CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.I

Excise Appeal No.70286 of 2017

(Arising out of Order-in-Original No.57-58/COMMISSIONER/NOIDA-II/2016-17 dated 30/01/2017 passed by Commissioner of Central Excise & Service Tax, Noida)

M/s LG Electronics India Pvt. Ltd., **.....Appellant**
(51, Udyog Vihar, Surajpur-
Kasna Road, Noida-201305)

VERSUS

Commissioner of Central Excise, Noida-II **....Respondent**

(Wegmans Business Park, KP-III, Greater Noida-201308)

APPEARANCE:

Shri Atul Gupta, Advocate for the Appellant
Shri A.K. Choudhary, Authorised Representative for the Respondent

CORAM: HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)
HON'BLE MR. ANGAD PRASAD, MEMBER (JUDICIAL)

FINAL ORDER NO.70501/2025

DATE OF HEARING : 16 July, 2025
DATE OF PRONOUNCEMENT : 18 July, 2025

SANJIV SRIVASTAVA:

This appeal is directed against Order-In-Original No.57-58/ COMM/NOIDA-II/2016-17 dated 30.01.2017 of the Commissioner, Central Excise, Noida-II. By the impugned order following has been held:

"***ORDER***

(i) I disallow Cenvat credit amounting to Rs. 1,87, 38,42 1/- (as per Show cause Notice dated 22-12-2015) and Rs.36,52,391/- (as per Show Cause Notice dated 18-10-2016) and order its recovery, along with interest, as applicable thereon, under the provisions of Rule 14 of

Cenvat Credit Rule read with Section 11A and Section 11AA of the Central Excise Act. 1944.

(ii) I confirm the demand of Rs.1,28,08,648/- (as per demand raised vide SCN dated 22-12-2015) along with applicable rate(s) of interest, under the provisions of under Rule 6(3) of the Cenvat Credit Rules read with Rule 14 of the said Rules and Section 1 1AA of the Central Excise Act, 1944.

(iii) The amount of Rs.38,82,360/- as also the amount of interest for Rs.68,742/-, which have already been deposited by the said party, i.e., M's L.G. Electronics India Pvt. Ltd., Greater Noida, are ordered to b appropriated against the aforesaid demands.

(iv) I impose penalty of Rs.3,51,99,460/- on the party, i.e.,M/s L.G Electronics India Pvt. Ltd., Greater Noida, under Rule 15(2) of the Cenvat Credit Rules, 2004 read with Section 11AC of the Central Excise Act, 1944."

2.1 Appellant is engaged in manufacture of Washing Machines, Air Conditioners, Refrigerators, Microwave-ovens etc. falling under Chapter 84 & 85 of the First Schedule to the Central Excise Tariff Act, 1985 (herein after referred to as the CETA) and are registered with the Central Excise & Service Tax, vide Registration Nos. AAACL1745QXM001 and AAACL1745QST003 respectively. They are availing the facility of CENVAT Credit as per the extant rules.

2.2 They are also registered with the Department as an Input Service Distributor under the CENVAT Credit Rules, 2004 for the purposes of taking and distributing tax credit in respect of input services.

2.3 During the course of audit of the records of appellant, it was observed that they have availed and utilized inadmissible CENVAT credit on input services, viz.

- "Advertisement Services" in the name of Brand Shop Management; and
- "Technical know-how" Service, i.e., Intellectual Property Right Services.

2.4 In the garb of advertising agency service appellant had taken credit on Brand shop Management which is not admissible in as much as

(i) The services of work viz. erection/installation and other work have been performed at places viz. Retails show rooms, sub-dealers show rooms which were beyond the scope of, "Input Services"

(i) the work done in many cases is repair maintenance, erection, commissioning and installation in nature and therefore does not fall under the category of advertisement ; and

(ii) Instead of taking credit of service tax on agency commission only took the credit of entire service tax paid on such invoices.

2.5 As input service distributor appellant distribute In-put service credit to their various other units in India. One of the Input services they are availing is, from their associate enterprise namely M/s L.G. Electronics, LG Twin Towers - 20, Yoido-Youngdungo, Seoul Korea. The service provided by LG Korea to LG Electronics India Pvt Ltd is - "Technical know How" where the licensor (LG Korea) has granted to the Licensee (the party) the consent to use the Technical Information and design and Intellectual Property Rights as defined in the Agreement entered between the two parties on 01-07-2001. Provision of such activity falls under the category of Intellectual Property Services [Section 65(105)(zzr)] of the Finance Act, 1994. The agreement entered between the two parties against the payment of Royalty to M/s LG INC Korea. The party is paying Royally on the sale of their products in local (domestic) sales as well as on export sales. During the MLU audit for the year 2012-13, it has been noticed that they did not reverse the CENVAT Credit under Rule 6(3) of the CENVAT Credit Rules, 2004, when such services were commonly used in respect of excisable and exempted goods. Prior to 01-04-2011, 6(5) of the CENVAT Credit Rules, 2004 provided that on Intellectual Property Services [Section 65 (105) (zzr)] among one of the 17 specified services, credit was

available unless such services were used exclusively in or in relation to manufacture of exempted goods or providing exempted services. After 01-04-2011 the Rule itself has been deleted/omitted by Notification No.03/2011-CE(N.T) dated 01-03-2011,w.e,f. 01-04-2011. On enquiry appellant stated that Cenvat credit availed IPR services is Rs.15,08,19,961/-. Since they did not maintain separate account of the common services for exempted and excisable products, an amount on to the tune of Rs.1,28,08,648/- is to be reversed along with interest under Rule 6(3) of Cenvat Credit Rules, 2004.

2.6 A show cause notice for the period April 2011 to September, 2015 dated 22-12-2015 was issued to them to show cause as to why:-

(i) Cenvat Credit amounting to Rs.1,87,38,421/- taken and utilized by them should not be disallowed and recovered from them along with interest, as applicable thereon, under Rule 14 of CC Rules read with section 11A and section 11AA of the Central Excise Act, 1944.

(ii) An amount of Rs, 1,28,08,648/- along with applicable interest there-upon should not be demanded/recovered from them under Rule 6(3) of the CC Rules read with Rule 14 of the Rules, ibid, and section 11A and 11AA of the Central Excise Act, 1944 and the amount of Rs.38,82,360/- and interest Rs.68,742/-already deposited should not be appropriated; and

(iii) Penalty should not be imposed upon them under Rule 15(2) of the CENVAT Credit Rules read with Section 11AC of the Central Excise Act, 1944.

2.7 Statement of Demand (S.C.N.) for the period October 2015 to July, 2016, was issued asking to show cause as to why:

(i) Inadmissible Cenvat Credit of service Tax amounting to Rs.36,52,391/- wrongly availed and utilized by them should not be disallowed and recovered from them under Rule 14 of the Cenvat Credit Rules, 2004;

(ii) Interest on wrongly availed Cenvat Credit should not be demanded under rule 14 of the Cenvat Credit Rules 2004 read with Sec.11AA of the Central Excise Act, 1944: and

(iii) Penalty should not be imposed upon them for the amount of credit wrongly availed and utilized by them under rule 15 of Cenvat Credit Rules, 2004 read with Section 11AC of the Central Excise Act, 1944.

2.8 The show cause notice and the statement of demand have been adjudicated as per the impugned order. Aggrieved appellant have filed this appeal.

3.1 We have heard Shri Atul Gupta, Advocate for the appellant and Shri A K Choudhary for the revenue.

3.2 Arguing for the appellant learned counsel submits that:

- Impugned order is beyond the show cause notice.
- Credit on IPR Services (Technical Know How) is admissible to the appellant.
- Credit on "Advertisement and Sales Promotion Services" (Brand Shop Management Services) arre admissible to the Appellant.
- Demand beyond the normal period of limitation is not maintainable. Reliance in this regard is placed on the decision of this Tribunal in the case of M/s Accurate Chemical Industries Vs CCE, Noida 2014 (300) ELT 451 (Tri.-Del.) affirmed by Hon'ble Allahabad High Court reported at 2014 (310) ELT 441 (All.).
- Interest and penalty is also not imposable to the appellant.

3.3 Authorized representative re-iterated the findings recorded in the impugned order.

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

4.2 Impugned order records findings as follows:

"7.2 On perusal of the records of the both the case files, I find that in the instant matter two issues need determination :-

i) Whether the Cenvat credit of construction services (inclusive of Erection & Installation services undertaken at their retail show rooms, Dealer, sub- dealer premises) termed as Brand-Shop Management under the garb of advertisement services was wrongly availed by the party in the light of the provisions of CC Rules, 2004? and

ii) Whether Cenvat credit availed on Intellectual Property Rights (lPR) services was improperly distributed and wrongly availed by the party (at Noida plant) though such credit pertains to trading activities of the party ?

7.3 At first, I take up the issue of admissibility of credit on construction services (inclusive of erection and installation etc.) advertising expenses. In this context, observe hat para 3 of the Notice dated 22-12-2015 being the crux of the said Notice dated 22-12-2015. which read as under -

a. Services of work viz. Erection, Installation and other work have been performed at the places namely; Retails show-room, Dealers or Sub-dealers which are beyond the place of removal

b. the nature of work done in many cases is of construction repair, maintenance, Erection, Commissioning and Installation, in-nature, which do not fall within the category of advertising service ; and

c. the said party instead of taking credit of service tax on Advertising Agency commission only, took the credit of entire service tax paid on such invoices.

7.4 With a view to verify these allegations, I have examined the invoices made available as case record and I make note of the following points :-

7.4.1 One of the Completion Certificates No.GIIR/EST/BS/2014-15/022 dated 26-06-2014 taken as a sample from amongst several such certificates, raised by M/s GIIR Communications India Pvt. Ltd.. has been issued for Rs.11,49,961/- in respect of M/s Next Step Engineering Pvt. Ltd. in respect of M/s Apollo Sales Paschim Vihar, New Delhi, for fixing/fabrication/installation of wooden, racks, walls, Podium, Inland, end-caps Mobile wall, Catalogue stand, cash desk zone, main table, side table, back drop, staff seating, discussion table with chairs, couch and carpet.

7.4.2 There are a number of such Completion Certificates in respect of above referred items of work and goods having been prepared/ fabricated at the site by getting it completed/ finished, and, accordingly, bills were raised for all such items. For sample sake, details of invoices/ Bills issued by M/s Nextstep Engg. Pvt. Ltd., Kundli, (Friends Colony) Distt. Sonepat (HR) in respect of such Completion Certificates are given below : -

(i) lnvoice No.HR/471/14-15 dated 01-09-2014 of M/s Nextstep, Engg.P Ltd

(ii) Bill No.ASA/ST/15-16/125 dated 28-07-2015 of M/s Nextstep, Engg.P Ltd

(iii) Bill No.ASA/ST/15-16/126 dated 28-07-20 15 of M/s Nextstep, Engg.P Ltd

7.4.3 Invoice No.HR/092/15-16 dated 25-05-2015 was issued by M/s Next step Engineering Pvt. Ltd., 99/23, Village Kundli, Friends Colony, district Sonipat- 131 028 Haryana for Rs.2,29,215/- for the expenses towards 'Erection, Commissioning and installation'. It is clearly seen that the activities undertaken were not for the advertising services as claimed by the party

7.4.4 Bill No.ASA/ST/13-14/136 dated 17-08-2013 was for Rs.2,59,3 18/- of M/s ASA Retail Solutions Pvt. Ltd., Plot No,.21, 12/6, Gurukul Industrial Area, Sector 38, Faridabad

raised for 'Labour charges for installation of Brand-shop display stand.' It is evident that services have been rendered for installation of stand at Dealer/sub-dealers premises

7.4.5 Invoice No.HR/713/14-15 dated 21-10-2014 of M/s Next Step Engineering Pvt. Ltd. was raised for Rs.3,40,750/- towards expenses for Erection, Commissioning or Installation services for Electronikrft done at B-4 Kanti Nagar Extension Jagatpuri, Main Road, Krishna Nagar Delhi -51. It is seen that the details available with the invoice were for the activities like providing items for display of goods like LCD/Plasma TV Display Panel, AC Display Panel Refrigerator Display Washing Machine Display, Microwave Display, GSM Gandola. Catalogue stand, Cash-zone-Counters, staff seating including table chairs, Podiums, Projector, Security Camera etc. at the premises of M/s Electronikraft, B-4, Kanti Nagar Extension, Jagatpuri main Road Krishna Nagar, Delhi-51. It is clearly seen that the above referred were activities and not services and, thus, the same are not eligible for credit of input services as advertising services.

