CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

EXCISE APPEAL NO: 975 OF 2012

[Arising out of Order-in-Original No: Belapur/79/Bel-III/R-IV/SLM/Commr/ 2011-12/Bel dated 21st March 2012 passed by the Commissioner of Central Excise, Belapur.]

Larsen & Toubro Limited
Automation Campus, A-600 TTC Industrial Area
Shil-Mahape Road, Navi Mumbai – 400 614 … ***Appellant***

versus

Commissioner of Central Excise
Belapur
1st Floor, CGO Complex, CBD Belapur
Navi Mumbai – 400 614 ***…Respondent***

APPEARANCE:

Shri Prakash Shah, Advocate for the appellant

Shri Sydney D'Silva, Additional Commissioner (AR) for the respondent

CORAM:

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

FINAL ORDER NO: A / 86283 /2022

DATE OF HEARING: 20/06/2022
DATE OF DECISION: 20/06/2022

PER: C J MATHEW

This appeal of M/s Larsen & Toubro Limited lies against order[1]

[1] [Order-in-original no. Belapur/79/Bel-III/R-IV/SLM/Commr/2011-12/Bel dated 21st March 2012]

of Commissioner of Central Excise, Belapur confirming demand of ₹ 60,38,775/- for the period from April 2008 to January 2009 under rule 14 of CENVAT Credit Rules, 2004, along with appropriate interest, besides imposing penalty of like amount under rule 15 of CENVAT Credit Rules, 2004. This dispute is before us for the second time as the fresh adjudication, consequent to the remand direction of the Tribunal on the previous occasion *vide* order dated 20th May 2011, granted relief only to the extent of ₹1,30,13,266/- in the demand proposed and confirmed during the earlier round.

2. We have heard Learned Counsel for the appellant and Learned Authorised Representative.

3. It transpires that the dispute had its genesis in the alleged failure of the appellant to reverse required proportion of credit from out of ‘inputs’ and ‘input services’ used in common for manufacture of dutiable and exempted goods. Learned Counsel pointed out that they had, indeed, effected the reversal along with the corresponding interest which the original authority had been taken cognizance of but discarded on the sole ground that the exercise of that option in rule 6(3) of CENVAT Credit Rules, 2004 had not been availed in the manner prescribed therein. He also cited the decision of the Tribunal in *Star Agriwarehousing & Collateral Management Ltd v.*

Commissioner of Central Excise & Service Tax, Jaipur[2] and *The Oberoi Rajvilas v. Commissioner of Central Excise*[3] on subsequent reversal sufficing for compliance with rule 6(3A) of CENVAT Credit Rules, 2004.

4. The confirmation of the amount in the impugned order has been based on failure to comply with the procedural pre-requisites for such reversal. By Finance Act, 2010, a specific provision had been incorporated for retrospective availment of the method of reversal for the period from 1st September 1996 to March 2008 though, admittedly, appellant had undertaken the exercise only thereafter. In *re Star Agriwarehousing & Collateral Management Ltd*, it has been held that

> *'8. We have heard the rival contentions and are of the view that it is a matter of record that the appellant have been providing both taxable and exempted output services in respect of which they have been availing credit of common input services. It is also a matter of record that the appellant have fulfilled the requirement of Rule 6 (3) (ii) of the Cenvat Credit Rules, 2004 read with Rule 6 (3A) and have been reversing the amount of common Cenvat credits, proportionate to value of exempted output services. In this regard we take note of the fact that appellant have furnished Cenvat credit register for the period April 2009 to June 2012 which indicate that they have regularly been reversing the proportionate amount of the Cenvat credit taken on the common inputs which have gone into exempted output services. In this regard, we are of the view once the*

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2 *[2021 (44) GSTL 271 (Tri.-Del.)]*
3 *Jaipur [2018 (5) TMI 1715 CESTAT-NEW DELHI]*

appropriate reversal have been made under Rule 6 (3A) of the Cenvat Credit Rules any procedural violations of minor nature would be of in-consequential nature and will not dis-entitle the assessee from availing the Cenvat credit of the common inputs for which they have already been making a regular reversal of proportionate credits. We also take note of the fact that the Department has nowhere mentioned in entire proceedings that the amount of Cenvat credit reversed is not proportionate to the value of exempted services or not proper otherwise. The only ground that the appellant have not followed the laid down procedure of availing the option of Rule 6 (3A) like not declaring value of turnover of exempted services in their periodic service tax return etc. can be minor procedural lapses, but same cannot become ground for denying a substantial benefit to the appellant.

