CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
REGIONAL BENCH
Single Member Bench

Service Tax Appeal No. 86902 of 2019

(Arising out of Order-in-Appeal No. MKK/559/RGD APP/2018-19 dated 29.03.2019 passed by the Commissioner of Central Tax (CGST & Central Excise) (Appeals), Raigad)

M/s. Thyssenkrupp Industrial Solutions (India) Pvt. Ltd. — **Appellant**
UHDE House, LBS Marg,
Vikhroli (W), Mumbai 400 083.

Vs.

Commissioner of Customs, Nhava Sheva (Appeals)-I — **Respondent**
JNPT, Custom House,
Nhava Sheva, Raigad 400 707.

Appearance:

Shri Udayan Choksi, Advocate, for the Appellant
Shri Dilip Shinde, Assistant Commissioner, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

Date of Hearing: 06.05.2022
Date of Decision: 06.05.2022

FINAL ORDER NO. A/85509/2022

This appeal is directed against Order-in-Appeal No. MKK/559/RGD APP/2018-19 dated 29.03.2019 passed by the Commissioner of Central Tax (CGST & Central Excise) (Appeals), Raigad. By the impugned order, the Commissioner (Appeals) upheld the order-in-original of the Assistant Commissioner, Division V, CGST & Central Excise, Navi Mumbai, except for reducing the penalty imposed on the appellant.

2.1 Appellant is provider of taxable services under the category of "Consulting engineer services & erection, commissioning and installation services".

2.3 During the course of audit, it was observed that for the period April 2013 to March 2015, the appellant was also engaged in trading of various goods and trading in exempted services in terms of Cenvat Credit Rules, 2004. Following the formula as prescribed under Rule 6(3A) of Cenvat Credit Rules, appellant has reversed the cenvat credit attributable to the exempted services. Audit was of the view that the proportionate reversal made by the appellant in terms of Rule 6(3A) was not proper and certain additional amounts were needed to be reversed. After taking note of the above, a show cause notice dated 02.11.2017 was issued to the appellant asking them to show cause as to why:-

"(i) The Service Tax/Cenvat Credit amounting to Rs.34,76,397/- (Rupees Thirty Four lakes Seventy Six Thousand Three Hundred and Ninety Seven Only) for the period from April 2015 to March 2016 as detailed in para 12 above of this Notice, should not be demanded and recovered/reversed from them under Section 73(1) of the Finance Act, read with Rule 14 of the Cenvat Credit Rules, 2004.

(ii) the amount of Rs.4,66,531/- (Rupees Four Lakhs Sixty Six Thousand Five Hundred and Thirty One Only) already paid by the assessee, for the period from 2015-16 should not be appropriated against the total Cenvat credit demanded as mentioned at Sr. No. (1) above.

(iii) Interest should not be recovered from them under Rule 14 of the Cenvat Credit Rules, 2004 read with Section 75 of the Finance Act 1994,

(iv) Penalty should not be imposed upon them under Section 76 of the Finance Act, 1994 read with Rules 15(1) & 15(4) of the Cenvat Credit Rules, 2004 for contravention the provisions of Section 70 of Finance Act 1994 and Rule 6 & 7 of Service Tax Rules 1994."

The show cause notice was adjudicated by the Assistant Commissioner vide order-in-original referred in para 1 above. Aggrieved, appellant filed appeal before the Commissioner (Appeals) who has upheld the order of the Assistant Commissioner except for reducing the penalty amount. Aggrieved, appellant has filed this appeal.

3.1 I have heard Shri Udayan Choksi, Advocate for the appellant and Shri Dilip Shinde, Assistant Commissioner, Authorised Representative for the Revenue.

3.2 Arguing for the appellant, learned Advocate submits that –

- The issue involved in the appeal is vis-à-vis the meaning of the term "total cenvat credit used in the formula prescribed as per Rule 6(3A)".
- Undisputedly, in respect of various input services used for providing output services, the appellant had been maintaining separate account. Only for certain common input services which have been used for providing both taxable and exempted services, the accounts were not indicated and hence the amounts were reversed in terms of Rule 6(3A) by taking the total cenvat credit in the formula prescribed as per Rule 6(3A) to be equivalent to the amount of credit availed against common input services.
- This issue has been decided by this Tribunal in the following cases:-
  - Reliance Industries Ltd. [2019 (28) GSTL 96 (Tri.-Ahmd.)]
  - E-Connect Solutions (P) Ltd. [2021 (376) ELT 678 (Tri.-Del.)]
  - Honda Cards India Ltd. [2021-VIL-64-CESTAT-DEL-CE].
- In view of the above decisions, the appeal needs to be allowed.

