CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

SERVICE TAX APPEAL NO: 88096 OF 2017

[Arising out of Order-in-Appeal No: MKK/88-89/RGD APP/2017 dated 9th October 2017 passed by the Commissioner of Central Tax, Central Excise & Service Tax (Appeals), Raigarh - 400614.]

JWC Logistics Park Pvt Ltd
69-91, NH No. 17, Palaspe, Panvel – 410 206 … ***Appellant***

versus

Commissioner of Central Excise & Service Tax
Kendriya Utpad Shulk Bhawan, Plot 01, Sector 17
Khandeshwar, Raigad – 410 206 …***Respondent***

APPEARANCE:

Shri Mehul Jivani, Chartered Accountant for the appellant

Shri Dilip M Shinde, Assistant Commissioner (AR) for the respondent

CORAM:

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

FINAL ORDER NO: A / 85431 /2022

DATE OF HEARING: 23/02/2022
DATE OF DECISION: 06/05/2022

The issue in this appeal of M/s JWC Logistics Park Private Limited, against order-in-appeal no. MKK-88-89/RGD/APP/2017 dated 9th October 2017 of Commissioner of Central Tax & GST

(Appeals), Raigad, arises from availment of credit of tax paid on 'input service' procured in common for providing 'output service' during 2013-14 and 2014-15 that was excluded from levy of tax and for providing 'cargo handling agency' service on which liability was being duly discharged.

2. Having admitted that they had not been segregating the consumption for accounting of three 'input services', procured for both taxable and exempted activities, the controversy is not about the consequent liability but only about the quantum; the appellant has reversed credit of ₹1,59,265, along with applicable interest, in discharge of obligation under rule 6(3)(ii) of CENVAT Credit Rules, 2004. However, the case of service tax authorities is that actual liability amounted to ₹15,26,965 by operation of rule 6(3)(i) of CENVAT Credit Rules, 2004.

3. Relying upon the decision of the Tribunal in *Vertiv Energy Pvt Ltd v. Commissioner of Central Excise & Service Tax, Pune-I [2019 (4) TMI 22 – CESTAT MUMBAI]*, holding that

> *'4. On perusal of the show cause notice, I find that there was no specific allegation made therein regarding adoption of wrong formula by the appellant-assessee. Since the learned Commissioner (Appeals) has held that non-filing of intimation/declaration is a procedural lapse, he should have allowed the appeal in favour of the appellant-assessee, instead of remanding the matter to the adjudicating authority*

> *for quantification of the amount to be reversed by the appellant-assessee. I find that the decisions relied upon by the appellant are squarely applicable to the facts of the present case inasmuch as the established principles of law is that the appellate authority is not empowered to raise any fresh issue for the first time, which was not proposed in the show cause notice. Further, I also find that for consideration of the prescribed formula, the learned Commissioner (Appeals) has not specifically issued any notice to the appellant-assessee for the defence submissions. Hence, I am of the considered view that consideration of altogether a new ground in the impugned order cannot be sustained for judicial scrutiny and accordingly, the appeal of the appellant-assessee should succeed on such ground.'*

Learned Chartered Accountant contended, on behalf of the appellant, that the initiation of proceedings for ineligibility could not have been concluded to their detriment merely for having adopted another prescribed formula for reversal.

4. It was further contended that the Tribunal, in *Arcadia Shipping Ltd v. Commissioner of CGST & Central Excise, Mumbai [2019-TIOL-2124-CESTAT-MUM]*, had interpreted rule 2(e) of CENVAT Credit Rules, 2004 to exclude 'ocean freight' from coverage therein and, thereby, precluded the consequence of rule 6 of CENVAT Credit Rules, 2004 on this service. Relying on the decision of the Tribunal in *Commissioner of Central Excise & Service Tax, Rajkot v. Reliance Industries Ltd [2019-TIOL-1593-CESTAT-AHM]* holding that

