CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
REGIONAL BENCH

Service Tax Appeal No. 86363 of 2015
Service Tax CO No. 91143 of 2015
(On behalf of Respondent)

(Arising out of Order-in-Original No. 41/ST-VII/RS/2014 dated 19.02.2015 passed by the Commissioner of Service Tax-VII, Mumbai)

Commissioner of Service Tax-VII, Mumbai **Appellant**
115, New Central Excise Building,
Maharshi Karve Road,
Churchgate, Mumbai 400 020.

Vs.

M/s. Aker Power Gas Pvt. Ltd. **Respondent**
Powergas House, Beta Building-I,
Think Techno Campus, Kanjurmarg Village,
Kanjurmarg (E), Mumbai 400 042.

Appearance:

Shri Dilip Shinde, Assistant Commissioner, Authorised Representative, for the Appellant
Shri Bharat Raichandani, Advocate, for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)
HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

FINAL ORDER NO. **A/87034/2021**

Date of Hearing: 27.10.2021
Date of Decision: 27.10.2021

PER: SANJIV SRIVASTAVA

This appeal filed by revenue is directed against Order-in-Original No. 41/ST-VII/RS/2014 dated 19.02.2015 of the Commissioner Service Tax Mumbai. By the impugned order, the Commissioner has held as under:

"ORDER

25. In view of the foregoing, I pass the following order:

i. I confirm the demand to the extent of Rs.25,82,311/- (Rupees Twenty Five Lakhs Eighty Two Thousands Three Hundred Eleven only) being Cenvat credit attributable to exempted services provided during the period from April 2008 to March 2012, and order recovery of the same from Ms. Aker Power Gas Pvt. Ltd., under the provisions of Rule

14 of the Cenvat Credit Rules, 2004 read with the first proviso to Section 73(1) of the Finance Act, 1994:

ii. I order appropriation of Rs.25,82,311/- (Rupees Twenty Five Lakhs Eighty Two Thousands Three Hundred Eleven only) already reversed / paid by M/s. Aker Power Gas Pvt. Ltd. against the demand confirmed at para 25 (1) above.

iii. I order recovery of Interest at appropriate rate from M/s. Aker Power Gas Pvt. Ltd. from the due date till the date of payment of amount demanded and confirmed above, under the provision of Rule 14 of the Cenvat Credit Rules, 2004 read with Section 75 of the Finance Act, 1994;

iv. I order appropriation of Rs. 2,12,301/- (Rupees Two Lakhs Twelve Thousand Three Hundred One only) paid by M/s. Aker Power Gas Pvt. Ltd. towards interest payable and recoverable against demand confirmed at para 25 (i) from M/s. Aker Power Gas Pvt. Ltd."

2.1 Records of the respondent were audited by the department and thereafter a show cause notice as follows was issued to the respondent,-

01. M/S. Aker Power Gas Pvt. Ltd. Situated ....

02. During the course of audit inspection of the records of the noticee, audit officers observed that the noticee has undertaken trading activities in the name and style of M/s. Aker Power Gas Pvt. Ltd. However, they have not maintained separate record as envisaged under Rule 6(2) of CENVAT Credit Rules, 2004 nor they have paid/reversed 8%, 6% or 5% amount of value of exempted service as applicable at relevant period including trading activities which is in breach of provision of Rule 6(3A) of Cenvat Credit Rules, 2004.

03. The Superintendent (Audit), Group 11, Service Tax Mumbai-II wrote a letter under F.NO. ST II/Audit/Gr. 11/72/APPL/2011-12 dated 30/05/2012 to the assessee for reversal of Cenvat credit as per the provisions of Rule 6(3A) read with Rule 14 of Cenvat Credit Rules, 2004 and also asked to pay interest at the applicable rate thereon.

04. ***The assessee submitted their reply vide their letter SRV/VH dated 6th June, 2012 in which they accepted the objection raised by audit officers and reversed Cenvat***

credit of Rs. 25,82,311/- attributable to inputs used in or in relation to provision of exempted services. *However, they have not paid/reversed 8%, 6% or 5% amount of value of exempted service as applicable at relevant period and interest due on said delayed payment/reversal of Cenvat credit as per the provisions of Rule 6(3A)(i) of Cenvat Credit Rules, 2004.*

05. The relevant provisions of Rule 6 of the Cenvat Credit Rules, 2004, as applicable from 01.04.2008, read as under

....

06. Exempted Service, as defined under Rule 2(e) of the Cenvat credit Rule, 2004, means taxable services which are exempt from the whole of service tax leviable thereon and includes services on which no service tax is leviable under Section 66 of the Finance Act. ***The explanation clarifies that exempted services includes trading.***

07. As per Rule 6(3) of Cenvat Credit Rules, 2004, 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 ***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)****.*

08. As per Rule 6(3A) (e), the manufacturer of goods or the provider of output service, shall, in addition to the amount short-paid, be liable to pay interest at the rate of twenty-four per cent. per annum from the due date, i.e., 30th June till the date of payment, where the amount short-paid is not paid within the said due date;

09. As per the Rule 6(3) of Cenvat credit Rules, 2004, If the assessee fail to maintain separate record of availment of Cenvat credit of exempted services, the assessee has either pay 8%, 6% or 5% amount of value of exempted service as applicable at relevant period or reverse the credit attributable to Inputs and inputs services used for providing exempted service. ***The***

assessee has to exercise the option and intimate to the Superintendent in writing. In instant case, the assessee failed to exercise the option and even not reversed the proportionate Cenvat credit for exempted services during the relevant period. It is seen from the records of the assessee that they have neither fulfilled the conditions laid down in the said sub rule (3A) nor have followed the procedure laid down thereof. In these circumstances, the only option left with the assessee was to pay the amount equivalent to 8%/6%/5%, as applicable for the relevant period, on the amount of exempted services, as provided under Rule 6(3)(I) of the Cenvat Credit Rules, 2004 along with interest due thereon at applicable rate as per the Rule 6(3A)(e) of Cenvat Credit Rules, 2004. *The assesse has merely reversed Cenvat credit of Rs. 25,82,311/- claiming as attributable to the inputs/input service used in exempted services. The assessee has not correctly calculated and paid the said full amount and interest thereon as well.*

10. It, therefore, appears from the above that the assessee have contravened the provisions of Rule 6(3A) and Rule 6(3A)(e) of Cenvat Credit Rules, 2004 in as much as:

i. *they failed to pay amount equivalent to 8% / 6% / 5%, as applicable to the relevant period, of the value of exempted services provided during the period from 01.04.2008 to 31.03.2011.*
ii. *they failed to pay due interest on delayed reversal of Cenvat credit at appropriate rate as per Rule 6(3A) of Cenvat credit rules, 2004*

11. The assessee had never disclosed to the department in any manner that they were also engaged in trading of goods and that they were availing Cenvat credit on the common input services used in the provision of the taxable output services and also used in the trading of goods. The same came to light only at the time of audit conducted on the assessee's records. Thus, the assessee had suppressed the vital fact of availment of Cenvat credit on the said common input services, in spite of the clear cut provisions that no Cenvat credit is admissible on inputs or input services used in exempted services. The action of the *assessee, therefore, appears deliberate and intentional and the said wilful suppression is with intent to evade payment of the amount specified under Rule 6(3) of the Cenvat Credit Rules, 2004. The assessee also contravened the provisions of Rule 6 (3A) of Cenvat credit Rules, 2004 with intent to evade payment of Service Tax. Therefore, the provisions of Rule 14 of the Cenvat Credit Rules, 2004 read with the first proviso to Section 73(1) of the Finance Act, 1994 appears invokable for demanding the said amount beyond one year period. Statutory interest also appears recoverable from the assessee under the provisions of Rule 6(3A)e of the Cenvat Credit Rules, 2004. The assessee is also liable for penal action under Rule 15 of Cenvat credit Rules, 2004 read with Section 78 of Finance Act, 1994.*

12. Now therefore M/s. Aker Power Gas Pvt. Ltd. are hereby required to show cause to the Commissioner of Service Tax, Mumbai-II Commissionerate having his office at Central Excise Building, 4th Floor, M.K.Road, Churchgate, Mumbai- 400 020 as to why:

(a) amount of Rs. 3,01,42,907/- (Rs. Three crore one Lakhs Forty Two Thousand Nine Hundred Seven only) not paid during the period from April 2008 to March 2011 as detailed in Annexure 'A' to Show Cause Cum demand notice should not be demanded and recovered from them under Rule 14 of the Cenvat Credit Rules, 2004 read with the provisions of sections. 73(1) of the Finance Act 1994.

(b) the amount of Rs. 25,82,311/- (Rs. Twenty Five Lakhs Eighty Two Thousand Three Hundred Eleven) reversed by the assessee should not be appropriated against their liability of amount equivalent to 8%, 6% or 5% of value of exempted service.

