(2024) 12 CESTAT CK 1218

In the Customs, Excise And Service Tax Appellate, New Delhi

Case No : Service Tax Appeal No. 51090 of 2018

M/s Sky Automobiles @APPELLANT @Hash The Principal Commissioner, Central GST, Central Excise & Service Tax @RESPONDENT

Date of Decision : 04-12-2024

Acts Referred:

Finance Act, 1994 — Section 65(105)(zzz), 66, 66B, 67, 68, 70, 71, 72, 73, 73(1), 75, 77, 78, 94
Central Excise Act, 1944 — Section 4, 4A, 37
Cenvat Credit Rules, 2004 — Rule 6, 6(2), 6(3), 6(3A), 6(3)(1), 14, 15

Citation : (2024) 12 CESTAT CK 1218

Hon'ble Judges : Dilip Gupta, President (J);P. V. Subba Rao, Member (T)

Bench : Division Bench

Advocate : Bimal Jain, Manoj Kumar

Final Decision : Partly Allowed

Judgement

P.V. Subba Rao, J

1. M/s. Sky Automobiles, Raipur, the appellant filed this appeal to assail the order-in-original dated 12.12.2017, impugned order passed by the Principal Commissioner of Central Excise and Service Tax, Raipur, the Commissioner, the operative part of which is as follows:

"1. I confirm the demand of total service tax of Rs.96,28,033/- (Rupees Ninety Six Lakhs Twenty Eight Thousand and Thirty Three only) [service tax Rs. 93,47,605/-, Education Cess Rs. 1,86,952/- and SHE Cess Rs. 93,476/-] on account of rendering of service of 'Business Auxiliary Service up to 30.06.2012' and "Service" thereafter during the period 2010-2011 to 2014-2015, as detailed in the SCN dated 20.10.2015, and order for its recovery from the Noticee under the section 73 (1) of the Act, along with interest under section 75 of the Act.

2. I also order for recovery of the amount of Rs. 3,25,80,796/- (Rs. Three Crore Twenty Five Lakhs Eight Thousand Seven Hundred and Ninety Six only) calculated @ 5%/ 6% of value of exempted service viz. Trading activity, rendered during the period 2010-2011 to 2014-2015, from the Noticee, as detailed in the

SCN dated 20.10.2015, in terms of Rule 6 (3) (1) of CENVAT Credit Rules, 2004 under Rule 14 ibid read with Explanation (1) to Rule 6 (3) and section 73 (1) of the Act, along with interest under Rule 14 of the said rules, read with section 75 of the Act. The amount of Rs. 5,51,543/- paid by the Noticee in the context is ordered to be appropriated against the above demand.

3. I impose a penalty of Rs. 10,000/- (Rs. Ten Thousand only) under section 77 of the Act on the Noticee.

4. I impose penalties of Rs. 96,28,033/- (Rupees Ninety Six Lakhs Twenty Eight Thousand and Thirty Three only) under section 78 of the Act and of Rs. 3,25,80,796/- (Rs. Three Crore Twenty Five Lakhs Eight Thousand Seven Hundred and Ninety Six only) under Rule 15 of the CENVAT Credit Rules, 204 read with section 78 of the Act on the Noticee".

2. The appellant is registered with the service tax department as provider of 'authorised service station service' and 'business auxiliary service' and was paying service tax at appropriate rates under section 66 of the Finance Act, 1994, the Act. After 1.7.2012 (when the negative list regime was introduced and all services except those in the negative list were taxable), the appellant paid service tax as provider of services, under section 66B of the Act.

3. The appellant's records were audited for the period 2010–2011, 2011–2012 and 2012–2013 (upto December 2013). It was noticed that the appellant was collecting "other charges" from the buyers of the vehicles. It was felt that the appellant was liable to pay service tax under section 65 (105)(zzz) "business auxiliary services" on these charges upto 2012 and thereafter as a 'service' because it was not under the negative list.

4. It was also noticed that the appellant was also providing exempted service of trading. It had availed CENVAT credit on common input services which were used both for providing taxable services and for providing exempted services in the form of trading. It was felt that the appellant had not maintained separate records of the input services used in providing taxable and exempted services and was therefore, required to pay an amount equal to 5%/ 6% of the value of the exempted services under Rule 6(3) of the CENVAT Credit Rules, 2004, CCR.

5. Show cause notice dated 20.10.2015, SCN was issued to the appellant proposing (a)recovery of the service tax of Rs.96,28,033/- on the "other charges" collected by the appellant under the head 'business auxiliary services' up to 30.6.2012 and thereafter for the service rendered; and (b) recover an amount of Rs. 3,25,80,796/- calculated @5%/ 6% of the value of the exempted service, viz., trading activity under Rule 6(3)(1) of CCR.