7.4.6 Invoice No.HR/471/14-15 dated 01-09-2014 for Rs.2,48,749/- towards expenses for 'Erection, commissioning or installation services' done at Apollo Sales Corporation, B-1 / 19-A, Pashcim Vihar, New Delhi,

7.4.7 Various Bills against 'CM-TWS COST of installation at Electronic Craft, Delhi and also CM-TWDS Cost of Retainer-ship Fee for Retainer- ship charges for July, 2014 to Dec.14, Jan-Feb.14, Jan.- Feb.14. etc. The said Bills shows that they were raised towards expenses incurred in respect of maintenance of a number of fittings and maintenance thereof. It is clearly seen that such activities are not eligible for claim of credit as input service in the name of advertising service.

7.5 From the above study of invoices/bills, I find that the same were raised as whole for preparation of the show rooms involving both civil and electrical fittings etc. for completion of display racks for TV, Air conditioner, Microwave oven, Washing Machines, podium for catalogue any other items of furniture like table chair etc., furnished with couch and carpets so on and so forth.

7.6 I further observe that a perusal of the Retainer ship Agreement dated 30-04-2013 executed in between the party and M/s GIIR Communications India Pvt. Ltd. shows that the object of their contract was merely "Designing & Supervision of the construction/ maintenance of Brand shop / show rooms of Dealer & sub dealers (PTP). The said contract contained following items of work:-

Introductory Para (of agreement):-

A. .....

GIIR is an advertising agency who are having an expertise in design, supervision, construction, maintenance and advertisement on such shops etc. all over India and also product campaigning and for all other marketing activities at any other place as desired by LGEIL

LGEIL is desirous to appoint GIIR on Retainer-ship for "Designing & Supervision of the construction / maintenance of Brand shop / show rooms of Dealer & sub dealers (PTP)

B. GIIR represents that it has expertise, experience & Professionals in "designing & supervision of the construction/maintenance of Brand shop/showrooms/PTP and is willing to work as an Consultant of LGEIL for the said purpose

C. SCOPE OF SERVICES

3.1

A. Verification & submission of estimation quotation for job containing full details of cost of material as well as services to LGEIL after obtaining the same from the Contractors on a contract to contract basis. GIIR will be required to obtain estimation for the job from the contractor for each individual contract and submit the same to LGEIL

7.7 On going through the above extracts taken from above said Agreement for the work carried out at various places, it is worth to note that that entire work included 'construction work' and 'cost of material'. It clearly goes to understand that the bills were raised inclusive of the cost of materials used and also the work relating to civil nature (i.e., construction work). This position is sufficient to hold that the allegations as labeled in the instant notice at point nos. (i), (ii) & (iii) of para 3 of the instant Notice are correct to the extent that the bills raised for erection, commissioning and installation of goods as also retainer-ship meant for repair services on monthly or on annual basis. The said agreement is also able to evince that bills also included the cost of materials used while carrying out in preparation of Dealer/sub-dealers premises. The above position also depicts that the activities taken place were not within the meaning of Advertising Agency in terms of definition, ibid.

7.8 Further, input service "means' any service used by a manufacture whether directly indirectly in or in relation to the manufacture of final products and clearance of final products up to the place of removal However, in the instant case, I note that services involving construction, erection, and installation activities provided by M/s GIIR were admittedly used in or in relation at a place other than the place of manufacture. Further, it is also not in dispute that such services were taken/ availed beyond the place of manufacture, and such services have not been utilized in or in relation to the manufacture of final products. It means

the services were performed and consumed subsequent to removal/sale of goods

7.9 I have also noted that the party has since themselves declared that the impugned services were performed at the places viz. Dealers', sub-dealers or at the LG Shoppe, so these places are, undisputedly, beyond the place of manufacture These places are points of sales' may be owned by other persons and are not connected with the completion of manufacture of goods having been removed from the factory. The said goods also have gone away from the place of removal before performance of service and it abundantly conveys to mean that the said service of advertisement of goods were performed by a number of service providers at a place other than the place of manufacture, having no nexus directly or indirectly with the event of completion of manufacture of final products

7.10 Having regard to the submissions advanced by the party on this score, it is seen that the inclusion clause of Rule 2 of CC Rules 2004 stipulates that

> *"and includes services used in relation to setting up, modernization renovation or repairs of factory, premises of out- put service or an office relating to such factory or premises, advertisement or sales promotion market research, storage up to the place of removal, procurement of inputs, activities relating to business, such as accounting, auditing, financing, recruitment and quality, control, coaching and training, computer networking, credit rating, share registry, and security, inward transportation on inputs, or capital goods and outward transportation of up to the place of removal."*

7.11 Here, it is worthwhile to observe that the provisions, as cited above, evince that impugned services are for activities rendered by the service providers or those consumed by the manufacturers of final product up to the place of removal. Such services were eligible either for an

office relating to such factory or for the premises of a service provider. Undisputedly, the party has not contended that the place of removal in respect of their final products is not their factory gate. The services were performed beyond the factory gate. In other words, it means that the services of advertisement has no nexus with the completion of manufacture of final products. In the instant matter, the inclusion clause of Rule 2 of the CC Rules,2004, do not cover the incidences of services performed and utilized at a place other than the place of removal. In the instant matter, places of provision of services fall beyond the place of removal that is the factory gate of the party.

7.12 While deciding the said issue, I place reliance on the decision of the Hon'ble Tribunal in the case of Kohinoor Biscuit Products Vs CCE, Noida, 2015 (37) STR 567 (Tri. Delhi.) CESTAT, Principal Bench New Delhi, wherein the goods viz. biscuits were assessable to duty under Sec.4A of the Central Excise Tariff Act, 1985. The facts of the case and the observations and findings of the Hon'ble Tribunal are as under:-

> *" …., the biscuits manufactured by them were being delivered at their depots from where the same were being sold. During the period of dispute, the biscuits were notified under Section 4A of the Central Excise Act, 1944 and accordingly the duty on the biscuits cleared by the appellant was being paid on the basis of the assessable value determined with reference to declared MRP i.e. MRP minus abatement. The point of dispute in this case is as to whether the appellant would be eligible for Cenvat credit of Service Tax paid on the GTA service availed for transportation of the biscuits from their factory to the depot of M/s. Parle Biscuits…. (para 1)*
>
> *5. ……*
>
> *Ultratech Cement Ltd. v. CCE, Raipur/Chandigarh [Final Order Nos. A/58257-58259/2013-EX(DB), dated 18-11-*

2013] [2014 (35) S.T.R. 751 (Tri. - Del.)], wherein it has been held that in the cases where the duty on the finished products is at specific rate or where the assessable value is determined under Section 4A of the Central Excise Act, 1944 and the provisions of Section 4 are not applicable, the definition of "place of removal" in the Section 4(3)(c) cannot be adopted for the purpose of Cenvat Credit Rules, 2004 and accordingly the place of removal would be the factory gate i.e. the place on removal from which the duty is liable to be paid.

8.....

"since in this case the assessable value of the goods was being determined not under Sec.4 but under Sec.4A of the Central Excise Act, 1944, the definition of 'place of Removal" as given in Section 4(3)(c) cannot be adopted for the purpose of Cenvat credit rules 2004 and accordingly it is the factory gate which would be the place of removal. Moreover, even if the definition of "place of removal" is given in Section 4(3)(c) is treated as applicable to the cases where the duty on the finished goods is payable on the value determined under Section 4A , even then, the Depot of M/s Parle Biscuits cannot be treated as "Place of removal" in respect of the goods manufactured by the appellant as the, "Place of removal" defined in Section 4(3) (c) is the place of removal for the manufacture of the goods and in case, the manufacturer after clearing the goods from the factory to his tepots(clears) all the depots it is those depots which would be the place of removal. However, when the manufacturer clears the goods to the depots of some other persons, those depots cannot be treated as "Place of removal" for the manufacture, unless the sales are on FOR basis. For this reason also, the "Place of removal" in this case is factory of the appellant and the depot of M/ls Parle Biscuits. .. In view of this, we hold that the Cenvat Credit of the service tax paid on the GTA services availed

for transportation goods from the factory of the appellant to the depot has been correctly denied and, as such, the Cenvat credit demand has been correctly up-held along with interest.

9. In view of the above discussion, we do not find any merit in the appeal. The same is dismissed."

7.13 I further observe that against the above detailed order of the Principal Bench, the appellant M/s Kohinoor Biscuit Products preferred an appeal before the Hon'ble Allahabad High Court. However, the appeal was dismissed vide their order dated 07-10-2014. While dismissing the appeal, Hon'ble High Court observed as follows:-

" In the present case, the clear finding, which has been recorded both by the Commissioner (Appeals) and by the Tribunal, is that the sale had not taken place on an "FOR Destination" basis. Hence, the place of removal in the present case is the factory gate of the appellant and not the Depot of Parle Biscuits. As a matter of fact, as held by the Commissioner (Appeals), the liability on account of freight is borne by Parle Biscuits. No amount was borne by the appellant towards freight under the agreement with Parle Biscuits. Hence, in this view of the matter, the Tribunal was justified in coming to the conclusion that the Cenvat credit on Service Tax paid on GTA Service availed for the transportation of the goods from the factory of the appellant to the Depot of Parle Biscuits, has been correctly denied. The view which has been taken by the Tribunal is in accordance with law.

The appeal, therefore, does not give rise to any substantial question of law. It is, accordingly, dismissed.

7.14 Applying the ratio of the above decision of the Hon'ble Allahabad High Court and the Tribunal to the case in hand, I take the view that in this case the "place of removal" in the matter cannot be accepted to be any place other than the factory gate. In the instant matter, the party has taken

credit of input services rendered and consumed at the places beyond the place of removal, that is their "factory gate". It is pertinent to keep in mind that the goods manufactured by the party are assessed to duty under section 4A of the Central Excise Act, 1944, i.e., on the basis of Retail Sale Price.

7.15 On the aspect of admissibility of input service credit availed on the Brand shop Management in the guise of Advertising service, the party has vehemently contended that the same was admissible to them as the same was in the nature of advertising service performed / consumed at various places viz. Dealer/ sub-dealer and LG Shoppe. In this regard, I have examined the party's plea that items /services utilized in dispute satisfy the criteria of use in or in relation to the manufacture of dutiable final products and hence they are eligible for credit. I have also gone through the case laws referred by the assessee find that the issue has been critically examined in respect of input services the case of Vikram Cement Vs. CCE Indore 2009(242) ELT 545, In the said case, the Tribunal held that the definition of input contains expressions 'used', 'in or in relation to' and "manufacture of final product and discloses that the same refer to products used in or integrally connected with the process of manufacture of final product. The term 'capital goods has been defined independently in the Rules, therefore if the inputs were to include every product under the sun which is somehow related to the premises wherc the manufacturing process is carried out then there is no need to provide a definition of the term capital goods. Relevant extracts of the verdict are reproduced below:-

> *" **28.** If one reads the decision of J.K. Cotton Spg. & Wvg. Mills Co. Ltd. case, it has been clearly held therein that the expression "in the manufacture of goods" should normally encompass the entire process carried on by the dealer of converting raw materials into finished goods. Where any particular process is so integrally connected*

with the ultimate production of goods that, but for that process, manufacture or processing of goods would be commercially inexpedient, goods required in that process would fall within the expression "in the manufacture of goods". This clearly disclose that the Apex Court in no uncertain term has ruled that of those goods which form part of the process carried out by the manufacturer for converting the raw material into finished goods would be the products used in the manufacture of the goods. In another words, if the product is not integrally connected with the process of the manufacture and which does not results in utilization of such product directly or indirectly into the manufacture of the finished product, then such a product cannot be said to be the input utilized for or in relation to manufacture of the final product. This is also evident from the definition of the term input as found in Rule 2(k). The definition clearly uses the word "used" and further clarity the same with the expression "in or in relation to" and further uses these expressions with reference to the term "manufacture of final products". The definition disclosing the expression like "used", "in or in relation to", "the manufacture of final products" would inevitably disclose, that the same refer to only those products which are used in or integrally connected with the process of actual manufacture of the final product and only such product could be entitled to be classified as the input in or in relation to the manufacture of final products, and not otherwise. When the legislature in its wisdom has specifically defined a term, no Court or Tribunal under the guise of interpretation thereof is empowered to expand the meaning of such term. If the contention on behalf of the appellants is accepted, it would virtually amount to expand the meaning of the term "input" beyond the scope prescribed under the definition clause in Rule 2(k) of the Cenvat Credit Rules, 2004.

