CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

Excise Appeal No: 1081 of 2008

[Arising out of Order-in-Original No: 14/M-I/2008 dated 'nil' July 2008 passed by the Commissioner of Central Excise, Mumbai – I.]

Metro Shoes Pvt Ltd … ***Appellant***
Jethabhai Warehouse Compound,
Opp: Byculla Railway Station (E),
Next to Jijamata Udyan, Mumbai – 400027

versus

Commissioner of Central Excise ***…Respondent***
Mumbai– I, Kendriya Utpad Shulk Bhavan,
115 Maharshi Karve Marg, Churchgate (E),
Mumbai – 400020

WITH

(i) **Excise Appeal No: 1172 of 2008 (Commissioner of Central Excise, Mumbai – I v. Metro Shoes Ltd), (ii) Excise Appeal No: 355 of 2009 (Metro Shoes Ltd), (iii) Excise Appeal No: 1842 of 2012 (Metro Shoes) and (iv) Excise Appeal No: 86473 of 2014 (Metro Shoes Ltd)**
[Arising out of (i) Order-in-Appeal No: YG(4)4/M-I/2008 dated 8th October 2008 passed by the Commissioner of Central Excise (Appeals), Mumbai – I, (ii) Order-in-Original No: 23&24/M-I/2008 dated 30th December 2008 passed by the Commissioner of Central Excise, Mumbai – I., (iii) Order-in-Appeal No: BR(45)/M-I/2012 dated 3rd September 2012 passed by the Commissioner of Central Excise (Appeals), Mumbai Zone – I, (iv) Order-in-Original No: 52 to 57/M-I/2013 dated 6th February 2014 passed by the Commissioner of Central Excise, Mumbai – I.]

APPEARANCE:

Shri Vipin Kumar Jain with Ms Sparsh Prasad, Advocate for the appellant/respondent - assessee

Shri KM Mondal, Special Counsel with Shri NN Prabhudesai, Superintendent (AR) for the respondent/appellant - Revenue

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: A/86844-86848 / 2019

DATE OF HEARING: 13/03/2019
DATE OF DECISION: 13/09/2019

PER: C J MATHEW

As we dispose off five appeals, by M/s Metro Shoes Pvt Ltd and by Revenue, arising from different orders-in-appeal, a narration of the facts, which are common to all the proceedings, will not be out of place. The assessee is a manufacturer of ‘footwear’, leviable to duties of central excise under heading no. 6401 19 of the First Schedule to Central Excise Tariff Act, 1985, at different locations among which the one at Dehradun is privileged with ‘area-based exemption’ on clearance of the resultant product. The retail distribution of these manufactured goods, originating from all their facilities, as well as branded ‘footwear’ of other manufacturers is catered from stores of the assessee at different locations. This salmagundi of sources of footwear sold in retail is one of the roots of the dispute in the impugned orders. Besides the registration of the two manufacturing facilities in Uttarakhand and at Mumbai under Central Excise Rules, 2000, the head office of M/s Metro Shoes Pvt Ltd, as ‘input service provider’, defined in rule 2 of CENVAT Credit Rules, 2004, with separate registration under Service Tax Rules, 1994 distributes credit of tax paid on services procured against invoices issued to them for adding to the CENVAT credit account of eligible manufacturing units and providers of output service. This, or more specifically the distribution of credit arising from tax paid on services that were allegedly used in common for manufacture of their own goods as well as in the sale of goods including those procured for trading, is the malaise that pervades the dispute; services utilized, wholly or partly, for trading, specifically excluded from coverage as output service *vide* notification no. 3/2001-CE (NT) dated 1st March 2011, and at the manufacturing facility in the 'area based exemption State' are not eligible 'input service' under CENVAT Credit Rules, 2004 to the extent of such use in 'exempted goods' or 'exempted services' as defined in rule 2(d) and 2(e) of CENVAT Credit Rules, 2004.

