CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
HYDERABAD

REGIONAL BENCH

EXCISE APPEAL NO. 26491 of 2013

[Arising out of Order-in-Original No. 04/2013-CE-Hyd-III-Adjn.-(Commnr) dated 31/01/2013 passed by The Commissioner of Central Excise, Customs and Service Tax, Hyderabad – III.]

M/s Nava Bharat Ventures Limited,
Paloncha, Khammam District – 507 154
(Andhra Pradesh). **...Appellant**

Versus

The Commissioner of Central Excise
Customs & Service Tax,
Hyderabad – III, Commissionerate,
Kendriya Shulk Bhavan,
L.B. Stadium Road, Basheerbagh,
Hyderabad – 500 004 **...Respondent**

APPEARANCE:
Shri Raghavan Ramabhadran, Advocate for the appellant.
Shri P.R.V. Raman, Special Counsel for the Department.

WITH

EXCISE APPEAL NO. 26681 of 2013

[Arising out of Order-in-Original No. 04/2013-CE-Hyd-III-Adjn.-(Commnr) dated 31/01/2013 passed by The Commissioner of Customs, Central Excise and Service Tax, Hyderabad – III.]

The Commissioner of Central Excise
Customs & Service Tax,
Hyderabad – III Commissionerate,
Kendriya Shulk Bhavan,
L.B. Stadium Road, Basheerbagh,
Hyderabad – 500 004 **...Appellant**

Versus

M/s Nava Bharat Ventures Limited,
Paloncha, Khammam District – 507 154
(Andhra Pradesh). **...Respondent**

APPEARANCE:
Shri PRV Ramanan, Special Counsel for the Department.
Shri Raghavan Ramabhadran, Advocate for the assessee.

CORAM:
HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

DATE OF HEARING: 14.07.2021
DATE OF DECISION: 10.11.2021

FINAL ORDER No. 30341-30342/2021

P.V. SUBBA RAO

These two appeals have been filed by the assessee and the Department assailing the same order-in-original dated 31.01.2013[1] passed by the Commissioner of Customs and Central Excise, Hyderabad – III deciding four show cause notices dated 15.05.2008, 02.02.2009, 05.02.2010 and 25.01.2011 for successive periods, all dealing with the same issue. The total demand in these show cause notices is Rs. 100,10,55,027/-, of which the Commissioner has confirmed an amount of Rs.5,52,03,415/- in the impugned order and imposed an equal amount as penalty. The assessee has already paid an amount of Rs.3,60,03,450 on the basis of its own calculations and is disputing the rest on the ground that Rule 6(5) of the Cenvat Credit Rules, 2004[2] entitles it to such credit. The assessee is also aggrieved by the penalty imposed in the impugned order. Revenue is in appeal against part of the demand that has been dropped by the Commissioner and wants the entire demand as per the show cause notice to be confirmed.

2. The appellant/assessee manufactures Ferro-Manganese and Silico-Manganese classifiable under Chapter 72 of Central Excise

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[1] **the impugned order**
[2] **CCR**

Tariff and pays Central Excise Duty. It has a captive power plant and part of the electricity generated is used in the manufacture of the final products and part is wheeled out to A.P. Transco, Subhash Kabini Power Corp. Ltd., Reliance Energy Trading Limited, A.P. Power Purchase Co-ordination Committee, etc. To the extent, the electricity is captively used in manufacture of final products, there is no dispute. The dispute is regarding the CENVAT Credit availed on the inputs and input services used in production of electricity to the extent it is wheeled out.

3. The assessee reversed proportionate amount of CENVAT Credit attributable to the inputs/input services to the electricity which is wheeled out. However, while calculating this proportionate amount of CENVAT credit, the credit on the input services mentioned in Rule 6(5) of CCR was not taken into account and no proportionate reversal was done on such input services. The show cause notice demanded an amount equal to 8%/10% of the value of the electricity that was wheeled out under Rule 6(3A) of CCR. In the impugned order, the adjudicating authority accepted the proportionate reversal and therefore, did not confirm the demand in the show cause notice of 8% or 10% of the assessable value. However, the input services under Rule 6(5) while calculating the amount to be reversed was not excluded and hence the amount confirmed is higher than as per the assessee's calculations. The adjudicating authority also imposed a penalty on the appellant. Assessee is aggrieved both by the calculation in the impugned order without excluding the credit of input services under Rule 6(5) and also by the imposition

of penalty. Revenue is aggrieved by the fact that the adjudicating authority allowed proportionate reversal which is permissible subject to some conditions which, according to the Revenue, have not been fulfilled by the assessee and hence the Commissioner should have confirmed the entire amount of demand as per the show cause notice.

