CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH - COURT NO. 1

Service Tax Appeal No. 21228 of 2018

(Arising out of Order-in-Original No. 29/2018 dated 09.04.20218 passed by the Commissioner of Central Tax, GST Commissionerate, Bengaluru.)

Commissioner of Central Tax,
GST Commissionerate,
Bengaluru East.

Appellant(s)

VERSUS

M/s. Motorola Mobility India Pvt Ltd.
Plot No. 66/1, 4th and 5th Floor,
Bagmane Tech Park,
C.V. Raman Nagar,
Bengaluru – 560 093.

Respondent(s)

Appearance:

Shri Dyamappa Airani, Authorised Representative for the Appellant.

Shri L. S. Karthikeyan, Advocate for the Respondent.

CORAM: HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)
HON'BLE MRS. R. BHAGYA DEVI, MEMBER (TECHNICAL)

Final Order No. 20318 / 2024

DATE OF HEARING: 01.03.2024

DATE OF DECISION: 30.04.2024

Per : R. BHAGYA DEVI

This appeal is filed by the department against Order-in-Original No. 29/2018 dated 09.04.20218 passed by the Commissioner of Central Tax, GST Commissionerate, Bengaluru.

2. Brief facts of the case are that the respondent M/s. Motorola Mobility India Pvt. Ltd. had availed credit on ineligible services. The audit officers on verification found that the respondents were engaged in trading activity involving purchase and sale of mobiles and its parts. Since Trading is an exempted service from 01.04.2011, the respondent was not eligible to avail the CENVAT Credit on services used in the trading activities. The respondent had neither maintained separate inventory nor had opted in terms of Rule 6(2) of CENVAT Credit Rule (CCR), 2004. In terms of provisions of Rule 6(3)(i) of CENVAT Credit Rules, 2004 wherever an assessee avails cenvat credit on common input services which are used for both taxable and exempted services shall pay an amount equal to 5% /6% of value of the exempted goods/services. Accordingly, Rs.2,84,71,485/- was demanded in terms of Rule 14 of CCR, 2004 read with Section 73(1) of the Finance Act, 1994 along with interest under Section 75 of Finance Act, 1994. The Commissioner in the impugned Order observed that for the period 2011-2012 and 2012-13, the respondents were predominantly engaged in the provision of taxable services mainly exports and the trading activity was minimal. He also states that most of the impugned services were utilized for taxable services/exports and not for trading activity. The respondent, therefore, taking into account the proportionate credit, reversed sum of Rs.1,14,64,277/- on 26.04.2016 as per the procedure laid down under 6(3)(ii) read with Rules 6(3A). The Commissioner held that Rule 6(3) provides 3 options and it is upto them to decide as to which option has to be exercised. On therefore, in view of the following decisions the commissioner accepts the reversal of proportionate credit.

- **Mercedes Benz India (P) Ltd. vs CCE Pune-I: 2015-TIOL-1550-CESTAT MUMBAI**
- **Cranes and Structural Engineers Vs CCE Bangalore-I 2016 VIL 664 CESTAT Bangalore CE**

- **Aster Private Limited vs. CC & CE, Hyderabad-III: 2016-TIOL-1035-CESTAT HYDERABAD.**

2.1 Regarding interest, the Commissioner has held that since they had sufficient balance in their cenvat credit account throughout the Financial Year 2011-12 and 2012-13 and since the respondent had reversed the proportionate credit immediately after audit observation much before the issue of show-cause notice, the reversal of such credit would amount to not taking the credit and therefore, dropped the interest following the decisions of the Hon'ble High court of the Karnataka in the case of **CCE, ST & LTU Bangalore vs Bill force Ltd.: 2012 (279) ELT 209**. Aggrieved against this impugned order, the Revenue is in appeal.

3. The Authorized Representative for the Revenue referring to the grounds of appeal submits that as per the amended Rule 6(3)(1) of the CCR, 2004 effective from 01.04.2011 credit shall not be allowed to be used in the exempted services. Rule 6(3) of the 2004 gives an option to the tax payer not to maintain separate account provided:

(i) Pay an amount equal to 6% /7% of value of the exempted goods or exempted services; or

(ii) Pay an amount as determined under sub-Rule(3A); or

(iii) Maintain separate accounts for the receipt, consumption and inventory of inputs as provided for in clause (a) of sub-rule (2), take CENVAT credit only on inputs under sub-clauses (ii) and (iv) of said clause (a) and pay an amount as determined under sub-rule (3A) in respect of input services. The provisions of sub-clauses (i) and (ii) of clause (b) and sub-clauses (i) and (ii) of clause (c) of sub-rule (3A) shall not apply for such payment.