29. *It is also pertinent to note that the legislature in its wisdom has independently defined the expression capital goods under Rule 2(a) of the said rules. If the inputs were to include every product under the sun which is somehow related to the premises where the manufacturing process goes on, then there is no need to provide a definition of the term capital goods and, therefore, the acceptance of the contention on behalf of the appellants would render the definition of the term the capital goods to be redundant as well as the provisions relating to extending the benefit of Cenvat credit to the capital goods."*

7.16 I note that the above views of the Tribunal in the case of Vikram Cement case supra were later endorsed by the larger bench of the Tribunal in the case of Vandana Global (2010(253) ELT 440; where Hon'ble Tribunal held that in the case where cement and steel items used for laying foundation and building structural support and not used in the course of manufacture of final product, the same are not eligible for taking Cenvat, credit. Further. the decision also clarified that definition of inputs cannot be interpreted to include either capital goods or foundation and supporting structures for such capital goods. Para 44 of the said Judgement is reproduced below:-

*"**44.** Another argument is that even the main definition of input under Rule 2(k) would include cement and steel items used for laying foundation and making supporting structures as the expression used thereunder is wide and includes everything "used in or in relation to the manufacture" of final products whether directly or indirectly. The argument is that cement and steel items so used are used in relation to the manufacture of final products. It has also been argued that at one time the definition of inputs excluded machines, machinery, plant, equipment, apparatus, tools, appliances used for producing or processing of any goods or for bringing about any change in any substance in or in relation to the*

manufacture of the final products and therefore, but for the exclusion, the expression inputs would have included machines etc. This argument appears to us to be clearly untenable. The exclusion provided earlier clearly appears to have been so provided by way of abundant caution to clarify that the inputs in any case would not include machinery and equipment. From such a clarificatory provision, it cannot be concluded that the expression 'input' would include cement and steel items used for laying foundation and making supporting structures. Moreover, if for a moment one has to agree with the contention that input included machinery etc. there would have been no need for providing a separate definition for capital goods and making a separate provision for allowing credit on capital goods. Such an argument cannot also be accepted as it would imply that capital goods would be included twice in the definition under Rule 2(a) with limited scope and with unlimited scope under Rule 2(k). Such a proposition appears to be totally absurd as the rule-makers cannot be seen to have provided two separate definitions to cover the same thing. There are also other rules in the Cenvat Credit Rules namely Rule 3, Rule 3(1), Rule 3(5), Rule 3 (5a), Rule 3 (5b), Rule 4(1), Rule 4(2), Rule 4(3), Rule 4(4), Rule, 5, Rule 6, Rule 9, Rule 15 which provide for different provisions for inputs and capital goods. It is very clear from these provisions that the rule making authority intended to deal with capital goods separately and inputs separately and the definition of input cannot be interpreted to include either the capital goods, or foundation and supporting structures for the same, as being argued by some of the Advocates."

7.17 I also take note of the decision of the Hon'ble Apex court in the case of Maruti Suzuki [2009 (240)ELT 641(S.C.)] wherein it has been stressed that integral connection of the input service with final product, which

includes dependence test and functionality test decide, whether any item is eligible for Cenvat credit as input. Applying the ratio, I find that the activities of erection, commissioning and/or installation of items at the Dealers/sub-dealers premises do not have any nexus with the manufacturing activities undertaken at the factory. While making this observation, I refer to para 14 of the said decision :-

> *" **14.** In the case of Collector of Central Excise, New Delhi v. M/s. Ballarpur Industries Ltd. reported in (1989) 4 SCC 566 the difference between the expression "used in the manufacture" and "used as input (raw material)" was highlighted. In that judgment, it was held that undoubtedly the said two expressions are distinct and separate, but, when an ancillary process (like electricity generation) aids the making of an end product, then, the ancillary process gets integrally connected to the end product. In the said judgment, this Court applied what is called as "the dependence test". It may, however, be noted that in the definition of "input" the expression "used in or in relation to the manufacture of final product" is not a standalone item. It has to be read in entirety and when so read it reads as "used in or in relation to the manufacture of final product whether directly or indirectly and whether contained in the final product or not". These words "whether directly or indirectly" and "whether contained in the final product or not" indicates the intention of the legislature. What the legislature intends to say is that even if the use of input (like electricity) in the manufacturing process is not direct but indirect still such an item would stand covered by the definition of "input". In the past, there was a controversy as to what is the meaning of the word "input", conceptually. It was argued by the Department in a number of cases that if the identity of the input is not contained in the final product then such an item would not qualify as input. In*

order to get over this controversy in the above definition of "input", the Legislature has clarified that even if an item is not contained in the final product still it would be classifiable as an "input" under the above definition. In other words, it has been clarified by the definition of "input" that the following considerations will not be relevant :

(a) use of input in the manufacturing process be it direct or indirect;

(b) even if the input is not contained in the final product, it would still be covered by the definition.

These considerations have been made irrelevant by the use of the expression "goods used in or in relation to the manufacture of final product" which, as stated above, is the crucial requirement of the definition of "input". Moreover, the said expression, viz, "used in or in relation to the manufacture of the final product" in the specific/substantive part of the definition is so wide that it would cover innumerable items as "input" and to avoid such contingency the Legislature has incorporated the inclusive part after the substantive part qualified by the place of use. For example, one of the categories mentioned in the inclusive part is "used as packing material". Packing material by itself would not suffice till it is proved that the item is used in the course of manufacture of final product. Mere fact that the item is a packing material whose value is included in the assessable value of final product will not entitle the manufacturer to take credit. Oils and lubricants mentioned in the definition are required for smooth running of machines, hence they are included as they are used in relation to manufacture of the final product. The intention of the Legislature is that inputs falling in the inclusive part must have nexus with the manufacture of the final product."

On perusal of above observations, I find the ratio of the above case is applicable in the present matter for the purpose of determining nexus between input services and the manufacture of final products

7.18 On the question of inclusion clause of service of Brand shop management under Rule 2(1) of the CC Rules 2004, I rely on the case of Vikram Ispat Versus C.C.E., Raigad, 2009 (16) S.T.R. 195 (Tri. Mumbai), while deciding the said case, Hon'ble Tribunal have held that input service should have nexus with manufacture of goods. Applying the same ratio, I find that the defence could not adduce any evidence to establish the nexus between installation, erection, commissioning activities performed at Dealers/Sub-dealers premises and the manufacturing activities undertaken at the factory. In this context, I find relevant to reproduced para 3, as below:-

> *" **3.** The learned counsel further refers to each of the four items on which the Cenvat credits in question were taken. He submits that these items are coming within the scope and ambit of the definition of "input service" given under Rule 2(l). The learned SDR has contested this claim. After considering the submissions, I find that the subscription given by the assessee to SIMA was in no way connected with the manufacture of final products or with clearance thereof from the factory. There is not even a remote connection between this item and anything contained in the definition of "input service". Security services were employed at the railway siding at Roha where the raw-material for the factory was unloaded from railway wagons and loaded on to the trucks which carried the goods by road to the factory. It is said that the security personnel were posted at that point to ensure the supply of the goods and the unloading/loading operations. The purpose of posting of security personnel must be discerned from the agreement between the appellant and security agency. But none is forthcoming. In this*

scenario, I am not in a position to accept the claim of the appellant that the security personnel were doing something, directly, or indirectly, in or in relation to the manufacture or clearance of final product. In other words, the claim is unsustainable. Coming to "rent-a-cab services", I am told that these services were used by functionaries, officials and employees of the company for purposes connected directly or indirectly with the manufacture or clearance of the final products. To a specific query from the Bench, the learned counsel submits that, if the representative of the company who is present in Court to assist him avails himself of "rent-a-cab service" for commuting between the administrative office of the company and this Court, Cenvat credit on the service is admissible to the appellant. This argument is farfetched inasmuch as, if it is accepted, Cenvat credit will have to be allowed to the assessee in respect of "rent-a-cab service " availed by the counsel himself to come to this Court to argue their case. It is understandable if the above service was used by functionaries/officials/employees of the company to commute between their administrative office and the factory for purposes connected with the manufacture and/or clearance of the finished goods. Even for this purpose, there must be documentary evidence. No document is available on record. "Mobile telephony service" has already been claimed to be an 'input service' defined under Rule 2(l). It is within anybody's knowledge that a mobile phone can be used by a person for multifarious purposes. No doubt, a functionary/official/employee of the company could use it for purposes connected with the manufacture and/or clearance of the final products, but the assessee has failed to establish that the mobile phones in question were dedicated to this purpose. The learned counsel has referred to the Tribunal's Larger Bench decision in CCE,

Mumbai-V v. GTC Industries Ltd. - 2008 (12) S.T.R. 468 (Tri.-LB), wherein outdoor catering services used for supply of food in a factory canteen were held to be input services. The learned counsel has cited the above decision in support of his submission that the definition of "input service" should be construed liberally. It is his submission that some of the items mentioned in the inclusive part of that definition are comparable to one or the other of the services in question and, therefore, it should be held that the latter are also covered by the definition of "input service". I do not agree. Any service to be brought within the ambit of definition of "input service" should be one which should specify the essential requirement contained in the main part of the definition. This requirement is equally applicable to the various items mentioned in the inclusive part of the definition as well. In this view of the matter, I am constrained to hold that the appellant is not entitled to Cenvat credit on any of the four items of "services" in question. In respect of some of the said services, they have not adduced evidence to establish the nexus, if any, between the "services" and the manufacture/clearance of the final products."

7.19 While deciding this matter, I also rely on the decision given by the Larger Bench of the CESTAT in the case of Tower Vision India Pvt.. Ltd. Versus CCE (Adj.) Delhi, reported in 2016 (42) S.T.R.249 (Tri. Larger Bench). In this case, it was held by the Hon'ble Tribunal that since there was no nexus between duty paid inputs and the telecommunication services hence credit was not extendable. The larger bench observed that Cenvat credit was not available because Telecom companies have created infrastructure and provided such business support service to themselves. So, infrastructure spun out to separate companies. In such case, no distinction could be made between telecom operators and infrastructure companies in deciding eligibility of Cenvat credit on MS angles, channels,

etc. and pre-fabricated shelters, used for fabricating telecommunication towers into concrete platform at site. Therefore, Rule 2() of CC Rules, 2004 does not allow credit on such activities.