6. Extended period of limitation was invoked in respect of both the above demands under the proviso to section 73(1) of the Act. Interest was proposed to be recovered under section 75 and penalties were proposed to be imposed under sections 77 and 78 of the Act.

7. The appellant opposed the proposals, which were, however, confirmed, by the Principal Commissioner in the impugned order. Aggrieved, this appeal is filed.

Submissions on behalf of the appellant.

8. Learned counsel made the following submissions on behalf of the appellant:

i) The demand of an amount of Rs. 3,25,80,796/-calculated @5%/ 6% of the value of the exempted goods under Rule 6(3)(1) of CCR was confirmed although the appellant reversed proportionate amount of CENVAT credit taken on common input services attributable to the exempted services. This reversal was not accepted by the Commissioner for the reason that no intimation as per Rule 6(3A) of CCR was given by the appellant.

ii) An amount under Rule 6(3) of CCR cannot be demanded from the appellant because it had not chosen this option and it is not open to the department to choose an option for the appellant and force it. Reliance is placed on M/s Tiara Advertising versus Union of India, 2019 (30) G.S.T.L. 474 (Telangana) in which the High Court of Telangana clearly held that the it is not open for the Revenue to choose an option for the appellant.

iii) The amount demanded under Rule 6(3) of CCR is much larger than the total amount of CENVAT credit taken by the appellant on common input services.

iv) The 'other charges/other income/miscellaneous income' proposed to be charged to service tax is on

account of

a) Recovery for fuel supplied along with the vehicle;

b) Recovery towards car decoratives and chocolates supplied

c) Recovery towards sale of optional accessories;

d) Recovery towards vehicle handling charges

v) The above, being in the nature of sales, are exigible to VAT and therefore, no service tax can be levied on these charges. It is immaterial if VAT was levied on these charges or not and it has been paid or not. Since these amounts are in the nature of recoveries towards sales, no service tax can be levied.

vi) CBEC's Circular No. 699/15/2003-CX dated 05.03.2003 clarified that any activity of the sales dealer at the pre-sale stage or at the time of sale will not come under the purview of 'service tax on authorised service station.' Therefore, no service tax can be charged on these services.

vi) For a subsequent period, Commissioner (Appeals) himself dropped the demand of service tax for the period April to August 2015 by OIA dated 11 September 2019 on account of the following three of the four charges:

a) Recovery for fuel supplied along with the vehicle;

b) Recovery towards car decoratives and chocolates supplied

c) Recovery towards sale of optional accessories;

vii) If service tax is upheld, cum-tax benefit may be allowed, i.e., the amounts collected may be treated as cum tax values.

viii) Extended period of limitation has been wrongly invoked because the appellant had taken registration and has been filing ST-3 returns based on its self-assessment as per its understanding. Therefore, the ingredients to invoke extended period of limitation are absent in this case.

ix) Penalty under section 78 also cannot be imposed for the same reason.

x) Penalty under section 77 also cannot be sustained.

xi) The appeal may be allowed and the impugned order may be set aside.

Submissions on behalf of the Revenue

9. Learned authorised representative vehemently supported the impugned order and made the following submissions on behalf of Revenue:

i) The "other/misc/handling charges" were collected by the appellant over and above sale price of the vehicles and they do not constitute the sale price of such vehicles. These amounts were collected by the appellant towards handling of vehicles which was a service which it provided to the customers. Therefore, service tax has to be paid on these charges.

ii) Under Rule 6(2) of CCR, the appellant had the option of reversal of proportionate common credits taken following the procedure prescribed under Rule 6(3A) of CCR. This procedure requires the assessee to intimate the Range officer. Since the appellant had not intimated, it was not covered by Rule 6(3A) of CCR. It had to pay an amount equal to 5%/6% of the value of the exempted services. The demand has been confirmed accordingly.

iii) Extended period of limitation was correctly invoked and penalties were correctly imposed.

iv) The impugned order is correct and proper and calls for no interference.

Findings

10. The two issues to be decided in this appeal are (a) demand for recovery of an amount under Rule 6(3)(1) of CCR; and (b) demand of service tax.

Demand of an amount under Rule 6(3)(1) of CCR

11. The CCR, 2004 were framed by the Central Government under Section 37 of the Central Excise Act and Section 94 of the Finance Act superseding the earlier Cenvat Credit Rules, 2002(which dealt with Cenvat credit only for manufacture) and Service Tax Credit Rules, 2002 (which dealt with only credit for service

providers). The CCR, 2004 integrated the two sets of rules and provided for credit of excise duty paid on inputs and service tax paid on input services used in or in relation to manufacture of dutiable final products or provision of taxable services. It has been the principle of these rules as well as the erstwhile Modvat Credit Rules, that credit shall be allowed only on inputs which go into manufacture of dutiable goods. No credit shall be allowed in respect of inputs which go into manufacture of exempted goods.