2. While the Rules disallow availing of credit of tax paid on services used wholly for manufacture/provision of ineligible output/output service, a *catena* of decisions have negated the availing of credit of tax paid on services attributable to manufacture/provision of ineligible output/output service and, more particularly, on the acceptability of compliance of rule 6 of CENVAT Credit Rules, 2004 at stages beyond that of taking of such credit, under rule 3 of CENVAT Credit Rules, 2004, in acknowledgement of uncertainty of use at the time of procurement of such services that find common use in ineligible and eligible output/output service. This poses the

conundrum that is the primal issue in the rival contentions before us and to which we shall presently turn our attention. The implication of the *Explanation*, inserted for including 'trading' among exempted services, and decided law thereon is that duties or taxes, as the case may be, incurred on 'input' or 'input services' exclusively used in trading activity, or to the extent that these may be, are not entitled for availment as credit. For the period before the incorporation of the *Explanation*, the Hon'ble High Court of Delhi in *Lally Automobiles Pvt Ltd v. Commissioner (Adjudication), Central Excise [2018 (17) GSTL 422 (Del.)]* has determined that

> *'16. ……. the issue is whether the assessee could claim the credit on input which were not services. Input credits can be used for payment of service on output service provided such services are used to provide output services. Undoubtedly, there cannot be an exact correlation between one kind of input and corresponding. That is the reason the Rules cover situations where assessees provide both exempted and taxable services. Wherever someone undertakes activities that cannot be called a service or which is not "manufacture", that activity goes out of the purview of both Central Excise Act as well as Finance Act, 1994. In such cases, an assessee would be ineligible for claiming input-service tax credit on an output which is neither a service nor excisable goods. There is no provision to cover situations where an assessee is providing a taxable service and is undertaking another activity which is neither a service nor manufacture. In such a situation, the only correct legal position appears to be that it is for the assessee to segregate the quantum of input service*

attributable to trading activity and exclude the same from the records maintained for availing credit. This cannot be done in advance as it may not be possible to foretell the quantum of trading activity as compared with taxable activity. The obvious solution would be to ensure that once in a quarter or once in a six months, the quantum of input service tax credit attributed to trading activities according to standard accounting principles is deducted and the balance only availed for the purpose of payment of Service tax on output service.

17. In the present case, the assessee's argument that there is no mechanism to reverse credit, once taken, in the opinion of this Court, cannot be accepted. The assessee was well aware of the exact nature and extent of its service tax liability. It was also aware of the eligible service tax inputs. Therefore, when it did claim successfully and unchallenged input credits in respect of activities that were not subjected to service tax levy, it was aware that the claim was excessive and could not be justified. If, for instance, input credits were claimed in respect of goods or rents, attributable to retail business, those credits were clearly impermissible. In these circumstances, this Court finds no infirmity with the concurrent findings of the lower authority and the CESTAT, which concluded that show cause notice and recoveries were in order.

18. As regards the method of calculation and invocation of extended period of penalty, the assessee's contentions again, to the Court's mind, are groundless. The assessee concededly did not maintain regular separate accounts in respect of non-service tax leviable activities. Therefore, the adjudicating authority adopted the method of proportionate turnover based attribution to the assessee's liability:

> *"I find that it was clear in 2008 itself that no Cenvat Credit*

> *is available for services used for trading as decided by Hon'ble CESTAT in the Metro shoes case. The noticee has availed the Cenvat Credit used for exempted services namely trading without reversing the proportionate credit. They have never informed the department about taking the wrong credit. This would have been undetected if the facts were not noticed during audit. M/s. Lally Automobiles Private Ltd. have failed to inform the department that they are not maintaining the separate records for input services used for taxable and exempted services. It is already noted that the law requires an assessee to maintain separate records of Cenvat credit received on taxable or non-taxable services. In case the separate records are not maintained, the Cenvat credit is to be reversed as per Rule 6(3) of the Cenvat Credit Rules, 2004. I find that M/s. Lally Automobiles Private Ltd. have not reversed the same by suppression of material facts. The excess credit availed utilized by them is liable to be recovered in terms of Rule 14 of Cenvat Credit Rules, 2004 read with proviso to Section 73(1) of Finance Act, 1994."*

> *19. This Court is of opinion that the lack of any method in the rules in such cases, would only mean that a reasonable and logical principle should be applied, not concededly that what should and could not be claimed as input credit, (but was in fact so claimed) ought to be "left alone" because of the composite nature of the assessee's business. While any assessee has a right to organize its business in the most convenient and efficient manner, it cannot claim that that such organization is so structured that its tax liabilities cannot be clearly discerned. In this case, the adjudicating authority adopted the proportionate percentage to the turnover method approach, which in this Court's opinion, is reasonable.'*

and affords further insight into the negation of credit of tax paid on services that are utilized in manufacture of ineligible output/rendering of ineligible output services.

