CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

REGIONAL BENCH -COURT No. 4

Service Tax Appeal No. 88486 of 2018

(Arising out of Order-in-Appeal No.NSK/EXCUS/000/APPL/249/17-18 dated 23.02.2018 passed by the Commissioner of CGST & Central Excise (Appeals), Nashik)

M/s. Kankariya Automobiles Pvt. Ltd. **Appellant**
(Nagar Manmad Road, Savedi,
Ahmednagar 414001)

Vs.

Commissioner of CGST & Central Excise, Ahemdnagar

Respondent

(Kisan Kranti Building, Market Yard, Station Road,
Ahmednagar Division-I, Nashik Commissionerate)

Appearance:

Shri Anand Nahar, Chartered Accountant, for the Appellant
Shri S.B.P. Sinha, Superintendent, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)

Date of Hearing: 20.12.2023
Date of Decision: 12.04.2024

FINAL ORDER NO. 85453/2024

PER: P.K. CHOUDHARY

The Appellant is an authorized dealer of Maruti Suzuki India Limited[1] engaged in the business of trading of motor vehicles and servicing thereof. These activities are governed by the Dealership agreement entered with MSIL. The Appellant carried out both taxable services as well as nontaxable/trading activities and availed Cenvat credit of Rs.3,01,395/- on input

[1] MSIL

services viz. "Security service, Telephone & Mobile Service" during the Financial years from 2012-13 to 2014-15.

2. Service Tax Department conducted audit where they noticed that the Appellant had provided taxable services as well as exempted services, availed cenvat credit, and have failed to either maintain separate books of account for receipt, consumption & inventory of input and input services meant for use in providing output service and the quantity of input and input services meant for use of exempted service. It is alleged that the Appellant has contravened the provision of Rule 6(3) of the Cenvat Credit Rules, 2004[2] with an intent to evade payment of amount attributable to input services used in or in relation to provision of exempted service provided. A Show cause notice dated 31.03.2016 was issued alleging that the Appellant has failed to pay the amount attributable to input service used in relation to trading activity amounting to Rs.2,80,532/- as computed in the table below:-

Year	Total Value of Exempted Service provided during Financial Year (M)	Total Value of output and Exempted Service provided during Financial Year (N)	Total Cenvat Credit taken during Financial Year (P)
2012-13	73,94,38,586/-	79,50,27,221/-	1,01,992/-
2013-14	110,68,54,745/-	118,94,85,443/-	44,885/-
2014-15	121,59,44,640/-	130,54,67,689/-	1,54,518/-
Total	306,22,37,971/-	328,99,80,353/-	3,01,395/-

3. The Order-In-Original No.57/ST/AC/2016-17 dated 09.02.2017 was passed ex-parte confirming the service tax

[2] CCR 2004

demand of Rs.2,80,532/- along with interest and penalty of equal amount was imposed under Section 78 of the Finance Act, 1994. On receipt of the impugned order, the Appellant paid the interest amounting to Rs.1,60,038/- and 25% of the penalty amounting to Rs.70,133/- on 08.03.2017. The Appellant also paid the demand of Rs.2,80,532/- on 31.01.2017.

4. Being aggrieved, the Appellant filed appeal before the learned Commissioner (Appeals) and the learned Commissioner (Appeals) vide the impugned order, dismissed the appeal. Being aggrieved, the Appellant has filed the present appeal before this Tribunal.

5. The learned Advocate appearing on behalf of the Appellant submits that since the sale of goods in itself is not an exempted service, there is no bar on the Appellant to avail credit on input services, so long as part of it is also being used for providing taxable services. He vehemently argued that the activity of purchasing cars and selling them on a principal to principal basis cannot be regarded as a "service", hence there is no question of the same even coming under the category of exempted services. He further submits that if at all the proportionate credit is to be computed than the same is to be based on formula provided from 1.04.2011, i.e., the difference between the sale price of the goods and cost of goods sold or 10% of the cost of goods sold.

6. The learned Departmental Representative justified the impugned order and submitted that the appeal filed by the appellant be dismissed being devoid of merits.

