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IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,

CHENNAI

REGIONAL BENCH – COURT No. III

(1) SERVICE TAX APPEAL No. 41580 of 2017

(Arising out of Order-in-Original No.CHN-SVTAX-001-COM-109-2016-2017 dated 27.03.2017 passed by the Principal Commissioner of Service Tax-1, Newry Towers, No.2054-I, II Avenue, Annanagar, Chennai 600 040)

M/s.Toshiba JSW Power Systems Private Ltd. ... Appellant
(Earlier known as Toshiba JSW Turbine and
Generator Private Ltd.)
75-95, Vaikadu Village,
Andrakuppam Check Post,
Manali New Town,
Chennai 600 103.

Versus

Commissioner of GST & Central Excise, ... Respondent
Chennai North Commissionerate,
No.26/1, Mahathma Gandhi Road, Nungambakkam,
Chennai 600 034.

WITH

(2) SERVICE TAX APPEAL No.41582 of 2019

(Arising out of Order-in-Appeal No.185/2019 (CTA-I) dated 20.06.2019 passed by the Commissioner of GST & Central Excise (Appeals-I), 26/1, Mahatma Gandhi Marg, Nungambakkam, Chennai 600 034)

M/s.Toshiba JSW Power Systems Private Ltd. ... Appellant
(Earlier known as Toshiba JSW Turbine and
Generator Private Ltd.)
75-95, Vaikadu Village,
Andrakuppam Check Post,
Manali New Town,
Chennai 600 103.

Versus

Commissioner of GST & Central Excise, ... Respondent
Chennai North Commissionerate,
No.26/1, Mahathma Gandhi Road, Nungambakkam,
Chennai 600 034.

APPEARANCE:

Mr. Raghavan Ramabadran, Advocate
For the Appellant

Mr. M. Ambe, Deputy Commissioner (A.R)
For the Respondent

CORAM :

HON'BLE MS. SULEKHA BEEVI, C.S. MEMBER (JUDICIAL)
HON'BLE MR. M. AJIT KUMAR, MEMBER (TECHNICAL)

DATE OF HEARING : 06.06.2023
DATE OF DECISION :08.06.2023

FINAL ORDER No.40407-40408/2023

Order : Per Hon'ble Ms. Sulekha Beevi C.S.

The issue involved in both these appeals being the same, they are heard together and disposed of by this common order.

2. Brief facts are that the appellant is engaged in trading of spares and accessories of "Turbines". They are also registered with the Service Tax Commissionerate. The appellant undertakes manufacture of Turbine and erection and installation of the same at the project sites of the customers. In the course of such activity, they procure bought out items through high sea sale and local procurements. Supply of these materials is a trading activity on the value of which CST is also paid by the appellant. During the course of audit of accounts of the appellant and scrutiny of the invoices, it

was noticed by the department that the appellant had short paid the amount of cenvat credit that has to be reversed by them under Rule 6 (3) of Cenvat Credit Rules, 2004 in respect of exempted services. On perusal of the records produced before the audit, it was noticed that the appellant availed cenvat credit on common input services. They had opted to exercise the option of paying the amount as determined under sub-rule (3A) of Rule 6 of CCR 2004. While doing so, they had not adopted the formula correctly and this non-adoption of correct formula resulted in short reversal of cenvat credit as required under Rule 6 (3) of CCR 2004. Thus the appellant was liable to reverse an amount of Rs.6,63,93,170/- for the period 2012-13 to 2014-15. Show cause notice dt. 28.07.2016 was issued proposing to demand the amount which ought to have been reversed by them on proper application of the formula along with interest and also for imposing penalties. Secondly, it was also noticed that the appellant had short-paid service tax under 'Business Auxiliary Service (BAS)' for the services rendered to NTPC. The notice proposed to demand the short-paid service tax along with interest and also for imposing penalties. After due process of law, the original authority vide order dated 27.03.2017 (impugned in Appeal No.ST/41580/2017) confirmed the amount on account of reversal of cenvat credit as required under Rule 6 (3) of CCR along with interest and also imposed equal penalty. Demand of service tax under BAS category was also confirmed along with interest and penalty was imposed under section 76 of the Finance Act, 1994.