3. In the case of the assessee referred to in the decision *supra*, the

Tribunal had discarded the plea of inappropriateness of retrospective applicability of the *Explanation* incorporated in 2011 owing to inconceivability of 'trading' ever being a tax of the Union precluding the scope for deeming the insertion as a deliberate legislative act of exemption from tax. It was correctly pointed out by Learned Special Counsel for Revenue that 'trading' being taxed, as it was, under Value Added Tax legislation authorized by entry in List II of Seventh Schedule of the Constitution, deliberate legislative exemption of trading was superfluous in the face of constitutional disempowerment. The Hon'ble High Court of Delhi also accorded its stamp of approval to adoption of a reasonable method for disaggregation of the credit attributable to 'taxable' and 'exempted' transactions in the absence of formulation in the Rules. Judicial sanctity and finality has, thus, been accorded to ineligility to credit of services that are required for trading activity from the very commencement of CENVAT Credit Rules, 2004. In *Metro Shoes Pvt Ltd v. Commissioner of Central Excise [2008 10 STR 382]*, the Tribunal, called upon to decide the eligibility under CENVAT Credit Rules, 2004 of tax paid on services used in manufacture, on services directly and wholly attributable to trading and on services incurred for running retail outlets, disallowed the second category while permitting the other two as admissible; this found approval with the Hon'ble High Court of Bombay. The contours of entitlement are, thus, amply clear.

4. It is in this backdrop that the submissions and counter-submissions in the present proceedings are required to be restricted to the limited aspect of confirmation of recovery of allegedly ineligible credit from the recipient of credit despite absence of the necessary pre-requisite of establishing the allegation by placing the distributor on notice. According to Learned Counsel for the assessee-appellant, the registration of both are separate and distinct under different statutes. On this submission, we cannot but take notice that, in CENVAT Credit Rules, 2004, rule 7 and rule 7A are specifically carved out as exceptions to rule 3 which is applicable when the registrant that has borne the incidence of tax avails credit thereof. Likewise, we are compelled to note of the distinction, in Service Tax Rules, 1994, between rule 4A(1) and rule 4A(2) in scope of operability and documentation requirements. Learned Counsel for assessee sought to buttress his contention of lack of jurisdictional competence by relying on the decisions of the Tribunal in *Castrol India Ltd v. Commissioner of Central Excise, Vapi [2013 (291) ELT 469 (Tribunal)]*, in *Gulf Oil Corporation Ltd v. Commissioner of Central Excise & Service Tax, Vapi [2016 (43) STR 220 (Tribunal)]* and in *Commissioner of Service Tax, Ahmedabad v. Godfrey Phillips India Ltd [2009 (239) ELT 323 (Tribunal)]*. Learned Special Counsel for Revenue argues that hair-splitting cannot obliterate the legal oneness of the recipient of credit and distributor of credit. According

to him, the assessee is both manufacturer of the impugned goods and provider of output service rendering them liable to respective obligations, as the case may be, and, thereby, precluded from claiming compartmentalized obligation. That is unarguably correct; however, statutes that not only acknowledge but also insist on such legal separateness is rife with scope for confusion in enforcing tax recoveries and susceptible to executive whim in which the assumption of unity may practically result in glossing over the broken links in the chain that purportedly leads from assumption of privilege by an assessee in its records to the detriment caused by its denial in recovery proceedings.

5. Nine show cause notices, covering the period from April 2006 to March 2011, were decided in three different orders leading to three of the appeals before us. Involved in these disputes are disallowance of credit of ₹ 46,37,021 for the period from April 2006 to October 2006, ₹ 1,66,25,625 for November 2006 to December 2007 and ₹ 2,85,26,566 for January 2008 to March 2011. Two other notices for the period from October 2004 to March 2005 and from April 2005 to September 2005, issued on 13th September 2006 and 3rd May 2006 respectively, were adjudicated by the original authority confirming demand of ₹ 79,834 and ₹ 47,12,362. The order-in-appeal, rejecting the challenge to the disallowance credit in excess of ₹ 48,101 in the former, is impugned before us by the appellant-assessee and that

pertaining to the latter, having restricted the demand to ₹16,10,179, while allowing credit availed on services utilised in common for manufacture as well as trading, is challenged by Revenue.

