CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.I

Excise Appeal No.3263 of 2012

(Arising out of MP (Dem.-19/2011) 21 of 2012 dated 02.08.2012 of Commissioner Central Excise and Service Tax, Allahabad)

M/s Hindalco Industries Ltd., **.....Appellant**
(P.O. Renukoot, Sonbhadra, U.P.231217)

VERSUS

Commissioner of Central Excise, Allahabad **....Respondent**

(38 M.G. Marg, Civil lines, Allahabad-211001)

WITH

Excise Appeal No.3429 of 2012

(Arising out of MP (Dem.-19/2011) 21 of 2012 dated 02.08.2012 of Commissioner Central Excise and Service Tax, Allahabad)

Commissioner of Central Excise, Allahabad **.....Appellant**
(38 M.G. Marg, Civil lines, Allahabad-211001)

VERSUS

M/s Hindalco Industries Ltd., **....Respondent**

(P.O. Renukoot, Sonbhadra, U.P.231217)

APPEARANCE:

Shri Atul Gupta, Advocate &
Shri Prakhar Shukla, Advocate for the Assessee
Shri Manish Raj, Authorised Representative for the Revenue

CORAM: HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NOs.70054-70055/2023

DATE OF HEARING : 22 August, 2023
DATE OF PRONOUNCEMENT : 25 August, 2023

SANJIV SRIVASTAVA:

These appeals one filed by the assessee (Appellant) (E/3263/2012) and one filed by the revenue (Respondent) (E/3429/2012) are directed against Order-in-Original No.MP (Dem.-19/2011) 21 of 2012 dated 02.08.2012 of Commissioner

Central Excise and Service Tax, Allahabad. By the impugned order following has been held:

ORDER

1. I disallow the Cenvat credit of Rs 1,54,51,005.15 (S Tax Rs 1,50,66,971.97 + Ed. Cess Rs 3,01,337.69 + S & H Ed Cess Rs 82,695.49) availed by the party on input services on the strength of supplementary invoices under rule 14 of CENVAT Credit Rules, 2004 read with proviso to section 11A (1) of the Central Excise Act, 1944 alongwith interest as provided under section 11AB of the Act as proposed in the Show Cause Notice No 06-Commr./Alld./2011 dated 22.03.11.

2. I also impose a penalty of Rs 2000/- only under rule 15 of the Cenvat Credit Rules, 2004 as applicable during the impugned period.

3. In the same way, I disallow the Cenvat credit of Rs 87,859.69 (S Tax Rs 84,915.48 + Ed Cess Rs 1976.50 + S & H Ed. Cess rs 967.71) under rule 14 of CENVAT Credit Rules, 2004 alongwith interest as proposed in the Show Cause Notice No 01/Dem/R-I/Rnkt/2011 dated 13.04.2011.

4. I also impose a penalty of Rs 87,859.69 on the party under rule 15 of the Cenvat Credit Rules, 2004 as applicable during the impugned period.

2.1 Appellant is manufacturer of excisable goods and are availing the CENVAT Credit as admissible to them in terms of CENVAT Credit Rules, 2004.

2.2 During the period from 2008-09 till December 201, Appellant received services from various contractor for provision and execution of various works such as maintenance and repair service, cleaning service, cargo handling services, recruitment agency service, site formation service.

2.3 The service providers issued bills and subsequently supplementary bills in respect of the service provided. In some

cases no service tax was charged on the original bill and in some case part service tax was charged. Subsequently service providers issue supplementary invoices/ bills and charged the uncharged portion of service tax from the appellants. Appellants paid the service tax, against the invoices/ bills and supplementary invoices/ bills.

2.4 Revenue was of the view that appellant could not have taken the credit of service tax charged on the supplementary invoices/ bills as these are not the prescribed documents for availment of CENVAT Credit. Accordingly, show cause notices dated 22.03.2011 and 13.04.2011 were issued to the appellant. Show cause notice dated 22.03.2011 was issued invoking a larger period of limitation as per proviso to sub-section (1) to section 11A, whereas show cause dated 13.04.2011 was within normal period of limitation. The show cause notice dated 22.03.2011 asked the appellant to show cause as to why the inadmissible credit of Service tax availed and utilized for payment of Central Excise duty on their final dutiable products amounting to Rs 1,54,51,005.15 (Service Tax Rs 1,50,66,971.97 + Ed. Cess Rs 3,01,337.69 + S & H Ed Cess Rs 82,695.49) may not be be demanded and recovered from along with appropriate interest under rule 14 of CENVAT Credit Rules, 2004 read with proviso to section 11A (1) & 11AB of the Central Excise Act, 1944 and penalty may not be imposed upon them under Rule 15 (2) of Cenvat Credit Rules, 2004 read with section 11 AC of the Central Excise Act, 1944 for contravention of CENVAT Credit Rules, 2002.