(c) Interest at appropriate rate should not be charged and recovered from them under the provisions of Rule 6(3A)(e) of Cenvat credit rules, 2004 read with Rule 14 of Cenvat credit rules, 2004,

(d) interest of Rs. 2,12,301/- (Rs. Two Lakhs Twelve Thousand Three Hundred One only) Paid by the assessee should not be appropriated against their liability of interest payable under the provisions of Rule 6 (3A)(e) of Cenvat credit rules, 2004.

(e) Penalty should not be imposed on them under Section 78 of Finance Act, 1994 read with Rule 15 of Cenvat credit Rules, 2004 for contravention of Rule 6(3A) and 6 (3A)(e) of Cenvat Credit Rules, 2004.

DETAILS OF DIFFERENTIAL SERVICE TAX AMOUNT PAYABLE FOR TRADING ACTIVITIES FOR THE PERIOD APRIL 2008 to MARCH 2011

ANNEXURE "A"

FY	*TRADING SALES*	*VALUE OF EXEMPTED SERVICE*	*SERVICE TAX AMOUNT PAYABLE*	*SERVICE TAX AMOUNT PAID*	*DIFFERENTIAL SERVICE TAX AMOUNT*
2008-09	*15000000*	*15000000*	*1200000*	*179867*	*1020133*
2009-10 (01.04.2009 TO 07.07.2009)	*63115000*	*63115000*	*5049200*	*0*	*5049200*
2009-10 (07.07.2009 TO 31.03.2010)	*331706046*	*331706046*	*19902363*	*2061180*	*17841182*
2010-11	*66522408*	*66522408*	*3991344*	*341263*	*3650081*
	476343454	*476343454*	*30142907*	*2582311*	*27560596*

2.2 The show cause notice was adjudicated by the Commissioner vide the impugned order, referred to in para 1, supra. Aggrieved, Revenue has filed this appeal.

2.3 Respondents have filed the cross objections

3.1 We have heard Shri Dilip Shinde, Assistant Commissioner, Authorized Representative for the appellant Revenue and Shri Bharat Raichandani, Advocate for the respondent.

3.2 Arguing for the Revenue, learned authorized representative, while reiterating the grounds stated in the appeal submitted that-

- respondent is provider of output services and is also engaged in trading of goods. They have availed of the CENVAT Credit on input services, and these input services have been used for providing output services and for trading of the goods.

- the issue in the present appeal is limited to the manner of determination of the amount to be reversed in terms of Rule 6 of the CENVAT Credit Rules, 2004.
- as per the show cause notice and appeal, appellant was required to reverse the amount calculated at the rate of 8%, 6% or 5% amount of value of exempted service as applicable at relevant period or reverse the credit attributable to Inputs and inputs services used for providing exempted service.
- respondent do not dispute the applicability of Rule 6 of CENVAT Credit Rules, 2004, but have while reversing the credit attributable to exempted trading activities, by applying the formula which was not prescribed for the same at the relevant time. They have reversed by computing the amount to be reverse by taking the difference of sale price and purchase price of the traded goods.
- This method of computation was prescribed after the March 2011, as per notification No 3/2011-CE(NT) dated 01.03.20011 and Notification No 13/2011-CE (NT) dated 31.03.2011, whereas the entire disputed period is prior to that. They also did not follow the procedure prescribed for computing reversal as prescribed under Rule 6 (3A) ibid.
- Commissioner has in the impugned order accepted the reversal made by the appellant by application of the wrong formula.
- The issue has been settled by the following decision
    - My Car (Bhopal) Pvt Ltd. [2019 (22) GSTL 273 (T-Del)
    - Lally Automobiles Pvt Ltd [2018 (17) GSTL 422 (Del)] affirmed at [2019 (24) GSTL J115 (SC)]
    - AVL India Pvt Ltd. [2017)4) GSTL 59 (T-Del)]
    - Metro Shoes Pvt Ltd {2000 (10) STR 382 (T-Mum)]
    - Mercedes Benz India Pvt Ltd [2014 (36) STR 704 (T-Mum)]
    - Mercedes Benz India Pvt Ltd. [2016 (41) STR 577 (Bom)]

3.3 Learned Counsel for respondent while supporting the findings recorded in the impugned order submits that-

- The genesis of entire issue is as per the audit undertaken by the revenue of their records. After detailed audit officers conducting the audit, concluded that the appellant was required to reverse the amount attributable to exempted services viz trading activities and also communicated the amount required to be reversed.
- Respondents admitted the audit objection and reversed the amount attributable to the exempted services, calculated and communicated to them by the audit.
- Thereafter the audit objection to the extent of quantum of reversal to be made was settled and issue remained only in respect of the interest amount. However the interest on the amount reversed was also paid by them before the issue of Show Cause Notice.
- The issue involved in the matter is settled in the favour of appellants and he would place reliance on the following decisions:
    - Reliance Life Insurance Co Ltd [2018 (363) ELT 1050 (T-Mum)]
    - Cranes & Structural engineers [2017 (347) ELT 112 (T-Bang)]
    - Aurbindo Pharma Ltd [2017-TIOL-1196-CESTAT-Hyd]
    - Sahyadri Starch & Industrial Pvt Ltd [2016-TIOL-615-CESTAT-MUM]
    - Aster Pvt Ltd [2016 (43) STR 411 (T-Hyd)]
    - Mercedes Benz India Pvt Ltd [2015 (40) STR 381 (T-Mum)]
    - Bombay Dyeing & Mfg Co Ltd [2007 (216) ELT 3 (SC)]
    - Chandrapur Magnet Wires (P) Ltd [1996 (81) ELT 3 (SC)]
    - Kundan Cars Pvt Ltd [2016 (43) STR 630 (T-Mum)]
    - Franke Faber India Ltd. [2017 (52) STR 155 (T-Mum)]
    - L G Electronics India Pvt Ltd [2017 (3) GSTL 249 (T-ALL)]

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

4.2 The findings of Commissioner relevant for consideration in this appeal are reproduced below:

"10. The noticee is engaged in providing both exempted and taxable services and were availing Cenvat Credit on input services. It is an admitted position of the noticee that they have not maintained separate accounts, have availed Cenvat Credit on common input services, and were required to reverse / pay Cenvat Credit attributable to exempted services provided by them. Audit vide letter dated 30.05.2012, had asked the noticee to reverse / pay Cenvat credit attributable to exempted / trading service provided, amounting to Rs.25,82,311/-, as detailed in Annexure A to the said letter. In reply to the said Audit objection, the noticee vide their letter No. SRV/VH dated 6th June, 2012 addressed to Audit has stated that "we hereby agree" to the audit objection and accordingly have reversed Cenvat Credit of Rs.25,82,311/- attributable to input services used in relation to provision of exempted service for entire audit period. The noticee also informed that Rs. 2,12,301/- has been paid by them as interest on said ineligible Cenvat credit availed.

11. The SCN is disputing the method of calculation of Cenvat Credit attributable to exempted services provided and resultantly the amount reversed / paid by the noticee. Noticee had taken the difference between cost of goods traded and sale value of goods (difference being more than 10%) sold while calculating and arriving at the said amount of ineligible Cenvat reversed / paid, along with interest. The Audit had also calculated and communicated the said amount of Rs. 25,82,3111- as payable by the noticee on account of provision of exempted services during the audit period. However, disputing the said method adopted by the noticee / audit, and taking sale value of traded goods as the value of exempted services provided, SCN demands Service Tax of Rs.3,01,42,907/- along with interest for the period of April 2008 to March 2011.

12. Thus, the short issue to be decided in this case is the method of calculation of Cenvat Credit attributable to exempted

/ trading services and required to be reversed / paid by the noticee under Rule 6 of CCR, 2014.

13. From the statutory provisions, it is evident that Rule 6 of Cenvat Credit Rules, 2004 does not allow taking Cenvat credit of service tax paid under Cenvat Credit Rules, 2004 on any services which are not used for providing taxable output services. Taking Cenvat credit of service tax paid on services which are clearly not used for providing taxable output services is a case of wrong availment of ineligible CENVAT credit under Rule 6 of Cenvat Credit Rules, 2004, which is not permissible. The noticee had clearly admitted that they had wrongly taken ineligible CENVAT credit attributable to exempted services and on pointing out by audit, had agreed to the objection in writing, and had reversed and communicated such payment to the department.

14. Thus, the noticee is not disputing reversal of Cenvat Credit on account of trading of goods activities undertaken as pointed out by audit but are objecting to the demand made in the SCN by taking entire sale value of traded goods as value of exempted services provided by them instead of taking the value of services as the difference between cost of goods and sale value of goods sold.