6. Learned Special Counsel asserts that the benefit of the decision in *re Metro Shoes Pvt Ltd* had been extended in the three orders of the adjudicating authority that are impugned here and submitted that the dispute before us pertains to services used commonly and on which credit, as a proportion of the traded/exempted goods to the total goods, has been disallowed but was not before the Tribunal in that dispute. The want of empowerment under section 11A of Central Excise Act, 1944 which is to be invoked only for recovery of short-paid or duty not paid, as claimed on behalf of assessee, was disputed by Learned Special Counsel with the submission that the proceedings were initiated under rule 14 of CENVAT Credit Rules, 2004 which specifically empowers recovery from manufacturer or the provider of output service. Decisions in *Mahindra and Mahindra Ltd v. Commissioner of Service Tax, Mumbai [2017-TIOL-2364-CESTAT-MUM]*, in *Indian Oil Corporation v. Commissioner of Central Excise, Delhi-II [2014 (35) STR 411 (Tri-Del)]*, in *Mahindra and Mahindra v. Commissioner of Service Tax, Mumbai-II [2018-TIOL-1235-CESTAT-MUM]* and in *SKF India Ltd v. Commissioner of Central Excise, Pune-I [2016 (41) STR 737 (Tri-Mumbai)]* were cited in support of the submission that the recovery, intended by rule 14 of CENVAT

Credit Rules, 2004, must be resorted to when credit taken is established as ineligible.

7. We entertain no doubt that the proceedings for recovery of duties that are not paid or short-paid or for recovery of refunds erroneously sanctioned is to be preceded by notice and the issue of such notice is consequent upon investigation which encompasses intelligence/information/reasonable cause for suspicion of the event contemplated in the recovery provision, isolation of the transgression leading to the event and, finally, identification of the person against whom the proceedings must lie. This sequence has to be stood on its head in the adjudication process as the proceedings can advance only against the person designated by law to be subject to such recovery. Denial of credit and recovery are indistinguishable as cause and effect. Therein lies the nub of jurisdiction.

8. Our discomfiture with subordinate legislation that, bowing to the inevitability of catering to a niche for ensuring integrity of the scheme of credit, provides for special procedures distinguishable from the ordinary default but, *prima facie*, is silent on the onus for establishing the claim thereto and the lack of consistency engendered thereby in executive action, admittedly, places Revenue at a disadvantage in this dispute. This is no matter to be ashamed of; on the contrary, it is incumbent upon an adjudicatory tribunal to consider

the consequences that assumption of such latitude may have on the immutable principle that tax collection without express backing of law is extortion.

9. In *re Godfrey Phillips India Ltd*, on being presented with the proposition that the 'input service distributor' was akin to *'a first stage or a second stage dealer'* who *'does not utilise any credit but only passes it on…'* and that tax authorities were competent to ascertain *'admissibility of credit or otherwise and whether it relates to any manufacturing activity directly indirectly ….. at the place where credit is taken and utilised for the purpose of payment of excise duty or output service'*, the Tribunal, after examining the definition of 'input service distributor' in rule 2 (m) of CENVAT Credit Rules, 2004, distinguished it from a dealer to conclude that

> *'5. When we look at the functions of the input service distributor and the documents to be issued by him for passing on the credit, it becomes quite clear that the document issued by him for passing on the credit does not contain the nature of service provided and the details of services. It contains the service provider's details, the distributor's details and the amount. This is further supported by the fact that both Central Excise assessees and Service Tax assessees are under the regime of self-assessment and therefore it is the assessee himself who has to specify that the credit availed by him is admissible. Therefore the input service distributor cannot say that he is not required to prove the eligibility or otherwise of the service tax credit since at the receiver's end which could*

> *be a branch or a factory of the distributor, no details of the available regarding the nature of service. Therefore the preliminary objection raised by the ld. Advocate has to be rejected and it has to be held that it is the responsibility of the jurisdictional officer with whom input service distributor has registered to decide the dispute regarding eligibility or otherwise of the service tax credit that the input service distributor has taken and proposes to pass on to others.'*

