CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH

Service Tax Appeal No. 58874 of 2013

(Arising out of Order–in-Original No. 5/Commr./ST/GZB/2012-13 dated 28.03.2013 passed by the Commissioner Customs, Central Excise & Service Tax, Ghaziabad)

M/s. Ingersoll-Rand Technologies and Services Private Limited ……**Appellant**
(Formally M/s. Ingersoll-Rand
Industrial Products Private Limited)
Plot No. 37A, Site-4,
Sahibabad Industrial Area,
Ghaziabad, Uttar Pradesh

versus

Commissioner, Central Excise, …….**Respondent**
Ghaziabad

APPEARANCE:

Shri B.L. Narasimhan, Advocate for the Appellant
Shri B.K. Jain, Authorized Representative of the Department

CORAM:

HON'BLE MR.JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

Date of Hearing: 01.08.2022
Date of Decision: 18.08.2022

FINAL ORDER No. 70137/2022

JUSTICE DILIP GUPTA:

M/s. Ingersoll Rand Industrial Products Private Limited[1] has filed this appeal to challenge the order dated 28.03.2013 passed by the Commissioner, Customs, Service Tax and Central Excise, Ghaziabad[2].

2. The operative part of the said order is reproduced below:

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1. **the appellant**
2. **the Commissioner**

ORDER

> **(i).** I confirm the demand amount of Rs. 28,56,667/- (Rs. Twenty Eight Lakhs Fifty Six Thousand Six Hundred & Sixty Seven Only) against the Party under the provisions of Explanation II as appended to Rule 6 (3) (c) of the Cenvat Credit Rules, 2004 read with provisions of Rule 14 of the Cenvat Credit Rules, 2004 and proviso to sub section (1) of Section 73 of the Finance Act, 1994;
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> **(ii).** I confirm the demand amount of Rs. 5,98,82,040/- (Rs. Five Crore Ninety Eight Lakhs Eighty Two Thousand & Forty Only) against the Party under the provisions of sub-rule (3A) to Rule 6 and Rule 14 of the Cenvat Credit Rules, 2004 read with proviso to Section 73(1) of the Finance Act, 1994;
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> **(iii).** I demand interest at the appropriate rate on the aforesaid amounts, as mentioned against S.No. (i) & (ii) above, under the provisions of Section 75 of the Finance Act, 1994 and;
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> **(iv).** I impose a penalty of Rs. 6,27,38,707/- (Rs. Six Crores Twenty Seven Lakhs Thirty Eight Thousand Seven Hundred Seven Only) [Rs. 28,56,667/- + Rs. 5,98,82,040/-], on the Party under the provisions of Section 78 of the Finance Act, 1994.

3. The first demand of Rs 28,56,667/- is under rule 6(3)(c) of the CENVAT Credit Rules, 2004[3]. The second demand of Rs. 5,98,82,040/- is under rule 6(3)(1) of the Credit Rules. The first demand is for the period from April 2006 to March 2008 and is the amount paid in excess of 20% of service tax payable from the credit account, on account of credit of input services used in manufacture of dutiable goods/taxable services as well as in trading activity (exempted service) while the second demand is for the period from April 2008 to March 2011 @ 8%/6% of the value of traded goods (exempted service) on account of credit of input services used in the

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3. the Credit Rules

manufacture of dutiable goods/taxable services as well as in trading activity (exempted service).

4. The appellant is engaged in manufacturing and trading of pneumatic tools, material handling equipment and other related goods. The appellant is also engaged in providing taxable services of 'management consultants', 'consulting engineering', 'management, maintenance & repair'.

5. During the relevant period, the appellant received various services for carrying out the above activities of manufacture of dutiable goods, provision of taxable services and undertaking the trading activity. In respect of such input services, the appellant availed CENVAT credit and utilized the same for payment of its outward tax liability.

6. The department believed that for the relevant period from April 2006 to March 2011, the 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' with effect from 01.04.2011 only clarified that trading activities are and were always an 'exempted service' for the purpose of the Credit Rules. Accordingly, the appellant, who was providing the taxable and exempted services (i.e. trading activities) and was utilizing the input services in respect of both taxable and exempted services, had contravened the provision of rule 6 of the Credit Rules inasmuch as-

(a) for period from April 2006 to March 2008, the appellant utilized CENVAT credit in excess of 20% of service tax payable on taxable output services from the CENVAT credit account, in violation of rule 6(3)(c) of the Credit

Rules; and

(b) for the period from April 2008 to March 2011, the appellant failed to follow the procedure prescribed under the provisions of rule 6(ii) and 6(iii) of the Credit Rules;

7. Accordingly, a show cause notice dated 14.10.2011 was issued to the appellant proposing the following demands.

(a) Demand of Rs. 28,56,667/- under rule 6(3)(c), being amount paid in excess of 20% of service tax payable from the credit account; and

(b) Demand of Rs. 5,98,82,040/- under rule 6(3)(1), being 6%/8% of the value of exempted services;

8. The demand for the period from April 2006 to March 2008 has been computed as under:

Sl. No.	**Period**	**Total Service Tax Liability (in Rs)**	**Service Tax paid through Cenvat Credit (Rs.)**	**Service Tax liability @20% to be paid through Cenvat Credit in view of provisions of Rule 6(3)(c)**	**Excess Cenvat Credit utilised beyond the permissible limit of 20% of overall Service Tax liability (in Rs)**
1.	April, 06 to Sept, 06	24,45,273	24,45,273	4,89,055	19,56,218
2.	Sept, 06 to March, 07	3,84,564	3,84,564	76,913	3,07,651
3.	April, 07 to Sept, 07	1,17,782	1,17,782	23,556	94,226
4.	Oct, 07 to March, 08	6,23,216	6,23,216	1,24,644	4,98,572
TOTAL		**35,70,835**	**35,70,835**	**7,14,168**	**28,56,667**