3.3 Learned Authorised Representative reiterates the findings recorded in the impugned order.

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

4.2 Undisputedly, the appellant had been maintaining separate accounts for the taxable services and exempted services. Certain common inputs which were used for providing both taxable and exempted services have been separately indicated.

In para 24 of the order-in-original, the adjudicating authority has observed as follows:-

"24. I find that the noticee is engaged in providing taxable services as well as is engaged in "trading, which is an exempt/ non-taxable service. The assessee is availing CENVAT credit on certain input services, which are common to both, i.e. taxable as well as non-taxable services. Rule 601) of CENVAT Credit Rules, 2004 (herein after referred to as CCR) disallows CENVAT credit on input services used for provision of exempted services. Since the noticee are also providing exempted/non taxable services, they have opted to pay an amount as determined under sub-rule (3A) of rule 6 of CCR. for satisfying the condition that CENVAT credit shall not be allowed on input services used for provision of exempted services, I find that there is no dispute on these facts. The dispute is regarding calculation of the amount as per formula, provided under sub-rule (3A)(c)(iii) of rule 6, and to be more specific, about the value of 'P', of the formula. The said sub-rule states that the provider of output service, shall determine finally the amount of CENVAT credit attributable to exempted services in the following manner the amount attributable to input services used in or in relation to provision of exempted services = (M/N) multiplied by P, where M denotes total value of exempted services provided plus the total value of exempted goods manufactured and removed during the financial year. N denotes total value of output and exempted services provided, and total value of dutiable and exempted goods manufactured and removed during the financial year and P denotes total CENVAT credit taken on input services during the financial year. As per formula given in the said rule, 'P' denotes total CENVAT credit taken on input services during financial year, whereas according to noticee 'P' denotes CENVAT credit taken on "common input service during the financial year. Hence the dispute."

4.3 Similarly, the same has been stated by the Commissioner (Appeals) in para 3 of the impugned order, as follows:-

"3. Brief facts of the case are that a periodical Show Cause Notice was issued vide F. No. V/CGST-NM/Dv-V/R-VI/SCN/

Thyssen Krupp/110/17-18 dated 02.11.2017 alleging that the appellant had reversed less 'amount' as required under Rule 6(3A) of CCR on exempted services i.e., trading of goods, as while working out the formula as laid down under Rule 6(3A)(c)(iii) of CCR, the appellants has taken (P) as cenvat credit taken only on 'common input service' instead of cenvat credit taken on 'total input services' for both taxable services and exempted services. The entire demand was raised for the period 2015-16. It also proposed for imposition of interest under Rule 14 of Cenvat Credit Rules, 2004 read with Section 75 of the Finance Act, 1994 and imposition of penalty under Section 76 of the Finance Act, 1994 read with Rule 15(1) & Rule 15(4) of CCR, 2004."

4.4 I find that the issue involved in the matter is no longer res integra and has been decided by the Tribunal in the case of Reliance Industries Ltd. [2019 (28) GSTL 96 (Tri.-Ahmd.)]. The Tribunal in paras 8 to 11 has held as follows:-

*"**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.

9. *An amendment made in Rule 6(3A) by Notification No. 13/2016-C.E. (N.T.), dated 1-3-2016. The amended sub-rule (3A) of Rule 6 of Cenvat Credit Rules, 2004 is reproduced below:-*

Sub-rule (3A) as per Notification No. 13/2016-C.E. (N.T.), dated 1 Mar., 2016

(d) for sub-rule (3A), the following sub-rule shall be substituted, namely :-

"(3A) For determination of amount required to be paid under clause (ii) of sub-rule (3), the manufacturer of goods or the provider of output service shall follow the following procedure and conditions, namely :-

(a) the manufacturer of goods or the provider of output service shall intimate in writing to the Superintendent of Central Excise giving the following particulars, namely :-

(i) name, address and registration number 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 inputs and input services used exclusively in or in relation to the manufacture of exempted goods removed or for provision of exempted services and description of such exempted goods removed and such exempted services provided;

(iv) description of inputs and input services used exclusively in or in relation to the manufacture of non-exempted goods removed or for the provision of non-exempted services and description of such non-exempted goods removed and non-exempted services provided;