4. The issues which fall for consideration, therefore, are:

a) Is the assessee entitled to reverse proportionate amount of CENVAT credit as asserted by the assessee and disputed by the Revenue?

b) If the assessee can reverse the credit proportionately, can the assessee exclude the credit taken on services under Rule 6(5) as done by the assessee, but disputed by the Revenue and disallowed in the impugned order?

c) Can a show cause notice be issued demanding an amount under Rule 6(3A) of the CCR?

d) Is the penalty imposed upon the appellant sustainable?

5. We proceed to consider the arguments of both sides with respect to each of the above questions.

6. CCR allow a manufacturer of dutiable products or provider of taxable services to take credit of the duty paid on inputs and service tax paid on input services which are used in the manufacture of dutiable final products or provision of taxable services and utilise such credit to pay excise duty or, as the case may be, service tax. There is no one-to-one correlation between

the inputs/input services on which credit is taken and the final products or services and credit taken can be used to pay excise duty or service tax. The principle in CCR as well its predecessor rules is that no credit can be taken on the inputs/input services used in manufacture of exempted goods or provision of non-taxable services. To avail CENVAT Credit, Rule 6 places some obligations on the assessee in the form of various alternatives. Rule 6(1) disallows CENVAT credit on inputs and input services used in manufacture of exempted products or provision of non-taxable services. Rule 6(2) requires the assessee who manufactures both dutiable and exempted products and/or provides both taxable and non-taxable services to maintain separate accounts of the receipt, consumption, etc. of the inputs and input services. Rule 6(3) requires an assessee who does not maintain separate accounts to pay an amount equal to 8%/ 10% of the value of the exempted goods. Later, with effect from 1.4.2008, Rule 6(3A) was introduced providing for reversal of proportionate amount of CENVAT credit as a further alternative. Rule 6(5) excludes certain types of services from Rules 6(1), 6(2) and 6(3) unless such services are used exclusively for manufacture of exempted goods or provision of non-taxable services. In other words, full credit in respect of the services covered by Rule 6(5) is available even if the service is used to some extent for manufacture of dutiable goods and/or providing taxable services. If CENVAT Credit is taken irregularly, such credit can be recovered under Rule 14 and a penalty can be imposed under Rule 15.

Reversal of proportionate amount of CENVAT Credit

7. It has been submitted on behalf of the assessee that it is entitled to reverse the proportionate amount of CENVAT Credit for the following reasons:

i. The inputs and input services have been used in the production of electricity only part of which is wheeled out and reversal of proportionate credit is as good as not taking credit at all. This meets the requirement under Rule 6(1). Reliance is placed on the judgment of the Supreme Court in **Chandrapur Magnet Wires (P) Ltd. versus Collector of Central Excise, Nagpur[3].**

ii. Proportionate reversal also meets the requirement of maintenance of separate accounts as envisaged under Rule 6(2).

iii. From 1.4.2008, Rule 6(3A) was introduced and it specifically provided for proportionate reversal and also gave a formula for reversal. The assessee has reversed the credit accordingly.

iv. For period prior to 1.4.2008, since there was confusion, a retrospective amendment has been made by Finance Act, 2010 providing for proportionate reversal which requires, inter alia, a declaration to be made to the Commissioner and the amounts to be reversed along with interest. The assessee appellant has also fulfilled these requirements.

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[3] 1996 (81) E.L.T. 3 (S.C.)

8. On behalf of the Revenue, it has been submitted that the assessee is not entitled to make proportionate reversal. Proportionate reversal was provided for specifically under Rule 6(3A) with effect from 1.4.2008 and for the past period by Finance Act, 2010. Both these provisions had some requirements which were not met by the appellant assessee. For the period after 1.4.2008, the assessee was required, as per Rule 6(3A), to intimate the jurisdictional Superintendent of Central Excise, which the appellant has not done. For period prior to 1.4.2008, as per the Finance Act, 2010, the assessee was required to make an application to the Commissioner, which it has not done. The application claimed to have been submitted by the appellant assessee was filed before the Deputy Commissioner of the division in Warangal and not before with the Commissioner (who is located in Hyderabad) and therefore, it does not meet the requirement. The Finance Act, 2010 also required the amounts to be paid along with interest. The interest in this case was paid much later and not along with the reversed amounts. For these reasons, the appellant is not entitled to the proportionate reversal.