7. Heard both sides and perused the appeal records.

8. I find that the issue in the present appeal is no more *res integra* and was considered by the Hon'ble Telangana High Court in the case of **Tiara Advertising V/s Union of India reported in 2019 (30) GSTL 474 (Telangana)**. The relevant paras of the aforesaid judgment are reproduced below:-

> ***"7.*** *Rule 6 of the Cenvat Credit Rules, 2004 deals with the obligations of a provider of taxable and exempted services.*

Rule 6(1) states that Cenvat Credit shall not be allowed on inputs/input services exclusively used for providing exempted services. Rule 6(2) provides that if inputs or input services are used for provision of output services which are chargeable to duty or tax as well as exempted services, then separate accounts are to be maintained for receipt, consumption and inventory of inputs and receipt and use of input services and the provider shall take credit only on inputs used for dutiable output services. Rule 6(3) of the Cenvat Credit Rules, 2004 is relevant for the purpose of this case and states to the effect that a provider of output services who opts not to maintain separate accounts, as required under Rule 6(2), should follow any one of the options provided under Clauses (i) to (iii) thereunder, as applicable to him. Clause (i) provides for the option of paying an amount equal to 5% of the value of the exempted services. Pursuant to Notification No. 18/2012, dated 17-3-2012, the amount to be paid under Clause (i) was increased to 6% with effect from 1-4-2012.

8. *It is an admitted fact that the petitioner did not maintain separate accounts of the inputs/input services utilized for providing certain taxable and exempted output services. It also did not choose to opt for one of the procedures stipulated in Rule 6(3) set out supra. The petitioner however availed and utilised Cenvat Credit on such inputs/input services which were common to both taxable and exempted output services and the same amounted to Rs. 17,15,489/-.*

9. *It may be noted that there is no controversy with regard to the entitlement of the petitioner to avail Cenvat Credit but for this disputed amount of Rs. 17,15,489/- out of the total extent of Rs. 1,41,51,903/-. While so, the second respondent issued show cause notice dated 19-4-2016 to the petitioner proposing to choose the option under the aforestated Rule 6(3)(i) on its behalf and calling upon it to explain as to why it should not be directed to pay an amount of 5%, upto 31-3-2012, and 6%, from 1-4-2012, of the value of the exempted services, aggregating to Rs. 3,52,65,241/-. In its reply dated 16-5-2016, the petitioner contended that it was wholly unreasonable on the part of the authorities to expect it to pay over Rs. 3.50 Crore when the total Cenvat Credit availed by it was less than Rs. 1.50 Crore and the actual dispute boiled down to a mere Rs. 17,15,489/-. It relied on case law to support its contention that such an unreasonable result could not be allowed to follow by application of the law. The impugned Order-in-Original however reflects that the second respondent did not even advert to the case law cited before him.*

10. *Another issue that was raised by the second respondent in the show cause notice was with regard to certain debit notes produced by the petitioner not being valid* *invoices for the purpose of availing Cenvat Credit. In response to this, the petitioner contended that debit notes were valid documents for availing such credit, by relying upon Rule 9(2) of the Cenvat Credit Rules, 2004. It also pointed out that this issue had fallen for consideration before the Mumbai Bench of the Customs, Excise and Service Tax Appellate Tribunal in Mahanagar Gas Ltd. v. CCE - 2015-TIOL-1069, wherein it was held that a debit note would be on par with the documents mentioned in Rule 9(1) of the Cenvat Credit Rules, 2004. Reliance was also placed on CCE, Indore v. Grasim Industries Ltd. - 2011 (24) S.T.R. 691, a decision of the Delhi Bench of the Tribunal, which also held to this effect. Various other decisions were also cited in this regard. However, the second respondent did not choose to advert to any of these decisions while holding against the petitioner on this aspect also.*