12. However, there can always be inputs or input services which go into manufacture of both dutiable and exempted goods or in providing both taxable and exempted services. It is undisputed that in this appeal, some input services were used to provide both taxable services and exempted service (trading). Rule 6 of the CCR deals with “Obligations of manufacturer of dutiable and exempted goods and provider of taxable and exempted services”. Rule 6 (1) of CCR states that credit shall not be allowed on such quantity of input or input service which is used in the manufacture of exempted goods or provision of exempted services. Rule 6 (2) of CCR requires separate accounts to be maintained and it reads as follows:-

“(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 receipt, consumption and inventory of input and input service meant for use in the manufacture of dutiable final products or in providing output service and the quantity of input meant for use in the manufacture of exempted goods or services and take CENVAT credit only on that quantity of input or input service which is intended for use in the manufacture of dutiable goods or in providing output service on which service tax is payable”.

13. Rule 6 (3) of CCR states that the manufacturer or provider of output service opting not to maintain separate accounts shall follow any of the conditions (a) (b) or (c) applicable to him. The clause in dispute is (b) which reads as follows :-

“(b) if the exempted goods are other than those described in condition (a), the manufacturer shall pay an amount equal to ten per cent of the total price, excluding sales tax and other taxes, if any, paid on such goods, of the exempted final product charged by the manufacturer for the sale of such goods at the time of their clearance from the factory ;

14. This Rule 6 (3) of CCR was amended w.e.f. 01.03.2008 and a new Rule 6 (3A) of CCR was also introduced. After amendment, Rule 6 (3) & Rule 6 (3A) of CCR read as follows :-

(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 either of the following options, as applicable to

him, namely :-

(i) the manufacturer of goods shall pay an amount equal to ten per cent of value of the exempted goods and the provider of output service shall pay an amount equal to eight per cent of value of the exempted services ; or

(ii) the manufacturer of goods or the provider of output service shall pay an amount equivalent to the CENVAT credit attributable to inputs and input services used in, or in relation to, the manufacture of exempted goods or for provision of exempted services subject to the conditions and procedure specified in sub-rule (3A).

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 and input services used exclusively for the manufacture of exempted goods or provision of exempted service.

(3A) For determination and payment of amount payable under clause (ii) of sub-rule (3), the manufacturer of goods or the provider of output service shall follow the following procedure and conditions, namely :-

(a) while exercising this option, the manufacturer of goods or the provider of output service shall intimate in writing to the Superintendent of Central Excise giving the following particulars, namely :-

(i) name, address and registration No. of the manufacturer of goods or provider of output service;

(ii) date from which the option under this clause is exercised or proposed to be exercised ;

(iii) description of dutiable goods or taxable services;

(iv) description of exempted goods or exempted services;

(v) CENVAT credit of inputs and input services lying in balance as on the date of exercising the option under this condition;

(b) The manufacturer of goods or the provider of output service shall, determine and pay, provisionally, for every month, -

(i) The amount equivalent to CENVAT credit attributable to inputs used in or in relation to manufacture of exempted goods, denoted as A;

(ii) The amount of CENVAT credit attributable to inputs used for provision of exempted services (provisional) = (B/C) multiplied by D, where B denotes the total value of exempted services provided during the preceding financial year, C denotes the total value of dutiable goods manufactured and removed plus the total value of taxable services provided plus the total value of exempted services provided, during the preceding financial year and D denotes total CENVAT credit taken on inputs during the month minus A;

(iii) The amount attributable to input services used in or in relation to manufacture of exempted goods or provision of exempted services (provisional) = (E/F) multiplied by G, where E denotes total value of exempted services provided plus the total value of exempted goods manufactured and removed during the preceding financial year, F denotes total value of taxable and exempted services provided, and total value of dutiable and exempted goods manufactured and removed, during the preceding financial year, and G denotes total CENVAT credit taken on input services during the month;

(c) The manufacturer of goods or the provider of output service, shall determine finally the amount of CENVAT credit attributable to exempted goods and exempted services for the whole financial year in the following manner, namely :-

(i) The amount of CENVAT credit attributable to inputs used in or in relation to manufacture of exempted goods, on the basis of total quantity of inputs used in or in relation to manufacture of said exempted goods, denoted as H;