2.5 Both the show cause notices have been adjudicated by the impugned order.

2.6 Appellant being aggrieved by the impugned order filed the appeal, whereas revenue being aggrieved by the par of order whereby only penalty of Rs 2000 has been imposed on the appellant filed the appeal.

3.1 We have heard Shri Atul Gupta & Shri Prakhar Shukla, advocates for the appellant and Shri Manish Raj, Authorized Representative for the revenue.

3.2 Arguing for the appellants learned counsel submits:

- Supplementary invoices issued under Rule 4A of the Service tax Rules, 1994 by service providers, are proper and valid documents for availing Cenvat credit in terms of Rule 9(1)(f) of the credit rules.
- In absence of any dispute on receipt of input services by Appellant as well as tax paid nature such services utilized in manufacture of dutiable finished goods, Cenvat credit cannot be denied to Appellant in terms of the proviso to rule 9 (2) of the Credit Rules.
    - Cyber park Pvt Ltd [2023 (8) TMI 604 Cestat Allahabad
    - Polyplex Corporation Ltd. [2019 (4) TMI 123 Cestat Allahabad
    - Delphi Automotive Systems (P) Ltd. [2013 (12 TMI 156 Cestat New Delhi.
    - Secure Meters Ltd. [2010 (1) TMI 284 Cestat New Delhi
- Issue involved is no more res-integra. Restriction on availment of credit on the strength of supplementary invoices under Rule 9 (1) (b) of the credit Rules not applicable to the cases supplementary invoices issued by service providers. Instead , a specific restriction on the credit availment on basis of supplementary invoices issued by input service provider was inserted w.e.f 1.04.2011 vide Rule 9 (1) (bb) which is prospective and not applicable prior to 01.04.2011.
- Show cause notice is silent about any show cause notices issued or adjudication order passed against the input service providers whereby charge of suppression etc has been made or upheld against them hence allegation made in this respect is vague.

- ➢ Extended period of limitation is not invokable in the present case
  - Accurate Chemical Industries [2014 (300) ELT 451 (T-Del)] upheld in [2014 (310) ELT 441 (ALLD)]
  - Zyg Pharma Pvt Ltd. [2017 (358) ELT 101 (MP)]
  - Petropole India Ltd. [2016 (9) TMI 125 Cestat New Delhi.
- ➢ The demand made by the impugned order cannot be sustained either on merits or on ground of limitation.
- ➢ Appeal filed by the appellant be allowed and by the revenue dismissed.

3.3 Arguing for the revenue learned authorized representative reiterates the findings recorded in the impugned order and the grounds taken in the appeal filed by the revenue.

4.1 We have considered the impugned order along with the submissions made in appeal and during the course of arguments.

4.2 For confirming the demand Commissioner has in the impugned order observed as follows:

> "6.1 The issue for determination involved in the case is whether "supplementary invoice" issued by a service provider is a specified document for the purpose of availment of Cenvat credit as per provisions of rule 9 of the Cenvat Credit Rules, 2004. Rule 9(1)(f) provides that Cenvat credit can be taken by a manufacturer on the basis of an invoice, bill or challan issued by a provider of input service on or after 10th day of September, 2004.
>
> 6.2 Rule 9(1) of the Cenvat Credit Rules, 2004 specifies the documents on the basis of which the Cenvat credit can be availed. In rule 9(1)(b) of the said rule "Supplementary invoice issued by the manufacturer" is one of the documents on the basis of which the Cenvat credit can be availed. Here in the present case the supplementary invoices have been issued by the service provider and not by the manufacturer on which the party intends to avail Cenvat credit on input services. The intention of the legislation is very clear, only "supplementary invoice" issued by a manufacturer is eligible document for the purpose of availment of Cenvat credit not the

supplementary invoice issued by the service provider. The language of the rule is plain and simple it does not require any interpretation.

6.3 Here it is pertinent to discuss the nature of the document issued by the service provider. In the present case as admitted by the party they were receiving the taxable services of the various service providers on the presumption that the services are not taxable. It was during the course of audit of the records of the party it was found by the department that the services were taxable and then the service providers naturally had obtained the Service Tax Registration and paid the tax by raising supplementary invoice. Service Tax on the basis of such supplementary invoice was paid by the party and now they are claiming service tax credit on the basis of such so called "supplementary invoices." The conduct of the party does not appear to be bonafide in as much as it is very difficult to comprehend as to how such a big concern dealing with the Central Excise & Service Tax department and also registered in the Service Tax under section 69 of the Finance Act, 1994 was unaware about the taxability of Services received by them and that too to such a extent involving Service Tax liability of crores of rupees.

6.4 In the case of manufacturer a supplementary invoice is raised when any short payment of Central Excise duty is detected either by the party themselves or by the department. Supplementary invoice is always preceded by a duty paying invoice, the short payment of Central Excise duty of which is made good by the supplementary invoice. However there is exclusion in the Rule 9(1)(b) of the Cenval Credit Rules, 2004 that if the short payment of Central Excise duty is on account of fraud etc. no Cenvat credit shall be admissible even on the basis of Supplementary Invoice issued by a manufacturer whereas in the case of the party the service providers originally issued an invoice on which no tax was paid.

