# CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
# MUMBAI

## REGIONAL BENCH – COURT NO.1

## Excise Appeal No.370 of 2011

[Arising out of Order-in-Original No.19/Central Excise/2010, dt.30.11.2010, passed by the Commissioner of Central Excise, Pune]

**M/s Mercedes Benz India Pvt. Ltd** **……Appellant**
E-3, MIDC Chakan, Phase-III,
Village: Kuruli&Nighoje,
Tal.: Khed

VERSUS

**Commissioner of Central Excise, Pune-I** **……Respondent**
ICE House, 41-A, Sasoon Road, Opp. Wadia College,
Pune 411 001

**WITH**

## Excise Appeal No.385 of 2012

[Arising out of Order-in-Appeal No.PI/RKS /169/2011, dt.15.12.2011, passed by CCE (Appeals), Pune-I]

**M/s Mercedes Benz India Pvt. Ltd** **……Appellant**
E-3, MIDC Chakan, Phase-III,
Village: Kuruli&Nighoje,
Tal.: Khed

VERSUS

**Commissioner of Central Excise, Pune-I** **……Respondent**
ICE House, 41-A, Sasoon Road, Opp. Wadia College,
Pune 411 001

**AND**

## Excise Appeal No.1019 of 2012

[Arising out of Order-in-Original No.12/CX/ 2012, dt.30.03.2012, passed by CCE Pune-I and Corrigendum dt.26.04.2012]

**M/s Mercedes Benz India Pvt. Ltd** **……Appellant**
E-3, MIDC Chakan, Phase-III,
Village: Kuruli&Nighoje,
Tal.: Khed

VERSUS

**Commissioner of Central Excise, Pune-I** **……Respondent**
ICE House, 41-A, Sasoon Road, Opp. Wadia College,
Pune 411 001

**AND**

**Excise Appeal No.456 of 2011**

**Excise Cross Objection No. 35 of 2011**

[Arising out of Order-in-Original No.19/Central Excise/2010, dt.30.11.2010, passed by the Commissioner of Central Excise, Pune]

**Commissioner of Central Excise, Pune-I** **……Appellant**
ICE House, 41-A, Sasoon Road, Opp. Wadia College,
Pune 411 001

VERSUS

**M/s Mercedes Benz India Pvt. Ltd** **……Respondent**
E-3, MIDC Chakan, Phase-III,
Village: Kuruli & Nighoje,
Tal.: Khed

**Appearance**:
For Appellant : Shri V. Sridharan, Sr. Advocate
For Respondent : Shri Bidhan Chandra, ADC (AR)

**CORAM:**

**HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)**
**HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)**

**FINAL ORDER NO. A/85162-85165/2020**

Date of Hearing: 02.08.2019
Date of Decision: 31.01.2020

**PER: DR.D.M. MISRA**

Out of the four Appeals filed against respective orders passed by Commissioner of Central Excise, Pune, three are by the Assessee and one by the Revenue.

2. Appeal No. E/372/2011, E/385/2012, E/1019/2012 are filed by the Assessee and Appeal No.456/2011 is filed by the Revenue. Cross Objection No. E/Cross/35/2011 is filed by Assessee in Appeal No.456/2011. Since the issues are common, all these appeals are taken up together for hearing and disposal.

3. Briefly stated the facts common to all the case are that the Appellants are engaged in the manufacture of Motor Vehicles and parts thereof. On the said manufactured goods, they had discharged appropriate excise duty at the time of clearance of the same from the factory. Besides manufacturing, the Appellants also provides taxable output services and discharged service tax. The Appellants also import cars in fully manufactured condition, called as completely built unit (CBU). The said imported vehicles are sold by the Appellant through dealers' network. Since no manufacturing activity or any service has been provided in relation to the imported cars, no excise duty nor service tax is paid on the sale of said cars.

