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(2021) 06 CESTAT CK 0047

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Service Tax Appeal No. 12148, 12149, 12150 Of 2018

Tarang Constructions And Ors. APPELLANT

Vs

C.C.E. And S.T.-Rajkot RESPONDENT

Date of Decision : 24-06-2021

Acts Referred:

Finance Act, 1994 — Section 65B, 66, 66A, 66B, 93, 102, 102(1)(c)
Cenvat Credit Rules, 2004 — Rule 2(1), 3, 3(4)(e), 4(7), 6, 11, 11(1), 11(2), 11(3), 11(4)
Finance Act, 2004 — Section 95
Finance Act, 2005 — Section 85
Finance Act, 2007 — Section 136, 140
Customs Act, 1962 — Section 27

Citation : (2021) 06 CESTAT CK 0047

Hon'ble Judges : Ramesh Nair, J

Bench : Single Bench

Advocate : Jigar Shah, V. Lukose

Final Decision : Allowed

Judgement

1. The appellant have provided Works Contract Service to various Government departments. The appellant have also availed input services in the

nature of Works Contract Service from various sub-contractors on which the sub contractor have discharged the Service Tax and the same was

availed as Cenvat Credit by the appellant. The said Cenvat Credit was utilized for discharging the service tax liability by the appellants during the

period from 01/04/2015-29/02/2016. During this period the appellants paid Service Tax on works contract which is their output service. The Central

Government inserted section 102 of Finance Act, 1994 giving retrospective exemption to the services provided to the various Government departments

for the period from 01/04/2015 to 29/02/2016. Section 102 of Finance Act, 1994

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also provided for the refund of Service Tax paid by the assessees

during the period 01/04/2015-29/02/2016. Section 102 of Finance Act, 1994 also provided the timelines for filing of such refund claim. The appellants

filed refund applications. However, said refund claim after due process of natural justice rejected by the Deputy Commissioner. The appellant being

aggrieved by the rejection order of the Deputy Commissioner filed appeal before the learned Commissioner (Appeals). The learned Commissioner

(Appeal) on facts agreed that the refund is payable. However, he rejected the refund claim on the ground that since the output services are exempted

in terms of Rule 6, the appellant is not entitled for refund on the Service Tax paid by utilizing Cenvat Credit on input services. In the case of Tarang

Construction, the learned Commissioner also held that the refund claim is not hit by the unjust enrichment. However, in the case of other two appeals,

refund was rejected also on the ground of unjust enrichment. Being aggrieved by the impugned orders, the appellant filed the present appeals.

2. I have heard both sides and perused the records. I consider the submission made by the appellant vide their letter dated 01/04/2021, 12/04/2021 and

submission made by learned Authorised Representative vide letters dated 24.02.2021, 25.02.2021 and 05.04.2021. The learned Commissioner

(Appeals) in principle held that the refund in terms of section 102 of Finance Act, 1994 is admissible. However, by invoking Rule 6 of Cenvat Credit

Rules, 2004, he rejected the refund claim. I find that in the exactly identical issue, this Tribunal has considered the case of Shanti Construction

Company wherein the Division Bench of this Tribunal vide order no. A/12244/2021 dated 18.06.2021, giving deliberations on all the points involved in

the present case also, passed the following order:

4. We have heard both the sides and perused the records .We find that in the present case the refund, though in principle allowed by the learned

Commissioner (Appeals), however, the refund of service tax paid by the appellant by utilizing the Cenvat credit has been denied by the Learned

Commissioners (Appeals) on the ground that by the virtue of section 102 of Finance Act, 1994 the output service was exempted therefore, in terms of

rule 6 the appellant was required to reverse the Cenvat credit availed on input services. It is observed though the Adjudicating authority has invoked

rule 6 however, the learned Commissioner (Appeals) in para 7.1 of the impugned

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order observed as under:-

â??The lower adjudicating authority has rejected the refund claim on the ground that, out of total claim of Rs 2,74,30,204/-, Rs

1,77,42,041/- has been paid through Cenvat credit account and apart from these the appellant has declared exempted services in ST-3

returns for FY 2015-16, however, the appellant has not followed mandatory provisions of Rule 6 of the CCR,2004; that payment of service

tax in cash does not grant them any exemption from compliance of Rule 6 of CCR,2004. The appellant has submitted that they have utilized

Cenvat Credit only of those input services which are directly related to taxable output services only and they have maintained separate

accounts as per the provisions of Rule 6 of the Cenvat credit Rules and that the service tax had been paid to the subcontractors pertaining

to this work was claimed as CENVAT. I find that when the appellant has maintained separate accounts in terms of Rule 6 of the Cenvat

Credit Rules, 2004 and have availed Cenvat credit only on those input services which were used for providing taxable output services, the

question of reversal of Cenvat credit under Rule 6 of the Cenvat Credit Rules. 2004 would not arise. However, I find that the appellant has

availed Cenvat credit of Rs 1,82,16,059/- as per Annexure-3 to their refund application in respect of sub- contracted work and this has not

been reversed by them at the time of filing of refund claim. I also find that when the appellant has availed Cenvat credit of service tax paid

to their sub- contractors, they are not entitled for refund of service tax as it would lead to double benefit to them, once through availment of

Cenvat credit and another through refund of service tax, which is not permissible at all. When the appellant has taken Cenvat credit of Rs

1,82,16,059/- and also utilized, it cannot be said that incidence of such service tax has been borne by them. Therefore, I uphold the

impugned order to this extent and reject the appeal for refund of Rs 1,82,16,059/- to the appellant.â??