(ii) The amount of CENVAT credit attributable to inputs used for provision of exempted services = (J/K) multiplied by L, where J denotes the total value of exempted services provided during the financial year, K denotes the total value of dutiable goods manufactured and removed plus the total value of taxable services provided plus the total value of exempted services provided, during the financial year and L denotes total CENVAT credit taken on inputs during the financial year minus H;

(iii) The amount attributable to input services used in or in relation to manufacture of exempted goods or provision of exempted services = (M/N) multiplied by P, where L denotes total value of exempted services provided plus the total value of exempted goods manufactured and removed during the financial year, M denotes total value of taxable and exempted services provided, and total value of dutiable and exempted goods manufactured and removed, during the financial year, and N denotes total CENVAT credit taken on input services during the financial year ;

(d) The manufacturer of goods or the provider of output service, shall pay an amount equal to the difference between the aggregate amount determined as per condition (c) and the aggregate amount determined and paid as per condition (b), on or before the 30th June of the succeeding financial year, where the amount determined as per condition (c) is more than the amount paid ;

(e) The manufacturer of goods or the provider of output service, shall, in addition to the amount short-paid, be liable to pay interest at the rate of twenty-four per cent per annum from the due date, i.e., 30th June till the date of payment, where the amount short-paid is not paid within the said due date;

(f) Where the amount determined as per condition (e) is less than the amount determined and paid as per condition (b), the said manufacturer of goods or the provider of output service may adjust the excess amount on his own, by taking credit of such amount;

(g) The manufacturer of goods or the provider of output service shall intimate to the jurisdictional Superintendent of Central Excise, within a period of fifteen days from the date of payment or adjustment, as per condition (d) and (f) respectively, the following particulars, namely :-

(1) details of CENVAT credit attributable to exempted goods and exempted services, monthwise, for the whole financial year, determined provisionally as per condition (b) ;

(2) CENVAT credit attributable to exempted goods and exempted services for the whole financial year, determined as per condition (c),

(3) Amount short paid determined as per condition (d), alongwith the date of payment of the amount short-paid,

(4) Interest payable and paid, if any, on the amount short-paid, determined as per condition (e), and

(5) Credit taken on account of excess payment, if any, determined as per condition (f) ;

(h) Where the amount equivalent to CENVAT credit attributable to exempted goods or exempted services cannot be determined provisionally, as prescribed in condition (b), due to reasons that no dutiable goods were manufactured and no taxable service was provided in the preceding financial year, then the manufacturer of goods or the provider of output service is not required to determine and pay such amount provisionally for each month, but shall determine the CENVAT credit attributable to exempted goods or exempted services for the whole year as prescribed in condition (c) and pay the amount so calculated on or before 30th June of the succeeding financial year.

(i) Where the amount determined under condition

(h) is not paid within the said due date, i.e., the 30th June, the manufacturer of goods or the provider of output service shall, in addition to the said amount, be liable to pay interest at the rate of twenty four per cent per annum from the due date till the date of payment.

Explanation I – “Value” for the purpose of sub-rules (3) and (3A) shall have the same meaning assigned to it under Section 67 of the Finance Act, 1994 read with rules made thereunder or, as the case may be, the value determined under Section 4 or 4A of the Central Excise Act, 1944 read with rules made thereunder.

Explanation II – The amount mentioned in sub-rules (3) and (3A), unless specified otherwise, shall be paid by the manufacturer of goods or the provider of output service by debiting the CENVAT credit or otherwise on or before the 5th day of the following month except for the month of March, when such payment shall be made on or before the 31st day of the month of March.

Explanation III – If the manufacturer of goods or the provider of output service fails to pay the amount payable under sub-rule (3) or as the case may be sub-rule (3A), it shall be recovered, in the manner as provided in Rule 14, for recovery of CENVAT credit wrongly taken."

15. Rule 6(3A) of CCR was further modified w.e.f. 2010 changing the formula for calculation.

16. Learned Counsel submission is that the appellant had reversed proportionate amount of CENVAT credit on common input services attributable to the exempted services provided. This fact is not in dispute. However, the Commissioner did not agree that the reversal was sufficient fulfillment of the obligation under Rule 6 of CCR because the appellant had not made the declaration as per Rule 6(3A) (a) of CCR before the Superintendent. He, therefore, confirmed recovery of an amount equal to 5%/6% of the value of the exempted services which amount is much higher than even the total CENVAT credit taken on common input services.

17. We have considered this reversal. If credit is taken and thereafter reversed, to the extent it is reversed, it is good as not having taken the credit at all. The Supreme Court held so while dealing with the MODVAT credit in the case of Chandrapur Magnet Wires (P) Ltd. versus Collector of Central Excise, Nagpur, 1996 (81) E.L.T. 3 (S.C.). Paragraph 7 of the judgment reads as follows:-

"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".