9. We find that Rule 6(1) prohibits taking of credit on inputs and input services used in manufacture of exempted goods or provision of non-taxable services. In some cases, if only some portion of such inputs or input services goes into exempted goods or services, reversal of such proportion of the credit meets the requirement of Rule 6(1). An illustration which everyone can relate to makes this position clear. A man buys a packet of milk worth Rs. 70 and gives the shopkeeper a hundred rupee note. The

currency note cannot be cut to give 70% of its value to the shopkeeper. Therefore, the shopkeeper returns him thirty rupees. It amounts to the man paying seventy rupees only although he gave a hundred rupee note. Similarly, if credit is taken on an invoice of input or input service and part of the input or input service has gone into exempted products, proportionate reversal is as good as not taking the credit to that extent at all.

10. Rule 6(2) requires separate accounts to be maintained by someone manufacturing both dutiable and exempted products or providing taxable and non-taxable services. It however, does not prescribe a particular format for maintaining such accounts nor does it require the inputs to be purchased and stored separately for dutiable and exempted products. In case of common input or input services, it is often impossible or extremely difficult to do segregate the two at the stage of taking credit. The only practical way of maintaining separate accounts when the same input or input service procured by the assessee is to take credit and debit entries. Either the assessee can take credit of only that proportion of the inputs/input services which has gone into the manufacture of dutiable goods or it can take the entire credit and reverse that portion of the inputs/input services which have gone into producing exempted products. Such an accounting practice becomes all the more necessary in cases such as this when the output good viz., electricity itself is common and becomes either exempted (if wheeled out) or not (if it is used captively for manufacture of dutiable goods). Even in the normal accounting practices, debit notes and credit notes are issued to make

adjustments towards excess payments or short payments. In our view, reversal of proportionate amount of CENVAT credit is a sufficient requirement under Rule 6(2). Supreme Court in **Chandrapur Magnets** also held so and the decision applies to this case.

11. After 1.4.2008, Rule 6(3A) specifically provides for proportionate reversal and provides a formula for the purpose and the assessee has followed it. Revenue's objection to accepting such reversal is on the ground that the assessee has not made the required declaration before the Superintendent but the assessee asserts that it made the declaration. Even if such a declaration was not made, in our considered view, such a technicality cannot deprive the assessee of its opportunity to avail Rule 6(3A). Thus, reversal of proportionate amount of CENVAT credit also satisfies the requirement under Rule 6(3A), in addition to meeting the requirement under Rule 6(1) and 6(2).

12. For the period prior to 1.4.2008, following the Finance Act, 2010, the assessee has reversed the credit and interest. Revenue's objection is that the declaration was filed with the jurisdictional Deputy Commissioner instead of the Commissioner and that the interest was not paid along with the reversal but much later. On the first question of declaration, we find that if the assessee made a declaration with the Central Excise department itself, even if wrongly with the Deputy Commissioner instead of the office of the Commissioner, it may be technically incorrect but such hyper-technicality should not deprive the assessee of substantial benefit. Similarly, Revenue's argument that interest

was paid much later does not hold much water as long as it has been paid.

13. We, therefore, find that reversal of proportionate amount of CENVAT credit by the assessee in this case is not only sustainable under Rule 6(3A) for the period post 1.4.2008 and under Finance Act, 2010 (for the period pre 1.4.2008) but such reversal itself meets the obligations of the assessee under Rule 6(1) (of not taking credit of inputs and input services used in exempted goods) and Rule 6(2) (of maintaining separate accounts).

Exclusion of the credit taken on services under Rule 6(5) while reversing

14. The Commissioner has, in the impugned order, accepted the assessee's contention that proportionate amount of CENVAT credit has been reversed but had disputed the assessee's calculation whereby it had availed entire amount of credit in respect of services enumerated into Rule 6(5). It is the contention of the assessee that credit on certain services was admissible as per Rule 6 (5) unless such services were used exclusively for manufacture of exempted goods or providing exempted services. Since the electricity was not entirely exempted, this Rule applies. Rule 6 (5) reads as follows :-

> "(5) **Notwithstanding anything contained in sub-rules** (1), (2) and (3), credit of the whole of service tax paid on taxable service as specified in sub-clause (g), (p) (q), (r) (v) (w), (za), (zm), (zp), (zy), (zzd), (zzg), (zzh), (zzi), (zzk), (zzq) and (zzr) of clause (105) of Section 65 of the Finance Act shall be allowed unless such service is used exclusively in or in relation to the manufacture of exempted goods or providing exempted services".