6.5 The intention of the legislation is very clear. Had there been intention to provide credit on the strength of such supplementary invoice issued by service provider it should have found place in the eligible documents under rule 9(1) of Cenvat Credit Rules, 2004 and omission in sub rule 9(1)(b) of Cenvat Credit Rules, 2004 in respect of supplementary invoice issued by a service provider also strengthens the view.

6.6 It will not be out of place to mention here that w.e.f. 01.04.2011 rule 9(1) of the Cenvat Credit Rules, 2004 has been amended by inserting rule 9(1)(bb) vide Notification No. 13/11-CE(NT) dated 31.03.11 which reads as under:-

Rule 9(1)(bb)- a supplementary invoice, bill or challan issued by a provider of output service, in terms of the provisions of Service Tax Rules, 1994 except where the additional amount of tax became recoverable from the provider of service on account of non-levy or non-payment or short-levy or short-payment by reason of fraud or collusion or willful mis-statement or suppression of facts or contravention of any of the provisions of the Finance Act or of the rules made thereunder with the intent to evade payment of service tax.

6.7 From the above insertion it is quite clear that supplementary invoice issued by a service provider was not a proper document for the purpose of availment of Cenvat Credit prior to 01.04.2011. The provisions of sub-rule 9(1)(bb) also provides an exception that if the non-levy, non-payment, short-levy or short-payment is on account of fraud etc. the Cenvat credit is not admissible on the basis of this document like in the case of supplementary invoice issued by the manufacturer.

6.8 It is also very pertinent to mention here that the supplementary invoices on the basis of which the party is claiming Cenvat credit of input services have been issued by the service provider at much later date. There is no cross reference of any earlier invoice issued by the service provider to establish any co-relation between the service provided, value of the service so provided, period during which service was provided and the actual value of service received by the party. In absence of any co-relation it is not possible to establish that the supplementary invoices issued by the service provider are only in relation to the services already provided to the party.

6.9 Apart from the fact that a supplementary invoice issued by the service provider is not a proper document under rule 9 of the Cenvat Credit Rules, 2004, rule 9(5) of the Cenvat Credit Rules. 2004 states that the burden of proof regarding admissibility of Cenvat credit shall be on the manufacturer of the final product or the provider of the output service. In the present case before me the party

has availed the Cenvat credit of input services as a manufacturer in respect of input services which were provided much before 2008 when the service provider did not pay any tax on these services. The service providers paid the service tax after 2008 and issued supplementary invoices on which the party is claiming service tax credit. As per provisions of rule 9(5) of the Cenvat Credit Rules, 2004 it is the responsibility of the party to show that the supplementary invoices are genuine and also to establish a co-relation between the supplementary invoices and the original in terms of services and the payments. The party has miserably fails to discharge this obligation.

6.10 Further admittedly the service tax was paid by the service provider only when the non- payment of the service tax was detected by the department during the course of audit and supplementary invoices were raised. In that case, if even for the sake of argument only, the contention of the party is admitted that the supplementary invoices issued by the service provider is also covered as one of the genuine documents as provided under rule 9(1)(b) of the Cenvat Credit Rules, 2004, then in that case also the case of the party gets excluded under exclusion clause of the provisions of rule 9(1)(b) of the Cenvat Credit Rules, 2004, which says that if such additional duty is paid on account of fraud, collusion, willful mis-statement or suppression of fact etc, the Cenvat credit will not be allowed on such supplementary invoices. Therefore, even if the supplementary invoices issued by the service provider, which are not covered under rule 9(1)(b) of the Cenvat Credit Rules 2004, are taken as parallel document for the purpose of availment of Cenvat credit in that case also since they fall under the exclusion category of rule 9(1)(b) of the said rules, Cenvat credit is not admissible to the party on the strength of such invoices.

6.11 The party's plea for accepting the so called supplementary invoices is an aberration of law because in the statutory frame work, supplementary invoices are not permissible and eligible appropriate documents. Notwithstanding this absolutely legally tenable proposition, if they are claiming, as they are, that the so called supplementary invoices satisfy in substance the requirement of law, they have to substantiate their claim with reference to such material, data and details as may enable the department to co-relate these invoices with the originals as also with the services provided/ received and

value of taxable services paid earlier. The party has failed to discharge this obligation. In this regard I place reliance on the following case laws:-

(I) In the case of Steel Authority of India Limited versus Commissioner, Central Excise. Raipur 2007 (208) E.L.T. 367 (Tri. - Del.)]-the Hon'ble Tribunal observed -

"Assessee failed to produce any supporting documentary evidence regarding period/duration of use of such C I/Steel rolls before sale/removal of same as waste and scrap- ***No efforts made by assessee to substantiate their claim……*** *[Emphasis supplied]*

