Customs, Excise & Service Tax Appellate Tribunal

West Zonal Bench At Ahmedabad

REGIONAL BENCH- COURT NO.3

Service Tax No. 11454 of 2018

(Arising out of OIA-RAJ-EXCUS-000-APP-295-2017-18 dated 16/03/2018 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-RAJKOT)

Shanti Construction Co **……Appellant**
G-1, Ami Apartment, 6-Patel Colony,
Jamnagar, Gujarat

VERSUS

C.C.E. & S.T.-Rajkot **……Respondent**
Central Excise Bhavan,
Race Course Ring Road...Income Tax Office,
Rajkot, Gujarat- 360001

APPEARANCE:
Shri Jigar Shah, Advocate for the Appellant
Shri H.K Jain, Assistant Commissioner (AR) for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR

Final Order No. A/ 12244 /2021

DATE OF HEARING: 23.02.2021
DATE OF DECISION: 18.06.2021

RAMESH NAIR

The brief facts of the case are that during the period 01.04.2015 to 29.02.2016 the appellants have provided works contract service to various Government Departments. The appellant have also availed the input services in the nature of works contract service from various sub- contractors as well on which the sub contractor have discharged the service tax and same was availed as Cenvat credit by the appellants. The said Cenvat credit was utilised for discharging the service tax liability by the appellant during the period of 01.04.2015 to 29.02.2016. During the period the appellants paid the total service tax of Rs 2,78,07,833/- on their works contract service. Out of the sum of Rs 2,78,07,833/- the appellants discharged the service tax by utilizing the Cenvat credit of Rs 1,82,16,059/- of service tax paid to their sub contractors.

1.1 The central government inserted section 102 of Finance Act, 1994 giving retrospective exemption to the service provided by the appellant to various government departments for the period 01.04.2015 to 29.02.2016 .

Section 102 of Finance Act, 1994 also provided for the refund of the service tax paid by the assessees during the period 01.04.2015 to 29.02.2016. Section 102 of Finance Act, 1994 also provided for the timelines for filing of the refund claim of the service tax paid during the period 01.04.2015 to 29.02.2016.

1.2 The appellants vide their application dated 10.11.16 filed the refund claim of Rs 2,78,07,833/- Service tax paid during the period 01.04.2015 to 29.02.2016 with reference to such refund claim, the Appellants were served show cause notice dated 22.12.2016 proposing to reject claim .

1.3 The Learned Deputy Commissioner after considering the appellants' reply dated 03.02.2017 rejected the refund claim vide order in original dated 10.02.2017 on the ground that the appellant have not followed the provisions rule 6 of Cenvat Credit Rules, 2004. Further, the government department have issued with work orders which are inclusive of service tax and therefore, the appellants' refund claim is hit by the unjust enrichment also. The appellant preferred an appeal before Learned Commissioner of central Tax (Appeals) at Rajkot against the OIO dated 10.02.2017 rejecting the refund claim filed by the appellants.

1.4 The Learned Commissioner (Appeals) vide impugned order dated 15.03.2018 partially allowed the refund claim and rejected the refund claim of Rs 1,82,16,059/- on the ground that the said service tax was paid by utilization of Cenvat credit.

1.5 Being aggrieved by said OIA dated 15.03.2018, the appellant filed the present appeal to the extent Learned Commissioner (Appeals) rejected the refund claim filed by the appellants.

2. Shri Jigar Shah Learned counsel appearing on behalf of the appellant submits that The Central Government introduced the Section 102 in the Finance Act, 1994 to grant retrospective exemption by way of refund to such services. As can be seen from the language of section 102 Finance Act 1994

that it is complete code in itself. The section 102 itself provides the mechanism for claiming the refund and restore the exemption for payment of service tax. Further Section 102 grants refund of entire amount of service tax collected by the central government during the period 01.04.2015 to 29.02.2016 irrespective and further classification whether the same was paid through cash or by utilization of Cenvat credit. Therefore he submits that denial of refund claim on the ground that Retrospective exemption has been granted and if the refund is granted to the appellant would result in double benefit to the appellant is bereft of any logic much less supported by any statutory provisions. He submits that the finding of Learned Commissioner (Appeals) is devoid of any merits and liable to be set aside on this ground itself.

2.1 He further submits that the appellant have paid service tax by utilization of Cenvat credit as may be available to them in consonance with provision of Rule 3 of Cenvat Credit Rules, 2004. As per Section 102 had provided refund of an amount paid as service tax. There is no such qualification that the amount of service tax should have been paid only through payment in cash / bank.

2.2 Rule 3 of Cenvat credit rules 2004 provides that service tax leviable under provisions of Finance Act, 1994 is eligible for availing as Cenvat credit for output taxable service provider. Further as per Rules 3 (4) of Cenvat Credit Rules, 2004 the Cenvat credit can be utilized for payment of service tax on taxable output service. Therefore, the appellant have utilised the Cenvat credit of service tax paid on their input services in terms of Rules 3 of Cenvat Credit Rules, 2004. Therefore to reject the refund claim on the ground that the appellant discharged liability of service tax through utilisation of Cenvat credit is against the provision of Cenvat Credit Rules, 2004.

