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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI

REGIONAL BENCH - COURT NO. I

Service Tax Appeal No. 86550 of 2017

(Arising out of Order-in-Original No. 03/ST/NGP-II/2017/C dated 24.02.2017 passed by the Commissioner of Customs, Central Excise & Service Tax, Nagpur-II)

M/s SMS Ltd. **.... Appellant**
(Formerly known as M/s SMS Infrastructure Ltd.)
Plot No. 20, S.T.P.I., IT Park, Gayatri Nagar,
Parsodi, Nagpur – 440 022

Versus

Commissioner of Central Excise & Service Tax, Nagpur-II **.... Respondent**
Kendriya Utpad Shulk Bhavan, Telangkhedi Road,
Civil Lines, Nagpur – 440 001

WITH

Service Tax Appeal No. 86072 of 2018

(Arising out of Order-in-Original No. 19/ST/C/2017/NGP-I dated 20.12.2017 passed by the Commissioner of CGST & Central Excise, Nagpur-I)

M/s SMS Ltd. **.... Appellant**
(Formerly known as M/s SMS Infrastructure Ltd.)
Plot No. 20, S.T.P.I., IT Park, Gayatri Nagar,
Parsodi, Nagpur – 440 022

Versus

Commissioner of CGST & Central Excise, Nagpur-I **.... Respondent**
Kendriya Utpad Shulk Bhavan, Telangkhedi Road,
Civil Lines, Nagpur – 440 001

Appearance:

Shri Rohan Shah, Sr. Advocate a/w Ms. Meetika Baghel, Advocate for the Appellants

Shri Piyush Badhe Barasu , Authorized Representative for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. M.M. PARTHIBAN, MEMBER (TECHNICAL)

FINAL ORDER NO. A/85088-85089/2024

Date of Hearing: 19.10.2023

Date of Decision: 19.02.2024

Per: M.M. Parthiban

Service Tax appeals in Appeal No. 86550 of 2017 assailing the Order-in-original No. 03/ST/NGP-II/2017/C dated 24.02.2017[1] and Appeal No. ST/86072/2018 assailing the Order-in-Original No. 19/ST/2017/NGP-I dated 20.12.2017[2] have been filed by M/s SMS Limited (formerly known as SMS Infrastructure Limited), Plot No.20, S.T.P.I. IT Park, Gayatri Nagar, Parsodi, Nagpur (herein after, in short, referred to as 'the appellants') before this Tribunal.

2.1 Briefly stated, the facts of the case are that the appellants herein is engaged in providing taxable services such as Works Contract service, Business Auxiliary Service, Maintenance or Repair Service, Mining service etc. under various sub–clauses of Section 65 (105) of the Finance Act, 1994 (for the period prior to 01.07.2012) and under Section 65B(51) ibid, subsequent to the introduction of negative list regime, for which they were registered with the Service Tax Department and were filing periodical returns. Apart from providing the taxable services, the appellants are also providing exempted services such as construction of public roads, Bridges, services by way of access to roads on payment of toll charges etc., and trading of goods. The appellants were availing Cenvat credit on inputs, capital goods and inputs services under Cenvat Credit Rules, 2004.

2.2 During the course of audit of the records of the appellants it was observed by the Department that the appellants were availing Cenvat credit of service tax paid on input services which were used by them for provision of taxable output services as well as exempted output services, and it was claimed by the department that no separate records regarding receipt and utilisation of these common services were maintained by the appellants. The appellants had responded to the allegations of the Department raised in the audit, vide letters dated 24.02.2014, 16.09.2014 stating that no Cenvat credit has been taken by them for input services which are wholly pertain to exempted sites or exempted services, and they had taken Cenvat credit on input services which pertain to taxable sites or taxable services; they maintain separate project wise accounts and accounted the Cenvat credit related to projects and their headquarters office (HO) separately; in respect of inputs

[1] First impugned Order
[2]Second impugned Order

services related to multiple projects, they have segregated the same by apportioning the common input Cenvat credit based on the turnover of the exempted and taxable projects, at their HO. The appellants had subsequently reversed that portion of Cenvat credit availed by them on the common input services, which was attributable to the common input services used for providing exempted services, for a total amount of Rs.1,04,52,325/- under protest on various dates and informed the same to the Department.

