CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHANDIGARH

REGIONAL BENCH - COURT NO. I

Excise Appeal No. 298 of 2010-[DB]

(Arising out of Order-in-Original No. 49-NS-ADJN-2009 dated 10.11.2009 passed by the Commissioner (Appeals), Delhi)

M/s Woodward Governor India Limited ……Appellant
12th floor, Epitome, Tower A, Building 5,
DLF Cyber City, Phase-III, Gurgaon
Haryana-122002

VERSUS

Commissioner of Central Excise-Delhi-IV ……Respondent
(Plot No. 36-37, Sector 32 Opp. Medanta Hospital NH-IV, Gurgaon, Haryana 121001)

WITH

Excise Appeal No. 920 of 2011-[DB]

(Arising out of Order-in-Appeal No. 272-CE-APPL-DLH-IV-2010 dated 21.01.2011 passed by the Commissioner (Appeals), Delhi)

M/s Woodward Governor India Limited ……Appellant
12th floor, Epitome, Tower A, Building 5,
DLF Cyber City, Phase-III, Gurgaon
Haryana-122002

VERSUS

Commissioner of Central Excise-Delhi-IV ……Respondent
(Plot No. 36-37, Sector 32 Opp. Medanta Hospital NH-IV, Gurgaon, Haryana 121001)

WITH

Excise Appeal No. 185 of 2012 [DB]

(Arising out of Order-in-Appeal No. 160-CE-APPL-DLH-IV-2011 dated 31.10.2011 passed by the Commissioner (Appeals), Delhi)

M/s Woodward Governor India Limited ……Appellant
12th floor, Epitome, Tower A, Building 5,
DLF Cyber City, Phase-III, Gurgaon
Haryana-122002

VERSUS

Commissioner of Central Excise-Delhi-IV ……Respondent
(Plot No. 36-37, Sector 32 Opp. Medanta Hospital NH-IV, Gurgaon, Haryana 121001)

AND

Excise Appeal No. 55360 of 2013 [DB]

(Arising out of Order-in-Appeal No. 92/CE/APPL/DLH-IV/2012 dated 06.11.2012 passed by the Commissioner (Appeals), Delhi)

M/s Woodward Governor India Limited ……Appellant
12th floor, Epitome, Tower A, Building 5,
DLF Cyber City, Phase-III, Gurgaon
Haryana-122002

VERSUS

Commissioner of Central Excise-Delhi-IV ……Respondent
(Plot No. 36-37, Sector 32 Opp. Medanta Hospital NH-IV, Gurgaon, Haryana 121001)

APPEARANCE:

Shri Abhishek Jaju, Advocate for the Appellant

Shri Amandeep Kumar, Authorized Representative for the Respondent

CORAM: HON'BLE MR. S.S. GARG, MEMBER (JUDICIAL)
HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO.60132-60135/2023

DATE OF HEARING: 02.03.2023
DATE OF DECISION: 12.05.2023

PER: P.ANJANI KUMAR

Heard both sides and perused the records of the case.

2. Brief facts of the case are that the appellants are engaged in manufacture and trading of Control Panels equipment etc; the appellants were availing CENVAT credit of the duties and taxes paid on inputs and input services. In the course of an Audit conducted, Department noticed that the appellants have been using the input

services in connection with the trading of the goods in addition to the manufacture; such inputs do not qualify themselves to be called Input Services in terms of Rule 2(l) of CENVAT Credit Rules, 2004 and as such the appellants have wrongly availed CENVAT credit on trading activity and the same is recoverable under the provisions of Rule 14 of CENVAT Credit Rules, 2004. Five different SCNs were issued periodically from April 2004 to March 2011 and the same were confirmed by the Commissioner of Central Excise confirming the recovery of wrongly availed credit along with interest; penalty under Rule 15(2) was also imposed. Therefore, the appellants are before us.