2.3 He further submits that in the facts of the present case, Rule 6 of Cenvat Credit Rules 2004 is inapplicable. Rule 6 of the Cenvat Credit Rules,2004 casts obligation on the output taxable service provider to maintain separate books of account and avail only that much Cenvat credit which may pertain to taxable output service in case the service provide is taxable as well as exempted services. To achieve the above object, Rule 6 has a specific formula for reversal of Cenvat credit of service tax paid on commonly used input services.

2.4 The appellants have paid the service tax to their sub- Contractors during the period 01.04.2015 to 29.02.2016 when the services were taxable at the hand of the subcontractors. The services provided by the appellant were also taxable at the hand of the appellant. Therefore, in terms of Rule 2(l) of the Cenvat credit Rules, 2004 such services provided by the sub-contractors were input services for the Appellants. Therefore, during the relevant period the input services availed by the Appellants as well as the output services provided by the Appellants, both were taxable.

2.5 He further submits that the formula for reversal of Cenvat credit of service tax paid on commonly used input services was prescribed in Rule 6(3A) of the Cenvat Credit Rules, 2004. The formula is applicable only in a case where during any tax period the assessee is engaged in providing taxable as well as exempted output services .While in the present case , the Appellants were engaged only in providing taxable services during the disputed time. Therefore, the provision of Rule 6 of the Cenvat Credit Rule, 2004 are inapplicable to the facts of the present case.

2.6 He further submits that eligibility of the Cenvat Credit is to be seen at the time of receipt of such services that was only for the purpose of providing output taxable services. Since at the time of receipt of services the output service was taxable the subsequent event does not disentitle to take

Cenvat credit even as per Rule 6 of Cenvat Credit Rules, 2004.In this regard he heavily placed reliance on this tribunal's judgment in case of M/s Alembic Ltd. reported in 2019 (28) GSTL 71 (Tri. Ahmd)The said decision of M/s Alembic Ltd. has been approved by the Hon'ble Gujarat High Court as reported in 2019 (29) GSTL 625 (Guj.) In view of the above judgment, The Learned Commissioner (Appeals) has erred in rejecting the refund claim to the extent the service tax was paid by utilization of the Cenvat credit.

2.7 With regard to decision of this tribunal in case of M/s. Shree Gurukrupa Constructions reported in 2019 (2) TMI 1420- CESTAT Ahmedabad relied upon by the learned Authorized Representative appearing for the revenue, Shri Jigar Shah submits that in the present case the Learned Commissioner (Appeals) has categorically observed in Para 7.1 of the impugned order in appeal that Rule 6 of the Cenvat Credit Rules, 2004 is not applicable to the present case. The revenue department has not objected or filed any appeal against such observations. The Revenue Department now cannot raise a point which was settled in favour of the Appellants and not objected to at relevant time. He further submits that in view of the decision of division bench of this Hon'ble Tribunal in case of Alembic Ltd. (supra) which is affirmed by Hon'ble Gujarat High Court also, the decision in the case of Shree Gurukrupa Constructions is not a good law.

2.8 He submits that in the case of M/s Almebic Ltd. it is held that the eligibility of the Cenvat credit is to be seen at the time of the receipt of services. At the time i.e. 01.04.2015 to 29.02.2016 the appellants were executing only taxable services and therefore they were eligible to claim the Cenvat credit. Rule 6 has no application if subsequently the refund is granted of the service tax so paid utilizing the eligible Cenvat credit. Therefore, invocation of Rule 6 of the Cenvat Credit Rules, 2004 now when

Learned Commissioner (Appeals) has already concluded the issue in favour of appellants is not permissible.

2.9 He further submits that appellants have availed Cenvat credit of input services only of those services which were directly used in taxable projects during the period 01.04.2015 to 29.02.2016. The appellants have established one to one correlation even if not required to do so. He submits that there are no such provisions in Cenvat Credit Rules, 2004 or Finance Act, 1994 to reject the refund claim if the services are exempted subsequently.

2.10 He further submits that though there is a transitional provisions in Rule 11 of the Cenvat Credit Rules, 2004 as per which in certain specific circumstances Cenvat credit needs to be reversed on happening of certain events in future. However, none of the provisions of Rule 11 of Cenvat Credit Rules, 2004 deals with specific situation like the present one. Therefore, no such mechanism provided in Cenvat Credit Rules, 2004 to reverse the Cenvat credit once it is availed legitimately. The very same proposition has been tested and approved in the decision of M/s Alembic Ltd (supra) by the Hon'ble Tribunal and Hon'ble Gujarat High Court.

2.11 In support of the above submission he also placed reliance on the judgments of Hon'ble Karnataka High Court in case of Tata Advanced Material Ltd reported in 2011 (271) ELT 62 (Kar.)

2.12 He further submits in absence of machinery provision for recovery of Cenvat credit, no Cenvat credit is required to be reserved. Legislative intention is absent in the present case to reverse the Cenvat credit. He placed reliance on the judgment of Hon'ble Supreme Court in the case of Larsen & Toubro Ltd. reported in 2015 (39) STR 913 (SC) .

2.13 He, without prejudice, submits that the appellants can seek refund of service tax paid to their sub – contractors being the customers/ recipient of such services in terms of Hon'ble Supreme Court judgment in case of Oswal Chemicals & Fertilizers reported in 2015 (318) ELT 617 (SC) . He submits that similar proposition was laid down by Hon'ble Bombay High Court in the case of Usha Agarwal 2009 (243) ELT 492 (Bom).