2.3 However, the Department did not accept these submission of the appellants and accordingly, show cause proceedings were initiated on the ground that the appellants were not allowed to take Cenvat credit on such quantity of input services which are used in or in relation to the provision of exempted services, under Rule 6(1) of the Cenvat Credit Rules, 2004, except in circumstances mentioned in Sub–rule (2) to Rule 6 ibid, whereby the appellants are required to maintain separate accounts for the receipt and consumption of input services meant for use in providing output services and exempted services and take Cenvat credit only on that the quantity of services which payable. The Show Cause Notice (SCN) dated 17.06.2016 covering the period from Financial Year (FY) 2011–2012 to the financial year 2014-2015 was adjudicated by the original authority in the first impugned order dated 24.02.2017; and in respect of SCN dated 24.02.2017 covering the financial year 2015-2016 was also adjudicated by the original authority in the second impugned order dated 20.12.2017, confirming the adjudged demands being the amount payable in terms of Rule 6 (3) (i) of the Central Credit Rules, 2004 and demanding the same under Rule 14 ibid, besides recovery of interest and imposition of penalty under Rule 15(3) ibid read with Section 78 of the Finance Act, 1994. Being aggrieved by the aforesaid impugned orders, the appellants have filed these appeals before this Tribunal.

3.1 Learned Advocate for the Appellants had submitted that the appellants were providing both taxable and exempt services. The taxable services provided by the appellants constitute (i) Works Contract Services (ii) Business Auxiliary Services (iii) Maintenance or Repair Services, and (iv) Mining Services; whereas, the exempt services provided by the appellants are (i) construction of public roads (ii) construction of bridges (iii) services by way of access to roads on payment of toll charges, and (iv) trading of goods. He further submitted that in relation to input services which were received and

utilised solely for exempt services, the appellants did not claim/avail Cenvat credit at all, and this position is not contentious. Further, in relation to input services that were received and utilised solely for taxable services, the appellants had availed Cenvat credit. As regards, common input services used for both taxable and exempt services, the appellants have segregated the same by apportioning to various projects and the head office. These common input services are primarily in the nature of man power supply services, security services, telephone services, legal consultancy services etc. The Cenvat credit amount in respect of such services were apportioned between the taxable sites/projects and exempt sites/projects on the basis of the turnover of each project. Learned Advocate also submitted that out of the entire pool of common input services amounting to Rs.3,40,41,460/- (Rs. 2,55,23,958/- for FY 2011-12 to FY 2014-15 and Rs. 85,17,502/- for FY 2015-16) received by the appellants, the amount of Cenvat credit of Rs.1,99,92,125/- (Rs. 1,50,71,633/- for FY 2011-12 to FY 2014-15 and Rs.49,20,492/- for FY 2015-16) had not been availed by the appellants at the outset; and Rs.1,40,49,355/- (Rs. 1,04,52,325/- for FY 2011-12 to FY 2014-15 and Rs. 35,97,010/- for FY 2015-16) which had been availed initially, was subsequently reversed by the appellants and the same was communicated to the Department under the cover of letters dated 23.01.2015, 23.09.2015, 27.10.2015 and 31.10.2015 along with copies of the journal vouchers, evidencing such reversals of Cenvat credit. Therefore, he submitted that the appellants had not availed any Cenvat credit whatsoever in respect of common services, as alleged in the show cause and the adjudication proceedings.

3.2 In support of their stand, Learned Advocate has relied upon the following case laws, to state that the provisions of Rule 6(3)(i) of Cenvat Credit Rules, 2004, cannot be foisted on the appellants by the Department, as these can be availed at the option of the assessee.

(i) *Hamdard (Wakf) Laboratories Vs. The Commissioner, Customs, Central Excise & Service Tax, Ghaziabad* – 2021 (11) TMIL 299 – CESTAT Allahabad

(ii) *Responsive Industries Ltd. and Axiom Cordages Ltd. Vs. Commissioner of Central Excise, Thane-II* – 2022 (8) TMI 639 – CESTAT Mumbai

Further, Learned Advocate has also relied upon the judgement of Hon'ble Supreme Court in the case of *Chandrapur Magnet Wires (P) Limited Vs. Collector of Central Excise, Nagpur*– 1995 (12) TMI 72 Supreme Court, to state

that in a situation where the Cenvat credit alleged to have been wrongly availed, when reversed, it is in law has to be considered as if no credit is availed.

3.3 On the above basis, the learned Advocate claimed thatthe impugned orders are unsustainable and bad in law. In view of the aforesaid submissions and on the basis of the additional written paper books, learned Advocate prayed that the appeals filed by the appellants may be allowed by setting aside the impugned orders.

4.1 Learned Authorised Representative (AR), appearing for the Revenue reiterated the findings in both the impugned orders, and stated that the invoices of the input services availed by the appellants are of three types, namely one with respect to (i) taxable site, second one with respect to (ii) non-taxable/exempt sites and the other in respect of (iii) Head Office (HO); appellants have not provided any details of the sites which are termed as non-taxable/exempt sites. From the above, he stated that the invoices with respect to input services in respect of HO definitely relate to consumption of services which are used both for provision of taxable services as well as exempt services. Thus learned AR claimed that the availment of Cenvat credit on common input services is illegal and the same has been correctly demanded in the impugned orders by the learned Commissioner.