4.1 From the above para it is clear that learned Commissioner (Appeals) held that reversal of Cenvat credit under Rule 6 of Cenvat Credit

Rules, 2004 would not arise. Despite this clear finding the learned commissioner (Appeals) denied the refund on the ground that it will lead

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to double benefit once through availment of Cenvat credit and another through refund of service tax which is not permissible at all. With the

above finding it is settled that Rule 6 shall not apply in the present case. The revenue also not challenged this finding therefore, it attains

the finality. Now the issue remains to be decided that when the output services has been exempted retrospectively with a rider that whatever

duty was paid to be refunded to the assessee, whether the service tax paid through utilization of Cenvat credit should be refunded or

otherwise. During the relevant period i.e. 01.04.2015 to 29.02.2016 the output services were very much taxable. The appellant for

discharged the service tax as per the statutory provision prevalent at the relevant time. The appellant was legally entitled for the Cenvat

Credit on the input service received from the sub- contractors and used in providing the output service. The relevant rule 3 of Cenvat Credit

Rules, 2004 is reproduced below:

â??3. (1) A manufacturer or producer of final products or a provider of [output] service shall be allowed to take credit (hereinafter

referred to as the CENVAT credit) of-

(i)-

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(viia).................

(ix) the service tax leviable under section 66 of the Finance Act

[(ixa) the service tax leviable under section 66A of the Finance Act;]

[(ixb) the service tax leviable under section 66B of the Finance Act;]

(X) the Education Cess on taxable services leviable under section 91 read with section 95 of the Finance (No.2) Act, 2004 (23 of 2004)

[(xa) the Secondary and Higher Education Cess on taxable services leviable under section 136 read with section 140 of the Finance Act,

2007 (22 of 2007); and]

[(xi) the additional duty of excise leviable under [section 85 of Finance Act, 2005

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(18 of 2005)] Paid on-

(i)...............

(ii) any input service received by the manufacturer of final product or by the provider of output services on or after t6he 10th day of

September,2004,...............

....

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(4) The CENVAT credit may be utilized for payment of â?

(a)...........................

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(e) service tax on any output service.â??

4.2 As regard nature of service tax there is no dispute that the input service received from sub contractors and used in providing the output

construction service in terms of 2 (l) of Cenvat Credit Rules, 2004. In terms of the above Rule 3 since the appellant have received the input

service and used the same for output service they are allowed to claim Cenvat credit on the service tax paid on the input service. The said

Cenvat credit is also allowed to be utilized for payment of service tax on any output service in terms of Rule 3(4)(e) of Cenvat Credit Rules,

2004. At the time of claiming credit there is no dispute on the fact that the input service received by the appellants was not only intended to

be used for providing the output service but in fact it was used for providing output services.

4.3 The output service was provided on payment of service tax in terms of section 66 of the Finance Act, 1994 it is also undisputed fact that

the appellant have utilized the Cenvat credit for payment of service tax on the output service during the relevant period. In view of this

undisputed fact appellants has legally and correctly availed the Cenvat credit at the time of receipt of services and used thereof. The

Government by section 102 of finance Act, 1994 made the output service exempted with retrospective effect. The said section 102 is

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reproduced below:

â??SECTION 102.Special provision for exemption in certain cases relating to construction of Government buildings. â?

(1) Notwithstanding anything contained in section 66B, no service tax shall be levied or collected during the period commencing from the

1st day of April, 2015 and ending with the 29th day of February, 2016 (both days inclusive), in respect of taxable 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 ofâ?"â?

(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 asâ?"â?

(i) an educational establishment;

(ii) a clinical establishment; or

(iii) an art or cultural establishment;

(c) a residential complex predominantly meant for self-use or for the use of their employees or other persons specified in Explanation 1 to

clause (44) of section 65B of the said Act, under a contract entered into before the 1st day of March, 2015 and on which appropriate stamp

duty, where applicable, had been paid before that date.

(2) Refund shall be made of all such service tax which has been collected but which would not have been so collected had sub-section (1)

been in force at all material times.

(3) Notwithstanding anything contained in this Chapter, an application for the claim of refund of service tax shall be made within a period

of six months from the date on which the Finance Bill, 2016 receives the assent of the President.â??

4.4 As per the plain reading of the above section 102 legislature knowing well that service tax on the construction service obviously paid

not only on cash but also by utilizing the Cenvat credit on input service. With this clear understanding provision of refund of service tax

paid on output service was also provided in section 102. There is no provision to

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given a different treatment of service tax paid on output

service that whether the entire service tax was paid from cash or partly paid from cash and partly from Cenvat credit. Therefore, in

whatever manner the service tax paid irrespective partly from cash and partly from Cenvat credit, total tax paid by the assessee was

mandated to be refunded to the service provider. Therefore, the views of the lower authorities that only because the output service was

subsequently exempted by virtue of section 102 the refund of service tax paid through Cenvat credit is not admissible is without any basis

and without support of any statutory provisions.

