CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

EXCISE APPEAL NO: 89823 OF 2013

[Arising out of Order-in-Original No: PUN-EXCUS-001-COM-021-13-14 dated 19th September 2013, passed by the Commissioner of Central Excise, Pune-I.]

Schaeffler India Ltd
MIDC, Talegaon, Tal: Maval, Pune - 410 507 … ***Appellant***

versus

Commissioner of Central Excise
Pune – I
ICE House, 41-A, Sassoon Road, Pune 411 001 ***…Respondent***

APPEARANCE:

Shri Prakash Shah, Advocate for the appellant

Shri Sunil Kumar Katiyar, Assistant Commissioner (AR) for the respondent

CORAM:

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

FINAL ORDER NO: 87163/2023

DATE OF HEARING: 25/08/2023
DATE OF DECISION: 22/11/2023

PER: C J MATHEW

The limited issue in this appeal of M/s Schaeffler India Ltd is the recovery of credit of tax paid on 'input services' that, allegedly, found common use in undertaking of manufacturing activity as well as rendering of ‘exempted service’ and had not been reversed in the manner prescribed in rule 6 of CENVAT Credit Rules, 2004.

2. The appellant, a manufacturer of ‘ball bearings’, had also procured similar products for sale and, as recipient of ‘taxable services’, had availed credit of tax paid thereon under rule 3 of CENVAT Credit Rules, 2004 but, taking note of the exclusion of certain activities for eligibility, claimed that they had reversed a portion thereof notwithstanding which they were served with show cause notice for recovery of ₹ 76,17,595/- pertaining to the period from April 2009 to July 2011 which was confirmed by order[1] of Commissioner of Central Excise, Pune – I Commissionerate, along with interest as applicable under section 11AA of Central Excise Act, 1944, besides being imposed with penalty of like amount under section 11AC of Central Excise Act, 1944; of the demand so confirmed, ₹ 66,14,902/- for the period up to 31st March 2011 and ₹ 9,48,265/- for the period from April 2011 to June 2011, in addition to ₹ 53,428/-, were held as attributable to trading activity. It is contended by appellant that, for the period prior to 31st March 2011, the proportion of credit to be reversed was computed by applying *ratio* of value of traded goods to the total sale of the entity whereas credit availed on services utilized in common was restricted to ₹

[1] [order-in-original no. PUN-EXCUS-001-COM-021-13-14 dated 19th September 2013]

23,34,816/- for 2009-10 and ₹ 42,81,086/- for 2010-11 for the period thereafter. It was held that the appellant had failed to comply with rule 3A of CENVAT Credit Rules, 2004 and, therefore, value of traded goods was to be adopted for the purpose.

3. According to Learned Counsel for the appellant, ‘trading activity’ had not been incorporated as ‘exempted service’ in rule 2(e) of CENVAT Credit Rules, 2004 till 2011 and, therefore, there was no requirement for them to exclude any service used in common from eligibility for credit. It was contended that the amendment carried out, by introduction of *Explanation* in rule 2(e) of CENVAT Credit Rules, 2004, cannot be deemed as having retrospective effect to cover the period of the dispute. He further contended that even if such view was tenable, reversal of credit in terms of requirements of rule 6(3) of CENVAT Credit Rules, 2004 precluded recovery of differential determined in the impugned order. It was pointed out that, by amendment of rule 6 of CENVAT Credit Rules, 2004, *Explanation I* was incorporated *vide* notification no. 28/2012-CE (NT) dated 20th June 2012 to provide that

> *‘(c) in case of trading, 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.’*

and it was contended by him that this too should, equitably, have retrospective effect.

4. Learned Authorised Representative submitted that, in *Orion Appliances Ltd v. Commissioner of Service Tax, Ahmedabad [2010 (19) STR 205 (Tri.-Ahmd)],* the Tribunal had held that

> *'8. Then the question arises as to whether the appellant would be eligible for the full amount of service tax credit taken by them on input services can be used for payment of service on output service provided the input services have been used for providing the output services. No doubt there is no one to one correlation required. This is the reason why provisions have been made in Cenvat Credit Rules and Service Tax Credit Rules to cover such situations where an assessee is providing both exempted and taxable services. In cases where an assessee is undertaking activities which cannot be called a service or which cannot be called manufacture, that activity goes out of the purview of both Central Excise Act as well as Finance Act, 1994. Therefore, we have a situation where an assessee would not be eligible to take input Service tax credit on an output which is neither a service nor excisable goods and at the same time 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 appellant to choose and segregate the quantum of input service attributable to trading activity and exclude the same from the records maintained for availment of credit. Naturally this cannot be done in advance since it may not be possible to forecast what would be the quantum of trading activity and other activity which is liable to service tax. The only obvious solution which would be legally correct appears to 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. This proposition is not against the law in view of the fact that there are several decisions of various High Courts and also of the Tribunal wherein a view has been taken that subsequent reversal of credit amounts to non-availment of credit.'*

5. Furthermore, it was pointed that the Tribunal, in *Mercedes Benz India Pvt Ltd v. Commissioner of Central Excise, Pune – I [2014 (36) STR 704 (Tri.-Mumbai)],* has held that trading is not an 'output service' and, hence, not eligible for credit to the extent that common input service had been deployed for such.