15. The services in question which were used according to the appellant in their power plant and Ferro Alloy plant are as follows :-

6 (5) services used only in power plant

Service	Reference in Finance Act	Amount in Rs.
Maintenance & Repair service	65 (105) (zzg)	1,43,00,339/-
Consultancy	65 (105) (r)	92,942/-
Inspection	65 (105) (zzi)	8,314/-
Technical service	65 (105) (zzh)	5,865/-
Testing gas analysis	65 (105) (zzh)	10,791/-
Port clearances	65 (105) (zzi)	10,710/-
Consulting engineer	65 (105) (g)	4,45,169/-
Cost audit fee	65 (105) (zzi)	7,344/-
Survey fee	65 (105) (r)	306/-
Testing of CTs	65 (105) (zzh)	2,754/-
Testing of drum safety	65 (105) (zzh)	2,313/-
Technical advisory service	65 (105) (zzh)	74,40,780/-
TOTAL		**2,23,27,628/-**

6 (5) services used in power plant & ferro alloy (common services)

Service	Reference in Finance Act	Amount in Rs.
Security	65 (105) (w)	8,77,965/-
Auditing	65 (105) (zzi)	3,824/-
Surveillance Audit	65 (105) (zzi)	6,420/-
Maintenance & Repair service	65 (105) (zzg)	1,10,380/-
Consultancy	65 (105) (za)	1,06,114/-
Inspection	65 (105) (zzi)	16,357/-
Professional services	65 (105) (g)	48,960/-
TOTAL		**11,70,022/-**

16. It has been submitted by the appellant/assessee that in violation of the explicit provision, the Commissioner has not allowed credit even for the input services covered by Rule 6(5).

17. It has been submitted on behalf of the Revenue that the Adjudicating Authority has correctly held that the provisions of Rule 6(5) were not applicable since the assessee had contended that electricity being non-excisable, Rule 6 itself not applicable. If Rule 6 itself is not applicable, Rule 6 (5) is not applicable also and therefore they cannot get its benefit. It has further been submitted that as per the definition under CCR, 'input' means, inter-alia, "all goods used for generation of electricity or steam for captive use" [Rule 2 (k) (iii)]. Similarly **final products as per Rule 2 (h) means "excisable goods manufactured from input or using input services**". Anything not used in manufacture of final products does not qualify as input and the final product has to be one which is an excisable good. Excisable good is not defined in the CCR but is defined in the Act to mean goods specified in Schedule to the Central Excise Tariff Act as being subject to a duty of excise and includes salt. While 'Electrical energy' is mentioned in the Schedule to the Tariff, no duty is mentioned against it; instead, somewhat unusually, '#' is mentioned against this entry. Since no amount or number including zero is indicated against electrical energy, it does not qualify as 'excisable good' at all. Since it is not excisable good, it does not qualify as 'final product' under CCR. If it is not a final product (whether exempted or otherwise), the benefit of Rule 6(5) is not available to the assessee at all. Thus the inputs attributable to electricity sold but not captively consumed cannot be regarded as input and the same argument applies to input

services. Therefore, no Cenvat credit is admissible on such inputs at all.

18. We cannot agree with this submission of the Revenue because if Rule 6 does not apply to the assessee's case, then nothing in this Rule including the demand in the show cause notice or the argument made by the Revenue would survive because all of them are on the premise that Rule 6 applies to the assessee. When Rule 6(5) explicitly excludes some services from the provisions of Rule 6(1), 6(2) or 6(3), the benefit of this cannot be denied to the assessee. Even otherwise, Revenue does not dispute that some of the common input services in dispute are used to produce electricity, which is further used in manufacture of dutiable products. Unless the services are exclusively used for production of exempted products, they are explicitly covered under Rule 6(5) and the assessee need not reverse proportionate amount of CENVAT Credit on such input services.

Show cause notice demanding an amount under Rule 6(3) of the CCR

19. Learned Counsel for the appellant submits that the department demanded under Rule 6(3) an amount equal to 10%/ 8% of the price of exempted goods which is not sustainable. He relies on the judgment of the High Court of Telangana and Andhra Pradesh in **Tiara Advertising** in which it was held that Rule 6 provides various options for the assessee who produces both dutiable and exempted goods or provides both taxable and non-taxable services to choose and one of these is the option to pay

an amount equal to 10% or 8% of the value of the exempted goods/ services. The authorities cannot choose an option for the assessee and enforce it. If the assessee does not follow any of the options and still takes credit, such irregularly availed CENVAT credit can be recovered under Rule 14 of CCR. Therefore, the show cause notice demanding an amount under Rule 6(3) is without authority of law and needs to be set aside. Learned counsel for the department, however, supports the show cause notice.