4.2 Learned AR further submitted that the appellants has not followed the procedure prescribed under Rule 6(3A) of the Central Credit Rules, 2004, as the statue makes them incumbent to follow the prescribed procedure as per Rules 6(2) and 6(3) ibid. He also stated that the appellants' claim that the entire Cenvat credit used for the exempt projects/ sites having been reversed would tantamount to non-availing of Cenvat credit cannot be accepted, as it is not as per prescribed procedure. The only option given under Rule 6(3)(i) ibid, which is free from any conditions attached thereto, is the proper procedure to be followed by the appellants and the Revenue is within it's right to recover the ineligible Cenvat credit and as such the impugned orders are legally sustainable and the appeals filed by the appellants are required to be dismissed.

5. Heard both sides and perused the records of the case and the additional paper books filed by both sides.

6. The issues that require our consideration, in brief, are as below:

(i) whether the appellants have availed credit of input services used in the provision of exempted services; and whether the appellants have maintained separate accounts of the same in terms of the Cenvat Credit Rules, 2004;

(ii) whether the appellants had incorrectly availed and utilised CENVAT credit; and if so, in such case, the reversal of credit claimed by the appellants would suffice in the facts and circumstances of the case;

(iii) whether the appellants are liable to pay the amounts demanded along with interest and penalty under the said two impugned orders.

7. In order to appreciate the various issues relating to availment of Cenvat credit, we find that it is necessary to have a look at the provisions of Cenvat Credit Rules, 2004 as it stood during the disputed period. The disputed period in both the SCNs dated 17.06.2016 and 24.02.2017 relate to FY 2011-12 to 2015-16. Sub-rules (2) and (3) to Rule 6 ibid was amended vide Notification No.13/2016-C.E. (N.T.) dated 01.03.2016, to be introduced with effect from 01.04.2016. Hence, for the purpose of these appeals before us, the relevant legal provisions of Rule 6 ibid, is as it stood prior to the above amendment. The extract of the relevant legal provisions are given below:

*"**Obligation of a manufacturer or producer of final products and a [3][provider of taxable output] service.***

6 . (1) The CENVAT credit shall not be allowed on such quantity of input used in or in relation to the manufacture of exempted goods or for provision of exempted services, or input service used in or in relation to the manufacture of exempted goods and their clearance upto the place of removal or for provision of exempted services, except in the circumstances mentioned in sub-rule (2):

(2) Where a manufacturer or provider of output service avails of CENVAT credit in respect of any inputs or input services and manufactures such final products or provides such output service which are chargeable to duty or tax as well as exempted goods or services, then, the manufacturer or provider of output service shall maintain separate accounts for—

(a) the receipt, consumption and inventory of inputs used—

(i) in or in relation to the manufacture of exempted goods;

(ii) in or in relation to the manufacture of dutiable final products excluding exempted goods;

(iii) for the provision of exempted services;

(iv) for the provision of output services excluding exempted services; and

(b) the receipt and use of input services—

(i) in or in relation to the manufacture of exempted goods and their clearance upto the place of removal;

(ii) in or in relation to the manufacture of dutiable final products, excluding exempted goods, and their clearance upto the place of removal;

(iii) for the provision of exempted services; and

[3] Substituted for "provider of taxable service" vide notification No.28/2012-C.E.(N.T) dt. 20.06.2012 w.e.f. 01.07.2012

(iv) for the provision of output services excluding exempted services,

and shall take CENVAT credit only on inputs under sub-clauses (ii) and (iv) of clause (a) and input services under sub-clauses (ii) and (iv) of clause (b).

(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 seven per cent of value of the exempted services; or

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

(iii) maintain separate accounts for the receipt, consumption and inventory of inputs as provided for in clause (a) of sub-rule (2), take CENVAT credit only on inputs under sub-clauses (ii) and (iv) of said clause (a) and pay an amount as determined under sub-rule (3A) in respect of input services.

The provisions of sub-clauses (i) and (ii) of clause (b) and sub-clauses (i) and (ii) of clause (c) of sub-rule (3A) shall not apply for such payment:

***Provided** that if any duty of excise is paid on the exempted goods, the same shall be reduced from the amount payable under clause (i):*

***Provided further** that if any part of the value of a taxable service has been exempted on the condition that no CENVAT credit of inputs and input services, used for providing such taxable service, shall be taken then the amount specified in clause (i) shall be seven 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 (i) shall be an amount equal to 2 per cent of value of the exempted services.*

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

Explanation II.—For removal of doubt, it is hereby clarified that the credit shall not be allowed on inputs used exclusively in or in relation to the manufacture of exempted goods or for provision of exempted services and on input services used exclusively in or in relation to the manufacture of exempted goods and their clearance upto the place of removal or for provision of exempted services.

Explanation III.—No CENVAT credit shall be taken on the duty or tax paid on any goods and services that are not inputs or input services."