4.5 As we discussed above availment of Cenvat credit and utilization thereof for payment of service tax on output service is not under

dispute. The Cenvat credit which was utilized has taken the color of service tax paid and that service tax is refundable in terms of section

102 of Finance Act, 1994. As regard contention of the revenue that the Cenvat credit utilized by the appellant is not admissible to the

appellant hence, the refund is not payable can be at the most be applied by invoking Rule 6 of the Cenvat Credit Rules, 2004.

4.6 As we discussed above the Learned Commissioner (Appeals) clearly held that in the given facts of the present case Rule 6 is not

applicable. Therefore, denial of the Cenvat credit cannot be made by invoking Rule 6 of the Cenvat Credit Rules, 2004. In case of exempted

service there is a transitional provision to deduct the Cenvat credit or lapse of Cenvat credit under Rule 11 of the Cenvat Credit Rules, 2004

which is reproduced below:-

Transitional provision.

11. (1) Any amount of credit earned by a manufacturer under the CENVAT Credit Rules, 2002, as they existed prior to the 10th day of

September, 2004 or by a provider of output service under the Service Tax Credit Rules, 2002, as they existed prior to the 10th day of

September, 2004, and remaining unutilized on that day shall be allowed as CENVAT credit to such manufacturer or provider of output

service under these rules, and be allowed to be utilized in accordance with these rules.

(2) A manufacturer who opts for exemption from the whole of the duty of excise

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leviable on goods manufactured by him under a notification

based on the value or quantity of cleaiances in a financial year, and who has, been taking CENVAT credit on inputs or input services before

such option is exercised, shall be required to pay an amount equiva-lent to the CENVAT credit, if any, allowed to him in respect of inputs

lying in stock or in process or contained in final products lying in stock on the date when such option is exercised and after deducting the

said amount from the balance, if any, lying in his &edit, the balance, if any, still remaining shall lapse and shall not be allowed to be uti-

lized for payment of duty on any excisable goods, whether cleared for home consump-tion or for export.

[(3)A:manufacturer or producer of a final product shall be required to pay an amount equivalent to the CENVAT credit, if any, taken by

him in respect of inputs received for use in the manufacture of the said final product and is lying:in stock or in process or is contained in the

final product lying in stock, if,â?

(i) he opts for exemption from whole of the duty of excise leviable on the said final product manufactured or produced by him under a

notification issued under section 5A of the Act; or

(ii) the said final product has been exempted absolutely under section 5A,of the Act, . and after deduCting the said amount from the balance

of CENVAT credit, if an. y, lying in his credit, the balance, if any, still remaining shall lapse and shall not be allowed to be utilized for

payment of duty on any other final product whether cleared for home consumption or for export, or for payment of service tax on any output

service, whether provided in India or exported.

(4) A provider of output service shall be required. to pay an amount equivalent to the CENVAT credit, if any, taken by him in respect of

inputs received for providing the said service and is lying in stock or is contained in the taxable service pending to be provided, when he opts

for exemption from payment of Whole of the service tax leviable on such taxable service under a notification issued under section 93 of the

Finance Act, 1994 (32 of 1994) and after deducting the said amount from the balance of CENVAT credit, if any, lying in his credit, the

balance, if any, still remaining shall lapse and shall not be allowed to be Utilized

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for payment of duty on any excisable goods, whether

cleared for home consumption or for export or for payment of service tax on any other output service, whether provided in India or

exported.]

4.7 From the reading of the above provision, we find that the said provision is applicable only in the case where the assessee has taken the

Cenvat Credit on Input Service and the said credit is lying unutilized and the output service became exempted.

4.8 In the present case while taking the Cenvat credit the output service were not exempted and the Cenvat credit was utilized for the

payment of service tax therefore, neither any Cenvat credit was lying accumulated nor the service at the relevant time was provided under

exemption particularly issued under section 93 of the Finance Act, 1994. In the present case during the relevant period the services were

very much taxable therefore, the availment of Cenvat credit and utilization thereof and also payment of service tax on the output service was

correct. Hence, the of sub- rule (4) of Rule 11 of the Cenvat Credit Rules is not at all applicable in the facts of the present case.

4.9 Therefore, unlike Rule 6 and/ or Rule 11 of Cenvat Credit Rules no machinery provision was provided to take back the Cenvat credit

availed and utilized for providing the output service which was provided on payment of service tax. In this position neither denial of Cenvat

credit nor denial of refund of service tax paid by utilizing such Cenvat credit has support of any law.

4.10 The identical situation of the case has been considered by the division bench of this tribunal in the case of M/s Almebic Ltd (supra).