‘8. From the reading of Rule 6(1), it is clear that only in respect of input or input service used in exempted goods are not allowed. That means input or input service used in taxable service/dutiable goods, Cenvat credit is allowed. Sub-rule (2) of Rule 6 is only as an option that if any input or input services used in exempted goods, credit should not be allowed and only with this intention some mechanisms for expunging Cenvat credit attributed only to the exempted goods are provided. As per clause (b)(ii) & (iv), it is clearly provided that entire credit in respect of receipt and use of inputs/input service is allowed when such input and input service is used in dutiable final products and taxable service. However, nowhere in Rule 6 it is provided that the input or input service used in dutiable goods shall not be allowed. The Revenue is only interpreting the term “total Cenvat credit” provided under the formula. If the whole Rule 6(1), (2) and (3) is read harmoniously and conjointly, it is clear that “Total Cenvat Credit” for the purpose of formula under Rule 6(3A) is only total Cenvat credit of common input service and will not include the Cenvat credit on input/input service exclusively used for the manufacture of dutiable goods. If the interpretation of the Revenue is accepted, then the Cenvat credit of part of input service even though used in the manufacture of dutiable goods, shall stand disallowed, which is not provided under any of the Rule of Cenvat Credit Rules, 2004.

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10. From the above it can be seen that when anomaly was noticed, the Government has substituted the sub-rule (3A). The legislators very consciously substituted the Rule with intention to give a clarificatory nature to the provision of sub-rule (3A) so as to make it applicable retrospectively. It was

> *all along not the intention of the Government to deny Cenvat credit on the input/ input service even though used in the dutiable goods. Keeping the said view in mind, the substitution in sub Rule (3A) of Rule 6 was made. Therefore, the substituted provision of sub-Rule (3A) shall have retrospective effect being clarificatory.'*

it is contended that the application of an irrelevant formula among the several prescribed in rule 6 of CENVAT Credit Rules, 2004 should not be sustained and that amendment of rule 6 (3A) of CENVAT Credit Rules, 2004 in April 2016 has retrospective effect to determine the outcome of the dispute in their favour.

5. It was also argued that the retrospective application was reiterated by the decision of the Tribunal in *Honda Cars India Limited v. Commissioner of Central GST, Customs and Central Excise, Alwar [2021 (2) TMI 948 – CESTAT NEW DELHI]* holding that

> *'15. It is also seen that with effect from March 01, 2016, the law has been amended clearly specifying that reversal of CENVAT Credit only on common inputs service is required. While clarifying the said issue, at the time of issue of said amendment, the Government of India vide DOF No. 334/8/2016-TRU dated February 29, 2016 clarified as follows:*
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> > *"(h) Rule 6 of Cenvat Credit Rules which provides for reversal of credit in respect of inputs and input services used in manufacture of exempted goods or for provision of exempted services, is being redrafted with the objective of simplifying and rationalizing the same without altering the established principles of reversal of such credit."*

> *16. From the above, it is apparent that the amendment made is of clarificatory nature and the principles of reversal of credit remains the same.',*

in *Dell International Services India Pvt Ltd v. Commissioner of Central Excise & Service Tax, Bangalore LTU [2020 (7) TMI 264 – CESTAT BANGALORE]* holding that

> *'10.9. Learned counsel further states that on similar allegations for the period 2015-16, the show-cause notice was issued which have been adjudicated vide O-I-O No. 30/2018 dated 28/03/2018 wherein the learned Commissioner have dropped the proceedings following the ruling of this Tribunal in IBM India (Pvt.) Ltd. (supra). Particularly mentioning in para 25.5, that this order in IBM of this Tribunal have been accepted in review by the Department on 03/07/2015. Learned Commissioner also took notice of the Notification No. 13/2016 dated 01/03/2016 where Rule 6 of Cenvat Credit Rules was re-drafted, particularly Rule 6(iii) which is as follows:*
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> > *"(i) No credit of inputs or input services used exclusively in manufacture of exempted goods or for provision of exempted services shall be available; (ii) Full credit of input or input services used exclusively in final products excluding exempted goods or output services excluding exempted services shall be available; (iii) Credit left thereafter is common credit and shall be attributed towards exempted goods and exempted services by multiplying the common credit with the ratio of value of exempted goods manufactured or exempted services provided to the total turnover of exempted and nonexempted goods and exempted and non-exempted services in the previous financial year"'*

and in *E-Connect Solutions (P) Ltd v. Commissioner of Central Excise & CGST, Udaipur [2021 (376) ELT 678 (Tri-Del)]* holding that