The relevant paras (21 &23) are reproduced below ;-

> *"**21.** Learned Counsel relied on the Hon'ble Supreme Court's decision in CCE, Ahmedabad v. Solid & Correct Engineering Works reported in 2010 (252) E.L.T. 481 (S.C.). The Supreme Court was examining excise duty liability of asphalt drum hot mix plant. The Court examined Section 3(26) of the General Classes Act with reference to "Immovable Property". The term "attached to the earth" has been examined with reference to Section 3 of Transfer of Property Act. The Hon'ble Apex Court concluded that any plant which is fixed by nuts and bolts to a foundation, wherein there is no assimilation of the machinery with a structure permanently and the civil foundation was only necessary to provide a wobble free operation of the machine, the test of permanency would fail. We have carefully perused the Apex Court order in this case. The Apex Court held that the hot mix plant which is specifically covered under Plant and Machinery Tariff Heading 8474 are manufactured and brought. The point decided by the Apex Court was whether setting up of such plant and machinery would amount to manufacture liable to Central Excise. First of all, in the present case we have no admitted capital goods brought for installation or erection in the desired site. The towers and their components cleared as angles and channels or as set of angles in CKD condition are cleared after duty payment by the manufacturer under Chapter 73, which is an excluded chapter for capital goods. As such, there is no movable capital goods which are otherwise eligible for Cenvat credit which are being denied such credit only applying the test of immovability.*

Tower Parts (MS Channels, Angles, etc.) as "Inputs" for availing credit :- *An alternate claim has been made by the appellants to allow Cenvat credit paid on structural parts/towers/shelters treating them as inputs in terms of Rule 2(k)(ii) which allows credit of all goods used for providing output services. It was argued that there is no bar for goods which do not fall under the category of capital goods to qualify as inputs. Reliance was placed on the Larger Bench decision in Union Carbide India Ltd. v. CCE, Calcutta-I reported in 1996 (86) E.L.T. 613 (Tribunal). In this ruling, Tribunal considered spare parts of machines to be eligible for credit as inputs under Modvat scheme. In Tata Engineering & Locomotive Co. Ltd. v. CCE, Pune reported in 1994 (70) E.L.T. 75 (Tribunal), the Tribunal held that credit on the machines which stand excluded is available under input category. We have examined the appellant's plea in the light of decided cases. In the present case, duty paid items are MS Angles and Channels/Shelters which are brought to the site installed/erected and further put to use for mounting/installing telecommunication antenna and other equipment. It is necessary to decide whether duty paid MS angles/shelter are used by infra-companies for providing business support service to telecom companies or for providing telecom service by telecom operators. This will bring us to the next question relevant to decide this issue.*

Question of nexus and Cenvat credit flow :- *The duty payment is on MS angles, channels (or towers in CKD as claimed by the appellants) and pre-fabricated shelters. The credit of this duty is claimed. The admitted basic requirement for eligibility of any duty credit is that goods on which duty is paid (credit of which is claimed) should have a connection or nexus to the output service. The credit availed on input is used for discharging tax on output service. In the present case, the duty paid MS*

angles, channels, etc., are brought to the site, fabricated into towers on a concrete platform. Similarly, the duty paid pre-fabricated shelters are brought and fixed to the ground base firmly. On such towers, the antenna or dish are fixed and connected by cables to electronic equipment housed in the pre-fabricated shelter on the ground. It is apparent that these duty paid items are not used for providing telecommunication service. The telecommunication service is provided by using erected and fixed towers and shelters. The inputs like MS Angles and Channels have gone into the making of such towers which in turn are used for providing infra-support service/telecom service. To apply the term "used for" in the definition for inputs, there should be a nexus between the inputs goods and the output service. In the present case the manipulation/fabrication of raw materials involved in erection and installation, fixing of towers and shelters will render such nexus tenuous. If the claim of the appellant is to be accepted, the credit can be even extended to duty paid MS Ingots if procured by the appellants to get the MS Angles manufactured which in turn used for erection of tower which in turn is used for providing telecom service. It is clear that such far remote linkages are not within the scope of the term "used for".

23. *It is necessary to note that before infrastructure companies came into the picture, telecom operators themselves were putting up such infrastructure and using the same to provide telecom service. In other words, in the absence of infrastructure companies as an intermediary, telecom companies themselves created such infrastructure and "provided" such business support service to self. The issue of Service Tax liability in such situation on business support service is not raised because there are no two persons as a provider or recipient of such service. In a sense such service was to the self. Considering such factual matrix, we find that no*

distinction could be made between the telecom operators and the infrastructure companies in deciding the eligibility of Cenvat credit on the impugned items now under consideration."

7.20 In the case of Vikram Ispat Vs CCE Raigad reported in 2010 (19) /.20 S.T.R 52 (Tri.- Mumbai), I observe that that Hon'ble Tribunal have held that no service may be classified as input service unless quintessential requirements laid down in main part of definition is not established. In the absence of any nexus between a services and manufacture/clearance of goods, such services may not be termed as input services on which the assessee could claim benefit of credit of service tax. The Hon'ble Tribunal quoted the case of Manikgarh Cement Work Final Order No. A/632/2009/SMB/C-IV, dated 3-11-2009 with approval and held that

*"**5.** I have considered the grounds of this appeal, the written submissions of the appellant and the argument of the learned SDR. The lower authorities have found that the barges and tugs were used in the sea and the channel and not in the jetty. In other words, it has been found that these vessels were operated in the sea and channel beyond the jetty. On the other hand, the appellant has claimed in the memorandum of appeal that the said vessels were used not only for bringing raw materials from the ships anchored in the sea to their own jetty but also for conveying the goods from the jetty to their factory. It is claimed that the jetty is located within the precincts of their factory. There is no evidence in support of these claims. In other words, the aforesaid findings of the lower authorities cannot be intertered with. Even according to the appellant, the ships laden with iron ore were anchored in the sea away from the jetty and the tugs and barges were used for transporting the goods from the ships to the jetty. The services in question were availed in respect of these tugs and barges. One service*

was used for repairs and maintenance of these vessels, another for insuring the vessels, and the third one for inspection and certification of the vessels. The fourth one was used for recruiting persons as crew of the vessels. Yet another service was availed for 'hydrographic survey of Revdanda channel/port for dredging etc.' The question before me is whether these services would qualify to be 'input services' defined under Rule 2(l) of the Cenvat Credit Rules, 2004. In the context of considering a similar question in the case of Manikgarh Cement Work (supra), I held that a nexus should be established between the services in question and the manufacture/clearance of excisable goods by the assessee for claiming the benefit of Cenvat Credit of the service tax paid on such services. Paras 4 to 7 of the order passed in that case are reproduced below :

"4. The Hon'ble High Court, in the case of Coca Cola (supra), examined the scope of the above definition. It held that the definition could be divided into five categories and that each category/limb of the definition could be considered as an independent benefit or concession/exemption. Their Lordships clarified that, if an assessee could satisfy any one of the five categories/limbs, credit of the service tax paid on the relevant services would be available to him. The assessee need not satisfy the other limb(s) of the definition. According to the ld. counsel, the question whether Cenvat credit of service tax paid on the aforesaid four services rendered at the residential colony outside the factory is admissible to the respondent is squarely covered by the Hon'ble High Court's decision, in their favour. On the other hand, ld. DR has heavily relied on the Hon'ble Supreme court's decision in Maruti Suzuki case. According to him, the Hon'ble Supreme Court's decision impliedly overrules the High Court's decision. I agree. In the case of Maruti Suzuki, the Supreme Court was considering the

definition of 'input' given under the CENVAT Credit Rules. The definition reads as under :-

"(k) 'input' means -

(i) all goods, except light diesel oil, high speed diesel oil and motor spirit, commonly known as petrol, used in or in relation to the manufacture of final products whether directly or indirectly and whether contained in the final product or not and includes lubricating oils, greases, cutting oils, coolants, accessories of the final products cleared along with the final product, goods used as paint, or as packing material, or as fuel, or for generation of electricity or steam used in or in relation to manufacture of final products or for any other purpose, within the factory of production;

(ii) all goods, except light diesel oil, high speed diesel oil, motor spirit, commonly known as petrol and motor vehicles, used for providing any output service;

Their Lordships considered the above definition to be divisible into three parts : (1) specific part (main or substantive part); (2) inclusive part; (3) place of use. Further discussion relevant to the instant case can be had from para 14 of the judgment and the same reads as under :-

"It may, however, be noted that in the definition of "input" the expression 'used in or in relation to the manufacture of final products' is not a standalone item. It has to be read in entirety and when so read it reads as 'used in or in relation to the manufacture of final products whether directly or indirectly and whether contained in the final product or not'. These words "whether directly or indirectly" and "whether contained in the final product or not" indicates the intention of the legislature. What the legislature intends to say is that even if the use of input (like electricity) in the manufacturing process is not direct but indirect still such an item would stand covered by the

definition of 'input'. In the past, there was a controversy as to what is the meaning of the word 'input' conceptually. It was argued by the Department in a number of cases that if the identity of the input is not contained in the final product then such an item would not qualify as input. In order to get over this controversy in the above definition of 'input', the Legislature has clarified that even if an item is not contained in the final product still it would be classifiable as an 'input' under the above definition. In other words, it has been clarified by the definition of 'input' that the following considerations will not be relevant :

(a) use of input in the manufacturing process be it direct or indirect;

(b) even if the input is not contained in the final product, it would still be covered by the definition.

These considerations have been made irrelevant by the use of the expression "goods used in or in relation to the manufacture of final products" which, as stated above, is the crucial requirement of the definition of 'input'. Moreover, the said expression, viz, "used in or in relation to the manufacture of final products" in the specific/substantive part of the definition is so wide that it would cover innumerable items as 'input' and to avoid such contingency the Legislature has incorporated the inclusive part after the substantive part qualified by the place of use. For example, one of the categories mentioned in the inclusive part is 'used as packing material'. Packing material by itself would not suffice till it is proved that the item is used in the course of manufacture of final product. Mere fact that the item is a packing material whose value is included in the assessable value of final product will not entitle the manufacturer to take credit. Oils and lubricants mentioned in the definition are required for smooth

running of machines, hence they are included as they are used in relation to manufacture of final product. The intention of the Legislature is that inputs falling in the inclusive part must have nexus with the manufacture of the final product."

(emphasis supplied)

The above judgment of the Supreme court hands down an important ruling, which it is to the effect that, where the inclusive part of a definition provides a list of items, any such item should also satisfy the quintessential ingredients of the main part of the definition. In other words, the definition has to be considered in its entirety. The inclusive part is not independent of the main part. It is not a 'stand-alone' provision. This ruling is applicable to 'input service', given the definition of this expression under Rule 2(l) of the Cenvat Credit Rules. There is nothing in this definition to indicate that the legislative intent behind it is different from the one underlying the definition of 'input'. Accordingly, I hold that any service which is apparently covered by the parameters of the inclusive part of the definition of "input service" should also satisfy the quintessential requirements of the main part of the definition and, accordingly, any person claiming the benefit of Cenvat credit on input service in terms of the inclusive part of the definition of "input service" should establish that such service was used, directly or indirectly, in or in relation to the manufacture of his final products or the clearance of such products from his factory.

5. I am not impressed with the way the ld. counsel has sought to distinguish Maruti Suzuki case from Coca Cola case. He argued that the apex court's decision relating to 'input' could not be applied to "input service". This argument is not acceptable, given the definition of 'input' and "input service". Whether it be input or input service,

the main part of the definition contains the quintessential ingredients and the inclusive part provides a non-exhaustive list of items each of which should satisfy the requirements of the main part. Ld. counsel has pointed out that, in the case of input, "place of use" is a third part of the definition, which is conspicuously absent in the definition of "input service". It has been argued that an input service need not necessarily be rendered within the factory premises whereas an input should normally be used within the factory. Broadly, this distinction sounds valid. But, again, it doesn't offer an answer to the question whether the service (which is rendered within the factory or outside) satisfies other essential requirements laid down in the main part of the definition. Even if it be held that there is no place of use in relation to input service, the basic requirement remains to be that anything mentioned as an input service in the inclusive part of the definition should be shown to have been used in or in relation to the manufacture or clearance of final products, whether directly or indirectly.

6. In the earlier cases of the same assessee, coordinate benches held in their favour. According to the ld. counsel, the Hon'ble High Court's decision in Coca Cola case should be followed as binding precedent in this case. I find that the Hon'ble Supreme Court's ruling in Maruti Suzuki case is to the contra and the same is constitutionally binding on this Tribunal.

7. In the result, the view taken by the lower appellate authority by following an earlier decision of this Tribunal which is presently under challenge before the Hon'ble High Court cannot be accepted. On the other hand, the view taken by the Ld. DR on the strength of the Hon'ble Supreme Court's ruling in Maruti Suzuki case should be followed. Accordingly, it is held that, as the respondent has not established nexus between any of the four services and the manufacture or clearance of excisable

goods, the benefit of Cenvat credit in respect of such service cannot be allowed. It is ordered accordingly. However, I think, in a case of this nature, the assessee should not be penalised. This case involves rival interpretations of a provision of law. In typical cases of interpretative nature, penalties have been waived by this Tribunal. In this view of the matter, the order-in-original is sustained except in respect of penalty imposed by the original authority. The appeal is disposed of accordingly."