8.1. As per above legal provisions, we find that Rule 6 of the Cenvat Credit Rules, 2004 deals with the obligations of a provider of taxable and exempted services. A plain reading of the above provisions indicate that while Rule 6(1) ibid provides that the manufacturer or provider of output service is not entitled for the credit of such quantity of input or input services which are used in the manufacture of exempted goods or exempted service except in the circumstances mentioned in the sub-rule (2) of the said Rules. Sub-rule (2) of

Rule 6 ibid provides for maintenance of separate records in respect of inputs, input services substantiating use of input and input services for taxable and exempted goods or services. Sub-rule (3) of Rule 6 ibid provides that in case separate accounts are not maintained, the manufacturer or provider of services shall follow either of the conditions stipulated in sub-rule (3) of Rule 6 ibid. Further, Rule 6(2) ibid *inter alia* provides that if input services are used for provision of output services which are chargeable to tax as well as exempted services, then separate accounts are to be maintained for receipt and use of input services and the provider shall take credit only on input services used for dutiable output services.

8.2 Rule 6(3) of the Cenvat Credit Rules, 2004 is relevant for the purpose of this case and it is a 'not withstanding' clause; this sub-rule specify that notwithstanding the provisions contained in the sub-rule (1) and (2) of Rule 6, the provision of Rule 6(3) would apply to the effect that a provider of output services who opts not to maintain separate accounts, as required under Rule 6(2), should follow any one of the options provided under Clauses (i) to (iii) there under, as applicable to him. Clause (i) provides for the option of paying an amount equal to prescribed percentage of the value of the exempted services. In this regard, we find that the Hon'ble High Court of Bombay in the case of *Indoswe Engineers Private Limited Vs. Union of India* – 1989 (41) E.L.T. 217 (Bom.) had explained about the effect of 'notwithstanding clause' and the relevant paragraph of the said judgement is extracted below:

> *"10. It may be pertinent to note that Rule 56-A (Notification No. 91767) starts with a non-obstante clause, viz., "Notwithstanding anything contained in the rules". This would indicate that whatever that might be contained in any other Rules, Rule 56-A (Notification No. 91/67) would operate on its own. The moment that result is achieved, full effect will have to be given to what is stated in Rule 56-A [Notification No. 91/67). Digvijay Cement v. Union of India, 1986 (25) E.L.T. 879 (902)]. In our view, unless a Notification contains a specific condition that the benefit thereunder is barred if a benefit is taken under the other provision or Notification, the assessee would be entitled to both the benefits. …"*

8.3 Notification No.13/2016-C.E. (N.T.) dated 01.03.2006 was amended with effect from 01.04.2016, as a part of Union Budget proposals for the financial year 2016-17. It is pertinent to note that after the said amendment the only change that could be seen in respect of unamended sub-rule (3) to Rule 6 ibid is to the extent of payment in respect of exempted goods produced or exempted services provided under Rule 6(1) which states that Cenvat Credit

shall not be allowed on inputs/input services exclusively used for providing exempted services. The Ministry of Finance, Tax Research Unit of the CBEC in the instructions issued to the field formations vide D.O.F.No.334/8/2016-TRU dated 29.02.2016, had explained about the above amendment and it has been stated as follows:

> *…2) The CENVAT Credit Rules, 2004 are being amended, so as to improve credit flow, reduce the compliance burden and associated litigations, particularly those relating to apportionment of credit between exempted and non-exempted final products / services. Changes are also being made in the provisions relating to input service distributor, including extension of this facility to transfer input services credit to outsourced manufacturers, under certain circumstances. The amendments in these Rules will also enable manufacturers with multiple manufacturing units to maintain a common warehouse for inputs and distribute inputs with credits to the individual manufacturing units.*

8.4 Thus, it could be concluded that the changes post 01.04.2016 has also been brought with an objective of facilitating the manufacturers, service providers to avail the Cenvat credit by reducing the compliance burden and associated litigations, even though this is not applicable to the case in hand.

8.5. From the above analysis of the legal provisions of Rule 6 ibid, as it stood during the relevant time of the disputed period (prior to the amendment brought w.e.f. 01.04.2016), we find that the appellants was allowed to maintain separate accounts for the receipt and use of input services, used (i) for the provision of 'exempt services' and (ii) for the provision of output services excluding 'exempt services', and take credit of input services used in the provision of taxable output services other than the 'exempt services', which is independent of the optional provision under Sub-rule (3) of Rule 6 ibid.

