CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

SERVICE TAX APPEAL NO: 85869 OF 2017

[Arising out of Order-in-Original No: 68/STC-I/SM/16-17 dated 24th January 2017 passed by the Commissioner of Service Tax –I, Mumbai.]

Oman Air SAOC
Center – 1, World Trade Centre, 19th Floor
Unit No. 4, Cuffe Parade, Colaba, Mumbai - 400005 … ***Appellant***

versus

Commissioner of Service Tax – I
14th Floor, Air India Building, Nariman Point
Mumbai – 400021 ***…Respondent***

APPEARANCE:

Shri PK Sahu, Advocate and Shri Rajiv Palpuri, Chartered Accountant for the appellant

Shri CS Pavan, Deputy Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: 86140/2025

DATE OF HEARING: 17/02/2025
DATE OF DECISION: 23/07/2025

PER: C J MATHEW

In this dispute of M/s Oman Air SAOC with order[1] of

[1] [order-in-original no. 68/STC-I/SM/16-17 dated 24th January 2017]

Commissioner of Service Tax-I, Mumbai, the peculiar nuances and fundamental underpinning of tax credit - purpose in design, mode of utilization and jurisdiction to recover – are necessarily to be considered. The impugned order, invoking section 73(2) of Finance Act, 1994 in conjunction with rule 14 of CENVAT Credit Rules, 2004 to confirm demand of ₹ 3,93,21,581, along with applicable interest under section 75 of Finance Act, 1994, and imposing penalty of ₹ 3,93,21,581 under rule 15 of CENVAT Credit Rules, 2004, is challenged for those very detriments even though, and strangely so, there is no allegation that the impugned credit had been ineligibly taken under rule 3 of CENVAT Credit Rules, 2004 or inappropriately retained in breach of rule 6 of CENVAT Credit Rules, 2004 and nor that the impugned credit had been utilized for the payment of duty at any time under rule 3(4) of CENVAT Credit Rules, 2004 with consequence of confinement to accounting limbo – the only circumstances warranting proceedings for extinguishment with resuscitation only through jurisdictional sanction. It is all about the proposition of service tax authorities that existence of credit is contingent upon reporting; that, but for retention in returns, credit lapses.

2. The proceedings boiled down to credit of ₹ 6,70,71,862, unprotestingly acknowledged as validly taken and unquestioned as properly retained as on 30th September 2008, that had not been carried forward as balance in the biannual returns until ₹ 3,93,21,581 surfaced

as available credit in the returns for April to September 2013. It is solely on the failure of the appellant to carry forward this amount for a period of over 4½ years that the said amount was sought to be erased by the impugned order, besides being made liable to pay the interest thereon, and, to rub further salt, hamstrung with penalty, to boot. In a twist though, some portion of purportedly expired credit, amounting to ₹ 2,77,50,281, was found to be sufficiently eligible to be exhumed and debited towards liabilities stemming from certain discrepancies that did call into question entitlement to such credit during the period prior to September 2008. Therefore, it appears that, the issue is not related to taking of credit, retention of credit or utilization of credit but is only about *suo motu* 'restoration of credit' for the possible utilization, such as it is, in future.

3. In the circumstances, it would be appropriate to take note of the backdrop to the dispute. The appellant is a provider of service, *viz*, transport of passengers and cargo burdened with liability to tax under Finance Act, 1994 only on transport of passengers by classes other than economy. As provider of service – taxable and non-taxable – with admitted inability to disaggregate 'input service' deployed in common for rendering of service, the utilization of credit, arising therefrom, had had to be circumscribed for preserving the integrity of 'tax credit scheme' established principally to avoid the cascading effect of tax. Thus it was that 'output service', 'input service' and 'exempted

service', along with 'input', 'exempted goods' and 'final product', in various permutations and combinations, provided the circumscribing framework in rule 3(1) of CENVAT Credit Rules, 2004 which was furthered by mandates in rule 6 of CENVAT Credit Rules, 2004 on retention of such credit beyond ineligible deployment for manufacture of exempted goods or rendering of exempted service.