6. *Following the above view, I have to reject the appellant's plea that the Hon'ble High Court's decision in Coca Cola India Pvt. Ltd.'s case be followed in preference to the Hon'ble Supreme Court's ruling in Maruti Suzuki Ltd.'s case. Accordingly, in terms of the ruling of the apex court, it is held, on the facts of this case, that none of the services in question is liable to be classified as "input service" as defined under Rule 2(l) ibid inasmuch as the quintessential requirements of "input service" laid down in the main part of the definition have not been established by the appellant.*

7. *The appellant has claimed support from the Tribunal's Larger Bench decision in GTC Industries' case to their limited proposition that the definition of "input service" should be construed liberally. The said definition can be construed only as per the ruling of the apex court given in Maruti Suzuki Ltd.'s case and that is a strict construction.'*

7.21 Having given due consideration to the facts and circumstances of the case, as discussed herein above, I conclude that the Cenvat credit taken in respect of the input services performed and consumed at the places like Dealers/ Sub-dealers premises in the name of Brand Shop Management were utilized beyond the place of removal and not up to the place of removal, and the credit attributable to said services was not admissible to the party. Accordingly,

the demand of inadmissible credit on this account deserves to be confirmed along with consequence thereto

8. I now proceed to the other issue, i.e. the issue of admissibility of credit availed on IPR services having been distributed and availed/utilized wrongly by Greater Noida Plant despite being attributable to trading activities.

8.1 The case set up in the instant Notice, in nut-shell, inter alia, is that the notice party wrongly availed CENVAT credit of Service Tax attributable to trading activities in terms of Rule 7 of CC Rules-2004, as also informed and admitted by them vide their letters dated 29-10-2015 and 04-11-2015. The fact of application of Rule 7 over such credit is stated by the party itself in Annexure A to both the said letters (RUDs 5, 4). The fact of applicability of rule 7 of CC Rules 2004, is also duly disclosed in Annexure B of RUD 5

8.2 In the context of this issue, I venture to look into the objections raised by the Audit team vide para 2 of Part -II of their report. The said para finds mention that the LG Korea granted licence and consented to use technical now how services to the for designing etc. for their products. This was under the agreement dated 01-07-2001. The relevant excerpts from the said agreement are available in para 2 of this order. The audit para also says that this service was duly covered and well defined under Section 65(105)(zzr) of the Finance Act, 1994. It also says that the party was paying Royalty and service tax thereon also. The party did not pay the amount CENVAT Credit as arrived at by them under Rule 7 of the CENVAT Credit Rules, 2004, when such services were commonly used in respect of excisable and cxempled goods. And, 1 find that this mere fact gave rise to the dispute in the instant matter

8.3 Having gone through the allegations contained in the Notice dated 22-12-2015 vis-a-vis the defence submissions, I find that following facts have already been admitted by the party:-

a. *Period of dispute falls between the period from April 2011 to January 2014*
b. *On being pointed out by the internal Audit, Cenvat credit amounting to Rs.38,82,360/- was voluntarily paid by the party vide voucher dated 14-03-2014 pertaining to the period February, 2013 to January 2014. Towards this delayed payment an amount of intcrest for Rs.68,742/- was also voluntarily made by the party themselves.*
c. *The party have discontinued to avail Cenvat credit with effect from February 2014 onwards, without inviting any further notice on this score*
d. *there is also no dispute about the payment of royalty paid, payment of service tax on them as also availing of credit of tax and utilization of the same by the party*

8.4 It, therefore, emerges that the party have themselves admitted to the applicability of the provisions of said Rule 7 of CC Rules which cast an obligation upon them to comply with the stipulations laid under Rule 6(3) of the CC Rules. In so far as submission of evidence to establish compliance by the instant party is concerned, I observe that the defence reply does not specifically answer to the allegation of non-reversal, although I find that the party has made following submissions in this regard:-

(i) Technical-know-how received is used in both the manufacturing operation as well for testing and maintaining quality of the product.
(ii) It is also used for marketing and sale of the goods manufactured by them
(iii) The technical knowhow is consumed by the party as and when received for manufacture of the products either at their end or at the end of various EMSs.
(iv) Technical know-how received and used by them as well as by their EMS will not negate the fact that the said technology was used by the party itself.

(v) There is no one to one co-relation required between the IPR service received by them and the products and manufactured by party itself or by their EMSs.

(vi) The cost for such IPR service is borne by the party even though the same is based on the sale price of the product

8.5 The above submissions, in my view, are not sufficient to establish the eligibility of input service credit which have been found to be attributable towards the trading activities. Moreover, although a number of case laws have been cited by the party regarding admissibility of Cenvat credit on the I.P.R Services, however it has not been stated by the defence as to why the amount attributable to trading activity as arrived at by the party themselves under Rule 7 of the CC Rules, 2004 was not required to be deposited/ paid back despite being pointed out by the audit?

8.6 I find that the party have contended in their defence that they were engaged with various manufacturers, vendors and Electronic Manufacturing Suppliers (such EMSS are Dixon Techno., Kapkan, Lotte, Indocount, Ambar, Starion, E-vision, E-Durables & PG International) for getting their products manufactured for and on their behalf. For this purpose they provided design and drawings to manufacturer the components of final product to various part-manufacturers and such part manufacturers seil the said parts to the party as well as other EMSs. In turn, the party purchases such goods from EMSs/Vendors and assembles them for their further selling to their distributors/dealers. It is also an admitted fact that the technology received by the party was transferred to EMS in the form of text, drawings, graphing, designs etc. And after use of technology and upon assembly/goods manufactured by the EMS, the said products were sent to warehouse of the party on payment of duty as applicable and then the same were sold by the party under their brand name.

Subsequent to sale of such goods, aftersale services were also provided by the party and not by their EMS.

8.7 I also take note of the fact that the royalty was being paid to LG Korea by the party on the basis of ex-factory sale price and payment of service tax was made under Reverse Charge Mechanism.

8.11 I observe that the party, in their defence submissions itself, has admitted the fact that they have availed Cenvat Credit for Rs.15,79,21,809/- on the input service namely I.P.R. Out of the said amount of Rs.15,79,21,809/-, component of IPR service attributable to trading was for Rs.1,28,08,648/-. Out of the said amount of Rs.1,28,08,6488/-, the party has admittedly reversed the amount of Rs,38,82,360/ attributable to trading activity and pertaining to the period from February 2013 to January 2014, and also discontinued to take such inadmissible credit after January 2014. But it has not been made clear by the party as to why inadmissible Cenvat credit amounting to Rs.89,26,288/- attributable to the trading activity for the period prior to February, 2013 was not paid back. The defence submissions are not clear on this score. The party has neither reversed the credit nor explained the reason for not reversing the said credit for the period prior to February 2013. I find no cogent reason for a differential treatment to the issue of reversal of credit to the period prior to February 2013 and as such it leaves no room for doubt that the said credit taken in respect of trading activity is also liable to be reversed by the party. In the case of Pune Unit, they focused their defence to stress upon the admissibility of Cenvat Credit on I.P.R. services in respect of the S.C.N. dated 02-07-2015 issued by the Pune Commissionerate. However, unlike Pune Commissionerate case, this is not the issue in the instant case. I recall that the moot issue in the present case pertains to wrong availment of Cenvat credit attributable to trading activities. Admissibility of Cenvat Credit on I.P.R. Services to the

extent of eligible share of Greater Noida Unit amongst the three segments, i.e. the Pune Unit, the Greater Noida and the trading activity in terms of Rule 7 of was never in dispute. Therefore, the pleas advanced before the CC Rules 2004, the Commissioner, Central Excise, Pune and reiterated here are not relevant in the present case in any way.

8.12 On perusal of the records, I find that the case set out in the instant notice is germane to the observations of the Internal Audit as contained in Para 2 of the (Departmental) internal Audit Report. And, I find it proper to reproduce it for the sake of clarity :-

> *"AS I.S.D. the corporate office at 51, Surajpur Kasna Road, Udyog Vihar, Gautambudh Nagar distribute In-put service credit to their various other units in India. One of the Input services they are availing is from their associate enterprise namely M/S L.G. Electronics, LG Twin Towers - 20, Yoido Youngdungo, Seoul Korea. The service provided by LG Korea to LG Electronics India Pvt Ltd is - "Technical know How" where licensor (LG Korea) has granted to the Licensee (the party) the consent to use the Technical Information and design and Industrial Property Rights as defined in the Agreement entered between the two parties on 01-07-2001. Provision of such activity falls under the category of Intellectual Property Services [Section 65(105)(zzr)] of the Finance Act, 1994. The agreement entered between the two parties against the payment of Royalty to M/s LG INC Korea. The party is paying Royalty on the sale of their products in local (domestic) sales as well as export sales. During the MLU audit for the year 2012-13, it has been noticed that they did not reverse under the CENVAT Credit Rule 6(3) of the CENVA Credit Rules, 2004, when such services were commonly used in respect of excisable and exempted goods. Prior to 01-04-2011, 6(5) of the CENVAT Credit*

2004 provided that on Intellectual Property Services Rules [Section 63 (105) (22r)] among one of the 17 specified credit was available unless such services were used services, exclusively in or in relation to manufacture of exempted goods or providing exempted services. After 01-04-2011 the Rule itself No.03/2011-CE (N.T) has been deleted/omitted by Notification dated 01-03-2011,w.e.f. 01-04-2011. The party did not agree with the department's contention. However, on being asked, they have provided the details as per Annexure-III to this para wherein, it has been stated that Cenvat credit availed on IPR services Rs. 15,08,19,961/- from 01-04-2011 and since they did not is maintain separate account of the common services for exempted and excisable products, an amount to the tune of Rs.122,95,899/- is to be reversed along with interest under Rule 6 (3) of Cenvat Credit Rules, 2004 as calculated at Annexure-III.

8.13 Here, it is worth observing that Rule 7 of CENVAT Credit Rules, 2004, prescribes manner of distribution of credit by input service distributor' and the said provision fairly comes into play in the instant matter. It stipulates that

"The input service distributor may distribute the CENVAT Credit in respect of the service tax paid on the input service to its manufacturing units or units providing output service subject to the following conditions, namely :-

(a) The credit distributed against a document referred to in rule 9 does not exceed the amount of service the tax paid thereon;

(b) Credit of service tax attributable to service (used by one or more units) exclusively engaged in manufacture of exempted goods or providing of exempted services shall not be distributed;

(c) Credit of service tax attributable to service (used wholly by a unit) shall be distributed only to that unit

(d) Credit of service tax attributable to service used in more than one unit shall be distributed pro rata on the basis of the turnover of the concerned unit to the sum total of the turnover of all the units to which the service relates during the same period

8.14 From the above referred statutory provisions, it is evident to me that as an Input Service Distributor (I.S.D.) the party ought to have distributed service tax credit to its Greater Noida Unit in terms of Rule 7(b) and, therefore, Gr.Noida Unit (i.e. the party) was no eligible for CENVAT Credit attributable to trading activity which was distributed by its corporate office as an Input Service Distributor (ISD). Further, in terms of Rule 7(d), only the credit attributable to Greater Noida Plant, i.e. credit of other plant attributable to other manufacturing plant was available to permissible/ relatable limits.

8.15 I find that the party that they have themselves accepted the role of Rule 7 of CC Rules, This fact is clearly stated vide their letter dated 04-11-2015 (RUD 6). It has stated that

"in compliance of para no.2 we like to inform that we have already reversed the Cenvat credit on IPR services pertaining to exempted service (Trading goods) as per the provision of Rule-7 of CCR 2004 at the time of conclusion for one year starting from Feb.-13 to Jan-2014 amounting to Rs.38,82,360/- against voucher no.Z00.2014-03-13 17:40:15

Now you required the detail of non reversal of Cenvat credit on IPR service from Apr-11 to Jan-13 under Rule-7 of Cenvat Credit Rule 2004 we like to inform you that during the above mentioned period we have availed credit of Rs. 10,01,95,877/- on IPR service and according to

rule -7 credit attributable to exempted service will be Rs.89,26,288/-"

8.16 In reply to the audit objection, the party has also furnished the following figures also –

Details of Cenvat Credit availed on IPR (Royalty) from April 2011 to Jan 2013 (ANNEXURE A To RUD-6

Period (Months)	*Credit availed on Royalty*	*Credit attributable Trading activity*
April 2011 to Jan.2013	*100,195,877*	*8,926,288*

8.17 In support of their above calculation, a chart showing month-wise details for the period April 2011 to January 2013 was annexed as Annexure A to the said letter dated 04-11-2015 and submitted to the Department. This shows that the party agreed to the departmental Audit para (2) to the effect and that they reversed/paid back the credit in respect of inadmissible input service credit relating to trading activities.

