CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
REGIONAL BENCH
COURT No. I

Excise Miscellaneous Application No. 95752 of 2014
(On behalf of Appellant)
in
Excise Appeal No. 525 of 2012

(Arising out of Order-in-Original No. 16/Commr/M-II/2011 dated 31.01.2012 passed by Commissioner of Central Excise, Mumbai-II)

M/s. Larsen & Toubro Ltd. (HED) **Appellant**
Gate No.1, Saki Vihar Road,
Powai, Mumbai 400 072.

Vs.

Commr. of Central Excise, Mumbai-II **Respondent**
9th floor, Piramal Chambers,
Jijibhoy Lane, Lalbaug,
Parel, Mumbai 400 012.

Appearance:

Shri V. Sridharan, Senior Advocate, with Shri Prakash Shah and Shri Prasad Paranjape, Advocates, for the Appellant
Shri Ajay Kumar, Additional Commissioner, Authorised Representative for the Respondent

CORAM:

Hon'ble Dr. D.M. Misra, Member (Judicial)
Hon'ble Mr. Sanjiv Srivastava, Member (Technical)

FINAL ORDER NO. **A/87027/2019**

Date of Hearing: 28.08.2019
Date of Decision: 28.08.2019

PER: SANJIV SRIVASTAVA

This appeal is directed against order in original No 16/Commr/M-II/ 2011 dated 31.01.2012 of Commissioner Central Excise, Mumbai II. By the impugned order, Commissioner held as follows:

"a) I confirm the amount of Rs 32,39,35,223/- (Rupees Thirty Two Crores Thirty Nine Lakhs Thirty Five Thousand Two Hundred and Twenty Three only) payable in terms of

Rule 6(3)(b) of CCR, 2004 prior to 01.04.2008 and Rule 6(3)(i) of CCR, 2004 w.e.f 01.04.2008 under Rule 14 of the CENVAT Credit Rules, 2004 read with Section 11A(2) of Cenvat Excise Act, 1944.

b) I appropriate the amount of Rs 1,22,98,068/- (Rupees One Crore Twenty Two Lakhs Ninety Eight Thousand Sixty Eight only) paid by the assessee against the above mentioned confirmed amount of Rs 32,39,35,223/-.

c) I order recovery of interest under Rule 14 of the CENVAT Credit Rules, 204 read with Section 11AB of the Central Excise Act, 1944.

d) I appropriate the amount of Rs 17,49,730/- (Rupees Seventeen Lakhs Forty Nine Thousand Seven Hundred and Thirty only) paid by the assessee against the interest payable on Rs 32,39,35,223/- under Rule 14 of the Cenvat Credit Rules, 2004 read with Section 11AB of the Central Excise Act, 1944 and order recovery of remain interest payable.

e) I impose a penalty of Rs 32,39,35,223/- (Rupees Thirty Two Crores Thirty Nine Lakhs Thirty Five Thousand Two Hundred and Twenty Three only) under Rule 15 of the CENVAT Credit Rules, 2004 read with Section 11AC of Central Excise Act, 1944 "

2.1 Appellants are engaged in manufacture of Heat Exchangers, Pressure Vessels and Boilers etc classifiable under Chapter 84 of First Schedule to Central Excise Tariff Act, 1985. They claimed benefit of exemption under Sr No 7, 8,19 and 21 of Notification No 64/1995-CE, in respect of the goods supplied to Department of Space, Government of India and Indian Space Research Organization and Sr No 1 of Notification No 10/1997-CE dated 09.03.1997 in respect of supplies made to Public Funded Research Institutions or Universities.

2.2 Since appellant maintains separate account in respect of the inputs used in the manufacture of exempted goods they do not take any credit of duty paid on such inputs. They have taken credit in respect of various input services as detailed in para 3 of the Show Cause Notice. Since these input services are common for manufacture of both exempted as well as dutiable goods, and they had not opted for the scheme provided by rule 6(3)(ii), they were required to pay the amounts as indicated in table below, attributable to the exempted goods cleared by them

Period	Exempted Clearance in Rs	Rate %	Amount in Rs
Amount to be reversed as specified by Rule 6(3)(b)			
2006-07	50,32,63,821	10	5,0326,382
2007-08	79,37,28,773	10	7,93,72,877
From April 08, the amount was specified by Rule 6(3)(i)			
2008-09	1,13,78,31,573	10	11,37,83,157
2009-10	25,12,02,225	10	2,51,20,222
From July 09, amount specified as per 6(3)(i) is 10% of exempted value			
2009-10	65,20,79,404	5	3,26,03,970
2010-11 till Dec 10	45,45,72,308	5	2,27,28,615
Total	379,26,78,104		32,39,35,223