Subsequently, the contrary position canvassed on behalf of the appellant, in *re Castrol India Ltd,* was considered by a Division Bench of the Tribunal, again with reference to rule 2 (m) of CENVAT Credit Rules, 2004, defining 'input service distributor', and to rule 7 therein, authorizing such distribution of credit, to hold the entitlement to be subject only to

> *'4…… following conditions, namely; the credit distributed against the documents referred to in Rule 9 does not exceed an amount to service tax paid thereof or; credit of service tax applicable to service used for unit exclusively in the manufacture of exempted goods or providing of exempted services shall not be distributed.*
>
> *xxxx*
>
> *6. We find considerable force in the arguments advanced by the learned counsel. It has not been alleged in the show cause notice nor there is finding that the credit distributed against the documents is more than the amount to service tax paid and in any case, this can be verified only at the end of ISD. It is also not the case of the Department that credit has been*

received by the assessee in respect of services/goods which are totally exempted. Under these circumstances, on this ground alone, probably the matter can be decided but the London advocate is fair enough to argue the case on merits and also agreed to reverse the credits which are patently inadmissible.'

and, while the final outcome, doubtlessly, was decided on the eligibility for availing of credit, consensus seems to have emerged within the Tribunal on lack of jurisdiction in law to deny the credit at the factory level as further reinforced by the decision, in *re Gulf Oil Corporation Ltd*, holding that

'4. I find from the records that the Appellant had taken a definite stand that they have taken credit on the basis of the invoices issued by the ISD. The Appellant also submitted the ISD invoices before the Tribunal in respect of the demand in question. It is seen that both the authorities below had not examined this issue. It is well settled by the various decisions of the Tribunal, as upon by the learned Counsel, that the jurisdictional officer, of recipient of input/input service credit, is not competent to adjudicate ISD invoices over the jurisdictional officer of Input Service Distributor (ISD), who is competent to decide this matter. So, in my considered view, if the Appellant avail the credit on the basis of the invoices issued by the ISD, the Adjudicating authority cannot deny the credit....'

The palpable consistency in these decisions that independently arrived at this identical conclusion cannot but fail to impress.

10. The finding that the 'input service distributor', proceeded against for recovery under rule 14 of CENVAT Credit Rules, 2004, was not liable because

> *'5. …….On a plain reading of the above rule, it is seen that the recovery of cenvat credit can only be made when the cenvat credit has been taken or utilised wrongly.*
>
> *6. In the present case, the input service distributors have not taken any credit whereas they have already distributed the input service credit. The credit was taken by various manufacturing units. Therefore, rule 14 can be made applicable only on the person who avails the cenvat credit wrongly or utilised the same. Therefore the appellant being an input service distributor cannot be issued any show-cause notice. The Board also in the letter dated 10.03.2014 clarified the issue in hand. The board circular is reproduced below:*
>
> > *"In this context of a case before the CESTAT Mumbai, Chief Commissioner, Mumbai I and Mumbai II have repeatedly sought a clarification from the Board as to who should issue the SCN in case of incorrect distribution of cenvat credit by an input service distributor (ISD)…..*
> >
> > *2. Attention is drawn to Rule 14 of the Cenvat Credit Rules, 2004 which stipulates that "Where the cenvat credit has been taken and utilised wrongly or has been erroneously refunded, the same along with interest shall be recovered from the manufacturer of the provider of the output service and the provisions of section 11A and 11AA of the Excise Act or Section 73 and 75 of the Finance Act shall apply mutatis mutandis for effecting such recoveries."*
> >
> > *3. Since there is no other provision for recovery, it is evident that recovery can be made only from the manufacturer or service provider. There is no provision in the Cenvat Credit Rules, 2004 for issuing SCN's to ISD's. This position is unambiguous and hence could have been pointed out by the jurisdictional Commissionerates, without asking the CBEC to restate the provision in the Cenvat Credit Rules.*
> >
> > *4. The Chief Commissioners have also pointed out varying*