3. On the same set of facts, another show cause notice dated 16.10.2018 was issued on the allegation of non-adoption of correct formula for the purpose of reversal of credit under Rule 6 (3A) of CCR 2004 and short payment of service tax. The SCN proposed to demand an amount of Rs.1,20,76,891/- along with interest and for imposing penalty. Upon adjudication of notice, the original authority confirmed the demand along with interest and imposed penalty under Section 76 of the Finance Act, 1994. On appeal, the Commissioner (Appeals) vide Order-in-Appeal dated 20.06.2019 (Impugned in Appeal No.41582/2019) upheld the OIO. Aggrieved by the impugned orders, the appellant is now before the Tribunal.

4. Ld. Counsel Shri Raghavan Ramabadran appeared and argued for the appellant. On the first issue, it is submitted that the case of the department is that for the purpose of calculating the reversal of credit under Rule 6 (3A) of CCR 2004, the appellant has not applied the formula corectly. Rule 6 (3A) of CCR 2004 provides the following formula for computation of the credit that has to be reversed when common input services are used for dutiable goods as well as trading activity. The formula is as under:

$$\frac{\text{Value of Exempted (Trading) Turn over}}{\text{Total Turnover (Manufacture+Trading)}} \, x \text{ Cenvat credit taken on } \textbf{common} \text{ input services}$$

5. It is alleged in the SCN that the appellant has to take total cenvat credit availed by them and not the common cenvat credit. Ld. Counsel submitted that the formula adopted by the appellant for reversal of cenvat credit is correct. He referred to Rule 6 (3) of CCR 2004 which reads as under :

> **"RULE 6. Obligation of a manufacturer or producer of final products and a provider of output service. -**
>
> … … ..
>
> (3) Notwithstanding anything contained in sub-rules (1) and (2), the manufacturer of goods or the provider of output service, opting not to maintain separate accounts, shall follow any one of the following options, as applicable to him, namely :-
>
> (i) pay an amount equal to six per cent. of value of the exempted goods and 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 he 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 for providing such taxable service, shall be taken then the amount specified in clause (i) shall be six per cent. of the value so exempted :
>
> Provided also that in case of transportation of goods or passengers by rail the amount required to be paid under clause (z) shall be an amount equal to 2 per cent. of value of the exempted services."

It is submitted by the Ld. Counsel that as per the provisions of Rule 6 (3) of CCR 2004, the manufacturer of goods or provider of output services shall pay an amount equivalent to the credit attributable to the inputs and input services used in or in relation to the manufacture of exempted goods or for provision of exempted services subject to the conditions and procedures stipulated in sub-rule (3A). Thus, the appellants having used common input services for manufacture of dutiable product as well as exempted services of trading, they are liable to reverse the credit attributable to the exempted

services viz. trading. Department has computed the demand applying the total credit availed by the appellant. If such value is to be accepted, it would lead to a situation where cenvat credit attributable to dutiable final products also would have to be reversed which is contrary to Rule 6 (3) (ii) of CCR 2004.

6. The issue is no longer *res integra* settled by series of following decisions :

- *CCE v. Reliance Industries Ltd. – 2019 (3) TMI 784-CESTAT Ahmedabad*
- *Honda Cars India Ltd. v. CGST & CE – 2020 (3) TMI 523-CESTAT Chennai*
- *CCE v. Chennai Petroleum Corporation Limited – Final Order No.40009/2020-CESTAT Chennai.*
- *Lotte India Corporation Ltd. v. The Commissioner of GST and CE – 2020 (3) TMI 307-CESTAT Chennai.*
- *E-Connect Solutions Pvt. Ltd. v. CE and CGST , Udaipur - 2020 (11) TMI 282-CESTAT New Delhi*
- *Honda Cars India Limited v. Commissioner of Central Goods and Service Tax, Customs, and Central Excise - 2021 (2) TMI 948 – CESTAT New Delhi.*
- *M/s.Deepak Fertilizers and Petrochemicals Corporatio Ltd. v. CCE & ST – 2020 (7) TMI 486 CESTAT Mumbai*
- *Aavantika Gast Ltd. v. Commissioner, CGST, Indore – 2023 (1) TMI 505-CESTAT New Delhi.*

7. Further, CBEC Circulars are in favour of the appellant and are binding on the Department. In circular No.754/70/2020-CX dated 09.10.2007, it has been clarified that sub-rule (2) and sub-rule (3) of Rule 6 of the erstwhile CCR 2002 will apply in respect of common inputs and input services and will not apply in respect of inputs used exclusively for the manufacture of exempted final products. Thus, when the Board has clarified that that Rule 6 is only for common inputs and inputs services, parallelly, the question of including input and input services exclusively used

in the dutiable goods / taxable services does not apply. The said rule is *pari materia* to Rule (6) of the CCR 2004.