18. Secondly, Rule 6(2) of CCR only requires the appellant to maintain separate accounts for receipt, consumption and inventory of inputs and input services used in manufacture of dutiable final products and manufacture of exempted goods or provision of taxable services and provision of exempted services. It does not specify any manner in which such accounting should be done. In case of common inputs or common input services, the most practical method of maintaining separate accounts is to either take credit of only some portion of the total credit which can be attributed to dutiable goods or taxable services or to

take the total credit and reversing that portion of the credit which is attributable to exempted goods or services. It is undisputed that the appellant had done this reversal and if so, it is as good as maintaining separate accounts as per Rule 6(2) of CCR.

19. Rule 6 (3A) was introduced in the CCR specifically providing for such proportionate reversal. The mere fact that the appellant had not given an intimation to the Range Superintendent does not, in any way, negate the effect of the reversal. The reversal cannot be ignored to demand an amount of 5%/ 6% under Rule 6(3) of CCR.

20. It also needs to be pointed out that Rule 6 of CCR places obligations on an assessee who avails CENVAT credit. If the assessee wants to avail CENVAT credit it has to fulfill its obligations under Rule 6 of CCR. If the assessee avails CENVAT credit but does not fulfil the obligations under Rule 6 of CCR, such irregularly availed CENVAT credit can be recovered under Rule 14. However, the assessee cannot be compelled to fulfill any of the obligations.

21. The obligations under Rule 6 of CCR can be fulfilled opting for any of the methods given in the Rule. It is not open to the department to choose an option and foist it upon the assessee. In no circumstances can the Department impose a particular choice upon the appellant and demand an amount under Rule 6 (3) of CCR as has been done in the impugned order.

22. The High Court of Andhra Pradesh and Telangana in the case of M/s Tiara Advertising versus Union of India, 2019 (30) G.S.T.L. 474 (Telangana) held as follows:

13. Having considered the issue of maintainability of this writ petition, we are of the opinion that the petitioner cannot be non-suited on the ground of availability of an alternative remedy. The alternative remedy principle is not a straitjacket formula but a rule of convenience which has been evolved by Courts so as to ensure equitable distribution of work. It is therefore within the discretion of this Court to refuse to adopt the said rule in a deserving case. Presently, we find that the second respondent has brazenly exercised power under a provision which was not even available to him, as it was an enabling provision put in place for the benefit of the assessee, and arrived at a wholly unreasonable, if not absurd, result. That apart, the second respondent did not even choose to deal with the binding case law cited before him while dealing with the issues arising for consideration. This arrogant and arbitrary approach adopted by the second respondent cannot be countenanced. It would therefore not be necessary for the petitioner to go through the motions of a statutory appeal to challenge the same. The contention of the respondents as to the maintainability of the writ petition is therefore rejected.

14. Further, we may reiterate that Rule 6(3) of the Cenvat Credit Rules, 2004, merely offers options to an output service provider who does not maintain separate accounts in relation to receipt, consumption and inventory of inputs/

input services used for provision of output services which are chargeable to duty/ tax as well as exempted services. If such options are not exercised by the service provider, the provision does not contemplate that the Service Tax authorities can choose one of the options on behalf of the service provider. As rightly pointed out by Shri S. Ravi, learned Senior Counsel, if the petitioner did not abide by the provisions of Rule 6(3) of the Cenvat Credit Rules, 2004, it was open to the authorities to reject its claim as regards the disputed Cenvat Credit of Rs. 17,15,489/-.

15. We may also note that in the event the petitioner was found to have availed Cenvat Credit wrongly, Rule 14 of the Cenvat Credit Rules, 2004 empowered the authorities to recover such credit which had been taken or utilised wrongly along with interest. However, the second respondent did not choose to exercise power under this Rule but relied upon Rule 6(3)(1) and made the choice of the option thereunder for the petitioner, viz., to pay 5%/6% of the value of the exempted services. The statutory scheme did not vest the second respondent with the power of making such a choice on behalf of the petitioner. The Order-in-Original, to the extent that it proceeded on these lines, therefore cannot be countenanced.

23. We are conscious that Rule 6 of CCR provides for recovery of an amount under Rule 6(3) under Rule 14. However, this can only mean such cases where the assessee opted for reversal under Rule 6(3) of CCR but did not pay the whole or part of the amount. This provision for recovery cannot be read to imply that even if the assessee wants to opt for some other method under Rule 6 of CCR, the provision of Rule 6(3) of CCR can be imposed upon the assessee by the department and the amount recovered.