2.3 Therefore a show cause Notice dated 03.05.2011 was issued to them asking them to show cause as to why-

a) the amount of Rs 32,39,35,223/- (Rupees Thirty Two Crores Thirty Nine Lakhs Thirty Five Thousand Two Hundred and Twenty Three only) payable in terms of Rule 6(3)(b) of CCR, 2004 prior to 01.04.2008 and Rule 6(3)(i) of CCR, 2004 w.e.f 01.04.2008 as mentioned above should not be demanded and recovered from them under proviso to Section 11A(1) of Central Excise Act, 1944.

b) the amount of Rs 1,22,98,068/- (Rupees One Crore Twenty Two Lakhs Ninety Eight Thousand Sixty Eight only) paid by the assessee under Rule 6(3A)(c) of CCR, 2004 should not be against the above mentioned amount of Rs 32,39,35,223/- (Rupees Thirty Two Crores Thirty Nine Lakhs Thirty Five Thousand Two Hundred and Twenty Three only) payable in terms of Rule 6(3)(b) of CCR, 2004 prior to 01.04.2008 and Rule 6(3)(i) of CCR, 2004 w.e.f 01.04.2008.

c) appropriate interest in terms of Section 11AB of the Central Excise Act, 1944 should not be demanded and recovered on the abovementioned amount of Rs 32,39,35,223/- (Rupees Thirty Two Crores Thirty Nine Lakhs Thirty Five Thousand Two Hundred and Twenty Three only), and

d) the amount of Rs 17,49,730/- (Rupees Seventeen Lakhs Forty Nine Thousand Seven Hundred and Thirty only) should not appropriate against the interest payable under (iii).

e) penalty of should not be imposed upon them under Section 11AC of Central Excise Act, 1944 read with Rule 15 of the CENVAT Credit Rules, 2004 for contravention of Rule 6(3)(b) of CCR, 2004 prior to 01.04.2008 and Rule 6(3)(i) of CCR, 2004 w.e.f 01.04.2008."

2.3 Show Cause Notice was adjudicated by the Commissioner as per the impugned order referred in para 1, supra.

2.4 Aggrieved appellants are in appeal before Tribunal.

3.1 We have heard Shri V Sridharan, Senior Advocate with Shri Prakash Shah and Shri Prasad Paranjape, Advocates, for the Appellants and Shri Ajay Kumar, Additional Commissioner, Authorized Representative for the revenue.

3.2 Arguing for the Appellant learned Counsels, submitted while reiterating the submissions made in appeal

- They had vide their letter dated 10.04.2008, 06.04.2009 and 8.04.2010 exercised the option under Rule 6(3)(ii) of the CENVAT Credit Rules, 2004. Thus when they had exercised the option under Rule 6(3)(ii), the demand made under Rule 6(3)(i) cannot be sustained for the period from 01.04.208 onwards.
- Though they had opted for the Scheme of Rule 6(3)(ii), for the reason that they had not made provisional reversal every month, the benefit of said rule and option cannot be denied. Interest in respect of delayed payment of the said amounts to be reversed every month can be demanded as provided by Rule 6(3A).
- They had reversed the credit required to be reversed in terms of the Rule 6(3A) prior to issuance of show cause notice, the demand made by invoking Rule 6(3)(i) is bad in law. Also the demand is barred by limitation as department was aware of the exempted clearances made by them.
- Demand for the period prior to 01.04.2008 is also bad in law in view Rule 6(7) inserted retrospectively from the inception, by section 73(1) of Finance Act, 2010 read with Eight Schedule.
- They had vide letter dated 8.07.2011 contended that they are required to reverse only part of the CENVAT Credit of the Service Ta on input services, as is attributable to the exempted final products. Accordingly they have worked out the amount to be paid/ reversed as Rs 1,22,98,068/- and interest on this amount would be Rs 17,49,730/-for the period 01.4.208 to 31.12.2010. They had paid the said

amounts and the same have been acknowledged and appropriated in the impugned order.

- By their letter dated 20th February 2012 they had intimated about reversing the proportionate credit for 206-07 and 2007-08 with interest at the rate of 13%.
- They had deposited Rs 50,00,000/- pursuant to the order of Tribunal, as intimated by letter dated 30.10.2012.
- They have vide their letter dated 2nd November 2012, intimated about depositing the differential interest (@24%-@13%) amounting to Rs 28,24,352/- for the entire period of dispute.
- Thus for entire period of dispute they have reversed the entire proportionate credit due with interest @ 24%.