11. *In fact, no case law whatsoever finds mention in the impugned Order-in-Original. This reflects the level of application of mind by the second respondent. It is not open to an authority to ignore the binding precedents cited before it while interpreting and applying legal provisions. All the more so, when such misguided application of law by it leads to preposterous results, as in the case on hand. The petitioner who availed total Cenvat Credit of Rs. 1,41,51,903/-, of which only a small sum of Rs. 17,15,489/- falls within the realm of dispute, is now sought to be mulcted with exorbitant demands by the second respondent. Be it noted that the second respondent ultimately called upon the petitioner to pay Rs. 3,52,65,241/- towards the Cenvat Credit irregularly availed by it, along with interest, apart from a penalty of Rs. 3,52,65,241/-. The second respondent also confirmed the demand for a sum of Rs. 12,75,645/- being the Cenvat Credit irregularly availed on the strength of debit notes along with a penalty for a like sum. A further penalty of Rs. 10,000/- was also imposed for contravention of the provisions of the Finance Act, 1994.*

12. *The Assistant Commissioner of Central Tax, Central Excise & Service Tax, Secunderabad GST Commissionerate, filed a counter affidavit. Therein, he stated that the writ petition was not maintainable as a statutory appellate remedy was provided to the petitioner. He sought to justify exercise of power by the second respondent under Rule 6(3) of the Cenvat Credit Rules, 2004, on the ground that the petitioner had failed to furnish any information about the option exercised by it. He asserted that the petitioner had availed input tax credit irregularly by furnishing wrong information. This fact was stated to have come to the knowledge of the department only after verification of the petitioner's records.*

13. *Having considered the issue of maintainability of this writ petition, we are of the opinion that the petitioner cannot be non-suited on the ground of availability of an alternative remedy. The alternative remedy principle is not a straitjacket formula but a rule of convenience which has been evolved by Courts so as to ensure equitable distribution of work. It is therefore within the discretion of this Court to refuse to adopt the said rule in a deserving case. Presently, we find that the second respondent has brazenly exercised power under a provision which was not even available to him, as it was an enabling provision put in place for the benefit of the assessee, and arrived at a wholly unreasonable, if not absurd, result. That apart, the second respondent did not even choose to deal with the binding case law cited before him while dealing with the issues arising for consideration. This arrogant and arbitrary approach adopted by the second respondent cannot be countenanced. It would therefore not be necessary for the petitioner to go through the motions of a statutory appeal to challenge the same. The contention of the respondents as to the maintainability of the writ petition is therefore rejected.*

14. *Further, we may reiterate that Rule 6(3) of the Cenvat Credit Rules, 2004, merely offers options to an output service provider who does not maintain separate accounts in relation to receipt, consumption and inventory of inputs/input services used for provision of output services which are chargeable to duty/tax as well as exempted services. If such options are not exercised by the service provider, the provision does not contemplate that the Service Tax authorities can choose one of the options on behalf of the service provider. As rightly pointed out by Sri S. Ravi, Learned Senior Counsel, if the petitioner did not abide by the provisions of Rule 6(3) of the Cenvat Credit Rules, 2004, it was open to the authorities to reject its claim as regards the disputed Cenvat Credit of Rs. 17,15,489/-.*

15. *We may also note that in the event the petitioner was found to have availed Cenvat Credit wrongly, Rule 14 of the Cenvat Credit Rules, 2004 empowered the authorities to recover such credit which had been taken or utilised wrongly along with interest. However, the second respondent did not choose to exercise power under this Rule but relied upon Rule 6(3)(i) and made the choice of the option thereunder for the petitioner, viz., to pay 5%/6% of the value of the exempted services. The statutory scheme did not vest the second respondent with the power of making such a choice on behalf of the petitioner. The Order-in-Original, to the extent that it proceeded on these lines, therefore cannot be countenanced.*

16. *As regards the issue of debit notes, Sri A. Radha Krishna, Learned Senior Standing Counsel, is not in a* *position to dispute the case law relied upon by the petitioner in its reply dated 16-5-2016. It is not his case that any of these decisions was overturned or that there is a binding decision of a higher judicial authority to the contrary. He also has no explanation to offer as to why the second respondent did not even deal with the case law cited before him. We therefore hold that disallowance of Cenvat Credit on the ground that the petitioner had availed the same by producing debit notes instead of invoices cannot be accepted.*