(II) Also, in the case of WHIRLPOOL OF INDIA LTD. Versus UNION OF INDIA [2001 (137) EL.T. 42 (P&H)] the Hon'ble High Court of Punjab & Haryana at Chandigarh held that-

"34. The submission is misconceived. The petitioner has come with a complaint against the action of the authorities. ***The merits have been examined. It has failed to 6 substantiate its claim****. Thus, the relief as prayed for cannot be granted." [Emphasis supplied)*

(III) In the case of **Commissioner of Central Excise, Bangalore v. Brindavan Beverages (P) Ltd. & Ors. [(2007) 5 SCC 3881**, the Apex Court held as under:

"14. …. As no sufficient material much less any material has been placed on record to substantiate the stand of the appellant, the conclusions of the Commissioner as affirmed by the CEGAT cannot be faulted."

This judgement was also relied upon by Hon'ble Supreme Court in the case of VINOD SOLANKI Versus UNION OF INDIA [2009 (233) E.L.T. 157 (S.C.)]

6.12 Now I want to discuss the case laws cited by the party in their defence.

(I) On the issue that the input service provider paid Service Tax under suppression clause is a mere allegation and not attained finality. On this issue they have cited the following case laws:-

(i) Abdul Rasak and other Vs. Kerala Water Authority and ors. AIR 2002 SC 817..

(ii) UOI Vs. Onkar S. Kanwar-2002 (145) ELT 266 (S.C.)

(iii) Mathew M. Thomas Vs. Commissioner of Income Tax-1999 (111) ELT 4 (S.C.)

Here in all the cases the issue involved was what is the relevant date to cover the non admissibility of Cenvat credit under the exception envisaged under Rule (9)(1)(b) of the Cenval Credit Rules, 2004. Rule (9)(1)(b) of the Cenvat Credit Rules, 2004 deals with the supplementary invoices issued by the manufacturer such is not the case here. In the present case the supplementary invoices has been issued by the service provider.

(II) That invoice issued by a service provider in the present case is a proper document for availing the Cenvat credit in respect of Service Tax. On this issue they have cited the following case laws which are evidently distinguishable as facts relating to present case are distinct and different:-

(i) EBG India Pvt. Ltd., Vs. CCE, Nasik - 2009 (240) ELT 317 (Tri-Mumbai) In this case "Supplementary invoices" were issued by the manufacturer/supplier of input. In the present case the supplementary invoices were issued by the input service provider.

(ii) Sanghi Industries Ltd., Vs. CCE, Rajkot-2009 (239) ELT 349. In this case the supplementary invoices did not bear the registration No. of the assessee which was not considered as proper document as per rule 9(2) of the Cenvat Credit Rules, 2004.

(iii) Eicher Ltd, Vs. CCE, Chennai-2003 (156) ELT 485 (Tri-Chennai) Here also the supplementary invoices were raised by the input supplier on account of additional payment of Central Excise duty.

(iv) Jindal Vijay Nagar Steels Ltd., Vs. CCE, 2005 (192) ELT 862. Here also the supplementary invoices were

raised by the input supplier on account of additional payment of Central Excise duty.

(v) Secure Meters Ltd., Vs. CCE, Jaipur-11-2010 (18) STR 490 (Tri-Del.)

The issue involved in this case was that at the time of providing taxable services the service provider did not have any service tax registration. Whereas in the present case the issue involved is whether supplementary invoice issued by the service provider is a genuine document under rule 9(I) of the Cenvat Credit Rules, 2004.

6.13 Other case laws cited by the party are on the issue that Cenvat credit cannot be denied on the grounds of procedural lapses. However even in the case of CCE. Madras Vs. Home Ashok Leyland Ltd.-2001 (134) 11 647 (Madras) Hon'ble High Court of Madras has held that the substantive right conferred by Rule 57A is not to be whittled down unless the legislative intention to so whittle down has been set out expressly or is necessarily implicit in any part of the statute or the rules. In the present case before me as per rule 9(1)(b) of the Cenvat Credit Rules, 2004 there is a provision of availment of Cenvat credit on the basis of supplementary invoices issued by the manufacturer but the similar provision in respect of service provider is missing. Therefore it is implicit from the rule that supplementary invoice issued by a service provider is not a proper document specified under sub rule (I) of rule 9 of the Cenvat Credit Rules, 2004 for the purpose of availment of credit. Therefore the case laws cited by the party are not relevant in the facts and circumstances of the present case.

6.14 Therefore I am of a considered view that as per provisions of rule 9 of Cenvat Credit Rules, 2004 "Supplementary Invoice" issued by a service provider cannot be regarded as a valid document for the purpose of availment of Cenvat credit prior to 01.04.2011. The following decisions of Hon'ble CESTAT are quite relevant on this issue.

