claim that as per then existing Rules, there were entitled to avail full CENVAT credit and the restriction was only to the extent of utilisation of 20% of the credit availed. It is contention of the Department that balance 80% of the credit would lapse as on 1.6.2007 when certain amendments were carried out to the Rule 6 of CENVAT Credit Rules. The appellant's claim is that sub-rule (3) of CENVAT Credit Rules begin with a non obstante clause and therefore the credit availed by them can be carried forward irrespective of what is contained in sub-rules (1) and (2) of Rule 6. To have a better understanding of the provisions of the Rules, it is required to have a look at the provisions of law as it existed as on 1.6.2007 and as on 1.4.2008.

Rules 6 of CENVAT Credit Rules as on1.6.2007

(1) The CENVAT credit shall not be allowed on such quantity of input or input service which is used in the manufacture of exempted goods or exempted services, except in the circumstances mentioned in sub-rule (2).

[Provided that the CENVAT credit on inputs shall not be denied on job worker referred to in Rule 12AA of the Central Excise Rules, 2002, on the ground that the said inputs are used in the manufacture of goods cleared without payment of duty under the provisions of that Rule.]

(2) Where a manufacturer or provider of output service avails of CENVAT credit in respect of any inputs or input services and manufactures such final products or provides such output service which are chargeable to duty or tax as well as exempted goods or services, then the manufacturer or provider of output service shall maintain separate accounts for receipt, consumption and inventory of input and input service meant for use in the manufacture of dutiable final products or in providing output service and the quantity of input meant for use in the manufacture of exempted goods or services and take CENVAT credit only on that quantity of input or input service which is intended for use in the manufacture of dutiable goods or in providing output service on which service tax is payable.

(3) Notwithstanding anything contained in sub-rules (1) and (2), the manufacture 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) If the exempted goods are ......

(b) ....

> *(c) The provider of output service shall utilise credit only to extent of an amount not exceeding twenty per cent of the amount of service tax payable on taxable output service.*

Explanation I – The amount mentioned in conditions (a) and (b) shall be paid by the manufacturer or provider of output service by debiting the CENVAT credit or otherwise.

Explanation II – If the manufacturer or provider of output service fails to pay the said amount, it shall be recovered along with interest in the same manner, as provided in Rule 14, for recovery of CENVAT Credit wrongly taken.

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Rules 6 of CENVAT Credit Rules as on1.4.2008

(1) The CENVAT credit shall not be allowed on such quantity of input or input service which is used in the manufacture of exempted goods or exempted services, except in the circumstances mentioned in sub-rule (2):

> *[Provided that the CENVAT credit on inputs shall not be denied to job worker referred to in Rule 12AA of the Central Excise Rules, 2002, on the ground that the said inputs are used in the manufacture of goods cleared without payment of duty under the provisions of that Rule.]*

(2) Where a manufacturer or provider of output service avails of CENVAT credit in respect of any inputs or input services which are chargeable to duty or tax as well as exempted goods or services, then, the manufacturer or provider of output service shall maintain separate accounts for receipt, consumption and inventory of input and input service meant for use in the manufacture of dutiable final products or in providing output service and the quantity of input meant for use in the manufacture of exempted goods or services and taken CENVAT credit only on that quantity of input or input service which is intended for use in the manufacture of dutiable goods or in providing output service on which service tax is payable.

(3) Notwithstanding anything contained in sub-rules (1) and (2), the manufacturer of goods or the provider of output service, opting not to maintain separate accounts, shall follow either of the following options, as applicable to him, namely;-

(i) The manufacturer of goods shall pay an amount equal to ten per cent of value of the exempted goods and the provider of output service shall pay an amount equal to eight per cent of value of the exempted services; or

(ii) The manufacturer of goods or the provider of output service shall pay an amount equivalent to the CENVAT credit attributable to inputs and input services used in, or in relation to, the manufacture of exempted goods or for provision of

> *exempted services subject to the conditions and procedure specified in sub-rule (3A).*

Explanation I- If the manufacturer of goods or the provider of output service, avails any of the option under this sub-rule, he shall exercise such option for all exempted goods manufactured by him, or as the case may be, all exempted services provided by him, and such option shall not be withdrawn during the remaining part of the financial year.

Explanation II- For removal of doubt, it is hereby clarified that the credit shall not be allowed on inputs and input services used exclusively for the manufacture of exempted goods or provision of exempted service.