8.6. We also find that several exemption entries were provided under Notification No. 25/2012-Service Tax dated 20.06.2012, extending full exemption from payment of service tax on the following:

> 12A. Services provided to the Government, a local authority or a governmental authority by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of –
> (a) a civil structure or any other original works meant predominantly for use other than for commerce, industry, or any other business or profession;
> (b) a structure meant predominantly for use as (i) an educational, (ii) a clinical, or(iii) an art or cultural establishment; or
> (c) a residential complex predominantly meant for self-use or the use of their employees or other persons specified in the Explanation 1 to clause (44) of section 65 B of the said Act; under a contract which had been entered into prior to the 1st March, 2015 and on which appropriate stamp duty, where applicable, had

been paid prior to such date:provided that nothing contained in this entry shall apply on or after the 1st April, 2020;

13. Services provided by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of,-
(a) a road, bridge, tunnel, or terminal for road transportation for use by general public;
(b) a civil structure or any other original works pertaining to a scheme under Jawaharlal Nehru National Urban Renewal Mission or Rajiv Aawas Yojana;
(ba) a civil structure or any other original works pertaining to the 'In-situ rehabilitation of existing slum dwellers using land as a resource through private participation" under the Housing for All (Urban) Mission/Pradhan Mantri Aawas Yojana, only for existing slum dwellers."
(bb) a civil structure or any other original works pertaining to the Beneficiary led individual house construction / enhancement under the Housing for All (Urban) Mission/Pradhan Mantri Aawas Yojana;"; …

We also find from the records that the appellants have provided for various periods the list of projects/sites/contracts which are taxable services and exempt services besides the trading activity and the month-wise Cenvat credit involved in input services vide their letter 24.02.2014 addressed to the department in replying to the audit objections raised in this regard. To illustrate, in respect of Cenvat credit relating to the period from April, 2011 to September, 2011, the appellants had given a list of 31 projects, out of which 18 projects are taxable, 12 are non-taxable and 1 relating to trading activity. The total amount of Cenvat credit involved and the split up figures for the amount relating to Cenvat credit in respect of exempt/non-taxable projects, which have not been taken and the Cenvat credit relating to taxable projects, which they have taken was provided along with the figures provided in their periodical ST-3 returns and reconciliation of those figures were also explained in the said letter dated 24.02.2014. From the above facts, we find that it cannot be said that not even single piece of evidence was submitted by the appellants regarding the nature of projects and did not maintain separate accounts for the exempt services taxable services, as held by the original authority in the impugned orders. Inasmuch as the Cenvat credit amount relating to exempt services/projects, taxable services/projects and trading activity, having been separately accounted for in the books of accounts by the appellants, it can be concluded that the appellants have satisfied the requirement of maintaining separate accounts for 'receipt and use' of input services in terms of the Cenvat Credit Rules, 2004.

8.7. We also find that our above views have been duly supported by the Co-ordinate Bench of this Tribunal who had examined the issue of the admissibility of Cenvat credit in similar cases where the inputs and/or input services are used in manufacture/provision of dutiable as well as exempted products/services. The Co-ordinate Bench in its Final Order No.A/85696-85698/2022 dated 12.08.2022 in the case of *Responsive Industries Ltd. and Axiom Cordages Ltd. (supra)* had examined the above issue in respect of the appellant who had reversed the Cenvat credit in respect of exempt services, by holding that inasmuch as the quantum or method adopted by the appellant was not questioned by the department, the demand of Cenvat credit cannot be sustained. The relevant paragraphs of the case are extracted and given below:

> *"22. We find, on-going through the records of the case and rival contentions, that the appellants claim that they have maintained separate records; they have not availed credit on common inputs or services; Rule 6 is applicable only in the case where the Appellants had availed Cenvat credit on the inputs and input services pertaining to the exempted and dutiable goods/services; Rule 6(3) is not applicable to the present case; demand of duty at the rate of 5% or 6% was incorrect; they had made reversal of this availed Cenvat credit of the common inputs and/or services, used in the manufacture of both dutiable and the exempted excisable goods; reversal of Cenvat credit would mean non-availment of such credit in the ratio of the decision of the Supreme Court in Bombay Dyeing & Manufacturing Company, 2007 (8) SCC 177 and the decision of the Bombay High Court in Steelco Gujarat Limited, 2012 (285) ELT 161. These decisions enunciated the proposition that reversal, made prior to its utilization, would mean non-availment of such credit; Rule 6(3)(1) of the Cenvat Credit Rules, 2004 would come into play only when a manufacturer did not wish to comply with Rule 6(1) thereof by not making reversal of the availed Cenvat credit.*
>
> *23. Ongoing through the averments of the appellants and the case law cited and paraphrased as above, we find, in the light of judicial pronouncements it is clear that*
>
> > *(i). Rule 6 lays down the obligations of the manufacturer of dutiable and exempted goods and provider of taxable, and exempted services; Rule 6 (1) and (2) Provide for different situations;*
> >
> > *(ii). Rule (3) starts with a non estante clause; it begins with the words 'notwithstanding' and refers to Sub-Rules (1) and (2) of Rule 6 of CCR, 2004; once the conditions stipulated in Sub-Rule (3) are complied with, the provisions of Sub-Rule (1) and (2) will not be applicable; sub-Rule (3) clearly provides that if the provider of output service does not opt to maintain separate accounts, he should comply with the provision of Rule 6(3)(c) of the said Rules;*
> >
> > *(iii). Reversal amounts to non availment of credit*

(iv). It is not open for the revenue to thrust upon the assessee the choices available under Sub-Rule (3)

(v). It is not the intention of the legislature to demand huge amounts of credit disproportionate to the credit availed on exempted goods.