(i) Tamilnadu Electricity Board Vs. CCE Coimbatore, reported in 2000 (116) ELT 473 (Tribunal)

In para 5 of the decision Hon'ble CESTAT held as under:- *"Therefore, I find that though inputs may have suffered duty when they were received from SAIL, since the Modvat credit by appellant was taken on the strength of a document which does not qualify as a duty paying document under Rule 57G(3), therefore there is clear infringement of Rule 57G(2). Under these circumstances, I do not find any infirmity in the impugned orders und hence there is no merit in the appeal and the same is dismissed."*

The above decision has been given by the CEGAT in the context of Rule 57G(3) and Rule 57G(2) of the then Central Excise Rules, 194, but the observation of the CEGAT is quite relevant even today in so far as eligibility of specified documents for the purpose of availment of cenvat credit is concerned.

(ii) Hon'ble CESTAT in the case of M/s JSW Steel Ltd., Vs. CCE, reported in (2008)17 STT 196 (CESTAT) held that the provisions relating to supplementary invoice as contained in rule 9(1)(b) are not applicable to service tax at all.

6.15 In view of the above discussion and findings and the decisions of the Hon'ble Tribunal, I am of the opinion that the service tax credit availed and utilized by the party on the basis of the supplementary invoices is liable to be recovered under rule 14 of the Cenvat Credit Rules, 2004 readwith section IIA of the Central Excise Act. 1944 alongwith interest as provided under section 11AB of the said Act. Since the ingredient of suppression of fact, mis-representation etc. with intent to evade payment of duty is establish in both the cases as discussed in the foregoing paras, the party is also liable for penalty under rule 15 of the Cenvat Credit Rules, 2004, as applicable during the material time."

4.3 The entire case of the revenue rests on the interpretation of Rule 9 (1) of the CENVAT Credit Rules, 2004. The text of the said Rule is reproduced below

Rule 9. Documents and Accounts - *(1) The CENVAT credit shall be taken by the manufacturer or the provider of output service or input service distributor, as the case may be, on the basis of any of the following documents, namely :*

a) an invoice issued by-

i) a manufacturer for clearance of -

(I) inputs or capital goods from his factory or depot or from the premises of the consignment agent of the said manufacturer or from any other premises from where the goods are sold by or on behalf of the said manufacturer;

(II) inputs or capital goods as such;

ii) an importer;

iii) an importer from his depot or from the premises of the consignment agent of the said importer if the said depot or the premises, as the case may be, is registered in terms of the provisions of Central Excise Rules, 2002;

iv) a first stage dealer or a second stage dealer, as the case may be, in terms of the provisions of Central Excise Rules, 2002; or

b) a supplementary invoice, issued by a manufacturer or importer of inputs or capital goods in terms of the provisions of Central Excise Rules, 2002 from his factory or depot or from the premises of the consignment agent of the said manufacturer or importer or from any other premises from where the goods are sold by, or on behalf of, the said manufacturer or importer, in case additional amount of excise duties or additional duty leviable under section 3 of the Customs Tariff Act, has been paid, except where the additional amount of duty became recoverable from the manufacturer or importer of inputs or capital goods on account of any non-levy or short-levy by reason of fraud, collusion or any wilful misstatement or suppression of facts or contravention of any provisions of the Excise Act, or of the Customs Act, 1962 (52 of 1962) or the rules made there under with intent to evade payment of duty.

Explanation.- For removal of doubts, it is clarified that supplementary invoice shall also include challan or any other similar document evidencing payment of additional amount of additional duty leviable under section 3 of the Customs Tariff Act; or

c) a bill of entry; or

d) a certificate issued by an appraiser of customs in respect of goods imported through a Foreign Post Office; or

e) a challan evidencing payment of service tax by the person liable to pay service tax under sub-clauses (iii) and (iv) of clause (d) of sub-rule (1) of rule (2) of the Service Tax Rules, 1994; or

f) an invoice, a bill or challan issued by a provider of input service on or after the 10th day of, September, 2004; or

g) an invoice, bill or challan issued by an input service distributor under rule 4A of the Service Tax Rules, 1994.

4.4 From the perusal of the above rule it is quite evident that this rule provides for the documents against which the appellant could have taken the CENVAT credit. Whereas sub rule 1 (a) and (b) are with reference to the documents that are in respect of the clearance and payment of Central Excise Duty/ Countervailing duty, sub rule 1 (e), (f) and (g) prescribes the documents against which the CENVAT Credit of Service Tax could have been taken. Sub-rule 1 (b) makes the distinction between the invoices issued at the time of clearance of goods and those issued subsequently as supplementary invoices. There is no such distinction made in this regard in respect of the documents prescribed for availing the CENVAT Credit of service tax paid. Any invoice issued after 10.09.2004 by the provider of input service provider has been prescribed as valid document for availment of CENVAT Credit. The demand made against the appellant by invoking Rule 9 (1) (b) is contrary to the scheme of the Rule 9 (1). Similar view has been expressed by the tribunal in following cases:

- Usha martin Limited [2023 (5) TMI 719 Cestat Kolkata].