2.14 He further submits that since the service tax liability was discharged by utilization of Cenvat credit and now the service tax was not payable, the appellants are entitled to re-credit the entire tax amount in their Cenvat credit register. After the introduction of GST, the appellants are otherwise eligible for refund in cash. He take support from this tribunal judgment in the case of Vatsal Construction reported in 2018 (11) GSTL 328 (tri. Ahmd).

2.15 Shri Shah, Learned counsel brought to notice the provisions of Section 142(6)(a) of the Central Goods & Service Tax Act, 2017 wherein it is stated that if as a matter of finalization of appeal the refund claim of Cenvat credit is found inadmissible that has to be paid back to the assessee in cash. Therefore the appellants are otherwise eligible to claim refund in cash.

2.16 As regard the refund of amount of Rs. 38,11,497/- for the project B-2/12/2014-15. He submits that this refund was rejected also on the ground that the date of work order i.e. 16.03.2015 was considered as date of contract and the same is not eligible for refund as per section 102. He submits that in this case the tender was opened and stands accepted on 28.01.2015 therefore, that date has to be considered as date of contract.

2.17 He submits that it was submitted before the Learned Commissioner (Appeals) that the entire refund has arisen because the appellants have

carried out certain work for government departments and the bid for project B-2/12/2014-15 for the tender was opened and appellants were declared as successful bidder. It was also submitted before the Learned Commissioner (Appeals) that in case of Government work no formal agreement/ contract is being entered into separately. The government department assigns contract number on their own for their internal purposes and accordingly RA bills are also raised by the government department itself as per the measurement taken by them. Learned commissioner (Appeals) has accepted this submission of the appellants. However, for the project B-2/12/2014-15 the appellants have not entered into any separate contract / agreement with any government department. The tender opened on 28.01.2015 itself has been accepted as contract and the appellants were given the work order (to begin the work) was given on 16.03.2015. The work order is nothing to do with acceptance of bid which was taken place on 28.01.2015.

2.18 The appellants have paid the service tax of Rs 38,11,497/- on the project which was accepted by government as acceptance of tender on 28.01.2015 itself. Therefore, the appellants are entitled for the refund of Rs. 38,11,497/- for project B-2/12/2014-15 as well.

2.19 He submits that the appellants have paid interest of Rs. 3,77,629/- as delayed payment of service tax which itself was not payable. The same issue has been decided in the favour of the assessee by decision of this Hon'ble Tribunal in case of Shanti Structure Pvt. Ltd. reported in 2018 (12) TMI 1610-CESTAT Ahmedabad .On basis of the above submission he submits that the appellants are entitled for the refund along with as well as interest and requested for allowing the appeal with all consequential relief.

3. Shri H.K Jain Learned Assistant Commissioner (AR) appearing on behalf of the revenue reiterates the findings of the impugned order. Post hearing he also submitted a decision of this tribunal in case of Shri Gurukrupa Constructions reported in 2019 (2) TMI 1420- CESTAT

AHMEDABAD to converse point that in the identical case the issue has been decided against the assessee.

4. We have heard both the sides and perused the records .We find that in the present case the refund, though in principle allowed by the learned Commissioner (Appeals), however, the refund of service tax paid by the appellant by utilizing the Cenvat credit has been denied by the Learned Commissioners (Appeals) on the ground that by the virtue of section 102 of Finance Act, 1994 the output service was exempted therefore, in terms of rule 6 the appellant was required to reverse the Cenvat credit availed on input services. It is observed though the Adjudicating authority has invoked rule 6 however, the learned Commissioner (Appeals) in para 7.1 of the impugned order observed as under:-

> *"The lower adjudicating authority has rejected the refund claim on the ground that, out of total claim of Rs 2,74,30,204/-, Rs 1,77,42,041/- has been paid through Cenvat credit account and apart from these the appellant has declared exempted services in ST-3 returns for FY 2015-16, however, the appellant has not followed mandatory provisions of Rule 6 of the CCR,2004; that payment of service tax in cash does not grant them any exemption from compliance of Rule 6 of CCR,2004. The appellant has submitted that they have utilized Cenvat Credit only of those input services which are directly related to taxable output services only and they have maintained separate accounts as per the provisions of Rule 6 of the Cenvat credit Rules and that the service tax had been paid to the sub- contractors pertaining to this work was claimed as CENVAT. I find that when the appellant has maintained separate accounts in terms of Rule 6 of the Cenvat Credit Rules, 2004 and have availed Cenvat credit only on those input services which were used for providing taxable output services, the question of reversal of Cenvat credit under Rule 6 of the Cenvat Credit Rules. 2004 would not arise. However, I find that the appellant has availed Cenvat credit of Rs 1,82,16,059/- as per Annexure-3 to their refund*

application in respect of sub- contracted work and this has not been reversed by them at the time of filing of refund claim. I also find that when the appellant has availed Cenvat credit of service tax paid to their sub- contractors, they are not entitled for refund of service tax as it would lead to double benefit to them, once through availment of Cenvat credit and another through refund of service tax, which is not permissible at all. When the appellant has taken Cenvat credit of Rs 1,82,16,059/- and also utilized, it cannot be said that incidence of such service tax has been borne by them. Therefore, I uphold the impugned order to this extent and reject the appeal for refund of Rs 1,82,16,059/- to the appellant."