8.18 Furthermore, the said party vide their letter dated 29-10-2015 (RUD 5) has stated that "Further we like to inform you that we having centralized Registration of service tax for all business location at Noida and also registered ourselves as a "input service Distributor" in which credit of services is being taken in ISD books and thereafter credit of input services is being distributed to different unit, i.e. Noida factory, Pune Factory and unit providing output services as per the provision of rule-7 of Cenvat Credit Rule 2004"

8.19 Here, it is relevant to mention that the party wrongly availed/taken credit and utilized towards the trading activity for the period under demands. This is crystal clear from the admitted fact that the rule 7 was applicable in their matter. From the to RUD 5 as also Annexure N to RUD 6, it facts as found mentioned in annexure F IS abundantly clear that though the party had admitted the application of rule 7, ibid. and had themselves quantified the amount attributable

to trading activities and despite depositing/reversing the said amount of Rs.38,82,360/- along with accrued interest of Rs.68,742/-, they wrongly availed the amount of credit pertaining to the period from April, 2011 to January, 2013. It is pertinent to mention here that the both the RUD 5 & 6 are the letters dated 14-03-2014 and 04-11-2015 respectively submitted by the notice party itself to the Department in compliance to the said Departmental Audit Para and nothing new has emerged after the audit. There is also found no scope for analyzing the applicability of Rule 7 of CC Rules, when on quantification the party have themselves arrived at the conclusion that an amount of Rs.89,26,288/- related to trading and it remained unpaid out of the total sum of RS. 12,80,86,48. It is a fact that an amount of Rs,38,82,360/- was deposited along with interest of Rs.68,742/- by their own

8.20 For the sake of clarity, it is pertinent to reproduce the information/details furnished by the party in Annexure- A to their letter dated 29-10-2015:-

Summary of Credit involved on Brand Shop Management

Details of Cenvat Credit availed on Advertising Brand Shop Management) from April, 2013 to Sept. 15 provided by the party vide letter dated 29-10-2015 (Annexure A)

Months	*Credit Involved in Advertisement (Brand shop Management)*	*Credit reversed u/rule 7 on Trading activities*	*Net eligible CENVAT on advertisement (brand shop Management)*	*CENVAT Credit availed by Noida Manufacturing*	*CENVAT Credit transferred to Pune Manufacturing*
From April 13 to Sept.15	*25737154*	*1571344*	*24165811*	*11896634*	*12269177*

8.21 A perusal of the above table furnished by the party as annexure to their letter dated 29-10-2015, (R.U.D.5), conspicuously displays the fact of taking recourse under Rule 7 of CC Rules and to make reversals. This is also a fact that in respect of Brand shop Management, they have

admitted the application of Rule 7 in respect of credit attributable /distributed to their Gr Noida Unit excluding the amount of trading activity in respect of Pune unit

8.22 In addition to above, it is also worth observing that the party has also themselves worked out their liability under Rule 7 of CC Rules and also reversed the amount of Rs.38,82,360/- at their own for the period February, 2013 to January 2014. This becomes clear from the fact the party was admitting role of Rule 7 of CC Rules, however, they did not agree to the audit objection by not reversing the same though the same was wrongly availed as per rule 7 of the said Rules.

Details of Reversal of Cenvat Credit ob IPR from Feb 13 to Jan.14

Month	*Total Cenvat Credit on IP'R from Ech-13 to lan.11*	*Reversal % as Per Rule 7*	*Reversal Cenvat Credit*
2013 Feb.	*4375875*	*7,26%*	*317688*
2013-03	*7190552*	*7.26%*	*522034*
2013-04	*7191200*	*6.12%*	*A61960*
2013-05	*7245438*	*7.13%*	*5168 10*
2013-06	*4693711*	*6.78%*	*318031*
2013-07	*3734322*	*6.25%*	*233527*
2013-08	*3097730*	*6.01%*	*186174*
2013-09	*3850463*	*5.22%*	*201089*
2013-10	*6156751*	*6.34%*	*3906IS*
2013-11	*2088043*	*7.66%*	*236539*
2013-12	*2657929*	*7.04%a*	*187079*
2014-01	*4443919*	*6.99%*	*310813*
Total	*57725932*		*3882360*

8.23 However, at this juncture, I deem it proper to make a summary of the entire data relating to taking and

distribution of Cenvat Credit on subject services by the party for the sake of bringing explicitly on the topic

SUMMARY OF CENVAT CREDIT DISTRIBUTED BY LG AS ISD (Input Service Distributor) To THE PARTY UNDER RULE-7 DURING THE PERIOD OF DEMAND

	Total	Noida	Pune	Trading	Amount reversed	Remark
1.Brand Shop Management service 2012-13						
2012-13		6841786				As per Annexure -A to letter dtd.29.10.15 (RUD-5) out of total credit of Rs.25737154 the assessee has availed credit of Rs.11896634 at Noida Plant and Rs.12269177/ at Pune Plant Thus they have admitted that at Noida Plant they were eligible to avail as much amount of Cenvat credit which may be attributed to Noida Plant in terms of Rule 7 of CCR-2004 i.e. norms of distribution of credit by Input Service Distributor.
2013-14		4485409				
2014-15		5509967				
2015-16		1901259				
Total	25737156	11896635	12269177	1571344	13840521	
Total Gross	25737156	18738421				
2. IPR Services						
Apr-11 TO JAN.13	100195877			8926288		Though the assessee it self admitted the application of Rule7 and had quantified
Feb-13 TO JAN	57725932			3882360	3882360 Interest paid	

14					Rs.68742/-	the amount attributable to Trading activity but despite reversing the said amount for 02/13 to 01/2014, did not reversed the amount pertaining to earlier period.
	157921809			12808648		

8.24 From the table above, it is clear that the amount of in admissiblc amount of Rs.89,26,288/- on IPR services for the period April 2011 to January, 2013 remained unpaid and the wrong availment of Rs.38,83,360/- for the period February`2013 to January, 2014 has not only been admitted by the party but the party has also paid the same. Thus, I find that the party have themselves admitted the applicability of Rule 7 of the said CC Rules, 2004, by segregating the quantum of credit attributable to both the Units, ie. at Pune and Greater Noida, in respect of services distributed by them as Input Service Distributor as they have divided Cenvat Credit not only on Brand Shop Management but also on 1.P.R.Services as is cvident from the table, referred to above

8.25 The admissibility of input service credit involved on IPR service has been contended by the party. But, the fact of the matter is that the eligibility of IPR service for availing credit has not at all been the subject matter of the SCN. The issue related to applicability of Rule 7 of the CC Rules for availing credit on trading was the moot point alone.

8.26 I observe that the issue relating to admissibility of input service Credit for trading activity has been discussed at length by the Hon'ble High Court Bombay in the case of Mercedes Benz India Pvt. Ltd. Vs Commissioner of C.Ex. Pune-I [2016 (41) S.T.R.577 (Bom.)] and also by the Hon'ble Tribunal in the case of Orion Appliances Ltd Vs

Commissioner of Service Tax, Ahmedabad [2010 (19) STR 205 (Tri.- Ahmd)]. Here also in the instant matter, I find that notice party too have admitted that amount of credit of input service involved on IPR service was not attributable to the extent of trading activities which they themselves worked out and out of such admitted amount they have reversed an amount of Rs.38,82,360/- along with interest of Rs.68,742/- as per their letter dated 04-11-2015 discussed herein before

8.27 Another fact is also worth-noticing that in the 2"d para of the letter dated 4-11-15 of the party have informed that according to Rule 7, input service credit attributable to trading activity worked out as Rs.89, 26,288/- for the period from April 2011 to January 2013. But the party failed to pay back the amount of credit attributable to trading, which was wrongly availed and utilized by the party despite having pointed to them by the Audit as well as by the Range officer vide letter dated 08-10-2015

9.1 In the context of deciding this issue, I place reliance on the decision of Hon'ble Tribunal given in the case of Commissioner of Central Excise Belapur Versus Elder Pharmaceuticals Ltd. Ltd. reported in 2015(37)S.T.R 241 (Tri. Mumbai) wherein, it has been held that though the Assessee was entitled to avail Cenvat credit of services referred in Rule 6(5) of Cenvat Credit Rules, 2004 for whole of credit attributable to dutiable as well as final exempted products and for taxable or exempted services, but they were not entitled to the credit attributable to activity of trading, during the relevant time, as trading activity was neither excisable nor exempted service during that time. The relevant portion of the said decision is reproduced below:-

> *"**8.1** The next issue before us is whether for the services covered under Rule 6(5) of Cenvat Credit Rules, 2004, the assessee is entitled to take Cenvat credit in full or in*

proportionate. We have to go through the Rule 6(5) as it existed during the relevant time, which is reproduced hereinunder :-

"(5) Notwithstanding anything contained in sub-rules (1), (2) and (3), creddit of the whole of Service Tax paid on taxable service as specified in sub-clauses (g), (p), (q), (r), (v), (w), (za), (zm), (zp), (zy), (zzd), (zzg), (zzh), (zzi), (zzk), (zzq) and (zzr) of clause (105) of Section 65 of the Finance Act shall be allowed unless such service is used exclusively in or in relation to the manufacture of exempted goods or providing exempted services."

As per the said Rule, there is no bar to avail Cenvat credit on the services covered under Rule 6(5) by a unit who is engaged in the activity of manufacturing on both dutiable as well as exempted goods and engaged in dutiable as well as exempted services. Therefore, we hold that in this case the assessee is entitled to take the Cenvat credit of services referred in Rule 6(5) of Cenvat Credit Rules, 2004 for whole of the credit attributable to dutiable as well as final exempted products and for taxable or exempted services but the assessee is not entitled to take Cenvat credit attributable to the activity of trading as during the relevant time, the trading activity was neither excisable nor an exempted service at all. Therefore, the quantification of inadmissible Cenvat credit is required to be done at the end of adjudicating authority to disallow the Cenvat credit attributable to trading activity.

8.2 *The next issue is that whether the learned Commissioner has jurisdiction to reallocate the Cenvat credit or not. We have gone through the show cause notice wherein the allegation is that the assessee is not entitled to take Cenvat credit referred under Rule 6(5) of Cenvat Credit Rules, 2004 as the same are not covered in Rule 7. Therefore we hold that the learned Commissioner*

has no jurisdiction to reallocate the Cenvat credit to the assessee in question as there was no such allegation in the show cause notice and he cannot go beyond the allegation in the show cause notice to decide the issue.

8.3 *We further find that the issue involved in this case is whether the assessee is entitled to take Cenvat credit on the services covered under Rule 6(5) or not and which is debatable issue therefore, extended period of limitation is not invokable. Therefore, the matter needs examination at the end of the adjudicating authority to quantify inadmissible credit for the normal period of limitation. As the extended period of limitation is not invokable, consequently the penalty on the assessee is not warranted. Therefore, in result we pass the following order :-*

(a) We hold that the assessee is entitled to take Cenvat credit on the services covered under Rule 6(5) of the Cenvat Credit Rules, 2004 as prescribed in the manner in the said Rule.

(b) The assessee is not entitled to take Cenvat credit on the services mentioned in Rule 6(5) of the Cenvat Credit Rules, 2004 which is attributable to their trading activity."

9.2 In view of the facts and circumstances, it is clear to me that the party was engaged in procurement of technical know-how services paying royalty to the LG Korea and paying service tax to Govt. Simultaneously availing credit having paid such tax. But the obligation, in respect of inadmissible credit availed on IPR services in proportionate of exempted services, as envisaged and worked out under Rule 7 read with Rule 6(3) of the CC Rules was not fulfilled in toto. It has been brought on record by the party themselves that they had reversed the credit for the Period from February 2013 to January 2014 and it has not been made clear in their defence as to how the credit

attributable to trading activities pertaining to the period of demand was admissible to them.

9.3 I find it pertinent that it has not been contested by the party that credit attributable to trading portion was not admissible to them. Rather they have focused their defence on admissibility of credit on IPR services, though it was not the subject matter of the Show Cause Notice. They have themselves admitted that the credit attributable to trading was not admissible to them.