15. As per Explanation to Rule 6'3A) of the Cenvat Credit Rules, 2004 value for the purpose of Rule 6(3) and Rule 6(3A) shall have the same meaning assigned to it under section 67 of the Finance Act, 1994 read with rules made there under or, as the case may be, the value determined under section 4 or 4A of the Central Excise Act, 1944 read with rules made there under. The definition of "value" as per clause (c) of explanation I of Rule 6(3D) of CENVAT Credit Rules, 2004, the for purpose of sub-Rule (6) and (6A) ibid, in respect of exempted trading services, the value thereof is to be calculated on the basis of difference between sale price and cost of goods or on 10% of cost of goods sold, whichever is more. As the difference between the sale price and purchase price is more than ten percent of the cost of goods sold, the higher amount of profit earned on trading is required to be taken as the value of exempted services provided for the purpose of reversal of CENVAT credit / payment of Service Tax. The noticee had taken the said difference in cost of goods sold *and sale value of goods as the value of exempted services provided for the purpose of reversal of Cenvat credit under Rule 6 (3) of Cenvat Credit Rules, 2004, which is the correct method of arriving at Cenvat credit attributable to impugned exempted services. Accordingly, I hold that the method adopted by the Audit, based on which the noticee had reversed the amount of Cenvat attributable to provision of exempted / trading service, is in accordance with the statutory provisions.*

16. The noticee had agreed to Audit objection and reversed / paid the Cenvat credit attributable to exempted services as calculated by audit even before issue of the SCN and also filed their ST-3 returns in time declaring the Cenvat credit availed.

17. The recovery mechanism provided in proviso clause to Section 73(1) of the Finance Act, 1994, as it existed at the material time, provides for demanding Service Tax short paid or not paid during the period up to five years, "by reason of

(a) fraud; or
(b) collusion; or
(c) wilful mis-statement; or
(d) suppression of facts; or
(e) contravention of any of the provisions of this Chapter or of the rules made

thereunder with intent to evade payment of Service Tax".

Thus, each of the sub-clauses getting covered by (a) to (e) of Section 73(1) are independent of each other and existence of any / each one of the individual situation is good enough to attract demand Service Tax for extended period under the proviso clause to Section 73(1). In the present case, the noticee has admittedly not maintained separate records and have not complied with the provisions of Rule 6 of CCR, 2004. The availment of Cenvat Credit on common inputs have come to the knowledge of department only after the Audit of their records were carried by the department. Further, in the ST-3 returns filed by the noticee, what they have declared was the month-wise, consolidated amount of Cenvat Credit availed and the amount debited therefrom against output services provided. The ST-3 returns filed by the noticee do not provide for service-wise details of inputs / input services / capital goods on which Cenvat *credit is availed. Thus, contrary to the provisions of Cenvat law and contrary to the Boards explicit clarification that trading is exempted service, the noticee has availed Cenvat credit on clearly inadmissible services, which itself shows the malafide intent of the noticee to evade payment of appropriate service tax. But for the Audit conducted, these facts would not have come to the notice of the department. Thus the contravention of various provisions of the Act and the rules made thereunder with intent to evade service tax is clearly established.*

18. Further, Section 73 ibid does not speak specifically about the knowledge gained by the Department. What is relevant for invoking the proviso clause to section 73(1), as it stood at the material time, is whether the Service Tax which had not been levied, short levied, etc., had been so (not paid) by reason of fraud or collusion or wilful misstatement or suppression of facts', etc. In other words, for invoking extended period clause, what is relevant is whether at the material time when the Service Tax leviable under law, was not paid, this fact remained to come to the notice of the department because relevant facts were misstated or not stated (suppressed) before the department. Hence, the department is justified in demanding Service Tax by invoking proviso to Section 73(1) of Finance Act, 1994 in the said demand notice.

19. In view of the foregoing, I hold that the noticee has wrongly availed ineligible Cenvat Credit of Rs.25,82,311/- (Rupees Twenty Five Lakhs Eighty Two Thousands Three Hundred Eleven only) during the period April 2008 to March 2011 attributable to exempted / trading services provided and the same is liable to be disallowed and recovered from them along with interest at applicable rate.

20. The SCN proposed recovery of interest on the ineligible amount of CENVAT credit availed by the noticee and though initially paid Rs.2,12,301/- as interest, the noticee has argued that interest is not payable by them. I have already held that the noticee is liable to reverse / pay ineligible Cenvat Credit amounting to Rs. 25,82,311/- (Rupees Twenty Five Lakhs Eighty Two Thousands Three Hundred Eleven only). The Hon'ble Supreme Court in the case of Commissioner of Trade Tax, *Lucknow Vs Kanhai Ram Thekedar, 2005(185) ELT 3 (SC), has held that interest liability accrues automatically from confirmation of demand as recoverable. Therefore, the noticee is liable to pay interest at the appropriate rate under Section 75 of the Finance Act, 1994 read with Rule 14 of Cenvat Credit Rules, 2004. Thus, the entire ineligible Cenvat credit of Rs. Rs.25,82,311/- (Rupees Twenty Five Lakhs Eighty Two Thousands Three Hundred Eleven only) pertaining to the period of April 2008 to March 2011 is liable to be recovered along with interest from the noticee.*

21. The Noticee in their written submission dated 16.06.2014 has submitted that as directed the Audit vide letter dated 30.05.2012 they had reversed the Cenvat credit attributable to trading activities amounting to Rs.25,82,311/- and had also paid interest amounting to Rs.2,12,3011-, which was communicated to department vide their letter dated 06.06.2012. The SCN has proposed appropriation of the amount of Cenvat credit reversed / paid as well as the interest paid. In view of my findings at para 19 holding the amount of Cenvat credit reversed as payable and my finding at para 20 that interest is payable on amount confirmed automatically, I intend to accept the proposal in SCN to appropriate the amount of Rs.25,82,311/- paid by the noticee against demand confirmed as well as Rs.2,12,301/- paid towards interest payable on said confirmed amount.

22. In the show cause notice under adjudication, penalty under Rule 15(3) of Čenvat Credit Rules, 2004 read with Section 78 of de Finance Act, 1994 has been proposed. The notice has contended that no penalty imposable in their case as the demand was actually based on their books of account they were under bonafide belief that they are entitled to avail and utilized Cenvat Credit and the issue involved interpretation of law. They have further claimed that they have filed ST-3 returns regularly declaring cenvat credit availed and utilised and mere omission to inform the department cannot be equated with suppression of facts. Under the circumstances it was pleaded argued that penalty under Section 78 is not is not imposable upon them.

23. The issue of whether or not trading is a non-taxable service / exempted service was not free from doubt prior to 01.04.2011.

Consequently, entitlement of Cenvat or reversal of Cenvat credit availed on common input services by providers of both taxable services and exempted / trading services was also not beyond doubt during the notice period of 01.04.2008 to 31.03.2011. The noticee had admittedly availed CENVAT credit on common inputs, but failed to opt and follow any of the options prescribed under rule 6(3) of Cenvat Credit Rules. They also failed to pay I reverse Cenvat credit attributable to exempted services in terms of Rule 6 (3) of Cenvat Credit Rules, 2004. However, from the records it is seen that enclosing work sheet, vide letter dated 31.05.2012, audit has requested the noticee to pay / reverse Rs. 25,82,3117 along with interest, being Cenvat credit attributable to exempted services. Notice has paid /reversed the ineligible Cenvat credit on the same day and communicated payment details along with debit particulars to department vide letter dated 06.06.2012. The noticee has also paid interest of Rs. 2,12,301/-, on said Cenvat liability and informed the department. Thus, it is evident from the records that on pointing out the discrepancy by the audit, the noticee had immediately reversed / paid the Cenvat Credit attributable to exempted / trading services, as calculated and intimated by Audit along with interest. The noticee had reversed the amount on 31.05.2012 and intimated the department on 06.06.2012, whereas the present SCN has been issued to them on the same issued much later on 10.04.2013, In view of these fact, I intend to accept the noticee's claim that they availed Cenvat credit under the bonafide belief, have maintained the books of accounts correctly reflecting the same, and that they have acted immediately upon receipt of Audit's direction to make payment of ineligible Cenvat credit and reversed the same."

4.3 Before we further proceed it is quite relevant to have look at the issue certain correspondences in relation to the audit need to be considered:

OFFICE OF THE DEPUTY COMMISSIONER OF SERVICE TAX (AUDIT), MUMBAI-II
2ND FLOOR, MSEB BUILDING, LABOUR CAMP, DHARAVI, MUMBAI-400 019.
EMail;st2audit@gmail.com Tel; 24079468/fax; 24076860

F.No.S-T-II/Audit/Gr.11/72/APPL/2011-12
Mumbai, 30/05/2012

To,
M/s. Aker Powergas Pvt Ltd,
Powergas House,Beta Bldg 01,
Think Techno Campus,
Kanjurmarg East ,
Mumbai 400042.