20. We find that Rule 6 of the CCR lays down 'Obligations of the assessee'. These obligations are not in the form of a charging section demanding a duty but are obligations to avail CENVAT credit. Just as no assessee can be compelled to maintain separate records under Rule 6(2), no assessee can be compelled to pay an amount under Rule 6(3). The obligations under Rule 6 are in the form of various alternatives and the assessee is free to choose any option. There is no mechanism either in the CCR or in the Act to enforce any of the options or one of the options on the assessee. If the assessee does not choose any of the options and still avails CENVAT credit, such irregularly availed CENVAT credit can, of course, be recovered under Rule 14 of the CCR. The High Court of Telangana and Andhra Pradesh has, in the case of **Tiara Advertising,** held as follows:

> "13. Having considered the issue of maintainability of this writ petition, we are of the opinion that the petitioner cannot be non-suited on the ground of availability of an alternative remedy. The alternative remedy principle is not a straitjacket formula but a rule of convenience which has been evolved by Courts so as to ensure equitable distribution of work. It is therefore within the discretion of this Court to

refuse to adopt the said rule in a deserving case. Presently, we find that the second respondent has brazenly exercised power under a provision which was not even available to him, as it was an enabling provision put in place for the benefit of the assessee, and arrived at a wholly unreasonable, if not absurd, result. That apart, the second respondent did not even choose to deal with the binding case law cited before him while dealing with the issues arising for consideration. This arrogant and arbitrary approach adopted by the second respondent cannot be countenanced. It would therefore not be necessary for the petitioner to go through the motions of a statutory appeal to challenge the same. The contention of the respondents as to the maintainability of the writ petition is therefore rejected.

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

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

21. As per the aforesaid judgment, the show cause notice is without authority of law and, therefore, any order in pursuance of it is bad in law and needs to be set aside.

Penalty upon the appellant

22. Penalty has been imposed upon the appellant under Rule 15 by the impugned order, which the assessee controverts and the Revenue supports. This Rule reads as follows:

> **"RULE 15. Confiscation and penalty.** — (1) If any person, takes or utilises CENVAT credit in respect of input or capital goods or input services, wrongly or in contravention of any of the provisions of these rules, then, all such goods shall be liable to confiscation and such person, shall be liable to a penalty in term of clause (a) or clause (b) of sub-section (1) of section 11AC of the Excise Act or sub-section (1) of section 76 of the Finance Act (32 of 1994), as the case may be.
>
> (2) In a case, where the CENVAT credit in respect of input or capital goods or input services has been taken or utilised wrongly by reason of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of the Excise Act, or of the rules made thereunder with intent to evade payment of duty, then, the manufacturer shall also be liable to pay penalty in terms of the provisions of clause (c), clause (d) or clause (e) of sub-section (1) of section 11AC of the Excise Act.
>
> (3) In a case, where the CENVAT credit in respect of input or capital goods or input services has been taken or utilised wrongly by reason of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of these rules or of the Finance Act or of the rules made thereunder with intent to evade payment of service tax, then, the provider of output service shall also be liable to pay penalty in terms of the provisions of sub-section (1) of section 78 of the Finance Act.
>
> (4) Any order under sub-rule (1), sub-rule (2) or sub-rule (3) shall be issued by the Central Excise Officer following the principles of natural justice".

23. We find that Rule 15 provides for imposition of penalty if CENVAT credit has been wrongly availed which allegation must be made in the show cause notice with a proposal to recover such wrongly availed CENVAT credit under Rule 14 but such a demand has not been made. Instead, a demand of an amount equal to 8%/ 10% of the exempted goods under Rule 6(3) has been made in the show cause notice, which is only an option to the assessee and cannot be demanded under Rule 14. Since the show cause notice itself has been issued without authority of law, any penalty imposed in the impugned order in pursuance of it needs to be set aside too.

24. To sum up, we find:

(a) reversal of proportionate amount of CENVAT credit attributable to the inputs/ input services of the exempted goods by the assessee is sufficient to meet the requirement under Rule 6(1) [of not availing the CENVAT credit on inputs/input services which used in exempted goods];

(b) such reversal also satisfies the requirement of maintaining separate records under Rule 6(2);

(c) While reversing such amounts, the assessee has correctly not taken into account the input services mentioned in Rule 6(5) as credit in respect of such input services, unless such services are exclusively used for manufacture of exempted goods and/or provision of non-taxable services;

(d) the demand in the show cause notice for an amount equal to 10%/8% of the value of exempted goods under Rule 6(3) is without authority of law and hence the impugned order which flows from such an show cause notice itself needs to be set aside on this ground also.

25. The impugned order is, accordingly set aside and the appeal of the assessee is allowed. The appeal filed by the Revenue is rejected.

(Order pronounced in court on **10/11/2021**.)

(JUSTICE DILIP GUPTA)

PRESIDENT

(P.V. SUBBA RAO)
MEMBER (TECHNICAL)

PK