3.3 Arguing for the revenue learned Authorized Representative while reiterating the findings in impugned order submitted that-

- Rule 6 provides for a scheme and also machinery provision to be followed by the manufacturer of dutiable and exempted goods;
- In case where the manufacturers does not maintain separate account of input/ input services used for manufacture of exempted goods as per Rule 6(2), he has been provided with two options, either to pay a specified % of the value of exempted clearance (Rule 6(3)(i)) or make proportionate reversal (Rule 6(3)(ii)).
- Since appellant had not maintained separate accounts as provide by Rule 6(2), they were required to either make proportionate reversal every month by following the procedure as laid down Rule 6(3A). Appellant having not made provisional reversal every month as required under Rule 6(3A), they were

required to pay amount determined at specified % of the exempted clearance as per 6(3)(ii).

- The contention of the appellants, in respect of applicability of Amendments made by Section 73 of Finance Act, 2010 are misplaced. These amendments were only applicable in respect of the disputes which were pending as on the date of assent. Since there was no dispute, pending in present case on the date of enactment, these provisos will not be applicable. Further the appellants have also not followed the procedure as laid down by the amendments made by section 73.
- Demand is not barred by limitation, as the appellants had not disclosed about not maintaining the separate accounts for input services used for manufacture dutiable and exempted goods. In fact they were maintaining separate accounts for the inputs. By doing so and also not reversing the credit on provisional basis every month, they had contravened the provisions of the CENVAT Credit Rules, 2004 with the intention to evade payment of duty. Hence extended period of limitation is applicable, for making the demand.

4.1 We have considered the impugned order with submissions made in appeal, during the course of arguments and in the written submissions.

4.2 As per the provisions of the Rule 6 of the CENVAT Credit Rules, 2004, as amended from time to time, in case of common input/ input services used for manufacture of both exempted and dutiable goods, appellants had following three options available:

a. Maintain separate accounts in respect of the common inputs and input services used for manufacture of exempted & dutiable goods and taxable and exempted service (Rule 6 (2)); or

b. Reverse the proportionate CENVAT credit in respect of the inputs and input services use for proving exempted goods and exempted services, by following the procedure as prescribed by the said rule (Rule 6(3)(ii); or

c Reverse the CENVAT Credit at the rate of 5% (earlier 10%) of value of exempted goods (Rule 6 (3)(i)).

4.2 Undisputedly appellants were following the option at "a" above in respect of the inputs used in manufacture of exempted goods. However they were not maintaining separate accounts in respect of the input services used by them hence they were required to follow either option at "b" or at "c". Since appellants were found not to be following either of the options proceedings have been initiated against them for recovery of the amounts that was required to be paid by them in terms of the said Rule 6(3) of CENVAT Credit Rules, 2004.

4.3 Courts and Tribunals have time and again while interpreting the scope of Rule 6 of CENVAT Credit Rules, 2004, concluded to state that in so circumstances the said rule should be used as a measure to extract illegal amounts from the assessee. The scope of Rule 6, is limited to the extent that assessee do not get the undue benefit by availing the CENVAT Credits in respect of the exempted goods manufactured by him or the exempted services provided by him. We find that issues which are in dispute have been considered by the tribunal in case of Mercedes Benz vs Commissioner of Central Excise Pune –II [2015-TIOL-1550-CESTAT-MUM] and following was held

"5. We have considered the submissions made by both sides. From the facts and circumstances of the case and arguments put forth by rivals, we find that the issue to be decided by us is whether appellant is required to pay 5% of total sale value of the goods traded by them in terms of Rule 6(3)(i) when the appellant paid the actual credit attributed to the quantum trading sale in terms of Rule

6(3A) along with interest following the option available under Rule 6(3)(ii). Provisions for payment of 5% of the sale value of exempted goods is provided as one of the option given in Rule 6(3) of CENVAT credit Rules which is reproduced below:

RULE 6.Obligation of a manufacturer or producer of final products and a [provider of output service.

(1)The CENVAT credit shall not be allowed on such quantity of [input used in or in relation to the manufacture of exempted goods or for provision of exempted services, or input service used in or in relation to the manufacture of exempted goods and their clearance upto the place of removal or for provision of 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.

Explanation 1 . - For the purposes of this rule, exempted goods or final products as defined in clauses (d) and (h) of rule 2 shall include non-excisable goods cleared for a consideration from the factory.

Explanation 2 . - Value of non-excisable goods for the purposes of this rule, shall be the invoice value and where such invoice value is not available, such value shall be determined by using reasonable means consistent with the principles of valuation contained in the Excise Act and the rules made thereunder.