> *case law on the subject. A detailed examination of these case laws has revealed that each one of them can be distinguished effectively and their inapplicability could also have been pointed out. If this had been done by the Chief Commissioners Mumbai, then the legal position regarding Rule 14 and the case law could have been pointed out to the Honourable Tribunal without making a reference to the Board.'*

in *re Mahindra and Mahindra (2017)*, emphasises the lack of unambiguous authority for recovery, highlights the reliance on executive instruction in the form of clarification of Central Board of Excise & Customs in F No. 137/68/2013-ST dated 10 March 2014 and underscores the virtual *diktat* therein that adjudicators must disengage the 'input service distributor' from its ambit. We are unable to reconcile ourselves to the lack of sanctity in this summary disposal contained in the instruction of the Central Board of Excise & Customs to which we shall adumbrate in due course. In *re SKF India Ltd*, the appellant sought refuge in the decisions now cited by Learned Counsel to alienate itself, as the manufacturing entity, from the recovery initiated against them with the claim that it should have been fastened on the 'input service distributor', that such recovery could not be effected without the preliminary of denying the assessment of the 'input service distributor' and, while the former was disposed of by holding that it

> *'9……….is not sustainable in the present facts and circumstances of the case as both ISD and the factory are located in one and the same place and the two registrations, one for Excise and the other as an ISD, will not make a*

> *difference. Both registrations are for the same legal entity. Both the activities are to be dealt by the same Commissioner. The credit in dispute, if eligible, will also be utilized in the factory located within the jurisdiction of the same Commissioner. The case law relating to Godfrey Philips India Ltd. (supra) is distinguishable as in that case the ISD and the factory were not located within the same place. Similar is the position in respect of the other four case laws quoted by the learned counsel for the appellant. These cases are therefore distinguishable……*

which is not applicable to the present facts, the latter was dealt with by holding that

> *10. The next contention of the learned counsel was that credit cannot be denied unless the assessment of distribution of credit made at the ISD is set aside. It is to be noted that input service distributor is not an assessee under the Service Tax Law. He is only a distributor. ISD neither provides any service nor pays any service tax as provider of output service and, therefore, there is no question of assessment or self-assessment. No doubt ISD is required to file a half-yearly return. That return only gives the details of credit received and distributed……………. cannot be called as a self-assessment by the ISD. In fact, it is to be noted that this return is common to the service tax payee as also the ISD and so called as declaration are common for the provider of output service and for the ISD. Concept of self-assessment is relevant for service taxpayer alone. Since there is no assessment, the contention of the learned counsel is required to be rejected outright…..In the present case, neither there is any self-assessment nor any assessment is required to be made under any provision of the Service Tax Law.*

and subjecting each of the disputed services to scrutiny for attribution.

11. We find that the later decision in *re Mahindra and Mahindra (2018)* has followed the one *supra* and that the latter has relied upon the decision in *re Indian Oil Corporation Ltd*. All of these arose from disputes in which the recovery was sought to be fastened on the 'input service distributor.' In *re Indian Oil Corporation Ltd*, the Tribunal took exception to the order impugned therein for adopting a position contrary to that of the original authority for the earlier period in which it was held that, as per rule 14 of CENVAT Credit Rules, 2004, the recovery could be effected only from the entity taking the credit. We cannot but note that in all of these, the prevailing decisions of the Tribunal, which discharged the recipient of distributed credit from scope of recovery, were not brought up during the hearing. Three of the decisions relied upon to advance the cause of Revenue fails the test of precedent, or even of persuasive, value owing to distinguishable facts and for having been rendered without being made cognizant of articulated wisdom of the same Tribunal and compounded by the overwhelming reliance on instructions of Central Board of Excise & Customs that is patently devoid of even jurisprudential logic.