17. *In effect, the Order-in-Original does not withstand judicial scrutiny on both issues and is accordingly set aside. The writ petition is allowed. Pending miscellaneous petitions shall stand closed in the light of this final order. No order as to costs."*

9. I find that the decision of Tiara Advertizing (supra) has also been relied upon by the Hon'ble High Court of Calcutta in the case of **Commissioner of Service Tax-I V/s Surya Vista reported in 2022 (7) TMI 719 (Kolkata).**

10. I further observe that the facts of the present case are squarely covered by the aforesaid decision. As pointed out in the abovementioned decision, if according to the Adjudication Authority, the assessee did not abide by the provisions of Rule 6(3) of CCR Rules, 2004, it was open to the Adjudicating Authority to reject the assessee's claim as regards the disputed cenvat credit and it could not mechanically invoke 5% Rule on the assessee.

11. I also find that the Tribunal in the case of M/s Ingersoll-Rand Technologies And Services Pvt. Ltd. V/s Commissioner, Central Excise, Ghaziabad reported [2022 (8) TMI 877-CESTAT Allahabad] being Service Tax Appeal No.58874 of 2013 vide Final Order No.70137/2022 dated 18.08.2022, have held that for not exercising the option under Rule 6 of the Credit Rules, the option of payment of 5/6% of trading of goods ('exempted service') cannot be thrust upon the Appellant. The relevant paragraphs are reproduced as under:-

"15. The stand of the department is that for the relevant period from April 2006 to March 2011, trading activities undertaken by the appellant qualified as „exempted service" within the meaning of rule 2(e) of the Credit Rules and that

the Explanation added to the definition of „exempted service" w.e.f. 01.04.2011 only clarified that the trading activities have always been treated as „exempted service" for the purpose of the Credit Rules. Thus, the appellant which was providing both taxable and exempted services was utilizing the input services in respect of both taxable and exempted service and, therefore, had contravened the provisions of rule 6 of the Credit Rules in as much as for the period from April 2006 to March 2008, the appellant utilized CENVAT credit in excess of 20 percent of service tax payable on taxable output services from the CENVAT credit account and for the period from April 2008 to March 2011, the appellant failed to follow the procedure prescribed under rule 6(ii) and rule 6(iii) ofthe Credit Rules.

16. The contention of the appellant is that „trading" was not an exempted service prior to 01.04.2011 since the Explanation to rule 2(e) of the Credit Rules, as amended on 01.04.2011, is not retrospective in nature.

17. Rule 2 of the Credit Rules deals with definitions and rule 2(e) deals with the definition of „exempted service". The definition of „exempted service" has undergone amendments from time to time and the definition as it stood from 2006 to 01.04.2011 and from 01.04.2011 onwards is reproduced below:

2006 to 1.4.2011

> *"(e) "exempted services" means taxable services which are exempt from the whole of the service tax leviable thereon, and includes services on which no service tax is leviable under section 66 of the Finance Act"*

1.4.2011 onwards

> *"(e) "exempted services" means taxable services which are exempt from the whole of the service tax leviable thereon, and includes services on which no service tax is leviable under section 66 of the Finance Act 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 service, shall be taken* ***Explanation-*** *For the removal of doubts, it is hereby clarified that "exempted services" includes trading."*

18. It is clear from the definition of „exempted services" w.e.f. 01.04.2011 that „exempted services" included trading. The issue that arises for consideration is whether the Explanation to rule 2(e) is prospective in nature as submitted by the appellant or it merely *clarifies that trading activities were always an „exempted service", as is contended by the department.*