(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

(a) the receipt, consumption and inventory of inputs used

(i) in or in relation to the manufacture of exempted goods;

(ii) in or in relation to the manufacture of dutiable final products excluding exempted goods;

(iii) for the provision of exempted services;

(iv) for the provision of output services excluding exempted services; and

(b) the receipt and use of input services

(i) in or in relation to the manufacture of exempted goods and their clearance upto the place of removal;

(ii) in or in relation to the manufacture of dutiable final products, excluding exempted goods, and their clearance upto the place of removal;

(iii) for the provision of exempted services; and

(iv) for the provision of output services excluding exempted services,

and shall take CENVAT credit only on inputs under sub-clauses (ii) and (iv) of clause (a) and input services under sub-clauses (ii) and (iv) of clause (b).

(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 [any one] of the following options, as applicable to him, namely:

(i) *pay an amount equal to five per cent of value of the exempted goods and exempted services; or*

(ii) *pay an amount as determined under sub-rule (3A); or*

(iii) *maintain separate accounts for the receipt, consumption and inventory of inputs as provided for in clause (a) of sub-rule (2), take CENVAT credit only on inputs under sub-clauses (ii) and (iv) of said clause (a) and pay an amount as determined under sub-rule (3A) in respect of input services. The provisions of sub-clauses (i) and (ii) of clause (b) and sub-clauses (i) and (ii) of clause (c) of sub-rule (3A) shall not apply for such payment: Provided that if any duty of excise is paid on the exempted goods, the same shall be reduced from the amount payable under clause (i):*

Provided further that if any part of the value of a taxable service has been exempted on the condition that no CENVAT credit of inputs and input services, used for providing such taxable service, shall be taken then the amount specified in clause (i) shall be [six percent.] of the value so exempted]

Provided also that in case of transportation of goods or passengers by rail the amount required to be paid under clause (i) shall be an amount equal to 2 per cent. of value of the exempted services.]

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. Ld.*

Adjudicating Authority demanded 5% of the total sale of the trading turnover of goods on the ground that option provided under Rule 6 (3) (i) is applicable on the ground that claim of the appellant on the option provided under Rule 6(3)(ii) is not available for the reason that appellant has not complied with condition provided under sub Rule (3A) of Rule 6 which provides that manufacturers of the goods shall follow certain procedure and conditions as provided under Sub Rule (3A)(a) (i) to (iv) inasmuch as the appellant have not given said information in writing to the Jurisdictional Superintendent of Central Excise. Secondly the appellant, as provided under Clause (b) of sub rule (3A) have not paid the amount of CENVAT on monthly basis and paid after almost 11 months.

5.1 We have observed that in Rule 6(3) prevalent at the relevant time, two options have been provided:(i) Payment of 5% on value of exempted services. (ii) Payment of an amount equal to the CENVAT Credit amount attributed to input services used in or in relation to manufacture of exempted goods or provision of exempted services as provided under sub rule (3A) (b). It is observed that the appellant has availed the option provided under sub rule (3)(ii) of Rule 6 and paid an amount as per sub rule (3A) along with interest and intimated the same to the jurisdictional superintendent in writing vide letter dated 14/3/2012. From the perusal of the said letter, we observed that the appellant categorically stated in the said letter that payment of CENVAT Credit which they have made along with interest is in accordance with Rule 6 (3A) of CENVAT Credit Rules. With this act of the appellant, it is clear that the appellant opted for the option as provided under Rule 6(3)(ii) of the CENVAT Credit Rules, 2012, in accordance to which, the appellant are supposed to an *amount equivalent to CENVAT Credit on input services attributed to the exempted service in terms of Rule 6(3A). In the present case, the appellant has availed CENVAT Credit in respect of common input services, which has been used in relation to the manufacture of the final product as well as for trading of bought out cars. Therefore they are supposed to pay an amount equivalent to CENVAT Credit which is attributed to the input service used for exempted service i.e. sale of car. In our view, three options have been provided under rule 6(3) and it is up to the assessee that which option has to be availed. Revenue could not insist the appellant to avail a particular option. In the present case the appellant have admittedly availed option as provided under Rule 6(3)(ii) and paid an amount as required under sub rule (3A) of Rule 6. As regard the compliance of the procedure and conditions as laid down for availing option as provided under sub rule (3) (ii), we find that foremost condition is that the appellant is required to pay an amount as per the formula provided under sub rule (3A) on monthly basis. However, we find that as per the provision, payment on monthly basis is provisional basis, therefore it is not mandatory that whole amount or part of the amount as required to be paid on every month. The appellant though belatedly calculated the amount required to be paid in terms provided under Rule (3A) of Rule 6, therefore to fulfil the condition, assessee should pay the said amount, which has been complied by the appellant.*