We find that the department has heavily relied upon the judgment of Mumbai High Court in the case of Nicholas Piramal (Supra). It can be seen that the judgments cited above are subsequent to this judgment and are of recent period. The decision of Principal Bench in the case of M/S Agrawal Metal Works Pvt Ltd (supra), flowing the decision of Hon'ble High Court of Telangana in the case of Tiara Advertising (supra), being the latest. It appears that Courts and Tribunals were consistent in following the principles listed above. Therefore, we are of the considered opinion that these judgments are to be followed and we do so.

24. In addition to the above legal issue, we find, in the factual matrix of the case, that the appellants have submitted to the Audit party as well as the adjudicating authority that process involved in the manufacture of goods respectively i.e. coated cotton fabrics (deluxe) by M/s Responsive Industries and Hawser Fishing Net by M/s Axiom Cordages Ltd did not involve the raw material which is disputed to have been a common input by the Department. We find that the appellants have given a detailed submission on the process of manufacture of the impugned goods. We find that the learned adjudicating authority has not gone into the submissions and has simply brushed aside the arguments of the appellant saying that understandably, the raw material used is common. We find that the Department has not taken any steps to negate the claims of the respective appellants. No Panchnama indicating the process of manufacture has been drawn, in the least, leave alone obtaining any technical opinion to support or to contradict the submissions of the appellants. The only averment of the learned adjudicating authority appears to be that the input services are understandably, used in the manufacture of dutiable as well as exempted goods. However, we find that no basis for such understanding has been given with cogent reasons. We find that it is not open to the Department to brush aside the submissions of the appellants without a proper enquiry and reason. In the absence of a systematic study and negation of the appellant's submissions, the findings of the learned adjudicating authority are not legally tenable.

25. Moreover, we find that the appellants have submitted Chartered Accountant's certificates. The learned adjudicating authority held that the Chartered Accountant's certificates are not acceptable without giving any reasons thereof. On the contrary, the claim of the appellants and the reversal thereof, as mentioned in the certificates, was taken to be ample proof that the appellants have availed cenvat credit of common inputs. It is not a case of the Department that the said Chartered Accountant has been examined. Learned Commissioner was within his rights to call the said Chartered Accountants and examine him to find out and establish the veracity or otherwise of the certificates issued by them. Interestingly, one more argument taken by the learned adjudicating authority is that the certificates given by the Manpower Recruitment Agency in respect of Axiom Cordages Ltd are verbatim to the end and do not disclose any details. In this context also, the learned adjudicating authority has not thought it fit to call upon the persons issuing certificates and to record the submission before proceeding to adjudicate the case. We find that in the absence of any enquiry, verification or examination of the persons concerned, the conclusion drawn by the

learned adjudicating authority do not sustain the scrutiny of law. For the reasons discussed above, we find that impugned orders are not sustainable.

26. Moreover, the judgments cited above, held that reversal of credit availed on inputs and services used exclusively in the manufacture of exempted goods or provision of exempted services, would tantamount to not availing credit. Learned adjudicating authority has recorded the fact of reversal of proportionate credit by the appellants. However, in the case of M/s Axiom Cordages Ltd., he gave the finding that it is not clear from submissions of the appellant as to when such reversal was made and also as to whether the same was in accordance with the provisions of CENVAT Credit Rules, 2004. It was held in the above cited judgments that it was not the intention of the legislature to burden the assessee with demand of duty disproportionate to the actual credit availed on the said common inputs used in the manufacture of exempted goods. In the instant case too, the appellants submitted that demands are disproportional to the credit availed. In the present case fact of reversal is not denied by the adjudicating authority. In view of the case laws cited and discussed above, we find that reversal of credit amounts to not availing credit and as the appellants reversed the credit demands do not survive.

27. We further find that the learned adjudicating authority mainly relies on the averments that the appellants did not disprove the allegation made in the show-cause notice. As discussed above, it is a matter of record that the appellants have given elaborate submissions in response to Audit reports and also during the adjudication proceedings, it is apparent that the learned adjudicating authority has not gone into the submissions in detail and has not negated the assertions made by the appellant in a reasoned manner. It is to be noted that it is the Department who are alleging certain non-observance, of procedures by the appellants and availment of CENVAT Credit in a proper manner, on the part of the appellants. Therefore, it was incumbent upon the Department to prove the same with cogent evidence, reasoned argument and on a legal basis. Having not discharged their onus, the Department cannot simply brush aside the submissions of the appellants. We find that on this count too the show-cause notices and the adjudication orders are not sustainable. Accordingly, we find that the demands raised therein are not sustainable and once the demands are held to be not sustainable, penalties imposed are also not sustainable. The same need to be set aside along with demand. We find that the appellants have reversed the credit attributable to the inputs or inputs services alleged to have been used in the manufacture of exempted goods. In view of the settled position of law, we find that reversal of CENVAT Credit amounts to non-availment of CENVAT Credit and therefore, demands would not sustain."