24. For all the above reasons, the demand of an amount under Rule 6(3) of CCR from the appellant cannot be sustained and it needs to be set aside.

Demand of service tax

25. This demand covers both the pre-negative list period (under the head of Business Auxiliary Services) and post negative list period (demand of service tax for rendering a service which was not in the negative list). The demand has been confirmed invoking extended period of limitation under the proviso to section 73 of the Finance Act.

26. Learned counsel for the appellant contests the demand both on merits and on limitation. We first proceed to decide the question of limitation.

27. The normal period of limitation under section 73 was changed during the period of dispute but the extended period of limitation was five years during the entire period. The relevant periods and the limitation were as follows:

Show cause notice dated 20.10.2015

(Period April 2010 to March 2015)

Financial Year

Normal Period of Limitation as per Section 73

Whether notice issued within normal or extended period

01.04.2010 to 30.09.2010

One year from the relevant date – 25.10.2010

Extended Period

01.10.2010 to 31.03.2011

One year from the relevant date – 25.04.2011

Extended Period

01.04.2011 to 30.09.2011

One year from the relevant date – 25.10.2011

Extended Period

01.10.2011 to 31.03.2012

One year from the relevant date – 25.04.2012

Extended Period

01.04.2012 to 27.05.2012

One year from the relevant date – 25.10.2012

Extended Period

28.05.2012 to 30.09.2012

18 months from the relevant date – 25.10.2012

Extended Period

01.10.2012 to 31.03.2013

18 months from the relevant date – 25.04.2013

Extended Period

01.04.2013 to 30.09.2013

18 months from the relevant date – 25.10.2013

Extended Period

01.10.2013 to 31.03.2014

18 months from the relevant date – 25.04.2014

Normal Period

01.04.2014 to 30.09.2014

18 months from the relevant date – 25.10.2014

Normal Period

01.10.2014 to 31.03.2015

18 months from the relevant date – 25.04.2015

Normal Period

28. Thus, the normal period of limitation was from 01.01.2013 to 31.03.2015 and the rest was extended period of limitation. The reasons for invoking extended period of limitation given in the SCN is as below:

"4.1.2 The Noticee has not declared the aforesaid "other receipts"/"other charges on new vehicles", as taxable value, in the ST-3 returns filed by it. Thus the material fact for assessment, determination and collection of tax was concealed and not disclosed to the department. The Noticee has not paid the service tax to the central government account at the rate specified in section 66 of the Finance Act, 1994. The Noticee has not self-assess the tax,

4.1.3 The Noticee have also not paid an amount as provided under the Rule 6 (3)(1) of the Cenvat Credit Rules and it had availed Cenvat Credit on input Services provisioned towards exempted services.

4.1.4 Thus the Noticee appears to have contravened the sections 68, 66, 66B and 70 of the Finance Act, 1994 read with Rule 6 of the Service Tax Rules, 1994.

4.1.5 It also appear to have contravened the provisions of the Rule 6 (1) of the Cenvat Credit Rules, 2004, in as much as, it has wrongly availed Cenvat Credit of service tax in respect of input service used in providing non-taxable service, it has also contravened the provisions of the Rule 6 (1), 6 (3)(1) of the Cenvat Credit Rules 2004 as it had not paid an amount as prescribed therein timely.

4.1.6 In view of the above, it appears that the Noticee had never disclosed the facts as discussed above to the service tax department and these facts came to the notice of the department only at the time of the audit of their records.

4.1.7 The Noticee appears to have suppressed the fact and contravened the provisions of the Finance Act, 1994 with intent to evade payment of taxes/an amount, hence the extended period of limitation of 5 years as provided in the proviso to the section 73 (1) of the Finance Act 1994 is invokable to recover service tax short paid.

The extended period of limitation under provisions of Rule 14 of Cenvat Credit Rules, 2004 read with explanation III to Rule 6 thereof, read with section 73 (1) of the Finance Act, 1994 is liable to be invoked for recovery "an amount". Thus, the Noticee also appears liable for penal action under Rule 15 of Cenvat Credit Rules, 2004 read with section 78 of the Finance Act, 1994 for violation of Rule 6 of the CENVAT Credit Rules, 2004".

29. The appellant's submissions regarding invoking extended period of limitation in its reply to the SCN as well as before us are as below:

"6.9 However, without prejudice, it is submitted that, the Noticee has a strong belief that there cannot be any levy of service tax on the recoveries made in relation to sale of vehicle and there was neither any bonafide intention of the Noticee to evade payment of tax nor there was fraud, collusion, willful misstatement or suppression of facts by the assessee and therefore there is no reason or occasion for invoking the larger period of limitation.