4. At the relevant point in time, there was no bar on retention of such credit as such providers, challenged in attributing 'input service' to corresponding 'exempted service', were entitled to discharge tax liability by recourse to credit only to the extent of 20% of the tax payable during any taxable period. Crude, doubtlessly, it was a method of neutralization, and, being amenable to refinement, erasure of credit was enabled from 1st April 2008 by a bouquet of reversals. That engendered its own disputes but that is of no relevance here. As far as appellant was concerned, lack of clarity on the credit remaining in balance then prompted them to keep the said amount, *i.e.*, ₹ 6,70,71,862, off the records and, thereby, under the radar of returns. Though circular[2] clarifying entitlement to carry forward such credit was issued by the Central Board of Excise and Customs (CBEC), the appellant did not venture to do so in subsequent returns either and it was only after an audit objection in which discrepancies, to the tune of ₹ 2,77,50,281, was pointed out during the audit of 2012-13 that the

[2] [circular no. 137/72/2008-Cx-4 dated November 21, 2009]

unreported credit was restored and partially debited for dues arising therefrom. The dispute revolves around the said amount so restored.

5. According to Learned Counsel for the appellant, there is neither bar on retention of the credit, as clarified in circular *supra*, nor any detriment fastenable on them for restoring that which was rightly theirs all along. It was contended that there is no provision in Finance Act, 1994, or in CENVAT Credit Rules, 2004, to confirm such demand either under section 73 of Finance Act, 1994 or to recover interest under section 75 of Finance Act, 1994. Reliance was placed on the decision of the Tribunal in *Bharat Petroleum Corporation Ltd v. Commissioner of Central Excise, Mumbai [2019 (365) ELT 536 (Tri.-Mumbai)]*, in *Warburg Pincus India Pvt Ltd v. Assistant Commissioner, Mumbai South [(2024) 22 Centax 64 (Tri.-Bom)]*, and in *Course 5 Intelligence Pvt Ltd v. Commissioner of CGST, Mumbai East [2022 (12) TMI 1192 – CESTAT MUMBAI]* and on the decision of the Hon'ble High Court of Madras in *ICMC Corporation Ltd v. CESTAT, Chennai [2014 (302) ELT 45 (Mad.)]*.

6. On the other hand, Learned Authorized Representative submitted that the issue was not about eligibility to credit but on *suo motu* restoration which purportedly was held as not permissible by a Larger Bench of the Tribunal in *BDH Industries Ltd v. Commissioner of Central* Excise *(Appeals), Mumbai – I [2008 (229) ELT 364 (Tri.-LB)]*

and by the Hon'ble High Court of Madras in *Himu Accessories Pvt Ltd v. Assistant Commissioner of Central Excise, Chennai [2007 (219) ELT 83 (Mad.)]*.

7. All too often, legacy does manage to slip into tax enforcement which, of itself, may not be a bad thing; contrarily, when an evolving design is anchored on rigidity, the purpose of the scheme is bound to be misdirected. From the era of ‘set off’, through ‘proforma credit’ and ‘MODVAT’, to CENVAT, much water has flown. Though may be too familiar as to render reiteration tedious, it must, nevertheless, be recalled that ‘tax credit’ intended avoidance of ‘cascading effects of tax’ on subsequent transactions in the value-added chain. In effect, this laudable object was permitted, nay even prompted, by the scheme of central excise duty having to conform to the ‘taxable event’ of sequential contribution in manufacture of products, and the rudimentary set off/proforma credit sufficed before 1985 even after manufacture took on new meaning after tariff item of 68 was incorporated in the central excise tariff, duty. With the comprehensive span of Schedule to Central Excise Tariff Act, 1985 itself having so expanded levy of duty on manufacture of goods, the rudimentary scheme of set off could no longer serve its purpose, hence MODVAT credit was brought into existence in 1985 and, after the maturation of taxation and services, incorporated in the CENVAT Credit Rules, 2004. Effectively, the intent was to bridge the gap between the charging

provision to tax manufacture and the valuation provision traversing beyond the taxable event and the taxable object as measure of the tax.