4.1 From the above para it is clear that learned Commissioner (Appeals) held that reversal of Cenvat credit under Rule 6 of Cenvat Credit Rules, 2004 would not arise. Despite this clear finding the learned commissioner (Appeals) denied the refund on the ground that it will lead to double benefit once through availment of Cenvat credit and another through refund of service tax which is not permissible at all. With the above finding it is settled that Rule 6 shall not apply in the present case. The revenue also not challenged this finding therefore, it attains the finality. Now the issue remains to be decided that when the output services has been exempted retrospectively with a rider that whatever duty was paid to be refunded to the assessee, whether the service tax paid through utilization of Cenvat credit should be refunded or otherwise. During the relevant period i.e. 01.04.2015 to 29.02.2016 the output services were very much taxable. The appellant for discharged the service tax as per the statutory provision prevalent at the relevant time. The appellant was legally entitled for the Cenvat Credit on the input service received from the sub- contractors and used in providing the output service. The relevant rule 3 of Cenvat Credit Rules, 2004 is reproduced below:

"3. *(1) A manufacturer or producer of final products or a provider of [output] service shall be allowed to take credit (hereinafter referred to as the CENVAT credit) of-*

(i)-

.....

.....

.....

.....

(viia).....

(ix) the service tax leviable under section 66 of the Finance Act

[(ixa) the service tax leviable under section 66A of the Finance Act;]

[(ixb) the service tax leviable under section 66B of the Finance Act;]

(X) the Education Cess on taxable services leviable under section 91 read with section 95 of the Finance (No.2) Act, 2004 (23 of 2004)

[(xa) the Secondary and Higher Education Cess on taxable services leviable under section 136 read with section 140 of the Finance Act, 2007 (22 of 2007); and]

[(xi) the additional duty of excise leviable under [section 85 of Finance Act, 2005 (18 of 2005)]

Paid on-

(i).....

(ii) any input service received by the manufacturer of final product or by the provider of output services on or after t6he 10th day of September,2004,.....

.....

.....

(4) The CENVAT credit may be utilized for payment of –

(a).....

.....

.....

.....

*(e) service tax on any output service**."***

4.2 As regard nature of service tax there is no dispute that the input service received from sub contractors and used in providing the output construction service in terms of 2 (l) of Cenvat Credit Rules, 2004. In terms of the above Rule 3 since the appellant have received the input service and used the same for output service they are allowed to claim Cenvat credit on the service tax paid on the input service. The said Cenvat credit is also allowed to be utilized for payment of service tax on any output service in terms of Rule 3(4)(e) of Cenvat Credit Rules, 2004. At the time of claiming credit there is no dispute on the fact that the input service received by the

appellants was not only intended to be used for providing the output service but in fact it was used for providing output services.

4.3 The output service was provided on payment of service tax in terms of section 66 of the Finance Act, 1994 it is also undisputed fact that the appellant have utilized the Cenvat credit for payment of service tax on the output service during the relevant period. In view of this undisputed fact appellants has legally and correctly availed the Cenvat credit at the time of receipt of services and used thereof. The Government by section 102 of finance Act, 1994 made the output service exempted with retrospective effect. The said section 102 is reproduced below:

> *"**SECTION 102.Special provision for exemption in certain cases relating to construction of Government buildings.** -*
> *(1) Notwithstanding anything contained in section 66B, no service tax shall be levied or collected during the period commencing from the 1st day of April, 2015 and ending with the 29th day of February, 2016 (both days inclusive), in respect of taxable services provided to the Government, a local authority or a Governmental authority, by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation or alteration of––*
> *(a) a civil structure or any other original works meant predominantly for use other than for commerce, industry or any other business or profession;*
> *(b) a structure meant predominantly for use as––*
> *(i) an educational establishment;*
> *(ii) a clinical establishment; or*
> *(iii) an art or cultural establishment;*
> *(c) a residential complex predominantly meant for self-use or for the use of their employees or other persons specified in Explanation 1 to clause (44) of section 65B of the said Act,*
> *under a contract entered into before the 1st day of March, 2015 and on which appropriate stamp duty, where applicable, had been paid before that date.*
> *(2) Refund shall be made of all such service tax which has been collected but which would not have been so collected had sub-section (1) been in force at all material times.*
> *(3) Notwithstanding anything contained in this Chapter, an application for the claim of refund of service tax shall be made within a period of*

six months from the date on which the Finance Bill, 2016 receives the assent of the President."

4.4 As per the plain reading of the above section 102 legislature knowing well that service tax on the construction service obviously paid not only on cash but also by utilizing the Cenvat credit on input service. With this clear understanding provision of refund of service tax paid on output service was also provided in section 102. There is no provision to given a different treatment of service tax paid on output service that whether the entire service tax was paid from cash or partly paid from cash and partly from Cenvat credit. Therefore, in whatever manner the service tax paid irrespective partly from cash and partly from Cenvat credit, total tax paid by the assessee was mandated to be refunded to the service provider. Therefore, the views of the lower authorities that only because the output service was subsequently exempted by virtue of section 102 the refund of service tax paid through Cenvat credit is not admissible is without any basis and without support of any statutory provisions.

4.5 As we discussed above availment of Cenvat credit and utilization thereof for payment of service tax on output service is not under dispute. The Cenvat credit which was utilized has taken the color of service tax paid and that service tax is refundable in terms of section 102 of Finance Act, 1994. As regard contention of the revenue that the Cenvat credit utilized by the appellant is not admissible to the appellant hence, the refund is not payable can be at the most be applied by invoking Rule 6 of the Cenvat Credit Rules, 2004.