9. The demand for the period from April 2008 to March 2011 has been computed as under:

Sl. No.	**Financial Year**	**Value of the exempted services (in Rs.)**	**% of the value of exempted services required to be paid under Rule 6(3)(i) of Credit Rules**	**Amount required to be paid under Rule 6(3)(i) of Credit Rules**

1.	2008-2009	24,54,33,000	8%	1,96,34,640/-
2.	2009-2010	25,75,95,000	8%	2,06,07,600/-
3.	2010-2011	32,73,30,000	6%	1,96,39,800/-
			Total	**5,98,82,040/-**

10. The show cause notice dated 14.10.2011 was adjudicated by order dated 28.3.2013 and the total demand of Rs. 6,27,38,707/- has been confirmed for the following reasons–

a) The Explanation added to rule 2(e) of Credit Rules has merely clarified that trading is an 'exempted service';

b) The definition of 'exempted service' not only includes services which are notified in the Finance Act and have been exempted under any Notification, but also includes services which are not covered under section 66 of the Finance Act. Any service which is not notified and on which no service tax is payable can fall under the category of 'exempted service';

c) The Explanation to rule 2(e) of Credit Rules deserves to be given retrospective effect; and

d) In order to comply with provisions of rule 6(3A) of Credit Rules, the appellant was under a legal obligation to have given option and worked out and reversed credit in accordance with the formula prescribed under the said rule namely month-wise provisional reversal and thereafter, at the end of close of Financial Year, final calculation of reversal, which the appellant did not do. Thus, this option is not available to the appellant.

11. Shri B.L. Narasimhan, learned counsel for the appellant made the following submissions:

(i) Trading' was not an 'exempted service' prior to 1.4.2011 and was added within the ambit of 'exempted service' only on 01.04.2011. The

Explanation added to the rule 2(e) is prospective in nature. In this connection reliance has placed on the judgments of the Supreme Court in **Sedco Forex International Drill Inc** vs. **Commissioner of Income Tax[4],** and **Union of India** vs. **Martin Lottery agencies Limited[5],** wherein it was held that if the Explanation widens the scope of the main provision, then it is presumed to have only prospective effect, unless a contrary intention is expressed by the legislature;

(ii) In any case, it has been held by the Tribunal in **Trent Hypermarket Ltd.** vs. **Commissioner of Central Excise[6]** and **CCT Bengaluru East** vs. **Lenovo India Pvt. Ltd.[7]** that the Explanation added with effect from 1.4.2011 is prospective and not retrospective;

(iii) In any case, the demand for period 2006 to 2008 does not survive as there was no restriction on availment of credit and was with respect to utilization;

(iv) For not exercising the option under rule 6 of Credit Rules by the appellant, the option of payment of 6/8% of trading of goods (exempted service) cannot be thrust upon the appellant. Hence the demand of Rs.5,98,82,040/- is unsustainable. In

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4. 2005 (12) SCC 717
5. 2009 (14) STR 593 (SC)
6. Pune-III - 2019 (6) TMI 1327 - CESTAT Mumbai
7. 2021 (11) TMI 899 – CESTAT Bangalore

support of this contention reliance has been placed on the judgment of the Telangana High Court in **Tiara Advertising** vs. **Union of India**[8] and the decision of the Tribunal in **Agrawal Metal Works Pvt. Ltd.** vs. **CGST**[9]**;**

(v) The extended period of limitation could not have been invoked in the facts and circumstances of the case; and

(vi) The appellant was in any view of matter, only required to pay Rs. 8,40,835/- under rule 6(3A) for period 2008-2011 and payment of such amount would tantamount to full compliance of rule 6(3).

12. Shri B. K. Jain learned aurhorised representative appearing for the department however, supported that the impugned order and made the following submissions:

(i) Trading activity is not a taxable activity and so CENVAT credit is not allowable on the common input services attributable to trading activity under rule 6 of Credit Rules before 01.04.2011; and

(ii) Since the appellant is not able to separate the common input services availed on both taxable activity and trading activity, it has to follow the procedure mentioned under rule 6(3) of Credit Rules and to reverse the credit accordingly attributable to trading activity during the relevant period and in support of this contention the

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8. 2019 (30) GSTL 474 (Telangana)
9. 2022 (7) TMI 924

learned authorised representative placed reliance on the decision of the Tribunal in **Mercedes Benz India Pvt. Ltd.** vs. **CCE Pune-I**[10]**.**

13. The submissions advanced by Shri B.L. Narasimhan learned counsel for the appellant and Shri B. K. Jain learned authorised representative appearing for the department have been considered.

14. As noticed above, the demand that has been confirmed is in two parts. The first demand of Rs. 28,56,667/- is under rule 6(3) (c) of the CENVAT Rules for the period from the April 2006 to March 2008, while the second demand for Rs. 5,98,82,040/- is under rule 6(3)(1) of the Credit Rules for the period April 2008 to March 2011.

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) of

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10. 2014 (36) STR 704 (Tri-Mum)

the 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.
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> 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."
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> **(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**[11]. Thus, the demand of Rs. 28,56,667/- confirmed against the appellant is not

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11. 2019 (6) EMI 903-CESTAT Mumbai

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.

25. 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.

26. Thus, for all reasons stated above, the impugned order dated 28.03.2013 passed by the Commissioner cannot be sustained and is set aside. The appeal is, accordingly, allowed.

(Order pronounced **18.08.2022**)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

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