The facts in that case was appellant were providing construction service of residential complex. At the time of receipt of input service and

construction of residential complex it was not certain that part of the residential complex would not attract the service tax due to the reason

that it is sold after obtaining the occupation certificate and due to this reason whatever constructed portion sold after obtaining the

occupation certificate no service tax was paid. It was the departmentâ??s case that since no service tax was paid on the part of the

residential complex; the assessee was not entitled for the Cenvat credit on the

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input service attributed to the said service on which no service

tax was paid. This tribunal after considering all the provisions of Cenvat Credit Rules came to the conclusion that at the time of availing the

Cenvat credit the services were very much taxable, part of the output service became exempted only at the later stage therefore, recovery of

the Cenvat credit attributed to the residential complex sold without payment of service tax cannot be made. The facts of the present case are

very much similar to the facts in the M/s Alembic Ltdâ??s case. The said judgment of the tribunal was maintained by the Jurisdictional

Honâ??ble Gujarat High Court as cited (supra). The relevant order portion of the tribunal in the M/s Alembic Ltd case 2019 (28) GSTL 71

(Tri. Ahmd) is reproduced below:

â??5. The appellants submitted that they availed only proportionate Cenvat credit, determined on scientific basis by them (considering

square foot area where Service Tax was paid and balance area where Service Tax will not be paid after completion certificate). They had

not only given due intimation in this regard at the time of obtaining completion certificate but also produced CA certificate to support their

case in this regard. The present appeals involves the following legal questions:

(a) Whether receipt of consideration for residential units sold as immovable property after receipt of completion certificate amounts to

providing exempted service and Rule 6 of the CCR, 2004 is applicable in such case and as such, whether the appellants are liable to pay

8%/10% amount of exempted value under Rule 6 of the CCR, 2004?

(b) Whether credit can be allowed to the appellants under Rule 3 of the CCR, 2004 in such circumstances?

(c) Whether the appellants can be said to have â??maintained proper separate accountsâ?? as required under Rule 6 of the CCR, 2004?

(d) Whether the appellants are required to reverse Cenvat credit availed during the period when output service was taxable before receipt

of completion certificate, since such services were availed to construct entire property, and portion of such property did not attract Service

Tax after receipt of completion certificate?

(e) Connected to the question

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(d), whether the appellants are eligible to seek refund of the amount paid under protest towards credit availed from 2010 till receipt of

completion certificate, based on CERA audit objection wherein such credit was sought to be reversed based on considering square feet area

where Service Tax was paid and balance area where Service Tax will not be paid after completion certificate?

12. As regards to the next issue of whether the appellants were also required to reverse proportionate credit, out of the valid input service

credits availed by them during the period 2010 till obtaining completion certificate, i.e. availing during the time when whole of output

service of construction of residential complex was taxable. It was argued by the appellants that out of business prudence, no developer

wishes to have a situation where the properties are not sold as soon as possible and the property is converted into immovable property after

receipt of completion certificate. It was also argued that as per Rule 3 of the CCR, 2004, credit eligibility is to be examined as on date of

receipt of input service and not governed by later developments such as portion of property getting converted into immovable property after

receipt of completion certificate. It was also argued that while Rule 6 of the CCR, 2004 deals with credits availed afresh, i.e. after output

activity becoming exempt, however Rule 11 is the only provision which deals with credits availed in the past when output activity was wholly

taxable however, at later point in time, became exempt.

13. We agree with such plea raised by the appellant. While the law does not intend to allow any undue benefit to a service provider in terms

of Cenvat Credit of Service Tax paid on input services used in providing non-taxable output activity, however, as held by the Honâ??ble

Apex Court in the case of Dai Ichi Karkaria, 1999 (112) E.L.T. 353 (S.C.), Modvat/ Cenvat credit is a vested right. Once it is legally and

validly availed, the same cannot be denied and/or recovered unless specific provisions exist for the same. The appellants have also correctly

relied upon the decisions/judgments in the case of HMT Ltd., TAFE, Ashok Iron & Steel Fabricators (supra) wherein an identical situation

qua â??inputsâ? used in production of dutiable finished goods was involved, where on a particular date, the said finished goods became

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exempt and the issue involved was as regards credits availed at a time when such finished goods was otherwise dutiable.

14. It has been a consistent judicial view, including that of the Honâ??ble Apex Court in such cases, that credit entitlement is on the date of

receipt of inputs when the output activity was wholly dutiable. Merely because the finished goods eventually became exempt later on, the

credit availed on inputs which were contained in semifinished/finished goods state was held as not deniable. The present case is squarely

covered vide such ratio laid down by higher courts.â??

The judgment by Honâ??ble Gujarat High Court in the case M/s Alembic Ltd 2019 (29) GSTL 625 (Guj.) whereby the above Tribunalâ??s decision

was upheld, is reproduced below:

â??16. The Tribunal therefore, on a harmonious reading of Rule 3 of the Rules read with Rules 6 and 11(4) of the Rules held that

eligibility/entitlement to credit has to be examined only at the time of receipt of input service and once it is found to be availed at a time

when output service is wholly taxable, and the said credit is availed legitimately, the same cannot be denied and/or recovered unless specific

machinery provisions are made in this regard. Sub-rule (7) of Rule 4 of the Rules held that the assessee is not required to wait till output

service is sold to the service recipient and the assessee can take the credit immediately after the day on bill/challan of input service is

received. In facts of the case, there is no dispute that the respondent availed the credit after receipt of bill/challan in respect of input service

and, therefore, it was legally entitled to take the credit on the date after the receipt of service bills/challans. Therefore, the availment of