10. During the course of Personal Hearing, it was also contended that issue of credit availed on I.P.R services being identical in nature involved in respect of heir Pune Unit has been adjudicated by the Commissioner, Central Excise, Pune, vide Order-in-original No.PUN-EXCUS-004-COM-02/16-17 Dated 14-06-2016 and since no notice of appeal against the said Order-in-original has been received by them till then, the same seems to have been accepted, and, accordingly, the present SCNs on this issue should also be dropped

10.1 With regard to above contention, it is pertinent to note that there were two different things happened in respect of Pune Unit. There was affirmation of fact by one Sh. Vipin Gupta, Production Engineer, to the effect that "there is no technology which is exclusively used for EMS production only in as-much-as the technology platform is almost same for the single product whereas there could be multiple variants on account of colour, size etc. in a particular product category

10.2 Secondly the said affirmation of facts by way of affidavit dated 04-04-2016 were placed reliance on the statement given by the Chartered Engineer's Certificate dated 04-05-2016, which according to him technically substantiated his statement.

10.3 I observe that the issue involved in the case considered by Pune 10.3 whether 1.P.R services had not

been used for manufacture Commissionerate was oF goods in the Pune Unit else by their Vendors/EMSs. L observe that since as I.S.D. the Corporate Office of M/s LG, Greater Noida, has only transferred as much amount of Cenvat Credit to Pune Unit which was admissible to them in terms of Rule 7 of CC Rules, 2004 and no extra amount was transferred to Pune Unit hence the issue present before the Commissioner, Central Excise Pune, was materially distinct from that considered by me. In view of the above position, it is evident that facts of the present case are not the same as those contained in the Notice issued to M/s L.G.Electronics (India) Pvt.Ltd., Pune by Commissioner Central Excise Pune. 'The facts of present case did not call for furnishing of an Affidavit and/or Certification of those facts by a Chartered Engineer for furnishing them in respect of the Show Cause notice issued to the party (i.e., Greater Noida Unit) because the same was not relevant to the issue involved. Thus, the issue involved in the present case is altogether different from the issue before the Commissioner, Central Excise, Pune as there was no such issue before him with regard to admissibility of Cenvat Credit on input service(s) attributable to trading activity but availed by the manufacturing unit. Moreover, the order passed by an authority of another Commissionerate may not be a binding precedence for authority of equal rank

10.4 In view of the above discussion and findings in the preceding para, I hold that the allegations of wrongly availing the amount attributable to trading/ exempted services, is correct and proper and, accordingly, the demand on this count deserves to be confirmed.

11. As far as the proposal of invocation of longer period of demand is concerned, the party has also contended that mere detection by the department does not mean that they suppressed the facts with intent to evade payment of duty. In this regard, it is seen that it is a case where the scheme of M.L.U (Multi Locational Unit) worked in the place and on

the visit by the Audit Team the fact of wrong availment of credit could be noticed during the course of such audit only and, accordingly irregular credit taken and its utilization was taken care of by issuance of instant notice invoking provisions of Sec.11A read with Section 11A(4) of the Central Excise Act, 1944. In view of this position, the provisions are found to be rightly invoked.

12. In so far as the penal provisions contained in the instant notices are concerned, it is seen that the facts and circumstances as described herein before, it has been found that the credit of input services was not rightly availed and found 1o be wrongly availed and utilized, therefore consequences thereto, i.e. penal provisions suo moto follow. I further note that in the absence of any material change in the facts of the case for subsequent period, the findings given above are also applicable for the Statement of Demand issued on 18-10-2016 and the same, accordingly, stands disposed of vide this order."

4.3 We have gone through the entire contents of the impugned order and have reproduced the same for the simple reason that order in our view fail to consider the issues in proper perspective. There are basically two issues involved in the matter which have been reproduced in the para 7.2 of the impugned order.

4.4 On the first issue we observe that appellant has availed CENVAT Credit in respect of certain services which have been received by them at their depot-Brand Shop. Undisputedly these credits are in respect of the erection commissioning and installation services received by them at the said premises. The credit has been sought to be denied by stating that these services are not the part of advertising agency services and were received at premises beyond the "place of removal". Reliance has been placed on various decisions which were deciding the issue in respect of GTA Service received beyond the place of removal.

4.5 As per the main of clause of definition of input services as per Rule 2 (l) of the CENVAT Credit Rules, 2004, the input services have been defined stating that "used by a manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products and clearance of final products upto the place of removal", and the place of removal has been defined by the Section 4 (3) (c) of the Central Excise Act, 1944 as follows:

> *"(c) "place of removal" means—*
>
> *(i) a factory or any other place or premises of production or manufacture of the excisable goods;*
>
> *(ii) a warehouse or any other place or premises wherein the excisable goods have been permitted to be deposited without payment of duty;]*
>
> *(iii) a depot, premises of a consignment agent or any other place or premises from where the excisable goods are to be sold after their clearance from the factory, from where such goods are removed;"*

Thus the place of removal as per the above definition can be the depot-brand shop of the appellant.

Further we note that Hon'ble Supreme Court has in the case of MRF Ltd [1995 (77) ELT (SC)] observed as follows:

> ***"25.*** *We agree that it is for each assessee to decide where to sell his goods. He can choose to sell his goods at the gate, i.e., at the place of removal or he may choose to sell his goods through his selling organisation, as in the case of Madras Rubber Factory. Where the goods are sold in the course of wholesale trade through depots outside the place of removal, the assessee does no doubt incur expenses not only for transporting the goods from the place of removal to the depots but also on maintenance and running of depots but these expenses, according to Bombay Tyre International are on the same par as after-sale service charges and advertisement charges and hence cannot be deducted. Where, however, the freight charges are equalised in the*

manner indicated in the preceding paragraph, such charges can be deducted from the normal price; it is obvious that such deduction will be common to the price at the gate and at the depots outside the gate - because of the equalisation, the price will equally be uniform at the gate as well as at the depots. This aspect will become clearer once we deal with the permissibility of the deductions claimed.

26.*With respect to the alternative argument of Sri Nariman, we must say that no direction can be given to the authorities to adopt the price at which the assessee sells its goods to the Government as the price in respect of its total sales. Firstly, by virtue of proviso (i) to Section 4(1)(a), the Government would be a class by itself and the price charged to it would be relevant only to the goods sold to it. So far as depot sales are concerned, they are to a different class or classes of buyers and in respect of the goods sold to them, the price charged to each of such class of buyers would be the normal price. The price charged to one class of buyers cannot, therefore, be directed to be adopted as the price in respect of all the classes of buyers. Since the position under the old Section 4 and new Section 4 is held to be the same, this holding holds good for both periods.*

27.*For the above reasons, we are unable to give effect to the submission of Sri Nariman. We hold that in cases where the goods are sold in the course of wholesale trade at place or places outside the place of removal, i.e., at depots, as in the case of Madras Rubber Factory, the expenses incurred in maintaining and running the said depots cannot be deducted from the price but the cost of transportation along with the cost of insurance on freight can be deducted as held in Bombay Tyre International. This holding does not, of course, prevent the assessees from representing their case to the Government if they are so advised in this behalf and it is for the Government to consider the same in the light of all relevant circumstances."*

Thus as per the above decision the brand shop (depot) of appellant will be covered by the definition of "Place Removal" and all the expenses incurred at the depot became the part of the assessable value for payment of excise duty. The appellant incurred certain expenses towards the maintenance of brand shop, and these expenses were towards services of erection, commissioning, installation etc., which were subject to service tax. The CENVAT credit in respect of the service tax paid in respect of such services received by the appellant could not have been denied. The decisions relied upon in the impugned order are not on the issue in dispute and hence could not have been relied upon. Thus we do not find any merits in the impugned order to this extent.

4.6 Our view gets support from the decision of Hon'ble Madras High Court in the case of Bata India Ltd. [2019 (24) G.S.T.L. 326 (Mad)] holding as follows:

> ***"16.*** *On a reading of the above paragraph, we find that the Adjudicating Authority held that in view of clarification given by the Board, vide letter dated 2-2-2006, the contention of the assessee was accepted. However, the next three sentences overturned the case of the assessee. The Adjudicating Authority held that the Service Tax credit distributed by the Regional Distribution Centres and the Corporate Office as discussed supra have no nexus with the manufacturing activity of the assessee and that the credit availed by the assessee was not in order.*
>
> ***17.*** *We find that the Tribunal also, to an extent, accepted the case of the assessee, which could be seen from paragraph 5.1 of the impugned order, which reads as follows :*
>
> *"In the first place, we intend to address the controversy as to whether in case of clearance under Section 4A, the Depot can be considered as 'a place of removal'? In this regard, we find that the C.B.E. & C., vide letter No. 137/3/200-C.X, dated 2-2-2006, inter alia, had clarified as under :*

In view of the above, the '4. undersigned is directed to state that, in case of depot sales of goods, the credit of Service Tax paid on the transportation of goods up to such depot would be eligible, irrespective of the fact, whether the goods were chargeable to excise duty at specific rates or ad valorem rates on the basis of valuation under Section 4 or 4A of the Central Excise Act.'

This being the case, there should not be any doubt that eligible services availed upto the Depot/RDCs by the appellant in this case would be eligible for availment of input service credit."

18.*The issue, which should have been decided by the Adjudicating Authority, is as to whether the point of sale is the RDC as contended by the assessee. In fact, the Tribunal partly allowed the assessee's appeals on input service credit availed in all the RDCs in respect of renting of premises, courier, telephone, security services, etc., under Rule 2(l) of the CCR irrespective of the amendment i.e. before and after 1-4-2008 and also set aside the penalty. However, in respect of GTA services, the Adjudicating Authority and the Tribunal disallowed the input credit availed by the assessee beyond the RDCs/Corporate Office from 1-4-2008 and held that they are not eligible for the purpose of Rule 2(l) of the OCR as it stood after 1-4-2008.*

19.*To arrive at the correct conclusion, the Adjudicating Authority should have taken note of the decision of the Hon'ble Supreme Court in the case of CCE, Belgaum v. Vasavadatta Cements Ltd. [reported in (2018) 52 GSTR 232 = 2018 (11) G.S.T.L. 3 (S.C.)]. The issue, which fell for consideration before the Hon'ble Supreme Court was as to what interpretation has to be given to input services, which is defined in Rule 2(l) of the CCR. The appeals before the Hon'ble Supreme Court all related to a period prior to 1-4-2008 and the said Rule stood amended with effect from 1-4-*

2008. The principles laid down by the Hon'ble Supreme Court in the said decision could be summarized as follows :

"The expression used in Rule 2(l) of the Cenvat Credit Rules, 2004 is 'from the place or removal'. It has to be from the place of removal upto a certain point. Therefore, Cenvat credit of Service Tax paid on goods transport agency service availed of for transport of final product from the place of removal upto the first point, whether it is a depot or the customer's premises, has to be allowed. The amendment of Rule 2(l) with effect from April 1, 2008 by Notification No. 10/2008-C.E. (N.T.), dated March 1, 2008, whereby the expression 'from the place of removal' was substituted by 'upto the place of removal' fortifies this view. Thus, from April 1, 2008, with the amendment, the Cenvat credit is available only upto the place of removal whereas under the unamended Rule, it was available from the place of removal upto either the place of depot or the place of customer, as the case may be."

20.*To be noted that the subsequent decision of the Hon'ble Supreme Court in the case of CCE & ST v. Ultra Tech Cement Limited [reported in 2018 (2) SCC 721 = 2018 (9) G.S.T.L. 337 (S.C.)] dealt with a case where the assessee had got finished goods (cement) from its parent unit on stock transfer basis and sold the same in bulk form and packed bags and during the period from January, 2010 to June, 2010 and availed CENVAT credit of Service Tax paid on outward transportation of goods through a transport agency from their premises to the customer's premises and on the said facts, it was held that the CENVAT credit was not admissible to the assessee for such transport. The decision came to be rendered on considering amendment to the CCR namely Rule 2(l) as effective from 1-3-2008. The decision does not overturn the earlier decision in the case of Vasavadatta Cements Ltd. However, the Tribunal did not endeavour to go into the factual matrix of the case, but*

applied the decision in the case of Ultra Tech Cement Ltd., and negatived the stand taken by the assessee.