5.1. A plain reading of the above provisions indicate that while Rule 6(1) provides that the manufacturer or provider of output service is not entitled for the credit of such quantity of input or input services which are used in the manufacture of exempted goods or exempted service except in the circumstances mentioned in the sub-rule (2) of the said Rules. Sub-rule (2) of Rule 6 provides for maintenance of separate records in respect of inputs, input services substantiating use of input and input services for taxable and exempted goods or services. Sub-rule (3) of Rule 6 provides that in case separate accounts are not maintained, the manufacturer or provider of services shall follow either of the conditions stipulated in sub-rule (3) of Rule 6. It is pertinent to note that after the amendment the only change that could be seen in respect of sub-rule (3) is to the extent of payment in respect of exempted goods produced or exempted services provided. While there is a cap on the utilisation of credit attributable to exempted goods or services, there is no cap whatsoever on the availment of CENVAT credit and there is no mention of any lapse of credit after utilisation of credit of 20% prior to 1.4.2008 or after payment of requisite percentage of value after 1.4.2008. Just because the services provided by the appellants have become taxable with effect from 1.4.2008, it cannot be said that the credit already availed and accrued shall lapse. As submitted by the appellants, we find that sub-rule (3) of Rule 6 begins with a word '*Notwithstanding anything contained in sub-rules (1) and (2)*'. The only inference that can be drawn from the non obstante clause is that the provisions of Rule 3 have an overriding nature. Non obstante clause requires to be inferred in which Supreme Court has held in the case of ***G.M. Kokil and***

Others (supra) wherein it was held that *"it is well known that non obstante clause is a legislative device which is usually employed to give overriding effect to certain provisions over some contrary provisions that may be found either in the same enactment or some other enactment."* The learned counsel for the appellants submitted that provisions of sub-rule (5) have been held by the Tribunal in the cases cited by him (supra), on the above lines. In the case of ***V.M. Salgaonkar Brothers*** (supra), the Tribunal held that *"it can be noticed that Rule 6(5) starts with non obstante clause 'notwithstanding', which would indicate that the provisions of Rule 6(3) are not applicable for the provisions of Rule 6(5) of CENVAT Credit Rules, 2004*." As a corollary one can infer that in the instant case, the provisions of Rule 6(3) also starting with a non obstante override the provisions of sub-rules (1) and (2) of Rule 6. Therefore, we find that the provisions of sub-rule (3) of Rule 6 is very clear that if the provider of output services does not maintain separate accounts, the only restriction is placed is on the extent of utilisation of credit and there is no provision which provides that the balance of credit, if any, shall lapse. We find that Tribunal has taken a similar view in the case of ***Nicolas Piramal*** (India) Ltd. (supra).

5.2. The appellant submitted that they have complied with the conditions that are required in the instance of use of input services in the provision of exempted and taxable services, there is no provision wherein it can be said that the balance of credit shall lapse. As we found above there is no provision which provides that credit availed earlier shall lapse and cannot be utilised with effect from 1.6.2007. Utilisation of credit is governed by provisions of sub-rule (4) of Rule 3 of CENVAT Credit Rules, which we find in the instance case to have been complied with.

5.3. While the learned AR for the Department has submitted that Madras High Court in the case of ***Ruchika Global Interlinks*** *(*supra) has interpreted that restriction on utilisation shall amount to restriction on availment, the learned counsel for the appellants submits that the issue before Hon'ble Madras High Court was in relation to use of input services for trading activity and not in the course of provision of an exempted service. He submits that as held by Bombay High Court in the case of ***Industrial Credit and Investment Corporation*** (supra) the ratio of a case can be followed only when the matter was directly on the issue, the issue needs to have been decided and the matter has been decided by giving reasons. We find that the questions of law framed and answered in the above case are:

(a) Whether in the facts and circumstances of the case, Rule 6(3)(c) of Cenvat Credit Rules, 2002, attracted, in cases, where the Service Tax on input services are not used in respect of trading activity but used only for taxable services?

(b) Whether in the facts and circumstances of the case, trading activity can be categorized as an exempted service for the purpose of invoking Rule 6 of Cenvat Credit Rules, 2002 prior to 1-4-2011.

(c) Whether in the facts and circumstances of the case, when trading was not a service or exempted service at the relevant time, requiring the appellant for reversal of any part of the credit on input services is legal?

5.4. In view of the above, we find that the questions framed in the case of ***Ruchika Global Interlinks*** (supra) do not relate to the overriding provisions of sub-rule (3) of Rule 6 and do not also relate to the lapsing of credit once prescribed conditions therein have been complied with. We also find that nowhere in the show-cause notice or in the Order-in-Original, it has been brought out with evidence that credit balance available with the appellants is relatable only to exempted services and therefore, cannot be utilised. On this count also, we find that the appellants claim survives.

5.5. Learned counsel for the appellants have relied upon Circular No.137/72/2008-CX4 dated 21.11.2008 and submitted that the said Circular was followed by the Tribunal in various cases cited by him as above. Learned Principal Commissioner (AR) vehemently states that the Circular is not in existence and not available on the website http://www.cbic.gov.in; the said purported circular was taken from a private website and is not admissible unless it is established to be correct; he submits a list of all circulars issued by CBIC taken from the website of CBIC; circulars are serially numbered and the list of circulars does not reflect the said circular having been issued by CBIC. Learned counsel for the appellants submits that the circular has been taken from the website of www.taxmanagementindia.com and was signed by Shri Gowtham Bhattacharya, Commissioner of Service Tax; Madurai Commissionerate has issued Trade Notice No.14/2009 dated 13.3.2009, Service Tax No.6/2009; the said circular was followed by the Tribunal in various decisions. We find that as per our discussion above, there is no provision in the Rules for the credit availed to lapse once the conditions therein have been fulfilled. Therefore, we find that despite the circular the issue is clear. We find that this Bench in the case of ***DHL Logistics Pvt. Ltd.*** (supra) has held that:

"5.1 *As regards the denial of Cenvat credit to the extent of 2.85 crore, on the ground that the appellant did not maintain separate accounts towards utilization of credit in respect of both taxable and exempt services and also utilization of credit in excess of 20%, it is noted that the cap of 20% is applicable on the service tax payable and not on the service tax credit actually availed. What is restricted is only utilisation of the credit and not taking the credit per se; the credit taken could be carried forward. When the cap was removed on 1-4-2008, the appellant was eligible to utilise the credit also. In the present case what is involved is the utilisation of credit in excess of 20% of the tax payable during the impugned period which was permitted. Therefore, utilising the credit in excess of the limit would attract only interest liability. The entire service tax itself cannot be denied to the appellant. This position has been clarified by the C.B.E. & C. vide a circular dated 21-11-2008 cited supra and the Ministry clarified as follows:*

"Prior to 1-4-2008 [before the amendment in Rule 6(3)] the option available to the taxpayer, under Rule 6(3), was that, he was allowed to utilize credit only to the extent of an amount not exceeding 20% of the amount of service tax payable on taxable output service. However, there was no restriction in taking Cenvat credit and also there was no provision about the periodic lapse of balance credit. This resulted in accumulation of credit in many cases.

W.e.f. 1-4-2008, under the amended Rule 6(3), the following options are available to the taxpayers not maintaining separate accounts;"

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As stated earlier, many taxpayers had accumulated Cenvat credit balance as on 1-4-2008. The matter to be considered was whether this credit balance should be allowed to be utilized for payment of service tax after 1-4-2008.

As no lapsing provision was incorporated and that the existing Rule 6(3) of the Cenvat Credit Rules does not explicitly bar the utilization of the accumulated credit, the department should not deny the utilization of such accumulated Cenvat credit by the taxpayer alter 1-4-2008. Further, it must be kept in mind that taking of credit and its utilization is a substantive right of a *taxpayer under value added taxation scheme. Therefore, in the absence of a clear legal prohibition, this right cannot be denied."*

In view of the above clarification given by the Board, recovery of the Cenvat credit wrongly taken cannot be sustained. What can be demanded is only interest on the wrongly availed credit from the date of utilisation of credit till 1-4-2008 when the assessee became entitled for the credit. Therefore, the adjudicating authority has to re-examine the matter in the light of the C.B.E. & C. circular dated 21-11-2008.

It is seen from the above that Tribunal has concluded the issue independently and sought to reinforce the decision on the basis of the purported circular. Therefore, we find that the existence or otherwise of the circular is inconsequential. However, it is not clear as to why Madurai Commissionerate has issued such a Trade Notice based on the Circular and as to whether the same was withdrawn subsequently. However, as we find that the appellants claim to the unutilised credit is correct on merits, we do not find any reason to go into the circular.

5.6. In addition, the appellants have pleaded that they have been regularly filing ST3 returns and ST3 returns; ST3 format was revised from October 2006 onwards specifically providing for declaring the value of exempted services under (F)(I)(c)(ii) and they have accordingly disclosed the same; the department never enquired about the availing of credit and proportionate reversal of the same; moreover, department issued a show-cause notice dated 25.3.2009 and 17.10.2008 in respect of utilisation of credit in excess of 20% of tax payable on output service; and therefore, extended period cannot be invoked. The learned Principal Commissioner (AR) submits that the appellants at no stage declared to the Department that they were availing full CENVAT Credit and not 20% of CENVAT credit as prescribed and therefore, in view of the following cases, extended period is invokable.

- ***M/s. FL Smidth Pvt. Ltd.: 2014-TIOL-2186-HC-MAD-CX***
- ***CCE vs. Rathi Steel & Power Ltd.: 2015 (321) ELT 200 (All.)***
- ***Merck Specialities Pvt. Ltd.: 2018-TIOL-1757-CESTAT-BANG.***

5.7. In the instant case, the issue involved as far as time bar is concerned is not only the submission of ST3 returns and the details contained therein. The appellant submitted that department has already served two show-cause notices on an issue which is an offshoot of the issue before us. The show-cause notices issued in 2009 and 2008 are in relation to excess utilisation of credit of input services vis-à-vis exempted services. Understandably, the show-cause notices must have been issued after detailed scrutiny of the ST-3 returns. Once such show-cause notice is issued, it is not open for the department to rake-up the issue on a different preposition invoking extended period. Therefore, we find that show-cause notice and Order-in-Original does not survive on time bar issue also.

6. In view of the above, the impugned order is set aside and the appeal is allowed with consequential relief, if any.

(Order pronounced in open court on 14.06.2019)

(D.M. Misra)
Member (Judicial)

(P Anjani Kumar)
Member (Technical)

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