Cenvat credit by the respondent is absolutely legal and correct and in accordance with Rule 4(7) of the Rules. As at the time of taking

credit, there was no existence of any exempted service, therefore, there is no application of Rule 6. That part of the service was exempted

only after obtaining completion certificate and thereafter, the respondent was not required to avail the Cenvat credit on the input service, if

any, received after obtaining the completion certificate. The respondent did not avail the Cenvat credit in respect of the services received

after obtaining the completion certificate in respect of exempted service or avail

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proportionate credit attributed to the taxable output

service. Therefore, Rule 6 has application for the period after obtaining the completion certificate. Rule 11(1), (2) and (3) of the Rules

applicable to provision for manufactured goods to hold that in case of service becomes exempted at a later stage, there is no such provision

in respect of the service. The only provision for the service is provided under sub-rule (4) of Rule 11 of the Rules which reads as under :

â??11(4). A person provider of output service shall be required to pay an amount equivalent to the CENVAT credit, if any, taken by him in

respect of inputs received for providing the said service and is lying in stock or is contained in the taxable service pending to be provided,

when he opts for exemption from payment of whole of the service tax leviable on such taxable service under a notification issued under

Section 93 of the Finance Act, 1994 (32 of 1994) and after directing the said amount from the balance of CENVAT credit, if any, lying in his

credit, the balance, if any, still remaining shall lapse and shall not be allowed to be utilized for payment of duty on any excisable goods,

whether cleared for home consumption or for export or for payment of service tax on any other output service, whether provided in India or

exported.â??

17. From the above sub-rule (4), it is clear that even if an output service provider avails the credit and output service becomes exempted in

such case the credit only in respect of inputs lying in stock or is contained in taxable service is required to be paid whereas there is no

provision for payment of Cenvat credit equivalent to the input services used in respect of exempted service. Therefore, Cenvat credit availed

in respect of input service is not required to be paid back under any circumstances and therefore, the respondent was not legally required

to reverse any credit which was availed by them during the period 2010 till obtaining completion certificate i.e. during the period when

output service was wholly taxable in their hands, merely because later on, some portion of the property was converted into immovable

property on account of receipt of completion certificate and on which no service tax would be paid in future.â??

4.11 In view of the above settled position in the similar case the issue in the

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present case is no longer res-integra. On the issue that

admissibility of the Cenvat credit has to be considered at the time of receipt of input service and not for the subsequent event, the

Honâ??ble Karnataka High Court has considered the case of Tata Advance Material Ltd 2011 (271) ELT 62(Kar.) wherein it is observed

as under

â??5.The Supreme Court in the case of the Collector of Central Excise, Pune v. Dai Ichi Karkaria Ltd. reported in 1999 (112) E.L.T. 353

(S.C.) at para 17 held as under :-

â??17. It is clear from these Rules, as we read them, that a manufacturer obtains credit for the excise duty paid on raw material to be used

by him in the production of an excisable product immediately it makes the requisite declaration and obtains an acknowledgement thereof. It

is entitled to use the credit at any time thereafter when making payment of excise duty on the excisable product. There is no provision in the

Rules which provides for a reversal of the credit by the excise authorities except where it has been illegally or irregularly taken. in which

event it stands cancelled or, if utilised, has to be paid for. We are here really concerned with credit that has been validly taken, and its

benefit is available to the manufacturer without any limitation in time or otherwise unless the manufacturer itself chooses not to use the raw

material in its excisable product. The credit is, therefore indefeasible. It should also be noted that there is no corelation of the raw material

and the final product; that is to say, it is not as if credit-can be taken only on a final product that is manufactured out of the particular raw

material to which the credit is related. The credit may be taken against the excise duty on a final product manufactured on the very day that

it becomes available.â??

6. Therefore, it is clear that there is no provision in the rules which provides for a reversal of the credit by the Excise Authorities except

where it has been irregularly taken in which event it stands cancelled or if utilised has to be paid for. This is not the case of the revenue. In

the instant case, when the assessee purchased the capital goods and when he has paid the excise duty on them, in law, he is entitled to get

the credit on the duty paid while clearing the finished products from his factory.

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Accordingly, he utilised the cenvat credit and cleared the

finished products. It is about three years after such payment, the capital goods were destroyed in fire. As the assessee had insured the said

capital goods, he put forth a claim for payment of the loss sustained by him, which includes the payment of excise duty. The Insurance

Company in terms of the policy has compensated the assessee. Merely because the Insurance Company paid the assessee the value of goods

including the excise duty paid, that would not render the availment of the cenvat credit wrong or irregular. At the same time, it does not

confer any sight, on the Excise Department to demand reversal of credit or default to pay the said amount. The assessee has paid the

premium and covered the risk of this capital goods and when the goods were destroyed in terms of the insurance policy, the Insurance

Company has compensated the assessee. It is not a case of double payment as contended by the department. At any rate, the Excise

Department has no say in the instant case as held by the Apex Court. In that view of the matter, the substantial questions of law framed in

this appeal are answered in favour of the assessee and against the revenue. Accordingly, the appeal is dismissed.â??

4.12 In view of the above judgment it is clear that in the present case there is no dispute in availment of Cenvat credit at the time of receipt

of input service. Therefore, subsequent exemption by virtue of section 102 of Finance Act, 1994 will not make disentitle the appellant from

the said Cenvat credit.