9.1 As regards the issue whether the appellants had incorrectly availed and utilised CENVAT credit, we find from the facts of the case that the appellants have produced to the department complete details of Cenvat credit of taxable, exempt services and trading activity for various periods; non-availment of Cenvat credit in respect of exempt projects/services duly correlating the figures with the periodical ST-3 returns data. Further, the appellants have also submitted the details of Cenvat credit involved in respect of common input

services which was subsequently reversed by the appellants by communicating the same to the Department along with copies of the journal vouchers, evidencing such reversals of Cenvat credit. It is also a fact that from the initial stage when audit objection was raised, the appellants have submitted various replies providing complete details to the department by various letters dated 24.02.2014, 16.09.2014, 14.11.2014, 23.01.2015, 23.09.2015, 27.10.2015, 31.10.2015, 21.06.2016 and 15.12.2016, as detailed in the appeal papers filed by the appellants. It is not the department's case that the Cenvat credit taken in respect of taxable services/projects and those Cenvat credit not taken in respect of exempt projects are incorrect, in terms of any specific document or record. In fact, we find that in respect of show cause notice proceedings initiated against the appellants subsequently on 28.10.2016 and 30.05.2017 by the department in confirmation of adjudged demands relating to Cenvat credit in respect of trading activity, the learned Commissioner (Appeals) vide Order-in-Appeal dated 23.08.2018 and 09.01.2019, by examining the compendium of 49 work orders related to taxable sites and exempt sites, and after considering the credit involved in common services that had been reversed proportionately on the basis of turnover ratio had dropped the demands confirmed by the original authorities. It has also been held in the said appellate orders that furnishing of such voluminous details can only be possible only when the records are maintained separately, and the finding of lower authority that the appellant did not maintain separate account of the taxable services as well as exempted services was also not sustained. As these records of the appellants are same and refer to the same disputed period in the two impugned orders in the case before us, we find that it clearly emerges that learned Commissioner had not gone into the details of records submitted by the appellants and had confirmed the adjudged demands without proper examination of the facts.

9.2 We also find that on this issue, the Hon'ble Supreme Court in the case of *Chandrapur Magnet Wires (P) Limited* (supra) had held that in case where an assessee has taken credit for the duty paid on the inputs utilised in the manufacture of the final product that are exempted, and subsequently makes a debit entry in respect of exempt final product, then this debit entry would make such credit entry stand deleted in the accounts of the assessee, maintaining that in effect no Cenvat credit was taken in respect of exempt final products. The relevant paragraphs of the said judgement of the Hon'ble Apex Court is extracted below:

"3. *The case of the appellants is that if a manufacturer clears various final products utilising duty paid inputs, according to Central Excise Rules, he was entitled to the benefit of MODVAT scheme and was entitled to get credit for the duty of excise paid on the inputs which were utilised for manufacture of final product. The credit amounts were adjusted against the duty leviable on the final product. As soon as the inputs were purchased, the duty paid on the inputs were entered in a register which had to be maintained statutorily recording the amount of credit allowable to the manufacturer.*

4. *The problem in this case arose because, some of the goods manufactured by the appellants were exempted from duty by Notification No. 69/86-C.E., dated 10th February, 1986. This notification was amended by a further notification No. 106/88, dated 1st March, 1988 by which copper winding wires were exempted from payment of the whole of the duty subject to the condition that the final products were manufactured from copper wire bars of over 6 mm and also subject to the stipulation that -*

> *"(b) No credit of the duty paid on goods (a) (ii) above, used in their manufacture, has been taken under Rule 57A of the said Rules."*

There is no dispute that the inputs which were utilised in the manufacture of the copper wires were duty paid and that the amount of duty paid on the inputs had been entered by the appellants to their credit in the ledger which has to be maintained under the Excise Rules. The credit amount can be utilised by the manufacturer towards payment of duty of excise leviable on the final products. Since the copper wires manufactured by the appellants had become duty free, there was no question of any adjustment of the credit amount against the duty payable on these copper wires. Moreover, Rule 57C specifically provides that credit of duty cannot be allowed if final products were exempt from payment of excise duty. Faced with this situation, the appellants reversed the credit entries of duty paid on inputs which were utilised for manufacture of the duty free copper wires.