5.2 As regard the delay in payment, if any, the appellant have discharged the interest liability on such delay. Regarding the compliance as provided under Clause (a) of Sub Rule (3A) of Rule 6 the appellant while exercising this option is required to intimate in writing to the Jurisdictional Superintendent, Central Excise, the following particulars namely:

(i) Name, address and registration No. of the manufacturer of goods or provider of output service;

(ii) Date from which the option under this clause is exercised or proposed to be exercised;

- *(iv) Description of dutiable goods or taxable services;*
- *(v) Description of exempted goods or exempted services;*
- *(vi) CENVAT credit of inputs and input services lying in balance as on the date of exercising the option under this condition.*

As per the submission of the appellant and perusal of their letter along with enclosed details, it is found that more or less all these particulars were intimated to the jurisdictional Superintendent. The appellant has been filing their returns regularly on monthly basis to the department. On perusal of the copies of the such return submitted along with appeal papers, it is observed that the particulars, as required under clause (a) of sub rule (3A) of Rule 6 has been produced to the range superintendent. Therefore all the particulars which are required to be intimated to the Jurisdictional superintendent while exercising option stand produced. Though these particulars have not been submitted specifically under a particular letter, but since these particulars otherwise by way of return and some of the information under their letters has admittedly been submitted, we are of the view, as regard this compliance of Rule 6(3A), it stood made.

5.3As regard the contention of the adjudicating authority that this option should be given in beginning and before exercising such option, we are of the view that though there is no such time limit provided for exercising such option in the rules but it is a common sense that intention of any option should expressed before exercising the option, however the delay can be taken as procedural lapse. We also note that trading of goods was considered *as exempted service from 2011 only, thus it was initial period. We are also of the view that there is no condition provided in the rule that if a particular option, out of three options are not opted, then only option of payment of 5% provided under Rule 6(3)(i) shall be compulsorily made applicable, therefore we are of the view that Revenue could not insist the appellant to avail a particular option. In the present case admittedly it is appellant who have on their own opted for option provided under Rule 6(3)(ii). The meaning of the option as argued by the Ld. Sr. Counsel is that" option of right of choosing, something that may be or is chosen, choice, the act of choosing". From the said meaning of the term 'option', it is clear that it, is the appellant who have liberty to decide which option to be exercised and not the Revenue to decide the same.*

5.4We find that the appellant admittedly paid an amount of Rs. 4,06,785/- plus interest, this is not under dispute. Therefore in our view, the appellant have complied with the condition prescribed under Rule 6(3)(ii) read with sub-rule (3A) of Rule 6 of CENVAT Credit Rules, therefore demand of huge amount of Rs. 24,71,93,529/- of the total value of the vehicle amounting to Rs. 494,38,70,577/- sold in the market cannot be demanded. We are also of the view that Rule 6 of the CENVAT Credit Rules is not enacted to extract illegal amount from the assessee. The main objective of the Rule 6 is to ensure that the assessee should not avail the CENVAT Credit in respect of input or input services which are used in or in relation to the manufacture of the exempted goods or for exempted services. If this is the objective then at the most amount which is to be recovered shall not be in any case more than CENVAT Credit attributed to the input or input services used in the exempted goods. It is also observed that in either of the three options given in sub-rule (3) of Rule6, there is no provisions that if the assessee does not opt any of the option at a particular time, then option of *payment of 5% will automatically be applied. Therefore we do not understand that when the appellant have categorically by way of their intimation opted for option provided under sub-rule (3)(ii), how Revenue can insist that option (3)(i) under Rule6 should be followed by the assessee.*

5.5As discussed above and in the facts of the case that actual CENVAT credit attributed to the exempted services used towards sale of the bought out cars in terms of Rule6(3A) comes to Rs. 4,06,785/- whereas adjudicating authority demanded an amount of Rs. 24,71,93,529/-. In our view, any amount, over and above Rs. 4,06,785/- is not the part of the CENVAT Credit, which required to be reversed. The legislator has not enacted any provision by which CENVAT credit, which is other than the credit attributed to input services used in exempted goods or services; can be recovered from the assessee.

5.6 We have gone through judgments relied upon by the Ld. A.R. In the arguments, we found that as regards the judgments on the issue of availment of CENVAT credit on the input or input services used in dutiable and exempted goods, the provision involved in the present case i.e. rule 6(3)(i)(ii), (3A) has not been considered in the relied upon judgments, therefore the same are not applicable. As regard the other judgements, all these judgments having different facts and dealing with other provisions such as SSI exemption, exemption notification, etc., which are not identical to the fact of the present case. Moreover, in the present case the substantive provision sunder Rule 6(3)(ii) and sub-rule (3A) i.e. payment of equivalent to the CENVAT credit, which the appellant have complied with and if at all there is delay, the required interest has also been paid, therefore in the present case, there is no case of non compliance of procedure and condition. Therefore the judgments cited by the Ld. A.R. are not applicable."