Gentlemen,

Sub: Service Tax Audit drawn on the records of M/s. Aker Powergas Pvt ltd for the period from April 2007 to March 2011-reg
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During the course of Service Tax Audit , on scrutiny of the records viz. ST-3 Returns stand filed with the department ,Bills/invoices raised/issued, GAR-7 challan /e-payment challan copies, cenvatable inputs/ input services, invoices and the relevant year Balance Sheets, the following discrepancies have been noticed:-

Para 01; Non-reversal of Cenvat credit attributable towards exempted services viz Trading Activities Rs 25,82,311/- S.T + Interest;

During the course of Service Tax Audit, on scrutiny of the records viz. ST-3 Returns, Bills/invoices raised/issued, and the relevant year Balance Sheets, it is observed that, you have undertaken trading activities in the name and style of M/s Aker Powergas Pvt Ltd and availing, cenvat credit on inputs/input services, whereas you have not reversed proportionate cenvat credit attributable towards exempted services including trading activities. you are required to reverse the same, in terms of provision of Rule 6(3A) of Cenvat Credit Rules, 2004. The details of the same have been shown in Annexure 'A" attached.

You are therefore requested to pay/reverse Rs.25,82311/- S.T as per the provisions of Section 68(1) of Finance Act 1994 read with Rule 6(3A) and Rule 14 of Cenvat Credit Rules, 2004 and interest due on it as per the provisions of Section 75 of the Finance Act 1994 read with Notfn. No 15/2011 S.T dt 01/03/2011 and intimate the payment particulars thereof to the audit team within a week time

Para 02; Wrong availment of Cenvat Credit Rs 145,248/- S.T+ Interest.

During the course of Service Tax Audit , on scrutiny of the records viz. ST-3 Returns stand filed with the Department, cenvatable input invoices/bills, it is observed that, you have taken cenvat credit on the strength of input services invoices/bills pertains to service tax paid on car repairing, charges, brokerage charges, cocktail party bills,etc which are not inputs services relates to output services being provided by you, in terms of input service definition under Rule 2 (I) (1) of Cenvat Credit Rules, 2004. As such cenvat credit so availed on such input services are not admissible in terms of provision of Rule 9 read with Rule 14 of cenvat Credit Rules, 2004. The details of the same have been shown in Annexure 'B" attached.

You are therefore requested to pay/reverse Rs. 145,248/- S.T as per the provisions of Section 68(1) of Finance Act 1994 read with Rule 9 and Rule 14 of Cenvat Credit Rules, 2004 and interest due on it, as per the provisions of Section 75 of the Finance Act 1994 read with Notfn No 15/2011 S.T dt 01/03/2011 and intimate the payment particulars thereof to the audit team within a week time

Yours faithfully,

(B. D. Sankhe) 30/05/2012
Superintendent (Audit)
Group – 11, S.T. Mumbai II

Encl; as above

AKER POWERGAS PVT LTD
Annexure "A"
Details of Cenvat Credit attributable towards trading activities for the period from April 2007 to March 2011
Summary

FY 2007-08	FY 2008-09	FY 2009-10	FY 2010-11	TOTAL
RS	RS	RS	RS	RS
0	179867	2061180	341263	2582311

FOR AKER POWERGAS PRIVATE LIMITED

Aker Powergas Pvt Ltd
Annexure "A"
Details of Cenvat Credit attributable towards trading activities for the period from April 2008 to March 2009

Service Tax Reversal

	F.Y. 2008-09	Gross Profit / Total Billing (As Per PL)	X	Input Credit Monthly	=	Service Tax
Sales	15,000,000					
Purchase	2,583,893					
Gross Profit	12,416,107					
Total Revenue as per PL	3,212,563,892					
0.39%	Apr-2008	12,416,107 / 3,212,563,892	X	810590	=	3,13
	May-2008	12,416,107 / 3,212,563,892	X	2566993	=	9,92
	Jun-2008	12,416,107 / 3,212,563,892	X	2891663	=	11,17
	Jul-2008	12,416,107 / 3,212,563,892	X	2034281	=	7,86
	Aug-2008	12,416,107 / 3,212,563,892	X	4660226	=	18,01
	Sep-2008	12,416,107 / 3,212,563,892	X	2720198	=	10,51
	Oct-2008	12,416,107 / 3,212,563,892	X	2400969	=	9,27
	Nov-2008	12,416,107 / 3,212,563,892	X	3800716	=	14,68
	Dec-2008	12,416,107 / 3,212,563,892	X	3400956	=	13,14
	Jan-2009	12,416,107 / 3,212,563,892	X	9126037	=	35,271
	Feb-2009	12,416,107 / 3,212,563,892	X	3448799	=	13,32
	Mar-2009	12,416,107 / 3,212,563,892	X	8677768	=	33,538
						179,867
		FOR AKER POWERGAS PRIVATE LIMITED				service tax

Aker Powergas Pvt Ltd

Annexure "A"

Details of Cenvat Credit attributable towards trading activities for the period from April 2009 to March 2010

Service Tax Reversal

	F.Y. 2009-10	Gross Profit / Total Billing (As Per PL)	X	Input Credit Monthly	=	Service Tax
Sales	394,821,046					
Purchase	257,743,671					
Gross Profit	137,077,375					
Total Revenue as per PL	2,796,895,679					
4.90%	Apr-2009	137,077,375 / 2,796,895,679	X	1637234	=	80,242
	May-2009	137,077,375 / 2,796,895,679	X	1428411	=	70,007
	Jun-2009	137,077,375 / 2,796,895,679	X	994642	=	48,748
	Jul-2009	137,077,375 / 2,796,895,679	X	3092903	=	151,585
	Aug-2009	137,077,375 / 2,796,895,679	X	5039340	=	246,981
	Sep-2009	137,077,375 / 2,796,895,679	X	2643956	=	129,582
	Oct-2009	137,077,375 / 2,796,895,679	X	2055871	=	100,759
	Nov-2009	137,077,375 / 2,796,895,679	X	2260015	=	110,765
	Dec-2009	137,077,375 / 2,796,895,679	X	3311984	=	162,322
	Jan-2010	137,077,375 / 2,796,895,679	X	6715854	=	329,148
	Feb-2010	137,077,375 / 2,796,895,679	X	1884145	=	92,343
	Mar-2010	137,077,375 / 2,796,895,679	X	10991503	=	538,700
						2,061,180
						service tax
		FOR AKER POWERGAS PRIVATE LIMITED				2,061,180

SMRITI VIJAY
CFO & COMPANY SECRETARY

Aker Powergas Pvt Ltd

Annexure "A"

Details of Cenvat Credit attributable towards trading activities for the period from April 2010 to March 2011

Service Tax Reversal

	F.Y. 2010-11	Gross Profit / Total Billing (As Per PL)	X	Input Credit Monthly	=	Service Tax
Sales	66,522,408					
Purchase	40,630,959					
Gross Profit	25,891,449					
Total Revenue as per PL	3,043,891,721					

	0.85%	Apr-2010	25,891,450 / 3,043,891,721	X	1749269	=	14,87
		May-2010	25,891,450 / 3,043,891,721	X	650649	=	5,53
		Jun-2010	25,891,450 / 3,043,891,721	X	3666332	=	31,18
		Jul-2010	25,891,450 / 3,043,891,721	X	3511117	=	29,86
		Aug-2010	25,891,450 / 3,043,891,721	X	1818015	=	15,46
		Sep-2010	25,891,450 / 3,043,891,721	X	1874795	=	15,94
		Oct-2010	25,891,450 / 3,043,891,721	X	2649669	=	22,53
		Nov-2010	25,891,450 / 3,043,891,721	X	3737391	=	31,79
		Dec-2010	25,891,450 / 3,043,891,721	X	3237517	=	27,53
		Jan-2011	25,891,450 / 3,043,891,721	X	9368503	=	79,689
		Feb-2011	25,891,450 / 3,043,891,721	X	2712822	=	23,075
		Mar-2011	25,891,450 / 3,043,891,721	X	5144042	=	43,755
			FOR AKER POWERGAS PRIVATE LIMITED				341,263
							service tax

Aker Powergas Pvt Ltd

Annexure "A"

Details of Cenvat Credit attributable towards trading activities for the period from April 2010 to March 2011

Service Tax Reversal

	F.Y. 2010-11	Gross Profit / Total Billing (As Per PL)	X	Input Credit Monthly	=	Service Tax
Sales	66,522,408					
Purchase	40,630,959					
Gross Profit	25,891,449					
Total Revenue as per PL	3,043,891,721					

	0.85%	Apr-2010	25,891,450 / 3,043,891,721	X	1749269	=	14,87
		May-2010	25,891,450 / 3,043,891,721	X	650649	=	5,53
		Jun-2010	25,891,450 / 3,043,891,721	X	3666332	=	31,18
		Jul-2010	25,891,450 / 3,043,891,721	X	3511117	=	29,86
		Aug-2010	25,891,450 / 3,043,891,721	X	1818015	=	15,46
		Sep-2010	25,891,450 / 3,043,891,721	X	1874795	=	15,94
		Oct-2010	25,891,450 / 3,043,891,721	X	2649669	=	22,53
		Nov-2010	25,891,450 / 3,043,891,721	X	3737391	=	31,79
		Dec-2010	25,891,450 / 3,043,891,721	X	3237517	=	27,53
		Jan-2011	25,891,450 / 3,043,891,721	X	9368503	=	79,689
		Feb-2011	25,891,450 / 3,043,891,721	X	2712822	=	23,075
		Mar-2011	25,891,450 / 3,043,891,721	X	5144042	=	43,755
			FOR AKER POWERGAS PRIVATE LIMITED				341,263
							service tax

SRV / VH

ACK. COPY

6 JUNE 2012

सहायक आयुक्त सेवा परीक्षा
Asstt. Comm. (Audit)
सेवाकर, मुंबई-II
Service Tax, Mumbai-II

The Superintendent (Audit)
Group 11, ST Mumbai II

Dear Sir,

Ref: Your letter dated 30th May 2012, regarding service tax audit on the records of Aker Powergas Pvt Ltd (STC Code: AAACD1981EST001) for the period April 2007 – March 11.