12. The circular of the Board honestly admits that there is a deficiency in the Rules; however, instead of subjecting the special

provisions to ascertainment of legislative intent to allow credit subject only to the threshold tests laid down in *re Castrol India Ltd*, proceeded to fasten liability on recipient on the presumption that attributability should also tested. By this, a legislative want, as perceived by the executive branch, was sought to be remedied without legislative approval. Interpretation vests in the judicial branch and, while the executive cannot be denied the prerogative to propose an interpretation, it must subordinate itself to judicial decisions. The fastening of liability that flies in the face of decided interpretation is certainly beyond the pale of legality. In *Hansraj Gordhandas v. HH Dave, Asst Collector of Central Excise [AIR 1970 SC 755]*, the scope for interpretation has been restricted thus

> *'It is an application of this principle that a statutory notification may not be extended so as to meet a casus omissus. As appears in the judgement of the Privy Council in Crawford v. Spooner*
>
> > *'...we cannot aid the Legislature's defective phrasing of the Act, we cannot add, and mend, and, by construction, make up deficiencies which are left there.'*
>
> *....But the operation of the notifications has to be judged not by the object which the rule making authority had in mind but by the words which it has employed to effectuate the legislative intent.'*

13. Furthermore, even if the proposition in the circular were to be considered as kindergarten steps, as yet to be tried in the crucible of judicial interpretation, it lacks the rigour of jurisprudential interpretation, as laid down by Kelsen, which was taken note of by the Hon'ble Supreme Court in *Punjab Land Development and*

Reclamation Corporation Ltd v. Presiding Officer, Labour Court Chandigarh [1990 SCR (3) 111]. And, unquestionably, it must give way to judicial interpretation which, even by taking both streams of decisions in its stride, demonstrates a gap, whether intended to be so or by oversight, that cannot be filled by either. The remedial text, if at all, must lie in the legislative sphere. As noted in the same decision of the Hon'ble Supreme Court, with reference to the postulate in *RBI v. Peerless General Finance [(1987) 2 SCR 1]* that

> *'The interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted.'*

we owe it to ourselves have to look to the context of the existing text.

14. The dispute is about the propriety of recovering credit from the person who, while, undoubtedly, entitled to utilize the distributed credit, was statutorily enabled to take the credit without having to ascertain the eligibility except in terms of validity of documentation which is legally silent on the provenance. We have already made clear the want of precedent value in the decisions that fastened the liability on the person who utilized such credit. In these circumstances, the nature and purpose of CENVAT credit offer perspectives of the context.

15. In our view, CENVAT credit is the bridge that reconciles the

charging provision and the valuation provision of the taxing statute. In interpreting the various aspects – real, normal and transaction – of value that were subjected to duties before and after 1975 or after 2000, the Hon'ble Supreme Court has held that valuation, being only a measure of the levy, is not controlled by the charging provision and that legislative competence to prescribe the time and extent may accommodate administrative convenience. The decisions in *Union of India & others v. Bombay Tyres Ltd [1984 SCR (1) 347]* and *Commissioner of Central Excise, Indore v. Grasim Industries Ltd [order dated 11th May 2018 in civil appeal no. 3159 of 2004]* are seminal enough to warrant, for our purpose, mere reference without alluding to the significant portions. Propriety notwithstanding, and tempting though it may even be to the executive branch of government, the cascading effect of such measure on business, and the ultimate consumer, compelled the incorporation of some neutralizing mechanism. This was the inevitable consequence of expansion of the tax base from itemized, and limited, enumeration of goods with the insertion of a residuary tariff item and the subsequent adoption of the even more comprehensive Central Excise Tariff. The scheme of CENVAT credit restricts the actual collection to the value of contribution to the product emanating or service offering from the assessed entity which is the unambiguous intent of the charging provision. From the one-on-one correspondence of *pro forma* credit to the general pooling of CENVAT credit, the thread of continuity lies in this bridging intent.

16. Among the various perspectives of CENVAT credit, the two which predominate, and have coloured, the disputes are, in the eyes of the tax advisors, that it is a mirror of, and substitute for, the account current and, from the standpoint of the tax administrator, that it is an exemption scheme. In our opinion, such constricted appreciation is akin to describing the Taj Mahal as a spiffy looking tomb; not only is such perspective flawed in capturing the spirit of neutralization but also fails the test of statutory calibration. Even if the accumulated credit is acknowledged as an instrument for discharge of duty liability, it lacks the flexibility of the account current as a pool of money. The scheme is notified under the general rule making powers conferred by the taxing statute on the Central Government and not by recourse to the specific power of exemption in the respective statutes. Hence, the literal interpretation mandated by the Hon'ble Supreme Court in *Commissioner of Customs (Import), Mumbai v. Dilip Kumar & Company [2018 (361) ELT 577 (SC)]* does not find application in resolving this dispute which turns on the lack of clarity in pinpointing a recovery mechanism for distributed credit.