19. To understand the scope of „Explanation", it would be useful to refer to the decision of the Supreme Court in Sedco Forex. The Supreme Court clarified that if „Explanation" widens the scope of the main provision, then it would be presumed to have only prospective effect, unless a contrary intention is expressed by the legislature. The same view was expressed by the Supreme Court in Martin Lottery. The Supreme Court, in effect, held that the use of the phrases, „it is hereby declared" or „removal of doubts", in itself will not enable a presumption to be drawn that the Explanation is retrospective. 20. The Tribunal in Trent Hypermarket, while dealing with the definition of „exempted service" under rule 2(e) of the Credit Rules, held that trading cannot be treated as an „exempted service" for the period prior to 01.04.2011 and the Explanation added on 01.04.2011 was prospective and not retrospective. The relevant portion of the decision is reproduced below:

> *"5.5* ***It is evident from the amending provisions of Cenvat statute w.e.f. 01.03.2011 that a substantive law was enacted to consider the activities of trading as an exempted service.*** *Now the issue remains for resolution, as to whether, such amendment in the statutory provisions is to be construed as retrospective in effect or prospective, in order to be given effect to. In this context, the law is amply clear that if a substantive law is introduced, the date of effect of the instrument through which the decision of legislation was conveyed should be considered as the relevant date, when the same was issued or published in the official gazette for the knowledge of the general public.* ***In this contest, the Hon'ble Supreme Court in the case of Martin Lottery Agencies Ltd. (supra) have ruled that by reason of an explanation, a substantive law may also be introduced and if a substantive law is introduced, it will have no retrospective effect.*** *We find that the Hon"ble Madras High Court in the case of Ruchika Global Interlinks (supra) have held that inclusion in Explanation to Rule 2(e) "trading" was only clarificatory. It is further observed that the arguing counsels before the Hon"ble Madras High Court did not refer to or relied upon the judgment of Hon"ble Supreme Court in the case of Martin Lottery Agencies Ltd. (supra). Since, the law is well settled by the Hon"ble Apex Court in context with retrospective or prospective operation of the statute, the principles enunciated in the case of Martin Lottery Agencies Ltd. (supra) will be considered as the guiding factor for deciding the issue involved in the present case.*
>
> *5.6* ***In view of the above discussions, we do not find any infirmity in the findings recorded in the***

> ***impugned order, holding that amendment to Rule 2(e) by Notification No. 3/2011-C.E.(N.T.) dated 01.03.2011 will have the prospective effect and cannot be applied retrospectively.*** *Thus, we do not find any merits in the appeal filed by the appellant."*
>
> *(emphasis supplied)*

21. The same view was expressed by the Tribunal in Lenovo (India) and the relevant paragraph is reproduced below:

> *"7. We find that for the period 01.04.2011, the issue stands decided in the case of Mercedes Benz India Pvt. Ltd. (supra) wherein it was held that trading is not an exempted service prior to 01.04.2011; provisions of Rule 6 requiring reversal of 6% of trading turnover is not applicable."*

22. It is, therefore, clear that trading was not an „exempted service" prior to 01.04.2011. The demand confirmed in the impugned order cannot, therefore, be sustained and is liable to be set aside.

23. Even otherwise, the demand for the period 2006 to 2008 would not survive as there was no restriction on availment of credit as the restriction was in respect of utilization. In this connection reliance can be placed on the decision of the Tribunal in M/s. Idea Cellular Ltd. vs. The Commissioner of Central Excise, Thane-I [2019 (6) EMI 903-CESTAT Mumbai] . Thus, the demand of Rs. 28,56,667/- confirmed against the appellant is not sustainable.

24. It also needs to be remembered that for not exercising the option under rule 6 of the Credit Rules, the option of payment of 6/8 percent of trading of goods („exempted service") cannot be thrust upon the appellant. This view finds support from the decision of the Telangana High Court in Tiara Advertising and the decision of the Tribunal in Agrawal Metal Works. Thus, the demand of Rs. 5,98,82,040/- for the period from April 2008 to March 2011 cannot also be sustained."

12. In view of the aforesaid, it is not necessary to examine the contention advanced by the learned counsel for the Appellant regarding invocation of the extended period of limitation.

13. In view of the above discussions, the impugned order cannot be sustained and accordingly the same is set aside. The appeal filed by the Appellant is allowed with consequential relief as per law.

(Order pronounced on 12.04.2024)

(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

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