4.6 As we discussed above the Learned Commissioner (Appeals) clearly held that in the given facts of the present case Rule 6 is not applicable. Therefore, denial of the Cenvat credit cannot be made by invoking Rule 6 of the Cenvat Credit Rules, 2004. In case of exempted service there is a transitional provision to deduct the Cenvat credit or lapse of Cenvat credit

under Rule 11 of the Cenvat Credit Rules, 2004 which is reproduced below:-

Transitional provision.

11. (1) Any amount of credit earned by a manufacturer under the CENVAT Credit Rules, 2002, as they existed prior to the 10th day of September, 2004 or by a provider of output service under the Service Tax Credit Rules, 2002, as they existed prior to the 10th day of September, 2004, and remaining unutilized on that day shall be allowed as CENVAT credit to such manufacturer or provider of output service under these rules, and be allowed to be utilized in accordance with these rules.

(2) A manufacturer who opts for exemption from the whole of the duty of excise leviable on goods manufactured by him under a notification based on the value or quantity of clearances in a financial year, and who has been taking CENVAT credit on inputs or input services before such option is exercised, shall be required to pay an amount equivalent to the CENVAT credit, if any, allowed to him in respect of inputs lying in stock or in process or contained in final products lying in stock on the date when such option is exercised and after deducting the said amount from the balance, if any, lying in his credit, the balance, if any, still remaining shall lapse and shall not be allowed to be utilized for payment of duty on any excisable goods, whether cleared for home consumption or for export.

[10][(3) A manufacturer or producer of a final product shall be required to pay an amount equivalent to the CENVAT credit, if any, taken by him in respect of inputs received for use in the manufacture of the said final product and is lying in stock or in process or is contained in the final product lying in stock, if,—

(*i*) he opts for exemption from whole of the duty of excise leviable on the said final product manufactured or produced by him under a notification issued under section 5A of the Act; or

(*ii*) the said final product has been exempted absolutely under section 5A of the Act, and after deducting the said amount from the balance of CENVAT credit, if any, lying in his credit, the balance, if any, still remaining shall lapse and shall not be allowed to be utilized for payment of duty on any other final product whether cleared for home consumption or for export, or for payment of service tax on any output service, whether provided in India or exported.

(4) A provider of output service shall be required to pay an amount equivalent to the CENVAT credit, if any, taken by him in respect of inputs received for providing the said service and is lying in stock or is contained in the taxable service pending to be provided, when he opts for exemption from payment of whole of the service tax leviable on such taxable service under a notification issued under section 93 of the Finance Act, 1994 (32 of 1994) and after deducting the said amount from the balance of CENVAT credit, if any, lying in his credit, the balance, if any, still remaining shall lapse and shall not be allowed to be utilized for payment of duty on any excisable goods, whether cleared for home consumption or for export or for payment of service tax on any other output service, whether provided in India or exported.]

4.7 From the reading of the above provision, we find that the said provision is applicable only in the case where the assessee has taken the Cenvat Credit on Input Service and the said credit is lying unutilized and the output service became exempted.

4.8 In the present case while taking the Cenvat credit the output service were not exempted and the Cenvat credit was utilized for the payment of service tax therefore, neither any Cenvat credit was lying accumulated nor the service at the relevant time was provided under exemption particularly

issued under section 93 of the Finance Act, 1994. In the present case during the relevant period the services were very much taxable therefore, the availment of Cenvat credit and utilization thereof and also payment of service tax on the output service was correct. Hence, the of sub- rule (4) of Rule 11 of the Cenvat Credit Rules is not at all applicable in the facts of the present case.

4.9 Therefore, unlike Rule 6 and/ or Rule 11 of Cenvat Credit Rules no machinery provision was provided to take back the Cenvat credit availed and utilized for providing the output service which was provided on payment of service tax. In this position neither denial of Cenvat credit nor denial of refund of service tax paid by utilizing such Cenvat credit has support of any law.

4.10 The identical situation of the case has been considered by the division bench of this tribunal in the case of M/s Almebic Ltd (supra). The facts in that case was appellant were providing construction service of residential complex. At the time of receipt of input service and construction of residential complex it was not certain that part of the residential complex would not attract the service tax due to the reason that it is sold after obtaining the occupation certificate and due to this reason whatever constructed portion sold after obtaining the occupation certificate no service tax was paid. It was the department's case that since no service tax was paid on the part of the residential complex; the assessee was not entitled for the Cenvat credit on the input service attributed to the said service on which no service tax was paid. This tribunal after considering all the provisions of Cenvat Credit Rules came to the conclusion that at the time of availing the Cenvat credit the services were very much taxable, part of the output service became exempted only at the later stage therefore, recovery of the Cenvat credit attributed to the residential complex sold without payment of service tax cannot be made. The facts of the present case are very much similar to the facts in the M/s Alembic Ltd's case. The said judgment of the

tribunal was maintained by the Jurisdictional Hon'ble Gujarat High Court as cited (supra). The relevant order portion of the tribunal in the M/s Alembic Ltd case 2019 (28) GSTL 71 (Tri. Ahmd) is reproduced below:

> ***"5.*** *The appellants submitted that they availed only proportionate Cenvat credit, determined on scientific basis by them (considering square foot area where Service Tax was paid and balance area where Service Tax will not be paid after completion certificate). They had not only given due intimation in this regard at the time of obtaining completion certificate but also produced CA certificate to support their case in this regard. The present appeals involves the following legal questions:*
>
> *(a) Whether receipt of consideration for residential units sold as immovable property after receipt of completion certificate amounts to providing exempted service and Rule 6 of the CCR, 2004 is applicable in such case and as such, whether the appellants are liable to pay 8%/10% amount of exempted value under Rule 6 of the CCR, 2004?*
>
> *(b) Whether credit can be allowed to the appellants under Rule 3 of the CCR, 2004 in such circumstances?*
>
> *(c) Whether the appellants can be said to have "maintained proper separate accounts" as required under Rule 6 of the CCR, 2004?*
>
> *(d) Whether the appellants are required to reverse Cenvat credit availed during the period when output service was taxable before receipt of completion certificate, since such services were availed to construct entire property, and portion of such property did not attract Service Tax after receipt of completion certificate?*
>
> *(e) Connected to the question (d), whether the appellants are eligible to seek refund of the amount paid under protest towards credit availed from 2010 till receipt of completion certificate, based on CERA audit objection wherein such credit was sought to be reversed based on considering square feet area where Service Tax was paid and balance area where Service Tax will not be paid after completion certificate?*
>
> ***12.*** *As regards to the next issue of whether the appellants were also required to reverse proportionate credit, out of the valid input service credits availed by them during the period 2010 till obtaining completion certificate, i.e. availing during the time when whole of output service of construction of residential complex was taxable. It was argued by the appellants that out of business prudence, no*

developer wishes to have a situation where the properties are not sold as soon as possible and the property is converted into immovable property after receipt of completion certificate. It was also argued that as per Rule 3 of the CCR, 2004, credit eligibility is to be examined as on date of receipt of input service and not governed by later developments such as portion of property getting converted into immovable property after receipt of completion certificate. It was also argued that while Rule 6 of the CCR, 2004 deals with credits availed afresh, i.e. after output activity becoming exempt, however Rule 11 is the only provision which deals with credits availed in the past when output activity was wholly taxable however, at later point in time, became exempt.

13. *We agree with such plea raised by the appellant. While the law does not intend to allow any undue benefit to a service provider in terms of Cenvat Credit of Service Tax paid on input services used in providing non-taxable output activity, however, as held by the Hon'ble Apex Court in the case of Dai Ichi Karkaria, 1999 (112) E.L.T. 353 (S.C.), Modvat/Cenvat credit is a vested right. Once it is legally and validly availed, the same cannot be denied and/or recovered unless specific provisions exist for the same. The appellants have also correctly relied upon the decisions/judgments in the case of HMT Ltd., TAFE, Ashok Iron & Steel Fabricators (supra) wherein an identical situation qua "inputs" used in production of dutiable finished goods was involved, where on a particular date, the said finished goods became exempt and the issue involved was as regards credits availed at a time when such finished goods was otherwise dutiable.*

14. *It has been a consistent judicial view, including that of the Hon'ble Apex Court in such cases, that credit entitlement is on the date of receipt of inputs when the output activity was wholly dutiable. Merely because the finished goods eventually became exempt later on, the credit availed on inputs which were contained in semi-finished/finished goods state was held as not deniable. The present case is squarely covered vide such ratio laid down by higher courts."*

The judgment by Hon'ble Gujarat High Court in the case M/s Alembic Ltd 2019 (29) GSTL 625 (Guj.) whereby the above Tribunal's decision was upheld, is reproduced below:

"16. *The Tribunal therefore, on a harmonious reading of Rule 3 of the Rules read with Rules 6 and 11(4) of the Rules held that eligibility/entitlement to credit has to be examined only at the time of receipt of input service and once it is found to be availed at a time*

when output service is wholly taxable, and the said credit is availed legitimately, the same cannot be denied and/or recovered unless specific machinery provisions are made in this regard. Sub-rule (7) of Rule 4 of the Rules held that the assessee is not required to wait till output service is sold to the service recipient and the assessee can take the credit immediately after the day on bill/challan of input service is received. In facts of the case, there is no dispute that the respondent availed the credit after receipt of bill/challan in respect of input service and, therefore, it was legally entitled to take the credit on the date after the receipt of service bills/challans. Therefore, the availment of Cenvat credit by the respondent is absolutely legal and correct and in accordance with Rule 4(7) of the Rules. As at the time of taking credit, there was no existence of any exempted service, therefore, there is no application of Rule 6. That part of the service was exempted only after obtaining completion certificate and thereafter, the respondent was not required to avail the Cenvat credit on the input service, if any, received after obtaining the completion certificate. The respondent did not avail the Cenvat credit in respect of the services received after obtaining the completion certificate in respect of exempted service or avail proportionate credit attributed to the taxable output service. Therefore, Rule 6 has application for the period after obtaining the completion certificate. Rule 11(1), (2) and (3) of the Rules applicable to provision for manufactured goods to hold that in case of service becomes exempted at a later stage, there is no such provision in respect of the service. The only provision for the service is provided under sub-rule (4) of Rule 11 of the Rules which reads as under :

"11(4). A person provider of output service shall be required to pay an amount equivalent to the CENVAT credit, if any, taken by him in respect of inputs received for providing the said service and is lying in stock or is contained in the taxable service pending to be provided, when he opts for exemption from payment of whole of the service tax leviable on such taxable service under a notification issued under Section 93 of the Finance Act, 1994 (32 of 1994) and after directing the said amount from the balance of CENVAT credit, if any, lying in his credit, the balance, if any, still remaining shall lapse and shall not be allowed to be utilized for payment of duty on any excisable goods, whether cleared for home consumption or for export or for payment of service tax on any other output service, whether provided in India or exported."