(v) CENVAT credit of inputs and input services lying in balance as on the date of exercising the option under this condition;

(b) the manufacturer of final products or the provider of output service shall determine the credit required to be paid, out of this total credit of inputs and input services taken during the month, denoted as T, in the following sequential steps and provisionally pay every month, the amounts determined under sub-clauses (i) and (iv), namely :-

(i) the amount of CENVAT credit attributable to inputs and input services used exclusively in or in relation to the manufacture of exempted goods removed or for provision of exempted services shall be called ineligible credit, denoted as A, and shall be paid;

(ii) the amount of CENVAT credit attributable to inputs and input services used exclusively in or in relation to the manufacture of non-exempted goods removed or for the provision of non-exempted services shall be called eligible credit, denoted as B, and shall not be required to be paid;

(iii) credit left after attribution of credit under sub-clauses (i) and (ii) shall be called common credit, denoted as C and calculated as, -

C = T - (A + B);

Explanation. - Where the entire credit has been attributed under sub-clauses (i) and (ii), namely ineligible credit or eligible credit, there shall be left no common credit for further attribution;

(iv) the amount of common credit attributable towards exempted goods removed or for provision of exempted services shall be called ineligible common credit, denoted as D and calculated as follows and shall be paid, -

D = (E/F) x C;

where E is the sum total of -

(a) value of exempted services provided; and

(b) value of exempted goods removed, during the preceding financial year;

where F is the sum total of -

(a) value of non-exempted services provided,

(b) value of exempted services provided,

(c) value of non-exempted goods removed, and

(d) value of exempted goods removed, during the preceding financial year :

Provided that where no final products were manufactured or no output service was provided in the preceding financial year, the CENVAT credit attributable to ineligible common credit shall be deemed to be fifty per cent. of the common credit;

(v) remainder of the common credit shall be called eligible common credit and denoted as G, where, -

G = C - D.

Explanation. - For the removal of doubts, it is hereby declared that out of the total credit T, which is sum total of A, B, D, and G, the manufacturer or the provider of the output service shall be able to attribute provisionally and retain credit of B and G, namely, eligible credit and eligible common credit and shall provisionally pay the amount of credit of A and D, namely, ineligible credit and ineligible common credit;

(vi) where manufacturer or the provider of the output service fails to pay the amount determined under sub-clause (i) or sub-clause (iv), he shall be liable to pay the interest from the due date of payment till the date of payment of such amount, at the rate of fifteen per cent. per annum.

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.*

11. *In the case of GOI v. Indian Tobacco Association (supra), the Hon'ble Supreme Court held that "the word "substitute" ordinarily would mean "to put (one) in place of another"; or "to replace". In Black's Law Dictionary, Fifth Edition, at page 1281, the word "substitute" has been defined to mean "To put in the place of another person or thing", or "to exchange". In Collins English Dictionary, the word "substitute" has been defined to mean "to serve or cause to serve in place of another person or thing"; "to replace (an atom or group in a molecule) with (another atom or group)"; or "a person or thing that serves in place of another, such as a player in a game who takes the place of an injured colleague". By the reason of the amendment, no substantive right has been taken away nor any penal consequence has been imposed. Only an obvious mistake was sought to be removed thereby." As per this interpretation of the Hon'ble Supreme Court, the sub-rule (3A) being substitution shall have a retrospective effect and will be applicable for all time since when the Rule was enacted. Therefore, for this reason also, for the purpose of calculation of Cenvat credit reversal, in the formula, total Cenvat credit shall mean credit of only common input service and not of input service exclusively used for the manufacture of dutiable product on which the Cenvat credit is eligible to the respondent in its entirety."*

Similar view has been expressed by the Tribunal in the case of E-Connect Solutions (P) Ltd. [2021 (376) ELT 678 (Tri.-Del.)], in paras 16 to 20 as under:-

*"**16.** Rule 6(1) of the Rules curtails the service provider from availing Cenvat credit on input services used for exempted services. This clearly means that credit is allowed to be taken only on input services pertaining to taxable services. In other words, wherever exempted services are rendered, the credit pertaining to such exempted service is not admissible and is required to be reversed. Rule 6(2) provides that wherever exempted service is rendered, then such service provider has to maintain separate accounts for receipt, consumption and*

inventory of various input services used for rendering such service and that Cenvat credit should be availed only in respect of input services used in rendering taxable service. Rule 6(3) provides an elaborate procedure for reversal of credit on a proportionate basis in respect of those service providers opting not to maintain separate accounts. Rule 6(3A) provides for a procedure for calculating proportionate credit admissible to an assessee. A service provider can avail the entire credit of input services and at the end of every month reverse a provisional amount of credit based on the preceding financial year's turnover for different services, but at the end of the year, the service provider is required to calculate final credit based on the current year's actual turnover figures and make the adjustments. What transpires, therefore, is that in terms of Rule 6(3A), a provider of output service can take only proportionate credit that is attributable to the taxable service.