5. *The case of the Excise Department is that the reversal of credit entries are not permitted by the rules. The assessee is not entitled to remove the copper wires without payment of duty since credit of the duty paid on the inputs used in the manufacture of copper wire had already been taken in accordance with Rule 57A. Once appropriate entries have been made in the register, there is no rule under which the process could be reversed. Since the credit has been taken for the duty paid on the inputs in the ledger maintained by the assessees, the assessee cannot be heard to say that no credit of the duty has been taken by it under Rule 57A.*

6. *It is true that the assessee has not maintained separate accounts or segregated the inputs utilised for manufacture of dutiable goods and duty free goods, as should have been done. The contention of the Department that in this situation, the assessee is not entitled to reverse the entries and get the benefit of the tax exemption is a question which merits serious consideration. There is no doubt that the assessee should have maintained separate accounts for duty free goods and the goods on which duty has to be paid. But our attention was drawn to a departmental circular letter on this problem in which it has been clarified by the Ministry of Finance as under :-*

> *"3. The credit account under MODVAT rules may be maintained chapter wise, MODVAT credit is not available if the final products are exempt or are chargeable to nil rate of duty. However, where a manufacturer produces along with dutiable final products, final products which would be exempt from duty by a notification (e.g. an end use notification) and in respect of which it is not*

reasonably possible to segregate the inputs, the manufacturer may be allowed to take credit of duty paid on all inputs used in the manufacture of the final products, provided that credit of duty paid on the inputs used in such exempted products is debited in the credit account before the removal of such exempted final products."

This circular deals with a case where the manufacturer produces dutiable final products and also final products which are exempt from duty and it is not reasonably possible to segregate inputs utilised in manufacture of the dutiable final products from the final products which are exempt from duty. In such a case, the manufacturer may take credit of duty paid on all the inputs used in the manufacture of final products on which duty will have to be paid. This can be done only if the credit of duty paid on the inputs used in the exempted products is debited in the credit account before the removal of the exempted final products.

7. *In view of the aforesaid clarification by the Department, we see no reason why the assessee cannot make a debit entry in the credit account before removal of the exempted final product. If this debit entry is permissible to be made, credit entry for the duties paid on the inputs utilised in manufacture of the final exempted product will stand deleted in the accounts of the assessee. In such a situation, it cannot be said that the assessee has taken credit for the duty paid on the inputs utilised in the manufacture of the final exempted product under Rule 57A. In other words, the claim for exemption of duty on the disputed goods cannot be denied on the plea that the assessee has taken credit of the duty paid on the inputs used in manufacture of these goods.*

8. *The appeal is therefore, allowed. The order of the Customs, Excise and Gold (Control) Appellate Tribunal dated 17th May, 1995 is set aside. There will be no order as to costs."*

9.3 In view of the above facts of the case and the judgement delivered by the Hon'ble Supreme Court, it cannot be said that the appellants had incorrectly availed and utilised CENVAT credit, inasmuch as the appellants had not taken Cenvat credit in respect of exempt projects/services and had also reversed the Cenvat credit in respect of common input services, duly informing the department with complete details. Further, in view of the above judgement of the Hon'ble Apex Court, it could be concluded that the reversal of Cenvat credit in respect of common input services by the appellants is sufficient for compliance with the Cenvat Credit Rules, 2004.

9.4 We further find that the Co-ordinate Bench of the Tribunal in the case of Hamdard (Wakf) Laboratories (Supra) had held in clear terms that the appellants cannot be forced to avail the option of payment of prescribed percentage of the value of exempted services in terms of Rule 6(3) ibid. The relevant paragraph of the said order is extracted below:

> *"32. The next issue is whether the appellant can be compelled to choose one of the options under Rule 6 of Cenvat Credit Rules, 2004. The High Court of Telangana and Andhra Pradesh in the case of Tiara Advertising (supra) explained the scope of Rule 6 and observed that this provides for various options in the form of Rule 6 (1), 6 (2) and 6 (3) etc. There is nothing in this Rule which authorizes the Commissioner or any Departmental Officer to choose a particular option for the assessee and force the assessee to follow it. The High Court further clarified that if the assessee does not choose any of the options and still avails Cenvat credit then it would be wrongly availing such Cenvat credit and such wrongly availed Cenvat credit can be recovered under Rule 14 of Cenvat Credit Rules. However, it is not permissible for the Department to foist an option under Rule 6 upon the assessee as has been done in the impugned orders. For this reason also the impugned orders cannot be sustained and need to be set aside."*

10. In view of the foregoing discussions, we do not find any merits in the impugned orders passed by the learned Commissioner, Nagpur in confirmation of the adjudged demands in the impugned orders dated 24.02.2017 and 20.12.2017, in terms of Cenvat Credit Rules, 2004 and accordingly set aside the same.

11. Since the confirmation of the demands cannot be sustained under Rule 6(3) ibid, the demand for interest and imposition of penalty in the impugned orders also need to be set aside.

12. In the result, the impugned orders dated 24.02.2017 and 20.12.2017 cannot be sustained and are set aside. The appeals filed by the appellants are allowed with consequential relief, if any.

(Order pronounced in open court on 19.02.2024)

(S.K. Mohanty)
Member (Judicial)

(M.M. Parthiban)
Member (Technical)

Sinha