8. The Board has also issued a clarification vide its circular No.868/6/2008 dated 09.05.2008 while introducing Rule 6 (3A) of CCR. Sl.No.1 of the said circular clarifies that for the purpose of calculation of amount under formula given in Rule 6 (3A), the total cenvat credit taken on inputs and input services does not include excise duty paid on inputs or service tax paid on inputs services which are used exclusively for the manufacture of exempted goods or provisions of exempted services. The Board's circulars are binding upon the department as held by the Hon'ble Supreme Court in the case of *British Machinery Supplies Co. v. UOI* – 1991 (86) ELT 449 (SC).

9. With regard to the second issue of confirmation of demand under BAS, the Ld. Counsel submitted that appellant is only contesting the penalty imposed in this regard. Appellant had paid the service tax when pointed out by the department. Therefore, penalty imposed is required to be set aside. Ld. Counsel prayed that the appeals may be allowed.

10. Ld. A.R Shri M. Ambe appeared for the Department and supported the findings in the impugned orders.

11. Heard both sides.

12. The issue is with regard to formula that has to be adopted for reversing the credit as required under Rule 6 (3) of CCR 2004. The said sub rule has already been reproduced above. The only dispute is whether the total cenvat credit on input services availed by the appellant has to be taken for

computation of amount that has to be reversed or whether the total cenvat credit availed on common input services has to be applied. This issue is no longer *res integra* and has been decided by the Tribunal in the case of *CCE & ST, Chennai Vs Chennai Petroleum Corporation Ltd.* vide Final Order No.40009/2020 dated 06.01.2020. Relevant paragraphs of the said Tribunal decision are reproduced below :

> "12.0 The first issue is with regard to whether the letter "P" used in the formula prescribed in Rule 6 (3A) (c) (iii) denotes total Cenvat credit or total credit availed on common inputs and input services. Sub-clause (c) of Rule 6(3A) states that the manufacture of goods shall determine finally the Cenvat credit attributable to exempted goods/exempted services in the manner prescribed. Thus, the formula prescribed is for arriving at the amount that is availed in respect of exempted goods and services, which has to be reversed by the assessee. The formula is not for determining the eligible credit on inputs and input services used for dutiable goods or taxable services. While appreciating this answer, we can understand that "P" denotes the total common Cenvat credit and not the total credit availed by the assessee during the financial year. This issue has been analysed by the Tribunal in the case of *CCE &ST, Rajkot Vs. M/s. Reliance Industries Ltd., [2019 (3) TMI 784 CESTAT AHMEDABAD].*
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> > "We have carefully considered the submissions made by both the sides and perused the record. The limited issue is to be decided in this case is that for the purpose of calculating the Cenvat credit for reversal in terms of Rule 6(3A) as per the formula given therein, whether the total Cenvat credit means it is including the Cenvat credit of input services exclusively used for dutiable product should be taken or total Cenvat credit of only common input service should be taken.
> >
> > From the reading of Rule 6(1), it is clear that only in respect of input or input service used in exempted goods are not allowed. That means input or input service used in taxable service/dutiable goods. Cenvat credit is allowed. Sub-rule (2) of Rule 6 is only used as an option that if any input or input services used in exempted goods, credit should not be allowed and only with this intention some mechanisms for expunging Cenvat credit attributed only to the exempted goods are provided. As per clause (b)(ii) & (iv), it is clearly provided that entire credit in respect of receipt and use of the inputs/input service is allowed when such input and input service is used in dutiable final products and taxable service. However, nowhere in Rule 6 it is provided that the input or input service used in dutiable goods shall not be allowed. The Revenue is only interpreting the term "otal Cenvat credit" provided under the formula. If the whole Rule 6(1)(2)(3) is read harmoniously and conjointly, it is clear that "Total Cenvat Credit" for

> the purpose of formula under Rule 6(3A) is only total Cenvat credit of common input service and will not include the Cenvat credit on input/input service exclusively used for the manufacture of dutiable goods. If the interpretation of the Revenue is accepted, then the Cenvat credit of part of input service even though used in the manufacture of dutiable goods shall stand disallowed, which is not provided under any of the Rule of Cenvat Credit Rules, 2004."

> 12.1 In the said case, has also considered the Notification No.13/2016-CE(NT), dated 01.03.2016. It is concluded by Tribunal that amendment made by substitution is clarificatory in nature and, therefore, applicable retrospectively. Following the said decision, we do not find any error in the view of the Commissioner (Appeals) that the computation has to be done by adopting the 'total common Cenvat credit' and not "total Cenvat credit". The first issue is held against the Revenue."