Appeal No.	Period	OIA/OIO No.
E/298/2010	April 2004 to December 2008	49/NS/Adjn./09 dated 10.11.2009
E/920/2011	January 2009 to November 2009	272/CE/APPL/DLH-IV/2010 dated 21.01.2011
E/185/2012	December 2009 to October 2010	160/CE/APPL/DLH-IV/2011 dated 31.10.2011
E/55630/2012	November 2010 to March 2011	92/CE/APPL/DLH-IV/2012 dated 06.11.2012

3. Shri Abhishek Jaju, learned counsel for the appellants takes us through the provisions of CENVAT Credit Rules, 2004 and in particular Rule 6(1) and Rule 6 (3) and fairly submits that though there were

some restrictions, on availment of CENVAT credit of Service Tax paid on common input services to the extent they are used in exempt services/ products, prior to 1st April,2011, exempt services do not include trading of goods and therefore, there was no need for reversal of any credit on common input services. He relies upon Faber *Heatcraft Industries Limited- 2008 (232) ELT 182, Micro Labs Vs CCE, Bangalore – 2012-TIOL-1451-CESTAT-BANG, Magus Construction Pvt. Ltd. Vs UOI-2008 (11) STR 225 (Guwahati)* and *Orion Appliances Ltd. Vs CST Ahmedabad- 2010-VIL-10-CESTAT-AGM (CESTAT-Ahmedabad).* He also submits that Tribunal in a recent case *Adani Energy Ltd. Vs CST-Service Tax- Ahmedabad- 2022 (3) TMI 696-CESTAT Ahmedabad* has decided the issue in favour of the appellants.

4. He further submits that the Department while computing the amount recoverable has also included the CENVAT credit attributable to input services used in the manufacture of goods which is blatantly illegal. After giving allowance to the credit admissible, the reversal of CENVAT credit confirmed as Rs.1,59,94,030/- comes to Rs.41,82,096.48/-. He submits that they have made a pre-deposit of Rs.58,18,492/- which is more than the amount required to be reversed by them.

5. He submits that the demand is due to the difference in the interpretation of statutory provisions and not due to any *mala fide* act on the part of the appellants; there was no suppression of facts on the part of the appellants and thus, penalty under Rule 15(2) of

CENVAT Credit Rules, 2004 cannot be imposed. He relies upon the following case laws:

(i) ECE Inudstries Vs CCE [2004 (164) ELT 236 SC].
(ii) CCE Delhi Vs Escorts Ltd. [2009 (235) ELT 55 (P&H)]
(iii) Tisco Vs CCE Jamshedpur [2006 (199) ELT 855]
(iv) Siddharth Tube Ltd Vs CCE [2008 (228) ELT 193]
(v) Ballery Alloy Steel Vs CCE [2003 (157) ELT 324]

6. Learned Authorized Representative, on the other hand, submits that the assessee availed CENVAT credit on input services and utilized the same in trading activity also; the appellants have submitted separate ground plans for the premises to be used for manufacturing and for trading; thus, it was incumbent upon the appellants to maintain separate accounts for the inputs and input services used both in manufacture of dutiable goods and provision of exempted services. He submits that the Scheme of CENVAT credit does not contemplate allowing credit to a trader; the services, the credit of which were utilized by the appellant, cannot be called input services; the appellants did not maintain proper records as per Rule 9 of CENVAT Credit Rules, 2004. He submits that the appellants have suppressed the facts and they cannot claim, that the Department was well aware of the fact that they were utilizing the input services both for manufacturing as well as trading, is factually incorrect as the appellants could not produce any documentary evidence. He submits that this Bench vide Stay Order dated 23.05.2012 observed that "we are also of the view that the appellant would not be eligible for CENVAT credit in respect of services used in their trading activity;

since the annual turnover of their trading activity is about 70% of the total turnover, the appellants would not be eligible for Service Tax credit to that extent". He also relies upon the following case laws:

- *Mercedes Benz India Pvt. Ltd. VS CCE, Pune-I-2014 (36) STR 704 (Tri. Mumbai)*
- *Loreal India Pvt. Ltd. Vs CCE Pune-I- 2012 (281) ELT 113 (Tri. Mumbai)*
- *Orion Appliances Ltd. Vs CST, Ahmedabad- 2010 (19) STR 205 (Tri. Ahmd.)*
- *Metro Shoes Pvt. Ltd. VS CCE, Mumbai- 2008 (10) STR 382 (Tri. Mum.)*
- *CCE, Belapur Vs Elder Pharmaceuticals Ltd.- 2015 (37) STR 241 (Tri. Mum.)*
- *CCE, Ghaziabad Vs Rathi Steel & Power Ltd.- 2015 (321) ELT 200 (All.)*
- *CCE, Madras Vs Systems & Components Pvt. Ltd. – 2004 (165) ELT 136 (SC)*

7. We find that the issue involved had a chequered history of litigation. Different Benches of Tribunal have decided for or against the Revenue as cited above. We find that Hon'ble Supreme Court in the case of Lally *Automobiles Ltd. Vs Commissioner, 2019 (24) GSTL J115 (SC)* has set to rest the controversy by deciding that CENVAT credit is not admissible on input services attributable to trading activity. This was affirmation of the Order passed in the same case by the Delhi Bench of Tribunal as well as the Hon'ble Delhi High Court. We find that the Tribunal in this case *2018 (10) GSTL 310 (Tri. Del.)* have held that:

> *6. We have heard both the sides and perused appeal records. The admitted facts are that the appellants availed Cenvat credit on input services and they had considerable turnover and income in trading activities. It is also admitted that the services on which credit have been availed are partly relatable to trading activities also. We note that the appellants*

contested the reversal of credit to a proportionate extent on the ground that trading is not an exempted service prior to the insertion of explanation and as such the provisions of Rule 6(3) will not apply. One main aspect is missed by the appellant in such argument. The case of the appellant is that trading cannot be considered as exempted service. It is clear that trading is not a taxable service also. In other words, trading is an activity which is not covered under the scope of Cenvat Credit Rules, 2004. The appellants should not have availed any credit on input services when such services are attributable to an activity which is not at all taxable and hence not covered by the scope of Cenvat Credit Rules, 2004.

7. A deemed fiction is apparently created by naming 'trading' as an exempted service by way of explanation in Rule 2 of Cenvat Credit Rule w.e.f. 01.04.2011. We find prior to creation of such fiction, there is no scope at all even to consider the trading activity to be covered under the credit scheme. After the explanation, the position is more clear to the effect that the trading activity can be considered as an exempted service for the operation of scheme under Cenvat Credit Rules. In other words, prior to that clarification, in the absence of such explanation, trading is not at all covered by the credit scheme. Accordingly, we find the appellants should not have availed credit for common input services which are used for taxable output service as well as trading activity, as it is imperative to identify and reverse that amount of credit attributable to the trading activity. We find no infirmity in the findings of the original authority on merit or on quantification.

On an appeal filed by the appellant, Hon'ble High Court of Delhi while deciding the above case in 2018 (17) GSTL 422 (Del) held that:

16. Therefore, the issue is whether the assessee could claim the credit on input which were not services. Input credits can be used for payment of service on output service provided such services are used to provide output services. Undoubtedly, there cannot be an exact correlation between one kind of input and corresponding. That is the reason the Rules

> *cover situations where assessees provide both exempted and taxable services. Wherever someone undertakes activities that cannot be called a service or which is not "manufacture", that activity goes out of the purview of both Central Excise Act as well as Finance Act, 1994. In such cases, an assessee would be ineligible for claiming input-service tax credit on an output which is neither a service nor excisable goods. There is no provision to cover situations where an assessee is providing a taxable service and is undertaking another activity which is neither a service nor manufacture. In such a situation, the only correct legal position appears to be that it is for the assessee to segregate the quantum of input service attributable to trading activity and exclude the same from the records maintained for availing credit. This cannot be done in advance as it may not be possible to foretell the quantum of trading activity as compared with taxable activity. The obvious solution would be to ensure that once in a quarter or once in a six months, the quantum of input service tax credit attributed to trading activities according to standard accounting principles is deducted and the balance only availed for the purpose of payment of Service tax of output service.*