> Provided that if any duty of excise is paid on the exempted goods, the same shall be reduced from the amount payable under clause (i);
>
> Provided further that if any part of the value of a taxable service has been exempted on the condition that no CENVAT credit of inputs and input services, used or providing such taxable service, shall be taken then the amount specified in clause (i) shall be [(seven percent)] of the value so exempted.]

3.1. It is further submitted that having not exercised option in writing before the jurisdictional officer, under Rule 6(3)(ii) respondent is bound to pay an amount equal to 5%/6% of the value of the exempted services. The CESTAT has overlooked the fact that as per Explanation-I under Rule 6(3) of the CCR, 2004 *if the manufacturer of goods or the provider of exempted services, avails any of the option under sub-rule, he shall exercise such option for all exempted goods manufactured by him or, as the case may be, all exempted services provided by him, and such option shall not be withdrawn during the remaining part of the Financial Year*. In the preset case, it is not in dispute that the assesse-respondent had not exercised such an option, therefore, the Rules are mandatory and are required to be followed scrupulously and the question of reversing proportionate credit does not arise. They relied on the decision of the Hon'ble Supreme Court in the case of **Mangalore Chemicals and Fertilizers Ltd vs. Deputy Commissioner: 1991 (55) ELT 437 (SC)**. It is also submitted that the case relied upon by the respondent in **Mercedes Benz India (P) Ltd.** (supra) has been appealed against before the Hon'ble High Court. With regard to interest, it is submitted that it is an amount payable under Rule 6(3A) of CCR, 2004 and it is a facility given to the respondent to maintain separate accounts.

Any short payment or delayed payment attracts interest and as per Rule 6(3A) all reversals should attract interest.

4. The respondent on the other hand submitted that it is a settled law that reversal of proportional credit was sufficient for having utilized the input services for trading purpose and relies on the decision rendered in the case of **Tiara Advertising vs. Union of India: 2019 (30) GSTL 474 (Telangana)**. And also relies on the amendments to the law in the Finance Act, 2016, wherein the CCR, 2014 were amended to improve credit flow, reduce the compliance burden and associated litigations, particularly those relating to apportionment of credit between exempted and non-exempted products/services. He also submits that since sufficient credit balance was there in their books of accounts the question of interest did not arise and the appeal filed by the department on the ground that it is only an amount is also not sustainable.

5. Heard both sides. The relevant Sections of the CCR, 2004 are reproduced below:

CENVAT CREDIT RULES, 2004

[Notification No. 23/2004-C.E. (N.T.), dated 10-9-2004 as amended]

RULE 6. [**Obligation of a manufacturer or producer of final products and a [provider of output service**]. — (1) The CENVAT credit shall not be allowed on such quantity of input as is used in or in relation to the manufacture of exempted goods or for provision of exempted services or input service as is used in or in relation to the manufacture of exempted goods and their clearance upto the place of removal or for provision of exempted services and the credit not allowed shall be calculated and paid by the manufacturer or the provider of output service, in terms of the provisions of sub-rule (2) or sub-rule (3), as the case may be :

(3) (a) A manufacturer who manufactures two classes of goods, namely: -

(i) non-exempted goods removed;

(ii) exempted goods removed; or

(b) a provider of output service who provides two classes of services, namely: -

(i) non-exempted services;

(ii) exempted services,

shall follow any one of the following options applicable to him, namely: -

(i) pay an amount equal to six *per cent.* of value of the exempted goods and seven *per cent.* of value of the exempted services subject to a maximum of the sum total of opening balance of the credit of input and input services available at the beginning of the period to which the payment relates and the credit of input and input services taken during that period; or]

(ii) pay an amount as determined under sub-rule (3A):

Emphasis applied

Explanation 1. - If the manufacturer of goods or the provider of output service, avails any of the option under this sub-rule, he shall exercise such option for all exempted goods manufactured by him or, as the case may be, all exempted services provided by him, and such option shall not be withdrawn during the remaining part of the financial year.