"Further, the issue as to whether the supplementary invoices are specified documents in terms of Rule 9(1)(f) of CCR 2004, we find that this issue is also no longer res-integra as it is settled by the decision of the co-ordinate Bench of this Tribunal in Delphi Automotive Systems (P) Ltd. vs. Commissioner of C.EX., Noida, 2016 (46) S.T.R. 369 (Tri. Del.). In Para 8 of the said decision, it has been observed that:

> *"8. Coming to the first question as to whether during the period of dispute, 'supplementary invoice' could be treated as a valid document, I find that a Division Bench of this Tribunal in the case of EBG India Pvt. Ltd. v. CCE, Nasik (supra) has held that supplementary invoice evidencing payment of additional duty amount is not to be treated on a different footing vis-a-vis the original invoice evidencing original Excise Appeal No.80 of 2011 6 payment of duty as both these documents were issued under the same provisions of law. Moreover in the Service Tax Rules, 1994 there is provision only for issue of invoice by the service provider or input service distributor and, as such, the Service Tax Rules also do not mention the issue of supplementary invoices when additional service tax is required to be paid due to any reason. In view of this, the term 'invoice' mentioned in Clauses (f) and (g) of Rule 9(1) of Cenvat Credit Rules, 2004 has to be treated including supplementary invoice, as during the period of dispute, with regard to service tax payment, the Rule 9(1) did not make any distinction between 'invoice' and 'supplementary invoice'."*

8. We also agree with the submission that during the period in dispute there was no restriction for availing cenvat credit and such credit would be admissible even assuming that the tax that has been paid by the service provider is due to deliberate evasion on his part for the period prior to 01.04.2011. The

Tribunal in Para 9 of its decision in Delphi Automotive Systems (P) Ltd., (supra), has observed that :

> *"9. As regards the restriction that the Cenvat credit of the tax paid under supplementary invoice would not be admissible when the tax paid is additional service tax not paid or short paid due to deliberate evasion, this restriction during the period prior to 1-4-2011 was only in respect of supply of inputs and capital goods as provided in clause (b) of Rule 9(1) and such restriction in supply of services was introduced only w.e.f. 1-4-2011 by inserting clause (bb) to Rule 9(1). Since Rule 9(1)(bb) does not have retrospective effect, the provisions of the same cannot be applied during the period prior to 1- 4-2011….."*

The above views have also been taken in Commissioner of Central Excise Salem v Sakthi Sugars Ltd, 2014 (36) S.T.R. 1125 (TriChennai)"

Lafarge India (P) Ltd [2019 (2) TMI 1028 Cestat Kolkata]

7. The basic dispute is whether the appellant was entitled to avail the Cenvat credit on the service tax paid by the service provider. At the time of the issue of the original invoices for the activity performed by the service provider, only the value of the service was billed. After becoming aware of the service tax liability the service provider paid the service tax liability in full along with applicable interest. Supplementary invoice was issued for recovery of such service tax paid by them from the appellant. It is to be mentioned that supplementary invoice dated 30.4.2007 was accompanied by an annexure giving the full details of the original invoices along with the service tax amounts payable on each such invoice. The payment of the service tax along with interest by the service provider by means of challans is not disputed.

8. After careful consideration of the issue we are of the view that the Cenvat credit of the service tax cannot be denied to the appellant. We find that a similar issue has come up before the

Tribunal in the case of M/s. Diamond Cements -Vs-Commissioner of Central Excise, Bhopal (Supra) in which the Cenvat credit was allowed with the following observations:-

> *"3. Revenue took objection to this by taking a view that the service provider was not registered for payment of service tax at the time of rendering the service and was raising the invoice for the consideration for the service. Consequently, invoice raised by the service provider after registration at a later date cannot entitle the appellant to take Cenvat credit. Revenue further took the view that in terms of Rule 4A of the Service Tax Rules, 1994, the service provider is required to issue the invoice within a period of 14 days from the date of completion of such service or receipt of payment whichever is earlier. In the present two instances which are the subject matter of these two appeals, show cause notices were issued and were adjudicated under separate orders in which the Cenvat credit amounts were disallowed and demanded. When the issue was challenged before the Commissioner (Appeals), through separate orders both dated 3rd June, 2010, he upheld the orders of the original authority and disallowed the Cenvat credits to the extent of Rs. 11,24,127/- and Rs. 7,04,314/- with equal amount of penalty and payment of interest. Both the orders are challenged before the Tribunal mainly on the following grounds :*
>
> *(i) The service tax stands paid by the service provider and subsequently invoices have been issued which are clearly relatable to the original invoices on which the consideration for the service was recovered. Since the service tax amounts have been duly paid, the Cenvat credit thereof should be allowed to the appellant.*
>
> *(ii) The supplementary invoice raised by the service provider is on par with the original invoice as has been held by various judicial pronouncements. Further, since there is no record of any proceedings initiated by the Revenue against*

service provider in which there are allegations of suppression against them, there is no ground to deny the Cenvat credit availed on the basis of the supplementary invoices. They have also cited the following case laws in their support :

(a) Secure Meters Ltd. v. CCE - 2010 (18) S.T.R. 490 (Tri.-Del.).