6. We find that the issue lies in the narrow compass of applicability of rule 6(3) of CENVAT Credit Rules, 2004 insofar as the period prior to specific exclusion of 'trading activity' is concerned.

7. From the very beginning, eligibility for availment of CENVAT credit of tax paid on 'input service' was set out to exclude such as used for undertaking 'exempt service' – which incorporates both 'taxable service' subject to exemption and services on which no tax is leviable thereon. Though, 'trading' came to be acknowledged within the framework of CENVAT Credit Rules, 2004 specifically with effect from April 2011, the *Explanation* incorporating such specifies had to be clarificatory in consequence; such services as are beyond the purview of Finance Act, 1994 such as has been held by the Tribunal,

in *re Orion Appliances Ltd*, lies within exclusive powers of the State Government and is in conformity by the second limb of the definition. Accordingly, trading activity was always to be treated as having been exempt service within the meaning of rule 2(e) CENVAT Credit Rules, 2004. Consequently, credit availed thereof is to be disallowed to such extent insofar as 'input services' were deployed in common on the activity of manufacturing of, as well as 'trading' in, ball bearings.

8. The sole issue surviving for resolution thereafter is the mechanism to be adopted for neutralization owing to operation of rule 6(2) of CENVAT Credit Rules, 2004 which makes it clear that such services, as are deployed for production of exempted goods or rendering of exempted services, cannot continue to be retained in the CENVAT credit account. Rule 6(2) of CENVAT Credit Rules, 2004 provides for segregation of services, procured in common, upon being utilized for the two different streams of activity; however, owing to the nature of 'services', mapping of boundaries and patrolling of border, metaphorically speaking, is rendered well-nigh impossible. To deal with such inoperability, rule 6(3) of CENVAT Credit Rules, 2004 affords neutralization authorized by law as is evident from the commencement with *non obstante* qualification. Even within the scheme of such reversal, alternatives are provided with the option of discharging payment through CENVAT credit account by such percentage of value of exempted service as is prescribed or by proportionate reversal. The

appellant herein had undertaken proportionate reversal which is not in question and the only issue in contention is the correctness of proportion. While the impugned order has taken the value of manufacturing and value of trading as the factors for such delineation, it is the claim of the appellant that adoption of value of traded goods would distort the principle underlying CENVAT credit scheme.

9. We find that the service value of trading has been incorporated in rule 6 of CENVAT Credit Rules, 2004 with effect from 1st June 2012 and we find no reason for not according it retrospective application, especially as several decisions have held the specifying of 'trading' exempted service to be clarificatory.

10. Furthermore, the composition of cost of manufactured goods includes not only the value addition at the factory of the manufacturer but also of value of manufactured inputs used therein. Such construct of manufacturing cannot be presumed insofar as procurement of goods that are traded is concerned inasmuch as that, while being the object of trading, the value of such goods are not absorbed in the activity of trading. Consequently, value of trading must necessarily be limited to the difference between the selling price and the purchase price of the traded goods. The appellant claims to have adopted such as the basis for computation.

11. The impugned order has not taken this aspect into consideration

and, therefore, computation thereof has not been subjected to verification. In these circumstances, our finding *supra*, holding that the value adopted for the purpose of reversal shall be limited to the difference between the purchase price and selling price of traded goods and the proportion thereof to the proceeds of sale of manufactured goods as the basis for apportioning the credit that has to be reversed and allowed respectively, should govern the final outcome of the dispute for which purpose we remand the matter to the original authority with direction to restrict the demand arising therefrom, if any, to such short-fall not made good by the appellant.

12. As the appellant had reversed the credit, and rule 14 of CENVAT Credit Rules, 2004 would come into play only when the reversal prescribed in rule 6(3) of CENVAT Credit Rules, 2004 had not been complied with by assessee, we see no reason for further proceedings except insofar as notice under rule 14 of CENVAT Credit Rules, 2004 and penalty under rule 15 CENVAT Credit Rules, 2004 is to be confined to non-adherence to the terms as set out *supra*.

13. The appeal is disposed off on the above terms.

(Order pronounced in the open court on 22/11/2023)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*