Reference above, we desire to submit as under:

1) As regards the discrepancy observed by you in your above referred letter vide Para 01 : "Non-reversal of Cenvat credit attributable towards exempted services viz Trading Activities Rs 25,82,311/- S.T + Interest"; we hereby agree and have reversed the Cenvat credit of Rs 25,82,311 from our Cenvat Credit Availed which is lying in balance as on date .

2) As regards the discrepancy observed by you in your above referred letter vide Para 02; Wrong availment of Cenvat Credit Rs 1,45,248/- S.T+ Interest, we hereby agree and have reversed the Cenvat credit of Rs 1,45,248 from our Cenvat Credit Availed which is lying in balance as on date

We trust the above meets your requirements

Yours truly,

Enclosed

2. Journal Entry Vouchers

Smriti Vijay
(Authorised Signatory)

4.4 The above correspondences show that the amount was duly calculated by the audit and communicated to the respondent. Respondent have agreed to the said objection and amount directed and have reversed the credit as directed by the audit. Subsequent to the said debit the audit objection was considered by MCM and audit objection settled as is evident from the following correspondence.

OFFICE OF THE COMMISSIONER OF SERVICE TAX: MUMBAI - II
2nd FLR., ESTRELLA BATTERY COMPOUND, LABOUR CAMP,
MATUNGA, MUMBAI - 400 019
E-Mail: st2audit@gmail.com Tel: 2407 9842 / Fax: 2401 3521

F.NO.ST-11/AuditGr11/72/APPU 11-12/

Mumbai, the 30 July 2012

To,

The Assistant Commissioner,

Division - V.

Service Tax, Mumbai- II

Sub: Final Audit Report No. 73/201413 drawn on the records of M/s. Aker Powergas Pvt. Ltd.

Please find enclosed herewith, a copy of above mentioned Final Audit Report in respect of M/s. Aker Powergas Pvt. Ltd., along with copy of final minutes of MCM held on 28/06/2012 for information and necessary action please.

Encl: As above.

(VIVEK)

Assistant Commissioner (Audit)

ANNEXURE -G

FAR No. 73/2013-14

PART - 1

1	NAME & ADDRESS OF THE TAX PAYER	M/s. Aker Powergas Pvt. Ltd. Powergas House, Beta Building-1, Think Techno Campus, Kanjurmarg Village, Kanjurmarg (East). Mumbai 400042.
2	HO, REGIONAL BRANCH OFFICES, ETC	As above
3	STATUS OF THE TAX-PAYER	Pvt. Ltd. Company
4	JURISDICTIONAL COMMISSIONERATE / DIVISION / RANGE	Div-V, Service Tax, Mumbai
5	NAME OF TAXABLE SERVICES PROVIDED TO CLIENTS	1. Management Consultants 2. Consulting Engineer 3. Maintenance or Repair services 4. Erection, Commissioning & Installation 5. Business Support Services 6. Works Contract Services 7.Information Technology

		Software Services 8. Transport of Goods by Road
6	REGISTRATION NO	AAACD1981EST001
7	EXEMPTION NOTEN. NO. & ITS GIST	NIL
8	DATE OF LAST AUDIT	07.08.2008 TO 19.08.2008
9	PERIOD OF CURRENT AUDIT	2007-08 to 2011-12
10	DATES ON WHICH AUDIT UNDERTAKEN	24, 25.05.12 & 28 to 30.05.12
11	UNCONFIRMED DEMANDS	Nil
12	CONFIRMED DEMANDS	Nil
13	APPEAL FILED, IF ANY	Nil
14	TAX, INTEREST AND PENALTY PAID DURING THE CURRENT AUDIT PERIOD	Service Tax Rs. 25,82.311/- + Interest Service Tax Rs. 1,45,248/- + Interest
15	NO. OF REVENUE PARAS	02
16	NO OF PROCEDURAL PARAS	-
17	TOTAL REVENUE INVOLVED IN AUDIT PARAS	Service Tax Rs. 27,27,559/- + Interest

PART-II

SUMMARY OF FINAL AUDIT REPORT

M/s. Aker Powergas Pvt.Ltd.

Date of Preparation: 24.07.2012

The important and material non-compliance issues identified and reaction of the Tax Payer is indicated in the Table given below:

Division :V Reg. No.: AAACD1981EST001 Period of Audit : 2007-08 to 2011-12 Name of the Officer:	Brief Description of the Service: 1) Management Consultants 2)Consulting	Total Revenue Involved in Rs 2727559 + Interest Spot recovery made:

Gr-11 Shri B.D Sankhe, Supdt., Shri R.S. Parte, Supdt Smt. S.F. Batatawalla, inspector	Engineer 3)Maintenance or Repair services 4)Erection, Commissioning and Installation 5)Business Support Services 6) Works Contract Services 7)Information Technology Software Services 8)Transport of Goods by Road	Service Tax 2582311/- 145248 Total 27,27,559/

Sr No	Gist Of Objections	Revenue Implications	Assessee's Agreement Yes/No (Give Reasons For Disagreement)	Department's Conclusion
1	Non-reversal of Cenvat credit attributable towards services viz Trading Activities exempted Rs 25,82,311/- 5.T + Interest During the course of service tax Audit, on scrutiny of the records viz ST-3	2582311/-	Yes 1 Partly agreed. The assessee has paid due Service Tax amount however they have not paid interest amount for which they contended that, they do have sufficient balance ie in excess of duty amount	As per minutes of MCM held on 28.06.2012, the Para is accepted by the committee and MCM has directed the Dy. Commissioner (Audit) to prepare SCN for invoking penalty under Section 76 of Finance Act

	Returns, Bills/invoices raised/issued, and the relevant year Balance Sheets, it was observed that, the assessee has undertaken for trading activities in the name and style of M/s Aker Powergas Pvt Ltd and availing cenvat credit on inputs/input services, whereas they have not reversed proportionate cenvat credit cenvat credit attributable towards exempted services including trading activities. Thus they were required to reverse the		involved in para 01 and 02. 2 The assesses contention is not correct as once assessee availed cenvat credit then in case of wrong availment of cenvat credit interest is applicable as per the provisions of CENVAT Credit Rules, 2004.	1994

	same, in terms of provision of Rule 6(3A) of Cenvat Credit Rules, 2004. The assessee was asked to assessees reverse Rs 25,82,311/- 5.T as per the provisions of Section 68(1) of Finance Act 1994 read with Rule 6(3A) and Rule 14 of Cenvat Credit2004 and interest due on it as per the provisions of Section 751994 read with Notfn No 15/2011 ST dt 01/03/2011			
2	....			

(VIVEK)
Assistant Commissioner (Audit)
Service Tax, Mumbai-II

F.NO. ST-IV/Audit/Gr11/72/APPL/11-12/
Mumbai, the July 2012

4.5 As per the above correspondence the audit objection was settled to the extent of amount to be reversed and direction was to issue notice for penalty. Above also make it amply clear that all the facts were in knowledge of the revenue at the time of audit and a decision was taken for closure of the audit objection treating the reversal made as final settlement of audit objection. However subsequently revenue changed its mind and proceeded to issue this show cause notice seeking to demand additional amount.

4.6 By the notification 3/2011-CE (NT) the definition of exempted services was amended, as follows:

"in clause m(e) after the words and figures 'section 86 of the Finance Act" the following shall be inserted namely,-

"and taxable services whose part of value is exempted on the condition that no credit of inputs and input services used for providing such taxable services shall be taken.

Explanation: For the removal of doubts, it is hereby clarified that "exempted services" include trading."

"In rule 6 of the said rules,-

(vii) after sub-rule (3A), the following shall be inserted, namely-

Explanation I. - "Value" for the purpose of sub-rules (3) and (3A),-

(a) ...

(b)...

(c) in case of trading, shall be the difference between the sale price and the purchase price of the goods traded."