(b) Delphi Automotive Systems Pvt. Ltd. v. CCE - 2013-TIOL-1793- CESTAT-DEL = 2016 (46) S.T.R. 369 (Tri.-Del.).

4. I have heard ld. Advocate Ms. Sukriti Das for the appellant and ld. DR Shri M.R. Sharma for the respondent.

5. The short point involved in the present two appeals is the availment of Cenvat credit by the appellant on the basis of supplementary invoices issued by the service provider. The service provider issued invoices to recover the value of the taxable service initially. It is also on record that he has issued supplementary invoices after getting himself registered and payment of service tax. Such supplementary invoices have also been raised well after 14 days limit laid down by Rule 4A of Service Tax Rules, 1994.

6. It is not disputed that the service provider has raised the invoice for recovery of service tax. There is also no dispute that these service tax amounts which are relatable to the service rendered by service provider to the appellant. Based on such supplementary invoices the Cenvat credit has been availed by the appellant on cargo handling services which have been used by the appellant. The main lacuna based on which the authorities below have ordered for recovery of the Cenvat credit is that the service provider was not registered at the time of issue of the original invoice. They have got themselves registered at a later date and issued supplementary invoices well after time limits specified in Rule 4A. But I find that Cenvat credits stand allowed by the Tribunal in the case laws cited by the appellant under

identical circumstances. In the case of Secure Meters Ltd. (supra) which is on identical facts to the one in present appeals Tribunal has held as follows.

"3. I have carefully considered the submissions from both the sides and perused the records. In this case, there is no dispute about the fact that the appellant had received certain taxable services from M/s. Mother Power House Pvt. Ltd. and Vision Tech, during the period from December, 2003 to December, 2004, while at that time, the service providers i.e. M/s. Mother Power House Pvt. Ltd. and Vision Tech. were not registered and the invoices issued by them did not mention any Service Tax registration no. That they subsequently took the service tax registration and paid Service Tax under supplementary invoice dated 14-9-2004, 23-12-2003 and 23-12-2004 is also not under dispute. There is also no dispute that input services have been used by the appellant for providing output services which are taxable. In view of this, it is not correct to deny the service tax credit on the basis of the above-mentioned supplementary invoices, just because at the time of receipt of the input services, the input service providers were not registered and had not mentioned Service Tax registration no. in the invoices. When the receipt of input services is not disputed and the fact that the input service had been used for providing the taxable output services is not disputed, the credit of Service Tax on the input services even if paid subsequently under supplementary invoices, cannot be denied. The impugned order, therefore, is not sustainable and the same is set aside. The appeal is allowed with consequential relief".

7. In the case law of Delphi Automotive Systems (P) Ltd. (supra) it has been clearly held that supplementary invoices are to be treated as valid documents for availing Cenvat credit. I find no reason to take a different view in the

present appeals. Consequently, appeals are allowed and the impugned orders are set aside."

9. Our views are further fortified by the decision of the Madras High Court in the case of JSW Steel (Supra) wherein the Hon'ble High Court also allowed the Cenvat credit under similar circumstances with the following observations.

"15.5 Having said so, we notice that Rule 4A of the Service Tax Rules, 1994, inter alia, at the relevant time, required the provider of taxable service, to issue, not later than fourteen days from the date of provisioning of taxable service, an invoice, bill or challan. The details, which were to be provided in such an invoice, bill or challan, are also set out in the Rule.

15.6 A bare perusal of the Rule would show that the obligation, in that behalf, essentially rests on the service provider. The Rule does not advert to any consequences, in case issuance of invoice, bill or challan is delayed. The period provided appears to be directory and not mandatory. Nothing to the contrary has been articulated by the Revenue.

15.7 Furthermore, even in the grounds raised in the appeal, the Revenue, apart from articulating that the Tribunal failed to take into account the fact that the assessee had claimed CENVAT credit based on ineligible documents, it, sought to emphasise the factum of delay in the claim being made without adverting to the consequences of such delay. The delay, in our view, in this case, has been broadly explained by the assessee. In one case, the assessee could not claim CENVAT credit till such time it was served with an invoice, while in other case, it claimed credit only after it had paid service tax on the basis of reverse charge. Going by these peculiar circumstances, arising in the instant case, we are of the view, that the delay involved cannot be categorised as an inordinate period of

delay, as was sought to be conveyed by the Revenue, via its averments made in the appeal.

15.8 In these circumstances, we are of the view, as indicated above, question of law No. (iii), if at all, would have to be answered in favour of the assessee and against the Revenue.