13. The Tribunal in the case of *CCE Vs Reliance Industries Ltd.* - 2019 (3) TMI 784 CESTAT Ahmedabad had considered the issue as to interpreting the term "total cenvat credit" given in the formula. It was held that whole Rule 6 (1) (2) (3) has to be read harmoniously and conjointly and it would be clear that total cenvat credit for the purpose of formula under Rule 6 (3A) is only the total cenvat credit on common input services and will not include cenvat credit on input / input services exclusively used for the manufacture of dutiable goods. If the interpretation of the Revenue is accepted, it would result in an anomaly that the cenvat credit which is availed for manufacture of dutiable goods also will get disallowed. Relevant paragraphs of the said order are noticed as under :

> **"8.** From the reading of Rule 6(1), it is clear that only in respect of input or input service used in exempted goods are not allowed. That means input or input service used in taxable service/dutiable goods, Cenvat credit is allowed. Sub-rule (2) of Rule 6 is only as an option that if any input or input services used in exempted goods, credit should not be allowed and only with this intention some mechanisms for expunging Cenvat credit attributed only to the exempted goods are provided. As per clause (b)(ii) & (iv), it is clearly provided that entire credit in respect of receipt and use of inputs/input service is allowed when such input

> and input service is used in dutiable final products and taxable service. However, nowhere in Rule 6 it is provided that the input or input service used in dutiable goods shall not be allowed. The Revenue is only interpreting the term "total Cenvat credit" provided under the formula. If the whole Rule 6(1), (2) and (3) is read harmoniously and conjointly, it is clear that "Total Cenvat Credit" for the purpose of formula under Rule 6(3A) is only total Cenvat credit of common input service and will not include the Cenvat credit on input/input service exclusively used for the manufacture of dutiable goods. If the interpretation of the Revenue is accepted, then the Cenvat credit of part of input service even though used in the manufacture of dutiable goods, shall stand disallowed, which is not provided under any of the Rule of Cenvat Credit Rules, 2004.
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> ... ...
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> **10.** From the above it can be seen that when anomaly was noticed, the Government has substituted the sub-rule (3A). The legislators very consciously substituted the Rule with intention to give a clarificatory nature to the provision of sub-rule (3A) so as to make it applicable retrospectively. It was all along not the intention of the Government to deny Cenvat credit on the input/input service even though used in the dutiable goods. Keeping the said view in mind, the substitution in sub-rule (3A) of Rule 6 was made. Therefore, the substituted provision of sub-rule (3A) shall have retrospective effect being clarificatory."

14. The said decision was appealed by the Revenue before the Hon'ble High Court of Gujarat at Ahmedabad vide R/Tax Appeal No.850 of 2019. The Hon'ble High Court vide order dated 23.01.2020 dismissed the plea of the department in regard to the issue whether Tribunal was correct in holding that total cenvat credit for the purpose of formula under rule 6 (3A) is only total cenvat credit of common input service and will not include the cenvat credit on input/input service exclusively used for manufacture of dutiable goods.

15. After appreciating the facts and applying the decision of the Tribunal in the above cases, we are of the considered opinion that the demand confirmed alleging that appellant has adopted incorrect formula requires to be set aside. The demand therefore cannot sustain and we set aside the same.

16. The second issue which arises in ST/41580/2017 is with regard to demand of service tax under BAS. Ld. Counsel has submitted that they are not contesting the liability to pay service tax or the interest thereon. It is submitted that penalty imposed in this regard under Section 76 may be set aside. On perusal of the impugned order, it is seen that the original authority has imposed an amount of Rs.42,989/- only as penalty. Further option to pay reduced penalty @ 25% of the service tax demand has also been given. Taking into consideration these aspects, we find no grounds to set aside the penalty and the same is upheld.

17. In the result, impugned orders are modified to the extent of setting aside the demand raised alleging non-adoption of correct formula for reversal of cenvat credit under Rule 6 (3) of CCR only. Appeal No.ST/41580/2017 is partly allowed with consequential relief, if any. Appeal No.ST/41582/2019 is allowed with consequential relief, if any.

(pronounced in court on 08.06.2023)

Sd/-

(M. AJIT KUMAR)
MEMBER (TECHNICAL)

Sd/-

(SULEKHA BEEVI C.S)
MEMBER (JUDICIAL)

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