17. *From the above sub-rule (4), it is clear that even if an output service provider avails the credit and output service becomes exempted in such case the credit only in respect of inputs lying in*

*stock or is contained in taxable service is required to be paid whereas there is no provision for payment of Cenvat credit equivalent to the input services used in respect of exempted service. Therefore, Cenvat credit availed in respect of input service is not required to be paid back under any circumstances and therefore, the respondent was not legally required to reverse any credit which was availed by them during the period 2010 till obtaining completion certificate i.e. during the period when output service was wholly taxable in their hands, merely because later on, some portion of the property was converted into immovable property on account of receipt of completion certificate and on which no service tax would be paid in future**."***

4.11 In view of the above settled position in the similar case the issue in the present case is no longer res-integra. On the issue that admissibility of the Cenvat credit has to be considered at the time of receipt of input service and not for the subsequent event, the Hon'ble Karnataka High Court has considered the case of Tata Advance Material Ltd 2011 (271) ELT 62(Kar.) wherein it is observed as under

***"5.**The Supreme Court in the case of the Collector of Central Excise, Pune v. Dai Ichi Karkaria Ltd. reported in 1999 (112) E.L.T. 353 (S.C.) at para 17 held as under :-*

"17. It is clear from these Rules, as we read them, that a manufacturer obtains credit for the excise duty paid on raw material to be used by him in the production of an excisable product immediately it makes the requisite declaration and obtains an acknowledgement thereof. It is entitled to use the credit at any time thereafter when making payment of excise duty on the excisable product. There is no provision in the Rules which provides for a reversal of the credit by the excise authorities except where it has been illegally or irregularly taken. in which event it stands cancelled or, if utilised, has to be paid for. We are here really concerned with credit that has been validly taken, and its benefit is available to the manufacturer without any limitation in time or otherwise unless the manufacturer itself chooses not to use the raw material in its excisable product. The credit is, therefore indefeasible. It should also be noted that there is no co-relation of the raw material and the final product; that is to say, it is not as if credit-can be taken only on a final product that is manufactured out of the particular raw material to which the credit is related. The credit may be taken against the excise duty on a final product manufactured on the very day that it becomes available."

> ***6.****Therefore, it is clear that there is no provision in the rules which provides for a reversal of the credit by the Excise Authorities except where it has been irregularly taken in which event it stands cancelled or if utilised has to be paid for. This is not the case of the revenue. In the instant case, when the assessee purchased the capital goods and when he has paid the excise duty on them, in law, he is entitled to get the credit on the duty paid while clearing the finished products from his factory. Accordingly, he utilised the cenvat credit and cleared the finished products. It is about three years after such payment, the capital goods were destroyed in fire. As the assessee had insured the said capital goods, he put forth a claim for payment of the loss sustained by him, which includes the payment of excise duty. The Insurance Company in terms of the policy has compensated the assessee. Merely because the Insurance Company paid the assessee the value of goods including the excise duty paid, that would not render the availment of the cenvat credit wrong or irregular. At the same time, it does not confer any sight, on the Excise Department to demand reversal of credit or default to pay the said amount. The assessee has paid the premium and covered the risk of this capital goods and when the goods were destroyed in terms of the insurance policy, the Insurance Company has compensated the assessee. It is not a case of double payment as contended by the department. At any rate, the Excise Department has no say in the instant case as held by the Apex Court. In that view of the matter, the substantial questions of law framed in this appeal are answered in favour of the assessee and against the revenue. Accordingly, the appeal is dismissed****."***

4.12 In view of the above judgment it is clear that in the present case there is no dispute in availment of Cenvat credit at the time of receipt of input service. Therefore, subsequent exemption by virtue of section 102 of Finance Act, 1994 will not make disentitle the appellant from the said Cenvat credit.

4.13 The learned counsel also argued that the refund claim of the portion of service tax paid through Cenvat credit which was paid as service tax by the sub- contractors. The said service tax even without considering the Cenvat credit is refundable in the hands of recipient of such service as the services of sub- contractors was also exempted. This argument of the appellant is supported by the judgment of Hon'ble Supreme Court in the

case of Oswal Chemicals and fertilizers reported in 2015 (318) ELT 617 (SC) wherein it is held as under:-

> ***"7.****Explanation (B) defines "relevant date". Though this date has reference to the calculation of limitation period for the purposes of seeking refund of the duty under the aforesaid provision. However, clause (e) while stating the "relevant date" clarifies that in case of a person, other than the manufacturer, the date of purchase of goods by other person would be the relevant date. This itself indicates that the person can be other than the manufacturer and Explanation (B) caters to such other person. It is not even necessary to embark on detailed discussion on this aspect inasmuch as we note that the Constitution Bench of this Court in ' Mafatlal Industries Ltd. and others v. Union of India and others' [1997 (5) SCC 536 = 1997 (89) E.L.T. 247 (S.C.)] has already settled this aspect in the following words :-*
>
> *"(xii) Section 11-B does provide for the purchaser making the claim for refund provided he is able to establish that he has not passed on the burden to another person. It, therefore, cannot be said that Section 11-B is a device to retain the illegally collected taxes by the State. This is equally true of Section 27 of the Customs Act, 1962."*
>
> ***8.****We are, therefore, of the opinion that the appellant who had paid the excise duty to the manufacturer, viz., M/s. Indian Oil Corporation Ltd. (hereinafter referred to as 'IOCL') and BPCL in the instant case, had the necessary locus standi to file the application claiming the refund of the duty."*