4.4 Similar view has been expressed by the CESTAT in following decisions:

i. M/s TATA Technologies Ltd. vs Commissioner Central Excise Pune-II [2016-TIOL-272-CESTAT-Mum]
ii. Sahyadri Starch & Industrial Pvt Ltd vs. Commissioner Central Excise, Kolhapur [2016-TIOL-615-CESTAT-Mum]
iii. Aster Pvt Ltd vs. Commissioner Central Excise Hyderabad –III [2016-TIOL-1035-CESTAT-Hyd]

4.5 In case of Reliance Life Insurance Co Ltd [2018 (363) ELT 1050 (T-Mum)] CESTAT, Mumbai Bench held as follows:

"5. ……. Before us also it is their submission that they have been given option to reverse the proportionate credit and they cannot be forced to reverse 6% of the value of exempted goods in terms of Rule 6(3) of CCR, 2004. In our considered view the assessee cannot be forced to pay 6% of the value of exempted goods in case where they have availed the credit of input services used in exempted output services. The Rule 6(3A) of CC Rules, 2004 only contemplates procedure for application of Rule 6(3) and does not mandates that on failure to intimate in writing for availing option the manufacturer or the service provider shall lose their choice to avail option under Rule 6(3)(ii) for reversing proportionate credit. The procedure given therein and the conditions in said Rule 6(3A) is intended to make Rule 6(3) workable. It nowhere mandates to take away options exercisable available to the assessee. Rule 6(3)(i) cannot be made automatically applicable on failure to intimate in writing about option to be availed by the assessee. The assessee has the option either to reverse the proportionate credit pertaining to such exempted service or to pay 6%. It has been consistently held by this Tribunal that there is no bar on the assessee for reversal

of credit said to have been accrued while providing exempted services. This analogy has been accepted by the Tribunal in case of Mercedez Benz India (P) Ltd. v. CCE - 2015 (40) S.T.R. 381 (Tri.-Mum.), Tata Technologies Ltd. v. CCE - 2016 (42) S.T.R. 290 and by the Hon'ble High Courts in case of Maize Products - 2009 (234) E.L.T. 431 (Guj), Hello Minerals Water (P) Ltd. v. UOI - 2004 (174) E.L.T. 422 (All.), Ashima Dyecot Ltd. - 2008 (232) E.L.T. 580 (Guj.-H.C.). Further we find that in case of M/s. Commissioner of Central Excise, New Delhi v. Max New York Life Insurance Company Ltd. reported in 2017-TIOL-2385-CESTAT-DEL the Tribunal held that assessee is entitled for reversal of credit. The Tribunal held as under :

"6. The proceedings against the respondent is to recover an amount equivalent to 6% of the value of the exempted service. The Original Authority held that the respondent is liable to follow one of the two options in terms of Rule 6(3) of CCR, 2004. The respondent followed second option and reversed the proportionate credit attributable to the exempted service, along with interest for delayed reversal of such credit. We find that the only objection of the Revenue is to the effect that the respondent failed to exercise the option for reversal at the time of availing credit. We note that the annuity products are considered as exempted service as held by the impugned order. It is also held that the appellant has to follow the consequences of such finding. We note that upon the direction of the impugned order, the respondent did exercise the second option and reversed the credit along with interest. In such factual background, we find that there is no reason to insist that the respondent should necessarily follow the first option of paying 6% of the value of exempted service. We find no merit in the appeal by Revenue. Accordingly, we dismiss the same."

5.1 We are in agreement with the aforesaid order of the Tribunal and the other judgments and hold that the appellant is entitled for reversal of credit attributable to the exempted service and the demand of 6% is not sustainable against them. The appellant has also argued that there reversal of Cenvat credit ought to be computed by taking the entire Cenvat credit of the services of Insurance Auxiliary Service as the same fall in ambit of Rule 6(5) of Cenvat Credit Rules, 2004 in line with Tribunal's decision in case of TATA AIG Life Insurance Company Ltd. reported in 2014-TIOL-487 = 2015 (37) S.T.R. 570 (Tribunal). We find that in terms of Rule 6(5) of CCR, 2004 the credit of tax paid on Insurance Auxiliary Service cannot be denied if the person availing such credit is engaged in both categories of services i.e. taxable as well as exempted. In the present case it is not disputed that the appellant is engaged in providing both categories of services and therefore there is no reason to demand Cenvat reversal in respect of credit of Insurance Auxiliary services. However, input services which are exclusively used for providing exempted service the Cenvat credit on such services is not admissible in terms of Rule 6(5) of Cenvat Credit Rules, 2004."