16.Accordingly, both the appeals filed by the Revenue were dismissed; the impugned judgment of the Tribunal is sustained. Further, given the facts and circumstances of the case, there shall be no order as to costs".

4.5 The Commissioner has in his order referred to rule 9 (1) (bb) inserted with effect from 01.04.2011 to justify the invocation of Rule 9 (1) (b) for confirming the demand against the appellant. The above argument is devoid of any merits. Prior to 01.04.2011 service tax was payable only after receipt of consideration by the service provider. Rule 6 (1) of the Service tax Rules, 1994 was amended to provide for payment of service tax on the accrual basis instead of on the receipt basis i.e. service tax became payable, immediately on the issuance of the invoice evidencing the provision of taxable service by the service provider. The text of Rule 6 (1) prior to its amendment by Notification No 3/2011-ST dated 01.03.2011 is reproduced below:

"Rule 6 Payment of service tax. *-*

(1) The service tax shall be paid to the credit of the Central Government, -

(i) by the 6th day of the month, if the duty is deposited electronically through internet banking; and

(ii) by the 5th day of the month, in any other case,

immediately following the calendar month in which the payments are received, towards the value of taxable services :

Provided that where the assessee is an individual or proprietary firm or partnership firm, the service tax shall be paid to the credit of the Central Government by the 6th day of the month if the duty is deposited electronically through internet banking, or, in any other case, the 5th day of the month, as the case may be, immediately following the quarter in which the payments are received, towards the value of taxable services :

Provided further that notwithstanding the time of receipt of payment towards the value of services, no service tax shall be payable for the part or whole of the value of services, which is attributable to services provided during the period when such services were not taxable :

Provided also that the service tax on the value of taxable services received during the month of March, or the quarter ending in March, as the case may be, shall be paid to the credit of the Central Government by the 31st day of March of the calendar year.

Explanation.- For the removal of doubts, it is hereby declared that where the transaction of taxable service is with any associated enterprise, any payment received towards the value of taxable service, in such case shall include any amount credited or debited, as the case may be, to any account, whether called "Suspense account" or by any other name, in the books of account of a person liable to pay service tax"

Following amendments were made in the said rule by the Notification No 3/2011-ST dated 01.03.2011.

"4. In the said rules, in rule 6,

(i) in sub-rule (1),-

(a) for the words, "payments are received, towards the value of taxable services", the words "service is deemed to be provided as per the rules framed in this regard" shall be substituted;

(b) in the first proviso, for the words, "payments are received, towards the value of taxable services", the words "service is deemed to be provided as per the rules framed in this regard" shall be substituted;

(c) the second proviso shall be omitted;

(d) for the third proviso, the following shall be substituted, namely:

- "Provided also that the service tax on the service deemed to be provided in the month of March, or the quarter ending in March, as the case may be, shall be paid to the credit of the CentraGovernment by the 31 day of March of the calendar year.";

(e) after the third proviso, the Explanation shall be omitted."

Simultaneously the CENVAT Credit Rules,2004 were also amended by Notification No 13/2011-CE (NT) dated 01.03.2011 inserting Rule 9 (1) (bb) in the said rules as follows:

"(bb) a supplementary invoice, bill or challan issued by a provider of output service, in terms of the provisions of Service Tax Rules, 1994 except where the additional amount of tax became recoverable from the provider of service on account of non-levy or non-payment or short-levy or short-payment by reason of fraud or collusion or wilful mis-statement or suppression of facts or contravention of any of the provisions of the Finance Act or of the rules made thereunder with the intent to evade payment of service tax."

Above two amendments were made with effect from 01.04.2011. As the manner of payment of service tax was made on the accrual basis with effect from 01.04.2011, which was akin to the what had been provided in respect of the goods, Rule 9 (1) (bb) was a natural consequence to align the CENVAT Credit Rules in respect of services and goods. It is the first time that CENVAT credit rules made distinction between the Invoice and Supplementary invoices in respect of service tax paid. Hence

order of Commissioner drawing support from newly inserted rule 9 (1) (bb) to apply the Rule 9 (1) (b) for denying the credit availed by the appellant cannot cannot be sustained.

4.6 In view of the discussions as above we do not find any merits in the impugned order denying the credit on the supplementary invoices evidencing the payment of service tax for the period prior to amendments made in the CENVAT Credit Rule, 2004 by way of insertion of Rule 9 (1) (bb) with effect from 01.04.2011. As we decide the issue on merits we are not taking up any submissions made by the appellant in respect of invocation of extended period of limitation. As we set aside the order disallowing the CENVAT Credit, the order demanding the interest and for imposition of penalty to will be set aside.

4.7 As we have set aside the demands for Cenvat credit, interest and penalty the appeal of revenue will be dismissed.

5.1 Appeal filed by the appellant E/3263/2012 is allowed.

5.2 Appeal filed by the revenue E/3429/2012 is dismissed.

(Pronounced in open court on-25/08/2023)

Sd/-
(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

Sd/-
(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

akp