21.*It has to be noted that for the period prior to 1-4-2008, the Hon'ble Supreme Court, in the case of Vasavadatta Cements Ltd., held that the tax paid on the transportation of final product from the place of removal upto the first point, whether it is the depot or the customer, has to be allowed and we find that the issue addressed by the Hon'ble Supreme Court in the decision in the case of Ultra Tech Cement Ltd., pertains to the first limb of the definition under Rule 2(1) of the CCR. In other words, the issue involved in that decision was regarding availment of Cenvat credit on goods transport agency service availed for transport of goods from the place of removal to buyer's premises. In the case of Ultra Tech Cement Ltd., the Cenvat credit on tax paid upto the customer's premises was disallowed, as it was found that the factory gate is to be determined as the 'place of removal'. Therefore, the larger question would be as to whether the assessee would have been non-suited based on the decision in the case of Ultra Tech Cement Ltd. In our considered view, the assessee should not be non-suited in the light of the said decision for more than one reason.*

22.*Firstly, the modus operandi of the assessee requires to be examined by the Adjudicating Authority i.e. establishment of the RDCs and the WSDCs. The assessee's specific case is that the point of sale in their case is the RDCs. However, this issue has not been examined by the Adjudicating Authority in the manner it was required to be examined. We say so because the Adjudicating Authority is the First Authority, who will record the findings of fact. Therefore, before the legal position is applied, a thorough exposition of the facts needs to be done. Then, law is to be applied to the facts of the case and not vice versa.*

23.*One more reason, which weighs in our mind, is to state that the Adjudicating Authority could have examined the factual background on account of a decision of the Delhi Tribunal in the case of Pr. CCE v. Lafarge India Pvt. Ltd. [reported in 2017 (52) S.T.R. 350 (Tri.-Del.)]. According to the assessee, the said case was on identical facts and it was held in that decision that the place of removal is inextricably linked to the factum of sale. In the light of the decision of the Delhi Tribunal, which was rendered subsequently, what is required to be examined is as to whether the assessee was right in contending that the goods are removed to the RDCs without any sale and therefore, there can be no removal at the factory gate and the retail outlet, at which, the goods were finally sold was the place of removal."*

4.7 Now coming to the issue in respect of the demand of reversal of CENVAT Credit on certain services – which are in respect of the trading activities. Undisputed fact as has been acknowledged in the impugned order is that the appellant was receiving IPR Services from their principals in South Korea and paying the service tax due on the same on reverse charge basis. The said services were common input services both exempted trading services and for sale of the goods subjected to excise duty. The issue in the present case is not vis a vis the admissibility of CENVAT Credit in respect of the said service. The demand has been made for recovery of the amount to be reversed in terms of Rule 6 (3) of the CENVAT Credit Rules, 2004. Appellant have admitted and have reversed the amount due for the period February 2013 to January 2014, along with the interest. Impugned order records the said admission and proceeds to demand for the remaining period of demand i.e. for the period April 2011 to January 2013.

4.8 The order in original No PUN-EXCUS-004-COM-02/16-17 dated 14.06.2016 of Commissioner Central Excise Pune, is with regards to the admissibility of the CENVAT Credit in respect of the IPR services and do not decide the issue in hand and hence cannot have any precedence or persuasive value.

4.9 In the impugned order or in the show cause notice no specific reason has been stated for invoking extended period of limitation. It has not been brought on record as to what facts lead to invocation of extended period in the present case and for imposition of the penalties, on the appellant. In absence of any such allegation or finding in the impugned order we are not in position to hold that extended period of limitation could have been invoked for making this demand. Our view is supported by the decision of Hon'ble Supreme Court in case of Uniworth Textiles Ltd. [2013 (288) E.L.T. 161 (S.C.)] observing as follows:

> ***"12.*** *We have heard both sides, Mr. R.P. Bhatt, learned senior counsel, appearing on behalf of the appellant, and Mr. Mukul Gupta, learned senior counsel appearing on behalf of the Revenue. We are not convinced by the reasoning of the Tribunal. The conclusion that mere non-payment of duties is equivalent to collusion or willful misstatement or suppression of facts is, in our opinion, untenable. If that were to be true, we fail to understand which form of non-payment would amount to ordinary default? Construing mere non-payment as any of the three categories contemplated by the proviso would leave no situation for which, a limitation period of six months may apply. In our opinion, the main body of the Section, in fact, contemplates ordinary default in payment of duties and leaves cases of collusion or willful misstatement or suppression of facts, a smaller, specific and more serious niche, to the proviso. Therefore, something more must be shown to construe the acts of the appellant as fit for the applicability of the proviso.*
>
> *17. In fact, the Act contemplates a positive action which betrays a negative intention of willful default. The same was held by Easland Combines, Coimbatore v. The Collector of Central Excise, Coimbatore - (2003) 3 SCC 410 = 2003 (152) E.L.T. 39 (S.C.) wherein this Court held :-*

"31. It is settled law that for invoking the extended period of limitation duty should not have been paid, short levied or short paid or erroneously refunded because of either fraud, collusion, wilful misstatement, suppression of facts or contravention of any provision or rules. This Court has held that these ingredients postulate a positive act and, therefore, mere failure to pay duty and/or take out a licence which is not due to any fraud, collusion or willful misstatement or suppression of fact or contravention of any provision is not sufficient to attract the extended period of limitation." [Emphasis supplied]

18. We are in complete agreement with the principle enunciated in the above decisions, in light of the proviso to Section 11A of the Central Excise Act, 1944. However, before extending it to the Act, we would like to point out the niceties that separate the analogous provisions of the two, an issue which received the indulgence of this Court in Associated Cement Companies Ltd. v. Commissioner of Customs - (2001) 4 SCC 593, at page 619 = 2001 (128) E.L.T. 21 (S.C.) in the following words :-

"53… Our attention was drawn to the cases of CCE v. Chemphar Drugs and Liniments - (1989) 2 SCC 127, Cosmic Dye Chemical v. CCE - (1995) 6 SCC 117, Padmini Products v. CCE - (1989) 4 SCC 275, T.N. Housing Board v. CCE - 1995 Supp (1) SCC 50 and CCE v. H.M.M. Ltd. (supra). In all these cases the Court was concerned with the applicability of the proviso to Section 11-A of the Central Excise Act which, like in the case of the Customs Act, contemplated the increase in the period of limitation for issuing a show-cause notice in the case of non-levy or short-levy to five years from a normal period of six months...

54. While interpreting the said provision in each of the aforesaid cases, it was observed by this Court that for proviso to Section 11-A to be invoked, the intention to

evade payment of duty must be shown. This has been clearly brought out in Cosmic Dye Chemical case where the Tribunal had held that so far as fraud, suppression or misstatement of facts was concerned the question of intent was immaterial. While disagreeing with the aforesaid interpretation this Court at p. 119 observed as follows : (SCC para 6)

> *'6. Now so far as fraud and collusion are concerned, it is evident that the requisite intent, i.e., intent to evade duty is built into these very words. So far as misstatement or suppression of facts are concerned, they are clearly qualified by the word 'wilful' preceding the words 'misstatement or suppression of facts' which means with intent to evade duty. The next set of words 'contravention of any of the provisions of this Act or Rules' are again qualified by the immediately following words 'with intent to evade payment of duty'. It is, therefore, not correct to say that there can be a suppression or misstatement of fact, which is not wilful and yet constitutes a permissible ground for the purpose of the proviso to Section 11-A. Misstatement or suppression of fact must be wilful.'*

The aforesaid observations show that the words "with intent to evade payment of duty" were of utmost relevance while construing the earlier expression regarding the misstatement or suppression of facts contained in the proviso. Reading the proviso as a whole the Court held that intent to evade duty was essentially before the proviso could be invoked.

55. Though it was sought to be contended that Section 28 of the Customs Act is in pari materia with Section 11-A of the Excise Act, we find there is one material difference in the language of the two provisions and that is the words "with intent to evade payment of duty" occurring in proviso to Section 11-A of the Excise Act which are

missing in Section 28(1) of the Customs Act and the proviso in particular...

56. The proviso to Section 28 can inter alia be invoked when any duty has not been levied or has been short-levied by reason of collusion or any wilful misstatement or suppression of facts by the importer or the exporter, his agent or employee. Even if both the expressions "misstatement" and "suppression of facts" are to be qualified by the word "wilful", as was done in the Cosmic Dye Chemical case while construing the proviso to Section 11-A, the making of such a wilful misstatement or suppression of facts would attract the provisions of Section 28 of the Customs Act. In each of these appeals it will have to be seen as a fact whether there has been a non-levy or short-levy and whether that has been by reason of collusion or any wilful misstatement or suppression of facts by the importer or his agent or employee." [Emphasis supplied]

19. Thus, Section 28 of the Act clearly contemplates two situations, viz. inadvertent non-payment and deliberate default. The former is canvassed in the main body of Section 28 of the Act and is met with a limitation period of six months, whereas the latter, finds abode in the proviso to the section and faces a limitation period of five years. For the operation of the proviso, the intention to deliberately default is a mandatory prerequisite.

…..

24. Further, we are not convinced with the finding of the Tribunal which placed the onus of providing evidence in support of bona fide conduct, by observing that "the appellants had not brought anything on record" to prove their claim of bona fide conduct, on the appellant. It is a cardinal postulate of law that the burden of proving any form of mala fide lies on the shoulders of the one alleging it. This Court observed in Union of India v. Ashok Kumar &

Ors. - (2005) 8 SCC 760 that "it cannot be overlooked that burden of establishing mala fides is very heavy on the person who alleges it. The allegations of mala fides are often more easily made than proved, and the very seriousness of such allegations demand proof of a high order of credibility."

25. Moreover, this Court, through a catena of decisions, has held that the proviso to Section 28 of the Act finds application only when specific and explicit averments challenging the fides of the conduct of the assessee are made in the show cause notice, a requirement that the show cause notice in the present case fails to meet. In Aban Loyd Chiles Offshore Limited and Ors. (supra), this Court made the following observations :

> *"21. This Court while interpreting Section 11-A of the Central Excise Act in Collector of Central Excise v. H.M.M. Ltd. (supra) has observed that in order to attract the proviso to Section 11-A(1) it must be shown that the excise duty escaped by reason of fraud, collusion or willful misstatement of suppression of fact with intent to evade the payment of duty. It has been observed :*
>
> *'...Therefore, in order to attract the proviso to Section 11-A(1) it must be alleged in the show-cause notice that the duty of excise had not been levied or paid by reason of fraud, collusion or willful misstatement or suppression of fact on the part of the assessee or by reason of contravention of any of the provisions of the Act or of the Rules made thereunder with intent to evade payment of duties by such person or his agent. There is no such averment to be found in the show cause notice. There is no averment that the duty of excise had been intentionally evaded or that fraud or collusion had been practiced or that the assessee was guilty of wilful misstatement or suppression of fact. In the absence of any such averments in the show-cause notice it is difficult*

to understand how the Revenue could sustain the notice under the proviso to Section 11-A(1) of the Act.'

It was held that the show cause notice must put the assessee to notice which of the various omissions or commissions stated in the proviso is committed to extend the period from six months to five years. That unless the assessee is put to notice the assessee would have no opportunity to meet the case of the Department. It was held:

"...There is considerable force in this contention. If the department proposes to invoke the proviso to Section 11-A(1), the show-cause notice must put the assessee to notice which of the various commissions or omissions stated in the proviso is committed to extend the period from six months to 5 years. Unless the assessee is put to notice, the assessee would have no opportunity to meet the case of the department. The defaults enumerated in the proviso to the said sub-section are more than one and if the Excise Department places reliance on the proviso it must be specifically stated in the show-cause notice which is the allegation against the assessee falling within the four corners of the said proviso...."
(Emphasis supplied)

26. Hence, on account of the fact that the burden of proof of proving mala fide conduct under the proviso to Section 28 of the Act lies with the Revenue; that in furtherance of the same, no specific averments find a mention in the show cause notice which is a mandatory requirement for commencement of action under the said proviso; and that nothing on record displays a willful default on the part of the appellant, we hold that the extended period of limitation under the said provision could not be invoked against the appellant.

4.10 Thus in view of the above, we do not find any merits in the demand made by invoking the extended period of limitation except for the amount of CENVAT Credit for the period February 2013- January 2014 reversed by the appellant suo motto along with interest even prior to the issuance of Show Cause Notice. In terms of Section 11A (2), no show cause notice could have been issued for this amount.

4.11 As we do not find any merits in the invocation of extended period of limitation we also set aside the penalties imposed.

5.1 Appeal is allowed as indicated in para 4.5, 4.10 & 4.11.

(Order pronounced in open court on- 18 July, 2025)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

(ANGAD PRASAD)
MEMBER (JUDICIAL)

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