6.10 It is stated that SCN has been issued for extended period which can be invoked only if the circumstances stipulated in proviso to section 73 (1) of Finance Act, 1994 are satisfied. However, in the absence of such circumstances and without specifying any plausible reason for invoking extended period, period of more than one year has been invoked while issuing this impugned SCN. It is important to note that extended period can be invoked only when there is willful intention for avoiding payment of service tax".

30. The findings in the impugned order regarding invoking extended period of limitation are as below:

"23.1 The Noticee also argued against applying the extended period for demand and proposal for penalties stating that there is no suppression on its part, citing various judgments. In this connection, I observe that the Noticee has failed to disclose the fact of collection of 'Handling Charges' from its customers as well as the availment of CENVAT credit relatable to provision of exempt/taxable services. Such withholding of material facts, in my considered view clearly constitutes the willful suppression with intent to evade the tax. It is evident that such material facts for assessment, determination and collection of tax was concealed and not disclosed to the department without ulterior motives.

23.2 As per the provisions of section 68 of the Finance Act, 1994 read with Rule 6 of the Service Tax Rules, 1994, it is the statutory obligation on the Noticee to pay service tax on the taxable services being provided by him. I find that the Noticee by the act of not paying the tax due under law has contravened such statutory provisions with intent to evade payment of tax by resorting to suppression of material facts willfully and has failed to follow and fulfill its statutory obligations, supra, as required under the Finance Act, 1994 and the rules made there under. Therefore, the service tax not paid is recoverable by invoking the extended period of limitation as provided under proviso to section 73 (1) of the finance Act, 1994".

31. As can be seen, extended period of limitation was invoked for the following reasons :

a) The appellant had not disclosed the fact of collection of 'Handling Charges; from its customers.

b) Such withholding of material facts, in the considered opinion of the

Commissioner, clearly constituted willful suppression with intent to evade the tax.

c) Therefore, it is evident that such material facts for assessment, determination and collection of tax was concealed and not disclosed to the department with ulterior motives.

32. As per section 73, extended period of limitation can be invoked only in case of (a) fraud; (b) collusion; (c) wilful misstatement; (d) suppression of facts; or (e) violation of the Act or Rules with an intent to evade payment of tax. The reasoning of the Commissioner is that since the appellant had not disclosed the fact of collection of ‘handling charges’ from its customers, it amounts to withholding of material facts for assessment with ulterior motives.

33. According to the appellant, it had no such motives and it was and is still of the view that these charges were not exigible to service tax. Therefore, it had not assessed service tax including these amounts in the taxable value of goods. It was registered with the Service Tax department and had been filing ST-3 Returns.

34. The submissions of the appellant deserve to be accepted on this question. ST-3 returns only require aggregate value of the taxable services to be indicated and the service tax to be self-assessed. The assessee is under no obligation to indicate individual transactions. In the process, the appellant may wrongly self-assess service tax. If the assessee either does not file the return at all, or having filed it, does not self-assess the service tax correctly, Section 72 requires the Central Excise

officer to do ‘Best Judgment assessment’ and for this purpose, he is empowered to call of any records or accounts from the assessee. Section 72 reads as follows:

72. Best Judgment Assessment.

If –(a) any person fails to make the return under section 70, or;

(b) any person having made a return fails to comply with all the terms of a notice issued under sub-section (1) of section 71, or

(c) the Central Excise Officer is not satisfied with the correctness or the completeness of the accounts of the assessee, the Central Excise Officer, after taking into account all the relevant material which he has gathered, shall, by an order in writing, make the assessment of the value of taxable service to the best of his judgment and determine the sum payable by the assessee or refundable to the assessee on the basis of such assessment.

35. Thus, the remedy against wrong self-assessment of service tax is ?best judgment assessment? by the Central Excise officer and for this purpose he can call for any accounts. In this case, the fact that the amounts were being collected as ?handling charges? was not a secret and it was available in all the invoices. If the Central Excise officer had scrutinized the returns, as he was bound to, and called for records as he was empowered to, he would have discovered what was

discovered much later by the audit. Therefore, if at all there was any service tax that escaped assessment but was discovered later by the audit, the fault for that lies squarely at the doorstep of the officer and not at the door step of the appellant. Once the assessee self-assessed service tax as per his understanding, he cannot be alleged to have suppressed any facts, especially when all the facts were in its records and were discovered from them by the audit.

36. We, therefore, find that extended period of limitation was wrongly invoked in the case.

37. We now proceed to decide the demand within the normal period of limitation, i.e., from 01.01.2013 to 31.03.2015. This entire period is in the post-negative list regime, i.e., all services except those in the negative list were liable to be taxed. The only two issues to be determined are whether the payment was for a service rendered and if so, if it is in the negative list.