'17. The dispute in the appeal is regarding the interpretation of the term total Cenvat credit provided in the formula in Rule 6(3A)(b)(ii). According to the Department, the total Cenvat credit should include even those services used exclusively in taxable services, including the common service while according to the appellant it should include only common input services and services used in exempted services and not the services used exclusively in rendering taxable output service.

18. It would be clear from a conjoint reading of sub-rules 6(1), (2) and (3) of Rule 6 that the total Cenvat credit for the purpose of formula under Rule 6(3A) is only total Cenvat credit of common input service and cannot include Cenvat credit on input service exclusively used for the manufacture of dutiable goods.

19. This position is also clear from the underlying object of the amendment made in Rule 6(3A) of the Rules by Notification dated March 1, 2016, to consider only common input services and not total input service credit, for the purpose of computing the amount of reversal.

20. Such amendment was also clarified by the Tax Research Unit Circular dated February 29, 2016 to apply retrospectively inasmuch as the clarification clearly mentions that the provisions of Rule 6 providing for reversal of credit in respect of input services used in exempted services, is being redrafted with the objective to simplify and rationalize the same without altering the established principles of reversal of such credit. It has been further clarified at paragraph (iv) of the Circular that the purpose of the rule is to deny credit of such part of the total credit taken, as is attributable to the exempted services and under no circumstances this part can be greater than the whole credit.

21. In this connection, reference can be made to the decision of the Tribunal in Reliance Industries, wherein while dealing with a similar issue, the Tribunal held that the term total Cenvat credit taken on input services in the pre-amended rule is only total Cenvat credit of common service and will not include the Cenvat credit on input/input services exclusively used for the manufacture of dutiable goods. The relevant portion of the decision is reproduced below :

> *"7. We have carefully considered the submissions made by both the sides and perused the record. The limited issue to be decided in this case is that for the purpose of calculating the CENVAT credit for reversal in terms of rule 6(3A) as per of formula given therein, whether the total Cenvat credit means it is including the Cenvat credit of input services exclusively used for dutiable product should be taken or total Cenvat credit of only common input service should be taken. Before proceeding, it is necessary to read the relevant Rule 6(1), (2), (3) pre and post-amendment notification…………*
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> *………………*
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> *10. From the above it can be seen that when anomaly was noticed, the Government has substituted the sub-rule (3A). The legislators very consciously substituted the Rule with intention to give a clarificatory nature to the provision of sub-rule (3A) so as to make it applicable retrospectively. It was all along not the intention of the Government to deny Cenvat credit on the input/input service even though used in the dutiable goods. Keeping the said view in mind, the substitution in sub-rule (3A) of Rule 6 was made. Therefore, the substituted provision of sub-rule (3A) shall have retrospective effect being clarificatory."'*

to settle the issue once and for all.

6. Relying on the decision of the Hon'ble Supreme Court in *Collector of Central Excise, Calcutta v. Pradyumna Steel Ltd [1996 (82) ELT 441 (SC)]*, Learned Authorized Representative countered the

assailing of the provision invoked for computing liability. According to him, the excluded portion is to be computed in terms of the parameters as existing when an assessee became liable and not the amended provisions which were, in any case, substitutory and not clarificatory.

7. The issue of the denominator to be adopted for computation of proportionate reversal of CENVAT credit has now been settled as also the retrospective applicability of the amended provision in several decisions and no justification is adduced for not following the said decisions.

8. The impugned order has arrived at an incorrect computation. Accordingly, the computation is set aside and matter remanded back to the original authority for a fresh decision that is in consonance with law as judicially determined *supra*.

(Order pronounced in the open court on 06/05/2022)

(C J MATHEW)
Member (Technical)

**/as*