4.6 Thus in view of the decisions as above and also taking note of the fact that appellants had reversed the entire amount proportionate credit along with interest due in respect in respect of the period 01.04.2008 to 31.12.2010 (Rs 1,22,98,068/ +Rs 17,49,730/-) even prior to issuance of show cause notice we do not find any merits in the demands made post 1st April 2008 and set aside the same.

4.7 For the period prior to 1st April 2008, we find that as per the law as it existed during the relevant period appellant was required to pay 10% of the value of exempted goods, if he was not in position to maintain separate account in respect of the inputs/ input services used for manufacturing both exempted and dutiable goods. Interpreting the erstwhile rule 57CC of Central Excise Rules, 1944, Hon'ble Supreme Court has in case of Hindustan Zinc Ltd. [2014 (303) ELT 321 (SC)] held as follows:

"***15.*** *On merits, the learned Solicitor General argued that the interpretation furnished by the High Court to Rule 57CC of the Modvat Rules and Rule 6 of Cenvat Rules, respectively was not correct. The High Court was required to apply literal rule of interpretation when the language of these rules is clear and unambiguous.*

20. *Let us now examine the position contained in Rule 57CC on the touchstone of the aforesaid position. No doubt, Rule 57CC requires an assessee to maintain separate records for inputs which are used in the manufacture of two or more final products one of which is dutiable and the other is non-dutiable. In that event, Rule 57CC will apply. For example, a tyre manufacturer manufactures different kinds of tyres, one or more of which were exempt like tyre used in animal carts and cycle tyre, where car tyres and truck tyres attract excise duty. The rubber, the accelerators, the retarders, the fillers, sulphur, vulcanising agents which are used in production of tyres are indeed common to both dutiable and exempt tyres. Such assessees are mandated to maintain separate records to avoid the duty demand of 8% on exempted tyres. .....*"

4.8 However in order to mitigate the difficulties faced by the trade by strict application of the said rule, Rule 6 was amended retrospectively by Finance Act, 2010 in following manner:

"*72. (1) In the CENVAT Credit Rules, 2004, made by the Central Government in exercise of the powers conferred by section 37 of the Central Excise Act, as published in the*

Official Gazette vide notification of the Government of India in the Ministry of Finance (Department of Revenue) number G.S.R. 600(E), dated the 10th September, 2004, rule 6 shall stand amended and shall be deemed to have been amended retrospectively, in the manner specified in column (3) of the Eighth Schedule, on and from and up to the corresponding date specified in column (4) of that Schedule against the rule specified in column (2) of that Schedule.

(2) Where a person opts to pay the amount in accordance with the provisions as amended by subsection (1), he shall pay the amount along with interest specified thereunder and make an application to the Commissioner of Central Excise along with documentary evidence and a certificate from a Chartered Accountant or a Cost Accountant, certifying the amount of input credit attributable to the inputs used in or in relation to the manufacture of exempted goods, within a period of six months from the date on which the Finance Bill, 2010 receives the assent of the President.

(3) The Commissioner of Central Excise shall, on receipt of an application under sub-section (2), verify the correctness of the amount paid within a period of two months from the date of receipt of the application and in case the amount so paid is found to be less than the amount payable, he shall call upon the applicant to pay the differential amount along with interest, which shall be paid within a period of ten days from the date of receipt of the communication from the Commissioner in this regard.

(4) Notwithstanding anything contained in any judgment, decree or order of any court, tribunal or other authority, any action taken or anything done or purported to have been taken or done, at any time during the period commencing on and from the 10th day of September, 2004 and ending with the 31st day of March, 2008,

relating to the provisions as amended by sub-section (1), shall be deemed to be and deemed always to have been, for all purposes, as validly and effectively taken or done as if the amendment made by sub-section (1) had been in force at all material times.

For the purposes of sub-section (1), the Central Government shall have and shall be deemed to have the power to make rules with retrospective effect as if the Central Government had the power to make rules under section 37 of the Central Excise Act, retrospectively, at all material times.

Explanation.—For the removal of doubts, it is hereby declared that no act or omission on the part of any person shall be punishable as an offence which would not have been so punishable had this section not come into force."