From the above it is quite evident that the exempted services under Rule 2(e) were defined to include "trading" from the first time by this notification. Simultaneously the explanation also was added provided for the manner of computing the value of exempted service so defined by including trading. Prior to this date there was nothing in the CENVAT Credit Rules to show that trading was to be considered as service/ exempted service.

4.7 The Explanation 1 to rule 6 was further amended by the Notification No 13/2011-CE (NT) dated 31.03.2011 as follows:

3. In rule 6 of the said rules, in Explanation I, in clause (c) for the words "shall be the difference between the sale price and the *purchase price of the goods traded", the words "shall be the difference between the sale price and the cost of goods sold (determined as per the generally accepted accounting principles without including the expenses incurred towards their purchase) or ten per cent. of the cost of goods sold, whichever is more" shall be substituted*.

4.8 The show cause notice at para 6, takes note of the amendments made in rule 2 (e) of the CENVAT Credit Rules, 2004, but fails to take note of the amendments made in Rule 6 by providing the manner of computation of exempted services in relation to trading. If the view that the manner of computation of the value of exempted service as provided by the amendment made in 2011, is not applicable for period prior to these amendment, then what can be basis for holding that Rule 2 (e) so amended was applicable for the period prior to amendments made In 2011. It appears that notification issuing authority were conscious of the difficulties that will arise in computing the value of exempted services in relation to trading for which the clarification was made by way insertion of explanation in Rule 2(e) and they simultaneously provided for the manner of computation. In our view the amendments made in this regard by notification no 3/2011-CE (NT) in respect of trading needs to be read as a whole and applied for the pre and post amendments. In case it is viewed that amendments to Rule 6 are not applicable for the past period then the same should be true for the amendments made in Rule 2 (e) and vice versa. There are some case law which have gone to uphold that for the period prior to amendments made in 2011, trading was not service and hence not covered by the definition of exempted service. However in another set of case laws the same has been held to be taxable and proportionate reversal allowed, even without following the prescribed procedure as per Rule 6 (3A).

4.9 Even the idea of including the entire value of trading, for computation of the amount to be reversed in terms of Rule 6, during the relevant period is repugnant to the basic scheme of CENVAT credit. CENVAT Credit or in fact any scheme of tax credit operates on the principle of avoiding tax pyramiding or the cascading effect of the taxation, i.e. tax should not be levied on the tax again. This principle has been followed in the scheme of taxation of services. When so ever the taxable services as defined were provided along with the supply of goods, abatement attributable to the value of goods was provided for or else the amount attributable to the value of goods was deducted from the gross amount recovered in terms of Section 67 of the Finance Act, 1994 for providing such taxable services. In fact, it cannot be the case of department, that trading was done without associated supply of goods. The basic scheme followed for taxation of services associated with the supply of goods, should have been followed for determination of the value of exempted trading activities, while determining the amount to be reversed under Rule 6 even prior to introduction of Explanation 1 (c) by amendments made by the Notifications issued in the year 2011.

4.10 Authorized representative referred to the decision of this tribunal in case of Mercedes Benz [2014 (36) STR 704 (T-Mum)] wherein following has been held-

"13. The main contention of the ld. Sr. Advocate is that their business consists of two streams viz. manufacturing and trading. The services which are common for manufacturing and trading are therefore used in connection with their business and the definition of input services as per Rule 2(l) specifically includes activities relating to business and therefore, they are entitled to take the credit of the same. We are not impressed with the said argument of the ld. Sr. Advocate. The term "input service" is defined under Rule 2(l) as -

"input service" means any service, -

(i) used by a provider of taxable service for providing an output service; or

(ii) used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products up to the place of removal,

and includes services used in relation to setting up, modernization, renovation or repairs of a factory, premises of provider of output service or an office relating to such factory or premises, advertisement or sales promotion, market research, storage upto the place of removal, procurement of inputs, *activities relating to business, such as accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry, and security, inward transportation of inputs or capital goods and outward transportation up to the place of removal; (Emphasis supplied).*

We observe the definition of "input service" has two parts. The first part provides for use by a provider of a taxable service for providing output service. The second part provides for use by a manufacturer in or in relation to the manufacture of final products. Further, the said definition relating to manufacture not only relates to the services which are used in the manufacturing operations but also includes services used in relation to setting up, modernization, renovation or repairs of a factory, advertisement or sales promotion, market research, storage up to the place of removal, etc. The definition further includes activities relating to business such as accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry and security. Thus we observe that second part of the definition includes services which are required for setting up of the factory or marketing of the goods. For example, advertisement or sales promotion or market research or storage up to the place of removal, etc., are activities which may not be directly used in the manufacture of the goods but are required for sale of manufactured goods. Further, there are certain services which are not directly related to the manufacture or ultimate sale of the goods but would be used by the manufacturer in his day-to-day business activity such as accounting, auditing, financing, recruitment, quality control, etc. Here again such services are linked to his manufacturing activity. The definition of input service makes it very clear that the input service credit is available to a manufacturer and has to be related to the final products being manufactured by that manufacturer. Thus, if advertisement is relating to the goods manufactured by the manufacturer, then the manufacturer would be entitled for the credit of the same as an input service. Similarly, if the manufacturer's activity relating to accounting, financing, recruitment and quality control, etc., are relating to the goods manufactured by him, then the manufacturer would be entitled *to the credit of tax paid on input service. In our view the term 'business' used in the said definition is relating to the business of manufacture of the final products by the manufacturer and not relating to the trading activity. A somewhat similar issue i.e. whether "Activities relating to business" requires integral connection between activity/service and business of manufactured final products came up before this Tribunal in the case of Telco Construction Equipment Co. Ltd. v. C.C.E. & Cus., Belgaum reported in 2013 (32) S.T.R. 482 (Tri.-Bang.). This Tribunal by majority view observed as -*

"30.2 The proposed order by the Hon'ble Member (Technical) allowing the credit in respect of five services and the proposal to remand for fresh consideration of the eligibility of nine services has been made in the light of decision in Coca Cola case holding that -

"all services which constitute activities related to business need not have a nexus with manufacture in a manner different from what was found in the Coca Cola India Pvt. Ltd. case by the Hon'ble High Court to become input Service".

On the other hand, Hon'ble Member (Judicial) took note of the decision in the case of Ultratech Cement Ltd. relevant portion of which reads as follows :

"29. The expression "activities in relation to business" in the definition of "input service" postulates activities which are integrally connected with the business of the assessee. If the activity is not integrally connected with the business of the manufacture of final product, the service would not qualify to be a input service under Rule 2(l) of the 2004 Rules."

In view of the above judgment, he was of the opinion that "a manufacturer claiming the benefit of Cenvat credit on any service under Rule 2(l) on the premise that the service is covered by the above expression should establish an integral connection between the activity/service and the business of manufacturing the final product."

31.1 I find that the decision in the case of Coca Cola analyses the definition of "input services" in 5 limbs and holds that each limb of the definition of input service can be considered as *providing an independent benefit or concession or exemption. One of the limbs considered related to "services used in relation to activities relating to business ....". However, the scope of the term "activities relating to business" was not spelt out in the said decision.*

31.2 However, the latter decision of the Hon'ble High Court of Bombay, Nagpur Bench in the case of Ultratech Cement Ltd. has dealt with the scope of the said phrase and held as under :

"29. The expression "activities in relation to business" in the definition of "input service" postulates activities which are integrally connected with the business of the assessee. If the activity is not integrally connected with the business of the manufacture of final product, the service would not qualify to be a input service under Rule 2(l) of the 2004 Rules."

It is also relevant to note that the decision in the case of Ultratech Cement Ltd. has been rendered after considering the decision in the case of Coca Cola (Paragraphs 37 & 38).

31.3 It is further noticed that the Hon'ble High Court of Bombay in the case of Manikgarh Cement has also interpreted the expression "relating to business" and held as under :

"However to qualify as an input service, the activity must have nexus with the business of the assessee. The expression 'relating to business' in Rule 2(l) of Cenvat Credit Rules, 2004 refers to activities which are integrally related to the business activity of the assessee and not welfare activities undertaken by the assessee."

31.4 On the other hand, a close perusal of the decisions relied upon by the learned advocate for the appellant, reveals that the said decisions did not interpret the expression 'relating to business'.

31.5 In view of the above, the appellant should be required to establish integral connection between the service and the business of manufacture of final product for the benefit of Cenvat credit on the service as held by the learned Member (Judicial) relying on the Hon'ble High Court's judgment in the case of Ultratech Cement Ltd.