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."*

The Tribunal in the case of Honda Cards India Ltd. [2021-VIL-64-CESTAT-DEL-CE] has expressed the same view in paras 8 to 10 as follows:-

"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)(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.

9. An amendment made in Rule 6(3A) by Notification No. ***13/2016-CE (NT)*** *dated 01.03.2016. The amended sub* *rule (3A) of Rule 6 of Cenvat Credit Rules, 2004 is reproduced below:-*

Sub-rule (3A) as per Notification No. 13/2016-CE (NT) dated 01 Mar 2016

(d) for sub-rule (3A), the following sub-rule shall be substituted, namely:-

"(3A) For determination of amount required to be paid under clause (ii) of sub-rule (3), the manufacturer of goods or the provider of output service shall follow the following procedure and conditions, namely :-
(a) the manufacturer of goods or the provider of output service shall intimate in writing to the Superintendent of Central Excise giving the following particulars, namely :-

(i) name, address and registration number 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 inputs and input services used exclusively in or in relation to the manufacture of exempted goods removed or for provision of exempted services and description of such exempted goods removed and such exempted services provided;

(iv) description of inputs and input services used exclusively in or in relation to the manufacture of non-exempted goods removed or for the provision of non-exempted services and description of such non-exempted goods removed and non-exempted services provided ;

(v) CENVAT credit of inputs and input services lying in balance as on the date of exercising the option under this condition;
(b) the manufacturer of final products or the provider of output service shall determine the credit required to be paid, out of this total credit of inputs and input services taken during the month, denoted as T, in the following sequential steps and provisionally pay every month, the amounts determined under sub-clauses (i) and (iv), namely :-

(i) the amount of CENVAT credit attributable to inputs and input services used exclusively in or in relation to the manufacture of

exempted goods removed or for provision of exempted services shall be called ineligible credit, denoted as A, and shall be paid;

(ii) the amount of CENVAT credit attributable to inputs and input services used exclusively in or in relation to the manufacture of nonexempted goods removed or for the provision of non-exempted services shall be called eligible credit, denoted as B, and shall not be required to be paid;

(iii) credit left after attribution of credit under sub-clauses (i) and (ii) shall be called common credit, denoted as C and calculated as,-

C = T - (A + B);

Explanation.- Where the entire credit has been attributed under sub-clauses (i) and (ii), namely ineligible credit or eligible credit, there shall be left no common credit for further attribution.

(iv) the amount of common credit attributable towards exempted goods removed or for provision of exempted services shall be called ineligible common credit, denoted as D and calculated as follows and shall be paid, -

D = (E/F) x C;

where E is the sum total of –

(a) value of exempted services provided; and

(b) value of exempted goods removed, during the preceding financial year; where F is the sum total of-

(a) value of non-exempted services provided,

(b) value of exempted services provided,

(c) value of non-exempted goods removed, and

(d) value of exempted goods removed, during the preceding financial year :

Provided that where no final products were manufactured or no output service was provided in the preceding financial year, the CENVAT credit attributable to ineligible common credit shall be deemed to be fifty per cent. of the common credit;

(vi) remainder of the common credit shall be called eligible common credit and denoted as G, where,-

G = C - D;

Explanation.- For the removal of doubts, it is hereby declared that out of the total credit T, which is sum total of A, B, D, and G, the manufacturer or the provider of the output service shall be able to attribute provisionally and retain credit of B and G, namely, eligible credit and eligible common credit and shall provisionally pay the amount of credit of A and D, namely, ineligible credit and ineligible common credit.

(vi) where manufacturer or the provider of the output service fails to pay the amount determined under sub-clause (i) or sub-clause (iv), he shall be liable to pay the interest from the due date of payment till the date of payment of such amount, at the rate of fifteen per cent. per annum;

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."

5.1 In view of the above decisions, I do not find much merits in the impugned order.

5.2 The appeal is accordingly allowed.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

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