4.13 The learned counsel also argued that the refund claim of the portion of service tax paid through Cenvat credit which was paid as

service tax by the sub- contractors. The said service tax even without considering the Cenvat credit is refundable in the hands of recipient

of such service as the services of sub- contractors was also exempted. This argument of the appellant is supported by the judgment of

Honâ??ble Supreme Court in the case of Oswal Chemicals and fertilizers reported in 2015 (318) ELT 617 (SC) wherein it is held as

under:-

â??7.Explanation (B) defines â??relevant dateâ?. Though this date has reference to the calculation of limitation period for the purposes of

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seeking refund of the duty under the aforesaid provision. However, clause (e) while stating the â??relevant dateâ? clarifies that in case of

a person, other than the manufacturer, the date of purchase of goods by other person would be the relevant date. This itself indicates that

the person can be other than the manufacturer and Explanation (B) caters to such other person. It is not even necessary to embark on

detailed discussion on this aspect inasmuch as we note that the Constitution Bench of this Court in â?? Mafatlal Industries Ltd. and others v.

Union of India and othersâ?? [1997 (5) SCC 536 = 1997 (89) E.L.T. 247 (S.C.)] has already settled this aspect in the following words :-

â??(xii) Section 11-B does provide for the purchaser making the claim for refund provided he is able to establish that he has not passed on

the burden to another person. It, therefore, cannot be said that Section 11-B is a device to retain the illegally collected taxes by the State.

This is equally true of Section 27 of the Customs Act, 1962.â??

8.We are, therefore, of the opinion that the appellant who had paid the excise duty to the manufacturer, viz., M/s. Indian Oil Corporation

Ltd. (hereinafter referred to as â??IOCLâ??) and BPCL in the instant case, had the necessary locus standi to file the application claiming

the refund of the duty.â??

4.14 The similar view was expressed by the Honâ??ble Bombay High Court in the case of Usha Agarwal 2009 (243) ELT 492 (Bom)

wherein it is observed as:-

â??10. In the instant case as noted, the appellant had purchased goods on which earlier it was assumed that no excise duty was payable.

Then a Bank guarantee was obtained from the appellant that in the event the excise duty was demanded then he will reimburse O.N.G.C.

O.N.G.C. took up the matter in appeal up to the Commissioner (Appeals) and thereafter did not take any steps. It is the Petitioner who has to

pay the excise duty. It is the Petitionerâ??s contention that classification as done by the Revenue is not correct and accordingly he is

entitled to refund of duty paid. In our opinion, such person can be said to be person aggrieved as prejudice has been occasioned to him by

O.N.G.C. in not preferring an appeal and the appellant having to pay the excise duty which in his opinion is not payable. Considering the

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scheme of Central Excise Act, the appellant would not have any other remedy as an application for refund would only be maintainable if the

order of assessment is set aside and not otherwise. The appellant would therefore, be left with no remedy at law. The Appellant therefore,

has demonstrated the prejudice that would be occasioned. It is in that context that this court rightly had directed the appellant to move an

application to seek relief to prefer an appeal. The tribunal unfortunately misread the judgment of this court and proceeded to examine

whether an appeal itself lies. It is true that the tribunal in its judgment has noted that conferring a right on the person other than

manufacturer may create adverse impart on the ordinary claim of the Revenue and fiscal administration. In our opinion, this can be met by

holding that the person aggrieved who is allowed to prefer an appeal would only be entitled to prefer appeal to the extent of the prejudice

suffered by inaction of the original assessee through whom he claims the relief. This would rule out the possibility of matter going down the

chain.â??

4.15 From the above settled position the appellant is otherwise eligible for refund in respect of service tax paid by the sub- contractors as a

recipient of exempted service.

4.16 Shri H.K Jain Learned Assistant Commissioner (AR) appearing on behalf of the revenue heavily relied upon the decision of this

tribunal in the case of Shree Gurukrupa Construction (supra). We find that this decision has not considered the latest legal position settled

by Honâ??ble Gujarat High Court in the case of M/s Alembic Ltd. Therefore, the decision in the case of Shree Gurukrupa is distinguished.

4.17 There is one more issue in the present case that out of the subject refund in the present appeal the Learned Commissioner (Appeals)

denied the refund of Rs 38,11,497/- for project B-2/12/2014-15 on the ground that the contract was entered into after 01.03.2015 as per

the work order given on 16.03.2015. In this regard it is the appellantâ??s submission that the said tender was opened on 28.01.2015 and

the appellants were declared as successful bidder and the same has been accepted as contract.

5. We find that as per the facts before us there is no dispute that the tender was

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opened on 28.01.2015 and the appellant was declared

successful bidder thereafter no separate contract/ agreement was entered into. It is the departmentâ??s contention that the date of the

work order i.e. 16.03.2015 has to be considered as contract. We do not agree with this contention for the reason that work order is only a

procedure to begin the work however, since there is no separate contract/ agreement after opening of tender and acceptance thereof by the

appellant that itself is treated as contract. Therefore, the date of opening of tender i.e. 28.01.2015 has to be taken as a date of contract.

Section 102(1) (c) provides exemption only to those residential complex where a contract is entered into before the 1st day of March, 2015

and on which appropriate stamp duty, whenever applicable had been paid before that day.