In the case of the appellant assessee, there are distinct streams, the first one is manufacturing of cars in India and the second one is importing the cars and selling the cars in the Indian market, viz. trading activity. In view of above position, we are of the view that the credit of input services which are used both in the manufacturing and trading cannot be entirely allowed. It will also be interesting to see various common services of which credit has been taken and are matter of dispute in the present case. The main common services on which the credit has been taken are advertisement, event management service, business auxiliary services, business support services. These services are related to sales promotion and are included in the definition before the words "activities relating to business such as.........." In respect of these services, there can be no doubt that these have to be linked with manufactured product (and not to the traded goods). We also note that all services used in business are not included in the definition of input service. This part of the definition reads -

activities relating to business such as accounting, auditing, financing, recruitment and ...."

Thus the services used in activities such as accounting, auditing, financing, recruitment, etc., are only to be allowed. The services under dispute are mainly advertisement, event management, business auxiliary, business support services. None of these services are relating to activities illustrated or enumerated in the definition. On this ground also we do not find any merit in the contention of the appellant assessee that they would be entitled to the credit of common services. We, therefore, hold that the common services are not covered by the definition of activities relating to business.

14. As far as the amendments with effect from 2011 are concerned, we find that the ld. Sr. Advocate has argued that the amendments made in 2011 are substantive in nature even though the amendments have been introduced in the form of explanation. The explanation starts with the words "For removal of doubts". The same cannot be applied retrospectively, particularly, the said view is also supported by the fact that the said Notification was issued on 1-3-2011 and was to come into *force only from 1-4-2011. Moreover, Rules are delegated legislation and Government has no power to amend the Rule with retrospective effect. This can be done only by an Act. We agree with ld. Sr. Advocate's contentions in this regard. We also find support for the same from the judgment of the Hon'ble Supreme Court in the case of UOI v. Martin Lottery Agencies Ltd. reported in 2009 (14) S.T.R. 593 (S.C.). An explanation was appended to Section 65(19) of Finance Act, 1994 vide Finance Act, 2008. The said explanation started with the words "For the removal of doubts...." In this context, Hon'ble Supreme Court in Para 24 has observed -*

"24..... If by reason of the said explanation, the taxing net has been widened, it cannot be held to be retrospective in operation.

No doubt, the explanation begins with the words 'for removal of doubts'. Does it mean that it is conclusive in nature? In law, it is not. It is not a case where by reason of a judgment of a court, the law was found to be vague or ambiguous. There is also nothing to show that it was found to be vague or ambiguous by the executive. In fact, the Board circular shows that invocation of clause (ii) had never been in contemplation of the taxing authorities."

A somewhat similar situation arose in the case of Sify Technologies Ltd. v. Commissioner of Cen. Excise & ST., LTU Chennai reported in 2011 (21) S.T.R. 252 (Tri.-Chennai). This Tribunal in the said case observed as under -

"5. Pursuant to the above amendment, following Explanation was inserted in Rule 6 of the Service Tax Rules, 1994, w.e.f. 10-5-2008 :-

"Explanation. - For the removal of doubts, it is hereby declared that where the transaction of taxable service is with any associated enterprise, any payment received towards the value of taxable service, in such case shall include any amount credited or debited, as the case may be, to any account, whether called "Suspense account" or by any other name, in the books of account of a person liable to pay service tax.

6. The statutory provision for demanding service tax in respect of transactions between associated enterprises, immediately *upon amendment, has been introduced only w.e.f. 10-5-2008. Prior to 10-5-2008, neither the Finance Act, 1994 nor the Service Tax Rules, 1994 contain any provision enabling demand of service tax prior to the realization of taxable services, in any circumstances. This being so, it is not legally permissible to give retrospective effect to the Explanation inserted in Rule 6 of the Service Tax Rules. The Legislative intention behind the amendments was explained by the Board as for plugging avoidance of tax on the ground of non-realization of money from associated enterprises and the intention of the Legislature in bringing the amendments is to introduce a new provision and not to remove any doubts in the existing provision. It is not, nor can it be, anybody's case that Explanation shall always take effect retrospectively. In the case of Commissioner of Customs v. Skycell Communications Ltd. [2008 (232) E.L.T. 434], the Larger Bench of the Tribunal has held that Explanation placing restrictions prejudicial to the assessee will not be retrospective. In the case of CCE, Shillong v. Vinay Cement Ltd. [1999 (114) E.L.T. 753], the Tribunal has held that since a notification inserting an Explanation has specifically stated that it would be effective from the date of its publication, it takes effect only from that date. In the instant case also, Notification No. 19/2008 introducing Explanation to Rule 6 of the Service Tax Rules, 1994 contains a provision that it shall be effective only from the date of its publication. The amendment to Section 67 is a substantive one and will be applicable only from the date of its introduction and not retrospectively, even though the Explanation uses the expression "for removal of doubts". The decision of the Tribunal in CCE, Pune v. Bajaj Auto Ltd. [1999 (111) E.L.T. 846] relied upon by the lower appellate authority to conclude that the amendment, which is clarificatory in nature, is retrospective, is not applicable in the facts of the present case, as the Tribunal held in that case that clarificatory amendments are retrospective only when they did not materially change, the existing provisions, while in the instant case, there was no provision either in Section 67 of the Finance Act or Rule 6 of the Service Tax Rules to suggest that in the case of transactions between associated enterprises, service tax has to be paid immediately on entry of the transaction in the books of account".*

Similar view has been taken by this Tribunal in the case of Sitara Exports Ltd. v. Commr. of Central Excise, Vapi reported in 2010 (255) E.L.T. 117 (Tri.-Ahd.).

15. We find considerable force in the arguments of ld. Senior Advocate for the appellant that changes made by Explanation are substantive in nature. Explanations have been made in Rules by a Notification without giving it retrospective effect and though notification was issued on 1-3-2011 but came into force only 1-4-20011 and thus it cannot have retrospective effect. In our view, Revenue's act as to consider 'trading' as exempted service for the period Aug., 2010 to March, 2011 in E/1019/12-Mum and demanding 6% of the trading turnover is not correct.

16. In view of the above, we have come to the conclusion that trading was not a service and therefore, cannot be considered as an exempted service during the period prior to 1-4-2011 and the amended provision with effect from 1-4-2011 will not have retrospective effect. The next issue to be decided is how to apportion the credit of input service taken by the appellant, where such input services have been used both in the manufactured goods and trading activities of the imported goods. It is in this context that the ld. Sr. Advocate for appellant has argued that the same should be computed with reference to clause (c) of Explanation I appended after Rule 6(3D) of Cenvat Credit Rules, 2004. The said provision as noted earlier was inserted with effect from 1-4-2011. The argument of the ld. Sr. Advocate is that the said explanation only provides the procedure for computation and since this change is procedural in nature it will have a retrospective effect. Ld. Sr. Advocate also argued that in case of traded goods, the value addition by the appellant is only the difference between the sale price and the purchase price of the goods which is not so in the case of manufactured goods. On a query by the Bench that since ld. Sr. Advocate is arguing that only the value addition should be taken in respect of the traded goods, then why the same criteria should not be applied in the case of manufactured goods i.e. take the differential amount between the selling price and cost of various raw materials. Ld. Sr. Advocate stated that in case of manufactured goods so many things go into production process *like labour, electricity and many other services and it will not be appropriate to take the value addition. In support of his contention that in case of traded goods only value addition should be taken, ld. Sr. Advocate took us through the judgment of the Court (5th Chamber) dated 14-7-1998 in case C-172/96 which was passed on a reference under Article 177 of the EC Treaty by the High Court of Justice of England and Wales, Queen's Bench Division. We have gone through the said judgment carefully. In the said case, the issue was how to determine the turnover for purpose of value added tax in case of transactions in different currencies by the First National Bank of Chicago. The Bank used to purchase various currencies at a certain rate in other currencies. Similarly, the Bank used to sell various currencies in other currencies. The difference between the two is generally understood as spread and would be the income of the Bank. The question was what should be considered as the turnover for purpose of VAT. It is in that context, the said court has held that the spread, the difference between the selling price and purchase price should be taken for the purpose of VAT. In the present case, the dispute is not relating to computation of turnover for purpose of charging a tax as there is no tax liability in case of traded goods. The question is how to apportion the credit of tax on the input service between the manufactured goods and the traded goods, whether we should take the turner of the manufactured goods and traded goods for apportioning the credit of the service tax on input services or some other criteria should be followed. We, therefore, do not find any applicability whatsoever of the said judgment in the facts and circumstances of the present case. Another judgment quoted by the ld. Sr. Advocate is the judgment of the Hon'ble Supreme Court in the case of Commissioner of Wealth Tax, Meerut v. Sharvan Kumar Swarup & Sons reported in (1994) 6 SCC 623. In this case, wealth-tax was applicable on various assets. A new rule was inserted with effect from 1-4-1979 to determine the market value of properties. The question was whether the new inserted rule can be used for determining the value of properties for earlier period and hence determine the wealth-tax. It is in this context that the Hon'ble Supreme Court has taken a view that the same would be* *applicable to all the proceedings pending at the time of its enactment. In the present case, as mentioned earlier, it is not the computation of tax but apportionment of the credit of service tax on input services availed for manufactured goods and traded goods. As we have already held that trading was not a service and therefore cannot be considered as an exempted service before 1-4-2011, therefore, the substantive provision itself did not exist before the said date. Under the circumstances, we are of the view that the said judgment is not applicable in the facts and circumstances of the present case.*