THE EIGHTH SCHEDULE

[See section 73(1)]

S No	Provisions of CENVAT Credit Rules, 2004 to be amended	Amendment	Period of effect of amendment
1	2	3	4
	Rule 6 of the CENVAT Credit Rules, 2004 as published vide notification number G.S.R. 600(E),	In the CENVAT Credit Rules, 2004, in rule 6, after sub-rule (6), the following sub-rule shall be inserted, namely:— '(7) Where a dispute relating to adjustment of credit on inputs used in or in relation to exempted final products relating to the period beginning on the 10th day of September, 2004 and ending with the 31st day of March,	10th day of September, 2004 to the 31st day of March, 2008 (both days inclusive).

	dated the 10th September, 2004 [23/2004-CENTRAL EXCISE (N.T.) dated the 10th September 2004].	2008 (both days inclusive) is pending on the date on which the Finance Bill, 2010 receives the assent of the President, then, notwithstanding anything contained in sub-rules (1) and (2), and clauses (a) and (b) of sub-rule (3), a manufacturer availing CENVAT credit in respect of any inputs or input services and manufacturing final products which are chargeable to duty and also other final products which are exempted goods, may pay an amount equivalent to CENVAT credit attributable to the inputs or input services used in, or in relation to the manufacture of, exempted goods before or after the clearance of such goods: Provided that the manufacturer shall pay interest at the rate of twenty-four per cent. per annum from the due date till the date of payment of the said amount. Explanation.—For the purpose of this sub-rule, "due date" means the 5th day of the month following the month in which goods have been cleared from the factory.'.	

In the Notes on Clause, tabled along with the Finance Bill, 2010, explaining the said amendment following has been stated-

"Clause 72 of the Bill seeks to amend rule 6 of the CENVAT Credit Rules, 2004 in the manner specified in column (3) of the Eighth Schedule with retrospective effect, on or from and up to date specified in column (4) thereof, so as to provide for payment by manufacturer of an amount equal to CENVAT credit attributable to inputs or inputs services used in or in relation to manufacture of exempted goods or goods chargeable to nil rate of duty before or after clearance of such goods along with interest at the rate of twenty-four per cent. per annum. The proposed amendment will apply to cases in respect of which a dispute relating to adjustment of credit on inputs in or in relation to exempted final products relating to the period beginning on the 10th day of September, 2004 to 31st day of March, 2008 (both days inclusive) is pending on the date on which the Finance Bill, 2010 receives the assent of the President."

Similar explanation to proposed amendment is available in the J S TRU letter D.O.F.No.334/ 1/2010-TRU New Delhi, dated the 26th February, 2010.

"10.2 Other measures

10.2.1 Some of the other procedural simplification measures that are contained in the budget proposals are as under:

- *...*
- *Benefit of allowing Cenvat credit to be reversed on proportionate basis (when common inputs are used for the manufacture of dutiable and exempt products) is being extended retrospectively for pending cases. Suitable provisions have been incorporated in the Finance Bill, 2010 (clauses 68 to 72).*
- *......"*

4.8 Thus the benefit o proportionate reversal has been extended from retrospective effect, in cases where common inputs/ input services were used for manufacture of dutiable and exempt products. In our view the intention behind the amendment made, is quite obvious. The assessees have been allowed to proportionately reverse the credit attributable to inputs/ input services used for manufacture of exempted goods, in cases where common inputs/ input services are used or manufacture of both dutiable and exempted goods. We are no in agreement with the submissions made by the learned Authorized Representative, when he states that this amendment is applicable only in case where the show cause notice was issued and was pending on the date of assent by the President. In our view, phrase "*Where a dispute relating to adjustment of credit on inputs used in or in relation to exempted final products relating to the period beginning on the 10th day of September, 2004 and ending with the 31st day of March, 2008 (both days inclusive) is pending on the date on which the Finance Bill, 2010 receives the assent of the President,"* is limited to the show case notice issued, but refers to the dispute that is there on the issue during the specified period. The amendment specifically says that the dispute should pending on that date, and the show cause notice. Definitely if the dispute is pending then only show cause notice is issued. In our view the case of appellants for the periods, 2006-07 and 2007-08 is covered by the amendments made by way of insertion of sub-rule (7) in Rule 6 of the CENVAT Credit Rules, 2002.

4.9 Taking note of the submission made by the appellant counsel that subsequently they have paid/ reversed the entire amount of proportionate credit for the period 2006-07 and 2007-08 along with interest at rate of 24% and the amendments made by the Finance Act, 2010 we do not find merits in the demand made for this period also.

4.10 Thus in view of the discussions as above subject to the appropriation of the amounts deposited by the appellants toward proportionate credit attributable to input services used in manufacture exempted goods and the interest due, we set aside the impugned order.

4.11 Appellants have also filed a Miscellaneous Application for extension of stay, which in view of our finalizing the appeal has become infructuous and hence is dismissed.

5.1 In view of discussions as above we allow the appeal filed by the appellant as stated in para 4.10.

5.2 Miscellaneous application filed by the appellants is dismissed.

(Order pronounced in the open court)

(Dr. D.M. Misra)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

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