38. According to the learned Chartered Accountant for the appellant, the amounts were received by the appellant as:

a) Recovery towards fuel supplied with the vehicle sold;

b) Recovery towards car decoratives and chocolates supplied;

c) Recovery towards sale of optional accessories; and

d) Recovery towards vehicle handling charges.

39. According to the learned counsel, service tax cannot be charged on any of the above four because they were all in the nature of sales. Sale of fuel, sale of car decoratives and chocolates and sale of optional accessories are clearly in the nature of sale. As far as the handling charges are concerned, he submits that handling charges also form part of the value of the vehicles sold and hence are liable to VAT/CST and therefore, they are not liable to service tax. He relies on the judgment of Karnataka High Court in Central Arecanut & Cocoa Marketing & Processing Co-operative Ltd. Versus State of Karnataka, 2014(46) taxmann.com 243 (Karnataka) in support of this contention.

40. According to the learned authorised representative for the Revenue, these additional amounts recovered by the appellant and recorded in its books of account as other miscellaneous applications were not towards the sale of the vehicle. These were collected for rendering various services and there is nothing on record to show that any of these were in the negative list of services. Therefore, service tax has to be paid on the entire amount.

41. We have considered the submissions. We have also perused the debit notes and invoices and ledgers at pages 422 to 484 of the appeal. The invoices are issued by the appellant as authorised dealer of Maruti Suzuki. The invoices indicate that the sale was on ex-showroom basis and the price is indicated on this basis. In addition, that the appellant collected ‘other charges’ from the customers. The ex-show room price included the price of the vehicle and the

applicable VAT. In addition, the appellant collected an amount towards extended warranty and towards 'other charges'. For example, at page 424 of the appeal, invoice no. VSL100000243 dated 22.5.2010 has the following details:

1. Price of one Maruti Alto LXI BSIV 2,55,112.33

2. VAT@14% 35,715.72

3. EXT. Warranty 1,790.00

4. Other Charges 3,500.00

Sub Total Amount 2,96,118.05

Customer payments 2,30,000.00

Balance to collect/pay 66,118.00

Ex-showroom price 2,90,828.06

42. In the above invoice, the ex-showroom price of Rs. 2,90,828.06 is the sum of the price of the car (Rs.2,55,112.33) and VAT (Rs.35,715.72). The extended warranty and the other charges do not form part of the price of the car. Therefore, it is not possible to accept the submission of the learned counsel that these are handling charges and that they form part of the assessable value for VAT. In this case, they were clearly not part of the assessable value for VAT. Similar are the other invoices in the file.

43. The amounts were recovered from their customer by issuing debit notes. The debit note corresponding to this invoice issued to the customer shows recovery of Rs.4,000/-as follows:

1. Recovery towards petrol 700.00

2. Optional Accessories (incl.VAT) 1,300.00

3. Decoratives (incl.VAT) 200.00

4. Body Cover Sale (incl.VAT) 800.00

5. Handling charges 1,000.00

TOTAL 4,000.00

44. Other debit notes included in the appeal also show similar recoveries of about Rs.4,000/- from each of the customers. Evidently, to the extent these recoveries are towards the cost of some goods supplied such as accessories, decoratives and body cover or cost of petrol filled in the car, they cannot be called as payments for rendering any service. Other recoveries such as handling charges are clearly charges for rendering a service in the form of handling. All services other than those in negative list are exigible to service tax in the post negative list regime and therefore, service tax has to be paid on such amounts. If no service tax was collected by the appellant from its customers on such amounts,

the amounts so collected need to be treated as cum-tax values and the amount of service tax needs to be calculated backwards.

45. In view of the above, we partly allow the appeal and modify the impugned order as below:

a) The order to recover an amount of Rs.3,25,80,796/- calculated @5%/ 6% of the value of the exempted service, viz., trading activity under rule 6(3)(1) of CCR is set aside.

b) The demand of service tax on the 'other income' of the appellant is set aside for the extended period of limitation i.e., up to 30.9.2013.

c) The demand of service tax on the 'other income' of the appellant for the period 01.10.2013 to 31.03.2015 is set aside to the extent this income represents the value of the goods or petrol sold. It is upheld to the extent it is on account of the 'handling charges' or any other amounts collected for rendering any other service. Since the appellant had not collected service tax on these amounts from its buyers, the amounts collected by the appellant should be taken as cum-tax values.

(d) All penalties are set aside.

e) The matter is remanded to the Commissioner for the limited purpose of calculation of service tax as above after giving the appellant an opportunity to present its figures.

(Order pronounced in open court on 04/12/2024.)