17. Having come to the conclusion that clause (c) of Explanation 1 has no application for determining the apportionment of the credit of service tax on input services, the question is how to determine the same. We find that the major amount pertains to the services in relation to the advertisement, even management, business auxiliary service and business support service. When the appellant is spending certain amounts for sales promotion such as advertisement of the cars and consequent to the said expenditure he has certain turnover of the cars out of which some of the cars manufactured indigenously while other cars are imported and hence traded. In our view, the credit of tax paid on such sales promotion activities should be apportioned with reference to the turnover of the manufactured cars and turnover of the traded cars. For example, if the turnover in particular period is say Rs. 1,000 crore out of which turnover of Rs. 700 crore is pertaining to the indigenous cars and turnover of Rs. 300 crores pertains to the imported and traded cars then if the input credit of Rs. 10 crores is available then Rs. 7 crore should be considered for the manufactured cars in India and credit of Rs. 3 crore should be considered pertaining to imported and traded cars. If we go by the argument of the ld. Sr. Advocate then the value for traded cars will have to be taken as Rs. 30 crores and total turnover will be considered as Rs. 730 crores and credit of Rs. 10 crores will have to have apportioned in the ratio of 700 : 30 or 70:3. Obviously, this would be leading to incorrect results. It would amount to 96% expenditure (relating to sales promotion) is for the domestically manufactured goods and approximately 4% expenditure on the imported and traded cars. Similar is the position in respect of *event management service. Here again, the event management, service is used both for indigenously manufactured cars and also imported and traded cars. Same reasoning would be equally applicable for business auxiliary and business support service. In view of the above analysis, in our view, it would be appropriate to apportion the credit of service tax on input service in the ratio as is the turnover of manufactured cars and imported and traded cars. In fact, we have gone through clause (c) of Explanation I added with effect from 1-4-2011 and are of the view that perhaps the said new method has been adopted to encourage the trading of the goods rather than the manufacturing of the goods (otherwise criterion should have been same viz. based upon turnover or value addition).* ***We, therefore hold that for the period under dispute the credit of service tax paid on the common input services should be apportioned in the same ratio as the turnover of the manufactured and traded cars."***

4.11 This decision was appealed before Bombay High Court, and Hon'ble Bombay High Court [2016 (41) ELT 577 (Bom)] did not agreed with the manner of computation laid down by the tribunal in para 17 of tribunal order and observed as follows:

*"**20.** We had put it to Mr. Bhate as to how in the teeth of such finding could the Tribunal then sustain the formula and the working of the denominator arrived at by it. The Tribunal must firstly refer to the substantive Rule and as operative prior to 1st April, 2011 and then arrive at a conclusion in relation to the Explanation introduced with sub-clauses with effect from 1st April, 2011. On its introduction and even prior thereto, we do not find any justification then to hold that the Parliament intended to encourage trading of goods rather than manufacturing of the same.*

21. *The Parliamentary intent has to be gathered from the language used. If the words are plain, simple and clear, there is no scope for interpretation or applying any principle thereof. Once the Tribunal is bound to decide the controversy in the backdrop of the object and purpose sought to be achieved but has not arrived at any conclusion bearing in mind the same, then, we are required to step in. We cannot sustain this part of* *the finding and conclusion. Even Mr. Bhate found it difficult to support the same.*

22. *We are of the view that as far as working of the denominator is concerned (and even the numerator, technically speaking) and to apportion the input credit, it would be appropriate to send the matter back to the Tribunal. This course is also adopted because we do not find any discussion in the Tribunal's order insofar as questions (c) and (d) reproduced above."*

4.12 We also observe that in case of Mercedes Benz [2015 (40) S.T.R. 381 (Tri. – Mumbai)], the tribunal approved the manner of computation by adopting the Explanation 1 (c) for computing the amount to be reversed. The observations of Tribunal are reproduced below:

"The appeal is directed against Order-in-Original No. 38/RKS/CAX/P-I/2012, dated 14-11-2012 passed by the. Commissioner of Central Excise, Pune-I, wherein ld. Commissioner passed following order :

26.1 I confirm the demand of Rs. 24,71,93,529/- against the assessee i.e. M/s. Mercedes Benz India (P) Ltd. Chakan, Pune, in terms of Explanation-III to sub-rule (3D) of Rule 6 of Cenvat Credit Rules, 2004 read with Rule 14 ibid and Section 11A(1) of the Central Excise Act, 1944. I further order appropriation of an amount of Rs. 4,06,785/- already paid by the assessee vide Service Tax Cenvat Debit Entry No. 69, dated 13-3-2012 against the aforesaid demand.

26.2 I order recovery of interest on the amount of demand confirmed in Para 26.1 above, under the provisions of Rule 14 of the Cenvat Credit Rules, 2004 read with Section 11AA of the Central Excise Act, 1944. I further order appropriation of the amount of Rs. 20,993/- already paid by the assessee vide PLA Entry No. 273, dated 13-3-2012 against the aforesaid demand of interest.

26.3 I further impose a penalty of Rs. 24,71,93,529/-. On the assessee, i.e. M/s. Mercedes Benz India (P) Ltd. Chakan, Pune under the provisions of Rule 15(2) of Cenvat Credit Rules, 2004 read with Section 11AC of the Central. Excise Act, 1944.

27. I give an option to the assessee i.e. M/s. Mercedes Benz India (P) Ltd. Chakan, Pune under Section 11AC(1)(C) of Central Excise, Act, 1944, to pay 25% of the penalty amount as imposed in para 26.3 above, provided the assessee pays the entire amount of demand confirmed in para 26.1 above, along with interest payable thereon as ordered in para 26.2 above as well as the reduced 25% penalty imposed under Section 11AC ibid, within thirty days of the date of communication of this order.

2. The fact of the case is that appellant, M/s. Mercedes Benz India (P) Ltd. are engaged in the manufacture of motor vehicle i.e. passenger cars falling under Chapter 87 of the Central Excise Tariff Act, 1985. They are also engaged in the trading activity of similar goods along with their motor vehicle in the same premises. In case of trading activity, the appellant imports cars directly from Daimler Chrysler, Germany.

2.1 ……….

2.2 The appellant neither maintaining separate records for receipt and consumption of common services used for manufacture dutiable goods and provisions for exempted services viz. trading nor they are restricting availment of credit to the extent of input services used in manufacture of dutiable goods. The appellant have, according to the method of calculation provided vide sub-rule 3A(b) of the Rule 6 of CCR, 2004 read with clause (c) of explanation-1 provided below sub rule (3D) of the said rule on their own accord calculated and reversed Cenvat credit amounting Rs. 4,06,785/- vide service tax Cenvat debit Entry No. 69/13-03-2012 and paid interest @ 18% amounting to Rs. 20,993/- under Section 75 of the Finance Act, 1994 vide PLA Entry No. 273/13-3-2012 and intimated the same vide their Letter dated 14-3-2012.

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, 2004, in accordance to which, the appellant are supposed to an amount equivalent to Cenvat Credit on input service attributed to the exempted service in terms of Rue 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 was required to be paid on every month. The appellant though belatedly calculated the amount required to be paid in terms provided under sub-rule (3A) of Rule 6, therefore to fulfill 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;

(iii) Description of dutiable goods or taxable services;

(iv) Description of exempted goods or exempted services;

(v) 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.

5.3 As 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 be 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.

5.4 We 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 Rule 6, 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 Rule 6 should be followed by the assessee.

5.5 As 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 Rule 6(3A) comes to Rs. 4,06,785/- where as 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 judgments, 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 provisions under 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 noncompliance of procedure and condition. Therefore the judgments cited by the ld. A.R. are not applicable."

4.13 In the case of Lally Automobiles Pvt Ltd [2018 (17) GSTL 422 (Del)] referred to by the learned authorized representative, Hon'ble Delhi High Court has not observed against application of Explanation 1 (c), inserted in Rule 6 of CENVAT Credit Rules, 2004, by the amending notifications in 2011, but has noticed that during the period prior to 01.04.2011, no formula for computation of amount to be reversed has been prescribed. The observations made by Hon'ble Delhi High Court are reproduced below:

"16. *Therefore, 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 of 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."*

4.14 It is no body case that amount of CENVAT credit attributable to trading activities, should not have been reversed in terms of Rule 6 for the period 2008 to 2011, Hon'ble High Court of Bombay and Delhi, have ruled in favour of such reversal. In our view the decision of tribunal referred in para 4.11, is squarely on the issue in hand and following the said decision the appeal filed by the revenue needs to be dismissed.

5.1 The appeal filed by the Revenue is dismissed and the cross objections filed by the respondent disposed off.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

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