4.14 The similar view was expressed by the Hon'ble Bombay High Court in the case of Usha Agarwal 2009 (243) ELT 492 (Bom) wherein it is observed as:-

> ***"10.*** *In the instant case as noted, the appellant had purchased goods on which earlier it was assumed that no excise duty was payable. Then a Bank guarantee was obtained from the appellant that in the event the excise duty was demanded then he will reimburse O.N.G.C. O.N.G.C. took up the matter in appeal up to the Commissioner (Appeals) and thereafter did not take any steps. It is the Petitioner who has to pay the excise duty. It is the Petitioner's contention that classification as done by the Revenue is not correct and accordingly he is entitled to refund of duty paid. In our opinion, such person can be said to be person aggrieved as prejudice has been occasioned to him by O.N.G.C. in not preferring an appeal and the appellant having to pay the excise duty which in his opinion is not payable. Considering the scheme of Central Excise Act, the appellant would not have any*

other remedy as an application for refund would only be maintainable if the order of assessment is set aside and not otherwise. The appellant would therefore, be left with no remedy at law. The Appellant therefore, has demonstrated the prejudice that would be occasioned. It is in that context that this court rightly had directed the appellant to move an application to seek relief to prefer an appeal. The tribunal unfortunately misread the judgment of this court and proceeded to examine whether an appeal itself lies. It is true that the tribunal in its judgment has noted that conferring a right on the person other than manufacturer may create adverse impart on the ordinary claim of the Revenue and fiscal administration. In our opinion, this can be met by holding that the person aggrieved who is allowed to prefer an appeal would only be entitled to prefer appeal to the extent of the prejudice suffered by inaction of the original assessee through whom he claims the relief. This would rule out the possibility of matter going down the chain."

4.15 From the above settled position the appellant is otherwise eligible for refund in respect of service tax paid by the sub- contractors as a recipient of exempted service.

4.16 Shri H.K Jain Learned Assistant Commissioner (AR) appearing on behalf of the revenue heavily relied upon the decision of this tribunal in the case of Shree Gurukrupa Construction (supra). We find that this decision has not considered the latest legal position settled by Hon'ble Gujarat High Court in the case of M/s Almebic Ltd. Therefore, the decision in the case of Shree Gurukrupa is distinguished.

4.17 There is one more issue in the present case that out of the subject refund in the present appeal the Learned Commissioner (Appeals) denied the refund of Rs 38,11,497/- for project B-2/12/2014-15 on the ground that the contract was entered into after 01.03.2015 as per the work order given on 16.03.2015. In this regard it is the appellant's submission that the said

tender was opened on 28.01.2015 and the appellants were declared as successful bidder and the same has been accepted as contract.

5. We find that as per the facts before us there is no dispute that the tender was opened on 28.01.2015 and the appellant was declared successful bidder thereafter no separate contract/ agreement was entered into. It is the department's contention that the date of the work order i.e. 16.03.2015 has to be considered as contract. We do not agree with this contention for the reason that work order is only a procedure to begin the work however, since there is no separate contract/ agreement after opening of tender and acceptance thereof by the appellant that itself is treated as contract. Therefore, the date of opening of tender i.e. 28.01.2015 has to be taken as a date of contract. Section 102(1) (c) provides exemption only to those residential complex where a contract is entered into before the 1st day of March, 2015 and on which appropriate stamp duty, whenever applicable had been paid before that day.

5.1 We find that the Adjudicating Authority while denying the refund of this amount also noted that there is no evidence of payment of stamp duty on the contract. The Adjudicating Authority has missed the term "wherever applicable". In the present case payment of stamp duty is not applicable. Therefore, the condition whether stamp duty was paid or otherwise cannot be applied in the present case. Only aspect to be considered is whether the contract is of prior to 01.03. 2015 or post that date. As discussed above the date of opening of tender and acceptance thereof is the date of contract which is 28.1.2015. The appellant's claimed is squarely covered by section 102 and accordingly, they are eligible for the refund for this amount also.

5.2 The appellant also claimed refund of interest amount of Rs 3,77,629/- which was paid due to delay in payment of service tax during the relevant period. The lower authorities have rejected the refund of this amount on the

ground that section 102 provides the refund of service tax and not of interest.

5.3 We find that the said interest was paid on the service tax which is refundable under Section 102. When there is no levy of service tax the government cannot retain the interest paid on such non levy therefore, even though it is not specifically provided under Section 102. The interest paid on the service tax which is to be refundable is nothing but a piggy back of refundable service tax. Hence, the same is eligible for the refund to the appellant.

6. As per our above discussion and findings, we are of the view that appellant is entitled for the refund of service tax paid through Cenvat credit and also the interest paid for delay in payment of service tax.

7. Accordingly, the impugned order is modified to the above extent and appeal is allowed with consequential relief, if any, in accordance with law.

(Pronounced in open court on 18.06.2021)

(Ramesh Nair)
Member (Judicial)

(Raju)
Member(Technical)

Geeta