17. Notwithstanding the inapplicability of the decision in *re Dilip Kumar & Company*, the distillation of landmark decisions therein

does provide us with enlightenment in guiding us on our present path. CENVAT Credit Rules, 2004 fails the prescriptions laid down by the Hon’ble Supreme Court in *Govind Saran Ganga Saran v. Commissioner of Sales Tax [1985 Supp (SCC) 205]* to qualify as a taxing statute. It is a framework for, as we have premised *supra*, neutralizing the surplus that would have accrued to the exchequer at the cost of business and the ultimate consumer. Guiding, as it does, the availment of credit, any deficit of legitimacy in availment thereof can be remedied only through machinery provisions of the respective taxing statute that an assessee is subject to. It is here that we arrive at the crux.

18. The assessee-appellant is statutorily acknowledged as a manufacturer covered by Central Excise Act, 1944 and any recovery can be effected only under section 11A of that Act. More so, the duty liability intended to be recovered must have been short-paid or not paid; no such allegation has been made in the notice or held to be so by the lower authorities. The corporate enterprise that has established this manufacturing facility is not acknowledged by Central Excise Act, 1944 and dereliction on their part, if any, cannot be brought within the purview of this Act unless it be in relation to manufacture. Even if such recovery is ordered with reference to rule 14 of CENVAT Credit Rules, 2004, wrongful availment must be established. In the scheme of input service distribution, the assessee-

appellant is not required, by the framework Rules, to ascertain eligibility or be cognizant of the source of credit. It is a well-settled principle of natural justice that an assessee must not only be made aware of the reasons for proposed detriment but also be capable of defending its actions. The scheme of CENVAT credit precludes such defence by the appellant-assessee. The appellant-assessee is a recipient of credit that is assigned by the distributor who, undisputedly, has borne the incidence of tax on procured services. It is the distributor who can be charged with awareness of exempted output/output service, if any, and who is empowered by the statute to take the credit. And it is only such availment by the distributor that can be put to notice for ineligibility as espoused in the decisions that fulfill the criteria of precedent.

19. There is evident confusion arising from the evident dichotomy in the availment of ineligible credit and the utilization of pooled, distributed credit for discharge of tax liability which may, thereby, be correctly described as short-paid. The impugned proceedings have failed to take note of this gap and to apply itself to filling that gap. The consequence of short-payment, if any, is not enforceable in the light of this unfilled gap.

20. Tax administrators, understandably, incline towards maximizing revenue collection through the account current and are

likely to take recourse to rule 14 of CENVAT Credit Rules, 2004 without much encouragement. The existence of such a provision is no authority to deny credit without the pre-requisite of procedure established by law. Nor is there a presumption of ineligibility in the Rules that warrants the evidencing of claim for credit beyond the threshold stipulation in rule 3, conditional stipulation in rule 4 and documentary stipulation in rule 9 of CENVAT Credit Rules, 2004.

21. Even if the 'input service distributor' was unable to establish its claim to avail the credit of tax paid on the different services and, thereby, to deprive the utilization of such, the entity to be subject to recovery proceedings remains unidentified in the Rules. It would be a grave travesty to leave such identification to the adjudicating authority. Indeed, the different decisions highlight the inability of the several adjudicating authorities to arrive at a consensus. In this circumstance, there may have been no need to fill the gap. That many of the 'input services' so distributed, while amenable to arithmetical disaggregation, may actually have to be utilized to the entire extent even if 'exempt services' were not an activity is also to be reckoned with. An atomic scrutiny may carry with it the burden of administrative inconvenience and, hence, may have been deliberately obliviated. Notwithstanding all this, the wavering arrow of adjudicatory confirmation to fill the gap will have to be dislodged for that very reason.

22. In the circumstances of the Rules having failed to isolate the target of recovery which cannot be read into in the absence of any indication of legislative intent, it cannot be left to be taxed administrator to substitute for such legislative intent, the impugned orders will not sustain. Consequently, the appeals of the assessee are allowed and appeal of Revenue fails.

(Order pronounced in the open court on 13/09/2019)

(C J Mathew)
Member (Technical)

(Ajay Sharma)
Member (Judicial)

**/as*