5.1 We find that the Adjudicating Authority while denying the refund of this amount also noted that there is no evidence of payment of stamp

duty on the contract. The Adjudicating Authority has missed the term â??wherever applicableâ?. In the present case payment of stamp duty

is not applicable. Therefore, the condition whether stamp duty was paid or otherwise cannot be applied in the present case. Only aspect to

be considered is whether the contract is of prior to 01.03. 2015 or post that date. As discussed above the date of opening of tender and

acceptance thereof is the date of contract which is 28.1.2015. The appellantâ??s claimed is squarely covered by section 102 and

accordingly, they are eligible for the refund for this amount also.

5.2 The appellant also claimed refund of interest amount of Rs 3,77,629/- which was paid due to delay in payment of service tax during the

relevant period. The lower authorities have rejected the refund of this amount on the ground that section 102 provides the refund of service

tax and not of interest.

5.3 We find that the said interest was paid on the service tax which is refundable under Section 102. When there is no levy of service tax the

government cannot retain the interest paid on such non levy therefore, even though it is not specifically provided under Section 102. The

interest paid on the service tax which is to be refundable is nothing but a piggy back of refundable service tax. Hence, the same is eligible

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for the refund to the appellant.

6. As per our above discussion and findings, we are of the view that appellant is entitled for the refund of service tax paid through Cenvat

credit and also the interest paid for delay in payment of service tax.

7. Accordingly, the impugned order is modified to the above extent and appeal is allowed with consequential relief, if any, in accordance

with law.â??

It can be seen that the above order has considered the identical issue and the Division Bench of this Tribunal has held that the appellant is entitled for

refund as well as the interest paid on the Service Tax payment. Following the above decision of this Tribunal, I am of the view that the appellant is

entitle for refund on merit of Service Tax and interest, if any, paid for the delayed payment of Service tax.

2.1 As regard unjust enrichment in case of Tarang Construction, the learned Commissioner (Appeals) has categorically held that refund is not hit by

unjust enrichment. Therefore, the issue of unjust enrichment has attained finality in the favour of the appellant.

2.2 As regard appeal of Standard Buildcon, I find that in this case the service recipient was MES and Okha Nagarpalika. As per the contract clause

with Military Engineering Services (Air Force) it is observed that MES has given the instruction to all their contractors to get the refund of Service

Tax from the Government itself after the introduction of section 102 of Finance Act, 1994. Therefore, there is no question of payment of Service Tax

from MES to the appellant. It is also observed that at the time of entering into contract, there was no Service Tax applicable and thus, there is no

question of inclusion of Service Tax in the schedule rate quoted by the appellant. With this fact, it can be constructed that even if the Service Tax was

paid by the appellant, the same was not paid by the Service Recipient as per the contract. It is also found that the appellant have submitted the

certificate of Chartered Accountant showing the details of Service Tax and its payment made by the appellants through challans and Cenvatable bills.

Moreover, the appellant have also submitted affidavit signed by partners stating that the liability of payment of Service Tax is borne by them and not

by the Service recipient. On the basis of this undisputed fact, it is established that the appellant have themselves discharged the liability of Service Tax

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and the same was borne by them. Hence, the appellant has established that the incidence of Service Tax has not been passed on to any other person.

The following judgments cited by the Appellant also supports their case:

(1) Welspun Gujarat Stahal Roliren Ltd. vs CC (I), Nahava Sheva (2014) 306 ELT 513 (Cestat, Mumbai)]

(2) Hexacon (I) Ltd vs CCE, Jaipur 2003 (156) ELT 357; 2006 (3) STR 131 (CESTAT- Delhi)

(3) CCE, Pune vs Jayshree Suraksha Rakshak Sahakari Sanstha Maryadit 2007 (9) STJ 32 (2007); 2007 (9)STT 44 (CESTAT Mumbai)

(4) Jageti 7 Co. vs CST, 2012(26) STR 4115 (CESTAT, Ahmedabad)

2.3 In the case of Shyam Construction on the issue of unjust enrichment and facts related there to, I find that in the tender for the project the prices

includes cost of material, labour, other incidental expenditures, taxes applicable at the time of entering into contract, the schedule of rate is quoted. At

the material time when these tenders were placed no Service Tax was applicable and thus, there arises no question of including the same in the

Schedule of Rate. Therefore, only on the basis that the agreement uses the terminology that the price is inclusive of all taxes does not mean that the

service recipient has paid the applicable Service Tax. It is also undisputed that the appellant have shown an amount of Rs. 51,91,234/- as outstanding

in their balance sheet under â??sundry debtorsâ?? as receivable from Gujarat Council of Primary Education. I find that on this basis, the

Commissioner (Appeals) held that the amount is not lying under â??Service Tax receivableâ?? which is necessary pre-condition to be satisfied for

granting of refund. The appellant submitted that the treatment of amount in the balance sheet is not a determining factor for grant of refund. I find that

the appellant had submitted the ledger account of Service Tax payable wherein the total amount of Service Tax payable in case of all the bills is stated

on the credit side and the mode of its payment is stated on its debit side which includes Cenvat Credit taken and the challans amount. The

corresponding entry of Service Tax to be receivable was stated in the account of â??Service Tax Receivableâ??. This fact established that the

incidence of Service Tax for refund which is sought for has not been passed on to the service recipient. The appellant submitted that they have

submitted Chartered Accountant certificate showing that the incidence of tax has

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not been passed on the customer. The appellant has taken support

of the following judgments:

(i) CCE, Guntur vs. Crane Betel Nut Powder Works, 2011 (274) ELT 113 [CESTAT, Bangalore];

(ii) General Commodities Pvt. Ltd. vs. CST, Bangalore, 2010 (18) STR 460 [CESTAT, Bangalore];

(iii) TTK Textiles Ltd. vs. CCE, Madurai, 2015 (315) ELT 511

(iv) Santosh Patil vs. CCE, Raigad, 2013 (41) STR 90 [CESTAT, Mumbai]

2.4 I find that without any basis the Chartered Accountant Certificate cannot be discarded. Therefore, the same ought to have been accepted. In

addition, the appellant also submitted the affidavit signed by all the partners stating that the liability of the Service Tax was borne by them only and

have not been passed on to any service recipient. Even the sub contractor had submitted an affidavit that they had borne the Service Tax liability. The

above fact is not under dispute and on this the appellant gets the support from the following judgments:

(1) Welspun Gujarat Stahal Roliren Ltd. vs CC (I), Nahava Sheva (2014) 306 ELT 513 (Cestat, Mumbai)]

(2) Hexacon (I) Ltd vs CCE, Jaipur 2003 (156) ELT 357; 2006 (3) STR 131 (CESTAT- Delhi)

(3) CCE, Pune vs Jayshree Suraksha Rakshak Sahakari Sanstha Maryadit 2007 (9) STJ 32 (2007); 2007 (9)STT 44 (CESTAT Mumbai)

(4) Jageti 7 Co. vs CST, 2012(26) STR 4115 (CESTAT, Ahmedabad)

2.5 In view of above facts, it is established that the appellant themselves have discharged the liability of Service Tax and the same has not been

passed on to any other person. Therefore, the refund has passed through the test of unjust enrichment.

2.6 I further find that the refund in question in both the above cases is governed by self contention provision under section 102 of Finance Act, 1994.

Therefore, in the facts of this particular refund case, provision of unjust enrichment is not applicable. This view is supported by the following

judgments of this Tribunal:

(1) Commissioner of Central Excise & S.T., Kanpur vs Executive Engineer 2019 (2) TMI 951-CESTAT Ahmedabad wherein it was held as follows:

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â??4. On appeal against the said orders, Commissioner (Appeals) scrutinized all the documents and found that the observations of the

original adjudicating authority that the assessee had not filed any documents/ invoices to show that the Service Tax paid by them related to

the services specified in entry 12A of the mega exemption Notification are not proper inasmuch as there were all the documents to show that

the services provided by them were covered by the said entry. As regards unjust enrichment angle he observed as under:-

â??3.4 Further, it is observed that for executing these work orders, the appellants did not raise any bill/invoice on the concerned

department of the Government of Uttar Pradesh and on the basis of their estimates provided to the Government of Uttar Pradesh for such

works, they had received the funds from the Government of Uttar Pradesh. Since prior to 01.04.2015, Service Tax on such work orders,

was exempt under Sl.No.(a), (c) & (f) of the entry 12 of the Mega Exemption, the funds received by them during 2015-16 did not include the

Service Tax element. Since such work orders had become taxable during 01.04.2015 to 29.02.2016, they paid the Service Tax out of these

funds allotted by the Government of Uttar Pradesh which did not include the Service Tax element.â??

5. As is seen from the above findings of Commissioner (Appeals), he has observed that the contracts with the Government were executed

when the services were exempted in terms of various Sl.Nos. of Entry 12 of the Mega Notification. Admittedly in such a scenario the question

of inclusion of any tax in the contract value would not arise. He has further observed that the assessee was not raising any Bills for the

work executed by them and only the contract amounts were being paid to them. We find no infirmity in the above findings of Commissioner

(Appeals) and hence no merits in the Revenueâ??s appeals. We also note that when the legislation itself has legislated for the refund of

Service Tax in terms of the provisions of section 102, the objections raised by Revenue cannot be appreciated.

6. In view of the foregoing, we find no merits in the Revenueâ??s appeals. The same are accordingly rejected. Stay Petition as also the

Cross Objections filed by the respondents also get disposed of.â??

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(2) Commissioner of CGST & Central Excise, Lucknow vs M/s UP Projects Corporation Ltd. 2019 (9) TMI 1395- CESTAT Allahabad, wherein it

was held as follows:

â??5. We note the provisions of Rule 102 were specifically introduced in the Finance Act for refund of the service tax so paid, which was

actually paid on account of inadvertent withdrawing of exemption. The contracts with the U.P. Government were inclusive of all taxes, thus,

not attracting the provisions of unjust enrichment. As such, we find no infirmity in the impugned order and accordingly Revenueâ??s

appeals are rejected. Cross application also gets disposed of.â??

2.7 As per the discussion made hereinabove on the facts as well as on legal proposition, the provision of unjust enrichment is not applicable.

Accordingly, the refund ought not to have been denied on the ground of unjust enrichment also.

3. In view of my above discussion and finding, appellants are entitled for refund of Service Tax along with interest. Appeals are allowed with

consequential relief.

(Pronounced in the open court on 24/06/2021)

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