8. Though straddled by the two levies on goods and on services, CENVAT credit scheme has not been incorporated in either of, or both, the statutes. The legal patina of the scheme draws upon the rule making powers of the Central Government in both for tweaking 'payment of duty in the manner prescribed' as found in both Central Excise Rules, 2002 and Service Tax Rules, 1994. There was, thereby, an element of flexibility including the maintenance of internal records for keeping track of available credit in so far as the manufacturers and providers of service are concerned and stipulations only for the documents evidencing eligibility to take credit on each occasion. To some extent, and probably for the purpose of uniformity, provision has been made in the periodic returns prescribed in Central Excise Rules, 2002 and Service Tax Rules, 1994 for reporting and carrying forward of credit accumulated; in practice, these returns are consigned to the archives for retrieval only in the event of investigation. However, from the very nature of the purpose of CENVAT credit and its existence, the essential element to be considered for estopping the utilization, *i.e*., by recovery under rule 14 of CENVAT Credit Rules, 2004, is ineligibility to take credit under rule 3(1) or in retention of credit by operation of rule 6 of CENVAT Credit Rules, 2004. Concomitantly, utilization of credit, under rule 3(4) of CENVAT Credit Rules, 2004, stamps finality on

credit taken from not being available anymore and restoration thereafter would lie only within the scope of section 11B of Central Excise Act, 1944, akin to refund of duties of Central Excise Act, 1944 and as made applicable to Finance Act, 1994.

9. On perusal of the submissions of both sides, it is abundantly clear that the present dispute does not conform to any of the aspects *supra* in CENVAT Credit Rules, 2004. There is no allegation that the credit had been wrongly availed. There is no allegation that the disputed credit was to be erased in accordance with rule 6 of CENVAT Credit Rules, 2004. On the contrary, the circular *supra* leaves no room for doubt that the said credit could be accumulated and continued to be retained. It is also no less clear that on account of taxable and non-taxable services, the proportion of credit that could be utilized in subsequent years would also be limited, and, therefore, there would not be any scope for either monetization of the credit so accumulated or of the accumulated credit being utilized in a manner not envisaged in CENVAT Credit Rules, 2004.

10. The primary defence of the appellant is that they were entitled to the credit and that they had been deprived of the credit brought forward. The credit was never reversed and nor had they ever been deprived of the credit as to warrant permission of service tax authorities for such credit to be taken on record. Indeed, the fact that credit was allowed to

be utilized, without objection, for discharge of liability arising from irregularity of taking of the credit for the period prior to April 2008 reinforces the contention of the appellant of continued eligibility to retain the credit.

11. On perusal of the impugned order, it is seen that many of the objections raised by the appellant to the demand have been accepted and that the order itself created the dispute which now continues for the sole reason that reliance has been placed upon the decision of a Larger Bench of the Tribunal in *re BDH Industries Ltd* as well as re-formulation of rule 4(7) of CENVAT Credit Rules, 2004 to the extent that any restoration should have been within a reasonable period. We find no provision in law nor in any decision of the Tribunal or of the constitutional courts which has set out reasonable period as the criteria in identical or similar circumstances. On perusal of the decision of the Larger Bench of the Tribunal, as we find that the sole issue was limited to the precedent offered by decisions in *Commissioner of Central Excise, Belgaum v. Comfit Sanitary Napkins (I) Pvt Ltd [2004 (174) ELT 220 (Tri - Bang)]* and in Motorola *India Pvt Ltd v. Commissioner of Central Excise, Bangalore-III [2006 (193) ELT 468 (Tri - Bang)]* for adjudging dispute on duty liability discharged both at the time of clearance and cumulatively at the end of the month – an entirely different issue. M/s BDH Industries Ltd, the appellant therein took credit of the excess amount so paid and, in that context, reference was

made to the Larger Bench of the Tribunal on the common understanding that the Central Government was not entitled to retain the said credit but restitution was, nevertheless, constrained within the scheme of law. In the peculiar facts of that case in which the amount debited once was re-credited without express sanction of the competent authority even though the credit had been erased out of existence. In the present case, there is no assertion that the disputed credit was ever utilized wrongly or rightly and hence that credit never did merge into the corresponding duties/taxes paid to Central Government at one time. It was merely a non-reporting of the credit accumulated and, in the absence of any specific provision or any dispute on the eligibility which could not have a bar on the retention of the credit, there is no reason for us to suppose or presume a reasonable period. There is no prescribed internal record into which the impugned credit must go for validity.