8. Going by the ratio of the judgment above, we find that before 01.04.2011 it was not open to the appellants to avail CENVAT credit paid on input services and utilized for provision of exempted services or trading goods. We find that as has been held by the Tribunal in the *Lally Automobiles* case (supra) exempted goods were beyond the scope of CENVAT credit and therefore, the logic that the credit is not admissible only after 01.04.2011, when the same was specifically mentioned in the Rules, is farfetched and misplaced.. The appellants have relied upon the Tribunal's judgment in the case of *Adani Energy Ltd*. (supra). On going through the case, we find that in that case the judgment in the case of *Lally Automobiles* (supra) was not discussed

and it appears that the rival parties have not brought the same to the notice of the Bench. To that extent, we find that the judgment cannot be relied upon. *Lally Automobiles* case being affirmed by the Hon'ble Apex Court becomes the law of the land and requires to be followed. We do so. Therefore, we do not find any infirmity in the findings of the adjudicating authority as far as the denial of the CENVAT credit on input services used in trading is concerned.

9. However, coming to the quantification of the credit recoverable, we find that the appellants have claimed that credit attributable to input services used in the manufacture of dutiable goods cleared by them was also sought to be denied. We find that in terms of Rule 2(l), the input services used in the manufacture of dutiable goods cleared by them qualify to be called input services and therefore, credit cannot be denied on the same. Moreover, the appellants submit that the amount actually liable to be reversed is Rs.41,82,096.48/-. This requires to be checked and properly arrived at. For this reason, the case needs to be remanded back to the adjudicating authority.

10. Coming to the penalty imposed, the appellants have taken the plea that the Department was well aware of the activity of the appellant and as such extended period cannot be invoked. On the other hand, the Authorized Representative argues that the appellants have obtained separate registration and got separate ground plans approved for trading and manufacturing activities. Thus, they are expected to be aware of the provisions of law regarding the

admissibility of credit. While availing CENVAT credit, the appellant should have taken all precautions. We find that Tribunal in the case of *Lally Automobiles Ltd*. (supra) observed that the appellants have no reason to avail credit on services which they are fully aware were being used for trading activity also; it is not open to the appellant to claim that they were under bona fide belief that the provisions of Rule 6(3) will not apply to this situation; as already noted, we find that there is no ground for such belief. We find that the facts of the impugned case are comparable. Therefore, we are of the opinion that the appellants ought to have availed credit correctly. As contended by the Authorized Representative, the appellants failed to prove their bona fides. Therefore, the appellants have rendered themselves liable to pay penalty under Rule 15 of the CENVAT Credit Rules, 2004. However, looking into the contradictory judgments on the issue by different Benches of the Tribunal, we find that while imposition of equal penalty would be harsh, the omissions by the appellants can be mitigated by imposition of a suitable penalty. Therefore, we reduce the penalty to about 10% of the penalties imposed.

11. In view of our findings as above, the appeals are partly allowed by way of remand:

(i) Demand of CENVAT credit availed on input services and utilized for trading purposes is confirmed. Demand of CENVAT credit availed on input services used in the manufacture of dutiable goods is set aside.

(ii) For the sake of quantification of the CENVAT credit payable by the appellants, in above terms, matter remanded to

adjudicating authority who shall quantify the CENVAT credit, confirmed as above, within eight weeks of the receipt of this order. The appellants shall cooperate with the adjudicating authority by submitting the necessary documents and records.

(iii) Penalty confirmed is as follows:

Appeal No.	Penalty confirmed in Rs.
E/298/2010	7,00,000/-
E/920/2011	2,00,000/-
E/185/2012	4,00,000/-
E/55630/2013	1,00,000/-

(pronounced on 12/05/2023)

(S.S. GARG)
MEMEBR (JUDICIAL)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

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