*9. We are also of the view that once the proportionate reversal of the Cenvat credit has taken place, that tentamount to not availing of the input services credit of the common inputs which are going into the exempted services. While holding this view we take shelter of the decision of the Hon'ble Supreme Court in the case of **Chandrapur Magnet Wires (P) Ltd. versus Collector of Central Excise, Nagpur – 1996 (81) ELT 3 (SC)**.*

*10. We also take note of this Tribunal's decision on the same issue in case of **M/s The Oberoi Rajvilas versus Commissioner of Central Excise, Jaipur** reported under **2018 (5) TMI 1715 – CESTAT New Delhi**, the relevant extract of same are reproduced here below :-*

> *"9. From the above, we note that the appellant has followed the proportionate method for availment of credit on common input services. It cannot be said that the appellant has availed any credit on input services used in providing exempted service. The reversal of credit as above satisfies the requirement of non availment of credit laid down in the*

Notification No. 1/2006-ST ibid.

10. It is a settled position of law that proportionate reversal at a later date will satisfy the requirement of non availment of Cenvat credit. This view is supported by various decisions of the Supreme Court/ High Courts and Tribunal, some of which have been cited by the appellant.

11. The procedure prescribed in Rule 6(3A) of the Credit Rules is only to make the provisions of Rule 3 workable. By means of proportionate reversal the requirement of Rule 6(3) has been substantially satisfied. This is also provided in Rule 6(3D) of the Cenvat Credit Rules which was introduced at a later date".'

and, in *re The Rajvilas Oberoi,* it has been held by the Tribunal that

'9. We have considered the rival submissions and also perused the case record.

10. As far as the issue regarding the abatement as per Notification No. 1/2006-ST is concerned, the same is decided in their own case vide the order of this Tribunal as referred (supra). The relevant extracted of the decision is reproduced as under ;

"7. First we consider the claim of the appellant for the benefit of abatement in terms of Notification No. 1/2006-ST ibid. The abatement @ 50% and 70% will be available to short term accommodation service restaurant service subject to the condition that no cenvat credit is availed on input, input services and capital goods. The appellant does not deny the fact that they have availed the credit on input services. A part of the input services is exclusively used for provision of taxable services for which service tax is payable at full rate. Since the such cenvat credit has been used only for payment of service tax on taxable service at full rate, there can be no objection to allow the same.

8. In respect of the credit availed on common input services, the picture is not so clear. The services where the benefit of Notification No. 1/2006- ST is claimed, will fall under the definition of "exempted service" as per Rule 2(e) of the Cenvat Credit Rules, 2004. The appellant, after availing the credit on common input services, has claimed that they have utilised only proportionate credit for payment of service tax on output service. The utilisation has been restricted in the *proportion of turnover of its taxable service to total turnover, by considering the turnover from short term accommodation service as well as restaurant service as exempted service. Further, the proportion was provisionally determined on the basis of the turnover for the previous year and the same was finally determined at the end of the year and adjustment was made for reversal of credit with interest later on.*

9. From the above, we note that the appellant has followed the proportionate method for availment of credit on common input services. It cannot be said that the appellant has availed any credit on input services used in providing exempted service. The reversal of credit as above satisfies the requirement of non availment of credit laid down in the Notification No. 1/2006-ST ibid.

10. It is a settled position of law that proportionate reversal at a later date will satisfy the requirement of non availment of cenvat credit. This view is supported by various decisions of the Supreme Court/ High Courts and Tribunal, some of which have been cited by the appellant.

11. The procedure prescribed in Rule 6(3A) of the Credit Rules is only to make the provisions of Rule 3 workable. By means of proportionate reversal the requirement of Rule 6(3) has been substantially satisfied. This is also provided in Rule 6(3D) of the Cenvat Credit Rules which was introduced at a later date.

12. In view of the above, the benefit of abatement as per Notification No. 1/2006-ST cannot be denied to the appellant and the demands raised on this ground is set aside.

13. Next we turn the issue of payment of service tax on income from open air restaurant. The taxable service of restaurant as defined in Section 65(105)(zzzzv) of the Act lays down two fold conditions:- (a) the restaurant must have the facility of airconditioning; and (b) it must have the license to serve alcoholic beverages. It is undisputed that the open air restaurant does not have the facility of airconditioner. Hence, such restaurant cannot be said to be covered within the definition of the service as above. Further, the CBEC Circular No. 139/8/2011-TRU dated 10.05.2011 clarifies that within the same entity, if there are more than one restaurants, which are clearly demarcated the one with A/C alone will be liable to service tax. In view of the above clarification, there is no justification to demand service tax on the income from open air restaurant."

11. This decision has also been dealt with the levy of service tax on income from open air restaurant which is also in

> *favour of the appellant. We do not find any justification of demand on these services. This finding of Hon'ble Tribunal in these cases has also been upheld in the case of* ***Jai Mahal Palace Hotel (****supra).'*

5. In view of the decisions of the Tribunal *supra* and submissions of the Learned Counsel on behalf of the appellant that obligation under rule 6(3) of CENVAT Credit Rules, 2004 had been duly discharged, we set aside the impugned order and remand the matter back to the original authority solely for ascertaining correctness of the claim that the reversal has been done in full; only the remaining amount in the present demand that is yet to be reconciled shall be determined as liability of the appellant along with interest thereon.

6. The appeal is allowed by way of remand on the above terms.

(Operative Part of the Order Pronounced in the Open Court on 20th June 2022)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*