12. In the decision of the Hon'ble High Court of Madras, in *re Himu Accessories Pvt Ltd*, stressing on reasonable period, the specific issue was of higher and notional credit and the matter was decided thus

> *'13. Since their reasoning is based on legal principles enunciated by the propositions of the upper forums of law, this Court does not feel it necessary to cause its interference into such of the concurrent findings arrived at by all the three respondents alike and making inroads in any manner for the purpose of the case of the petitioner which would only jeopardise the general discipline adopted by the authorities in such matters and therefore, this Court is of the view not to*

cause its interference in the manner it is prayed for on the part of the petitioner company and therefore in all respects it would be reasonable only to confirm the orders impugned herein and hence the following order:

In result,

(i) the above writ petition does not merit acceptance and it becomes only liable to be dismissed and is dismissed accordingly;'

which does not offer a binding precedent as far as facts of this present case are concerned.

13. In *re Bharat Petroleum Corporation Ltd*, the Tribunal held that

'4. We have carefully considered the submissions made by both sides. We find that the limited issue to be decided by us is whether the appellant can be debarred from availing Cenvat credit in facts of the present case that the credit was not taken immediately at the time of receipt and the same was taken after 4 years. We find that the reason for non-availing the Cenvat credit immediately is due to the confusion regarding the quantum of credit to be availed, which is attributed to the dutiable goods. There was involvement of exempted activities also. In this regard, the appellant have been making various correspondence with the department and department was aware of the entire process. Therefore, it cannot be said that the appellant have not made claim for the Cenvat credit. It is further observed that as per the submissions of the Learned Counsel, the appellant have made the entries of all receipts of their inputs in the private records and in books of account. If that be so, the credit cannot be denied only on the ground that the credit was not taken in the particular Cenvat account,

which is not the prescribed record. As per the provisions of Cenvat Credit Rules, the requirement for allowing the credit is the inputs/input services should be received in the factory of the manufacturer and the same should be used in or in relation to the manufacture of final product. It is obvious that when input is received, the same is entered in the records. Therefore, it cannot be said that the appellant have availed the credit belatedly or there is no claim of the Cenvat Credit by the appellant. It is observed that the adjudicating authority decided the entire case only on the ground that the appellant have availed the Cenvat credit belatedly, therefore, no records were verified.'

and in *re Warburg Pincus India Pvt Ltd* the Tribunal held that

5. In view of the above observation, I hold that on the ground that the appellant has not shown Cenvat credit in their ST-3 returns, cannot be the ground to deny refund to the appellant."

Serco Global Services Pvt Ltd v. [2015 (39) S.T.R. 892 (Tri.-Del)]

"5 We have considered the contentions of the appellant. In view of concession by the appellant that it was not pressing for refund of the credit taken prior to 16-5-2008, we are not dwelling upon the issue of admissibility or otherwise of refund of Cenvat credit taken, prior to 16- 5-2008, or upon the issue of classification. As regards the ground of rejection of refund for the period 16-52008 to June, 2008 that the ST-3 return for June, 2008 did not show any unutilized balance of Cenvat credit, it is to be made clear that refund is to be granted on the basis of the Cenvat credit available in the Cenvat Credit Account and not on the basis of the closing balance of Cenvat credit shown in ST-3 Return. Further the appellant submitted revised return showing correct closing balance of Cenvat credit but the same was ignored by the Adjudicating Authority. In this regard, we find that in the case of Jagdamba Polymers Ltd. v. C.C.E., Ahmedabad - 2010 (253) E.L.T. 626 (Tri.- Ahmd.) it has been held by CESTAT that omission to reflect the balance in ER 1 return is only a procedural error for which credit cannot be denied when there is no dispute about its eligibility. In the case of Ceolric Services v. C.S.T.,

Bangalore - 2011 (23) S.T.R. 369 (Tri.-Bang) , the Hon'ble CESTAT held as under"

4.7 In view of the decisions as above and the finding recorded by me in para 4.5, I am of the opinion that refund claim could not have been denied for this reason. It is stated/ unstated policy which govern the exports of goods or services across the globe that the local taxes should not be exported along with the goods or services exported.

5.1 I do not see any merits in the impugned order to this extent.'

14. In the light of the above and on application of the facts of the present case, denomination as anything other than procedural lapse in not reporting the existence of such credit, the impugned order cannot survive and is accordingly set aside to allow the appeal.

(Order pronounced in the open court on 23/07/2025)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*