[(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: -

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(d) the manufacturer or the provider of output service shall pay on or before the 30th June of the succeeding financial year, an amount equal to difference between the total of the amount of Annual ineligible credit and Annual ineligible common credit and the aggregate amount of ineligible credit and ineligible common credit for the period of whole year, namely, [{A(Annual) + D(Annual)} – {(A+D) aggregated for the whole year)}], where the former of the two amounts is greater than the later;

(e) where the amount under clause (d) is not paid by the 30th June of the succeeding financial year, the manufacturer of goods or the provider of output service, shall, in addition to the amount of credit so paid under clause (d), be liable to pay on such amount an interest at the rate of fifteen *per cent.* per annum, from the 30th June of the succeeding financial year till the date of payment of such amount;

(f) the manufacturer or the provider of output service, shall at the end of the financial year, take credit of amount equal to difference between the total of the amount of the aggregate of ineligible credit and ineligible common credit paid during the whole year and the total of the amount of annual ineligible credit and annual ineligible common credit, namely, [{(A+D) aggregated for the whole year)} – {A(Annual) + D(Annual)}], where the former of the two amounts is greater than the later;

(g) the manufacturer of the goods or the provider of output service shall intimate to the jurisdictional Superintendent of Central Excise, within a period of fifteen days from the date of payment or adjustment, as per the provisions of clauses (d), (e) and (f), the following particulars, namely: -

(i) details of credit attributed towards eligible credit, ineligible credit, eligible common credit and ineligible common credit, month-wise, for the whole financial year, determined as per the provisions of clause (b);

(ii) CENVAT credit annually attributed to eligible credit, ineligible credit, eligible common credit and ineligible common credit for the whole of financial year, determined as per the provisions of clause (c);

(iii) amount determined and paid as per the provisions of clause (d), if any, with the date of payment of the amount;

(iv) interest payable and paid, if any, determined as per the provisions of clause (e); and

(v) credit determined and taken as per the provisions of clause (f), if any, with the date of taking the credit.]

[(3AA) Where a manufacturer or a provider of output service has failed to exercise the option under sub-rule (3) and follow the procedure provided under sub-rule (3A), the Central Excise Officer competent to adjudicate a case based on amount of CENVAT credit involved, may allow such manufacturer or provider of output service to follow the procedure and pay the amount referred to in clause (ii) of sub-rule (3), calculated for each of the months, *mutatis-mutandis* in terms of clause (c) of sub-rule (3A), **with interest calculated at the rate of fifteen *per cent.* per annum from the due date for payment of amount for each of the month, till the date of payment thereof.** Emphasis supplied

(3AB) Assessee who has opted to pay an amount under clause (ii) or clause (iii) of sub-rule (3) in the financial year 2015-16, shall pay the amount along with interest or take credit for the said financial year in terms of clauses (c), (d), (e), (f), (g), (h) or (i) of sub-rule (3A), as they prevail on the day of publication of this notification and for this purpose these provisions shall be deemed to be in existence till the 30th June, 2016.]

***Explanation III*.** - If the manufacturer of goods or the provider of output service fails to pay the amount payable under sub-rules (3), (3A) [and (3B)], it shall be recovered, in the manner as provided in rule 14, for recovery of CENVAT credit wrongly taken.

The above Rules very clearly establish that the taxpayer has been given an option to reverse the credit along with the interest when common credit is availed on inputs and input services on both dutiable and exempted goods/services.

6. The Hon'ble High Court of Telangana Hyderabad in the case of **Tiara Advertising vs. UOI** (supra) had observed as follows:

"6. At the outset, we may note that the Cenvat Credit availed by the petitioner during the relevant tax period was to the tune of Rs. 1,41,51,903/-. This included input tax credit availed upon output services which were subject to Service Tax and also some output services which were exempt therefrom. Be it noted that output services relating to advertising space booked by the petitioner in print media is exempted under Section 65(105) (zzzm) of the Finance Act, 1994, which defines 'taxable service' to mean any service provided to any person by any other person, in relation to sale of space or time for advertisement but does not include sale of space or advertisement in print media. The Cenvat Credit availed by the petitioner which is in controversy accounts for a sum of Rs. 17,15,489/- only.

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 afore stated 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.

10-13 ……

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."

6.1 In the case of **M/s. Rajasthan Prime Steel Processing Center Private Limited 2019 TOIL-1939-HC-RAJ-CX**. in a similar set of facts, the Hon'ble High court observed that *"in short, the Revenue argument is that Rule 6(3A) is not nearly procedural but was binding upon the assessee, who could not have claimed the benefit of even proportionate credit or it would have otherwise been entitled to input service for which CENVAT Credit was admissible, without following the procedure the Show-cause notice in this case covers two different periods(2011-16) substantial part of that period was when Rule 6(3A) did not exist. …… all that Rule 6 (3A) has done his to streamline the procedure for apportioning credit to ensure that proportionate credit, to the extent admissible could be claimed for the business and ensure that the concerned adjudicating officers do not have to spend time on carrying out the exercise. This amendment i.e. procedure for apportionment under subrule (3A) was facilitative and procedural. The entitlement to credit otherwise is in rule 3 of the CENVAT credit Rules. In the present case the period of dispute is after the introduction of Rule 3(A) in the CENVAT Credit Rule 2004 which was introduced from 01.04.2016, and Rule 3 provided an option to pay an amount as determined under subrule (3A) which allowed the appellant to*

reverse the proportional credit. Subrule (3AA) was introduced in the year 2016 from 01.04.2016, and the Rule reads as follows:

> *[(3AA) Where a manufacturer or a provider of output service has failed to exercise the option under sub-rule (3) and follow the procedure provided under sub-rule (3A), the Central Excise Officer competent to adjudicate a case based on amount of CENVAT credit involved, may allow such manufacturer or provider of output service to follow the procedure and pay the amount referred to in clause (ii) of sub-rule (3), calculated for each of the months, mutatis-mutandis in terms of clause (c) of sub-rule (3A), with interest calculated at the rate of fifteen per cent. per annum from the due date for payment of amount for each of the month, till the date of payment thereof."*

From the above, it is very clear that if the manufacturer or provider of service had failed to exercise the option under sub-rule 6(3) of the CCR, 2004 will be allowed to pay the proportionate credit along with the interest at the rate of 15% per annum from the due date for payment of amount till the date of payment. Hence the appellant is eligible for the benefit of reversing the proportionate credit only if it is done along with interest as per law. As per Rule 6(3) of the CCR, 2004 the appellant in the first place is not eligible to avail credit on exempted products. For the benefit of the taxpayers where common credit is availed on both dutiable and exempted goods/services, certain provisions are enabled for the convenience of the taxpayer to ensure that credit is taken only on the dutiable products/services. To ensure smooth implementation of these Rules a methodology is being adopted as is laid down at Rule 6(3A) of the CCR, 2004. Since the credit was not to be availed at all on exempted goods/services, having availed an option is given to reverse the same along with interest. Therefore, when in the first place the appellant is not at

all eligible to avail credit the question of whether utilised or not does not arise.

7. In the present case, the Commissioner while allowing payment of proportionate credit as per Rule 6(3A), with regard to interest holds that interest is not liable to be paid since sufficient balance was available in their account. The Commissioner has failed to notice that Rule 6(3A) is only an option given to the appellant allowing reversal of credit at a later date only if it is paid along with interest. For sake of repetition relevant clauses of Rule 6(3A) with regard to interest are reproduced below:

> "(e) where the amount under clause (d) is not paid by the 30th June of the succeeding financial year, the manufacturer of goods or the provider of output service, shall, in addition to the amount of credit so paid under clause (d), be liable to pay on such amount an interest at the rate of fifteen *per cent.* per annum, from the 30th June of the succeeding financial year till the date of payment of such amount;"

8. The reliance placed by the Commissioner on the decision of the Hon'ble High court of Karnataka in the case of **CCE, ST & LTU Bangalore vs Bill force Ltd. (supra)** is misplaced since the facts of that case was excess availment of credit which was unutilized and reversed. The present case is clearly distinguishable as it is allowing the option of proportionate reversal of credit provided the reversal happens along with interest. To avail the option the appellant has to necessarily pay the interest as specified therein. The Supreme Court of India in the case of **Pratibha Processors Versus Union of India 1996 (88) E.L.T. 12 (S.C.)** decided on 11-10-1996 observed:

> **"13.** In fiscal Statutes, the import of the words — "tax", "interest", "penalty", etc. are well known. They are different concepts. Tax is the amount payable as a result of the charging provision. It is a compulsory exaction of money by a public

> authority for public purposes, the payment of which is enforced by law. Penalty is ordinarily levied on an assessee for some contumacious conduct or for a deliberate violation of the provisions of the particular statute. Interest is compensatory in character and is imposed on an assessee who has withheld payment of any tax as and when it is due and payable. The levy of interest is geared to actual amount of tax withheld and the extent of the delay in paying the tax on the due date. Essentially, it is compensatory and different from penalty - which is penal in character."

9. The Hon'ble High Courts of Telangana and Rajasthan emphasized the fact that the authorities were entitled to recover the credit taken wrongly by allowing them to reverse the proportionate credit along with interest. Hence, we uphold the Commissioner's order with regard to confirmation of service tax demand of Rs.1,14,64,277/- only. The Revenue's appeal with regard to demand of interest is upheld and accordingly interest is to be paid on the above demand of Rs.1,14,64,277/- in terms of Rule 6(3A) of the Cenvat Credit Rules, 2004.

10. In the result, the Revenue's Appeal is allowed only to the extent of demand of interest.

(Order pronounced in Open Court on 30.04.2024.)

(D.M. MISRA)
MEMBER (JUDICIAL)

(R. BHAGYA DEVI)
MEMBER (TECHNICAL)

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