3.1 The appellant have availed CENVAT Credit of Central Excise duty paid on inputs, input services and capital goods. The CENVAT Credit availed on inputs are not used in the import and sale of CBUs. However, credit availed on certain input services are used for manufacture and clearance of dutiable final product, provision for taxable services and also for import and sale of CBUs. The present dispute relates to common input services used in the manufacture of goods, providing taxable output services and sale of CBUs. The common input services are namely, advertisement services, event management services, provisional services, cleaning of premises, telecommunication services etc. Alleging that the Appellant are not eligible for CENVAT Credit on service tax paid on the portion of input services, which have been utilized in the sale of CBUs, Show Cause Notices were issued from time to time for recovery of CENVAT Credit availed on common input services in accordance with Rule 6 of CENVAT Credit Rules, 2004.

3.2 First Show Cause Notice was issued on 18.03.2010 for the period from March 2005 to March 2009, proposing recovery of an amount of Rs.1,65,40,590/-; second Show Cause Notice was issued on 26.04.2012 for the period from April 2009 to December 2009, proposing recovery of Rs.40,79,892/-. Both the Show Cause Notices were adjudicated by a common order dt.30.11.2010, confirming demand of Rs.2,06,20,484/- and imposing penalty of Rs.1,65,40,590/-. Aggrieved by the said order, both the Assessee and the Revenue filed appeals before the Tribunal. This Tribunal by order dt.20.02.2014 dismissed the appeals E/370/11 filed by the Assessee and allowed Revenue's appeal No. E/456/2011 for enhancement of penalty. Third Show Cause Notice was issued on 30.10.2010 for the period January 2010 to July 2010, proposing recovery of Rs.68,810/- with interest and penalty, which was confirmed by the Adjudicating Authority by Order dt.19.08.2011, which was also challenged before this Tribunal and Assessee's appeal E/385/2012 was also dismissed by Order dt.20.02.2014. Fourth Show Cause Notice was issued to the Appellant on 26.08.2011 for the period from August 2010 to March 2011, for recovery of the amount of Rs.25,62,01,608/- with interest and penalty, was adjudicated on 30.03.2012. The Tribunal by Order dt.20.02.2014, remanded the matter for re-computation of the demand on pro-rata basis. Aggrieved by the order of the Tribunal dt.20.02.2014, the Assessee preferred an appeal before the Hon'ble High Court. Hon'ble High Court by Order dt.11.01.2016 remanded the matter to the Tribunal to re-decide the issue. While remanding the matter for re-computation, the Hon'ble High Court observed that the relief granted in Appeal No.1019/2012 by the Tribunal relating to

demand of 6% of the value of the trading turnover since not challenged by the Revenue should not be reopened. Thus, all the aforesaid matters came to be remanded by Hon'ble High Court to Tribunal to decide the issues raised by the Appellant.

4. The learned Senior Advocate Shri V. Sridharan for the Appellant submitted that the Assessee-Appellant are entitled for credit availed on various input services which were utilized alsofor sale for the imported cars (CBUs) specified in Rule 6(5) of CENVAT Credit Rules, 2004. It ishis contention that pro-rata reversal of CENVAT Credit availed on input services attributable to the sale of goods of goods will not apply to these input services enumerated under Rule 6(5) of CENVAT Credit Rules, 2004. Emphasizing the said argument, the learned Advocate has submitted that the exception has been created under Rule 6 of CENVAT Credit Rules, 2004. In the formula under Rule 6(5) of the said Rules, which starts with non-obstante clause should be given effect. It is his contention that it supersedes the sub-rules (1), (2), (3), & (4) of Rule 6 of CENVAT Credit Rules, 2004. Therefore, once a service fall under Rule 6(5) of CENVAT Credit Rules, 2004, then the Assessee is not required to comply with the condition prescribed under Rule 6(1) of CENVAT Credit Rules, 2004.

4.1 He has further contended that the credit of service tax paid on the services used exclusively in the activities of trading has already been reversed by the Appellant with interest and not disputed by them in the present Appeals. The present dispute relates to the input services which are common to the activities of manufacture,

provision of taxable output service and trading activity i.e. selling of imported cars (CBU). In support of his contention, the learned Sr. Advocate referred to CBEC Circular dt.09.05.2008 and CBEC Circular No.137/2003/2007/CX-4, dt.01.10.2007. It is his contention that in the third Show Cause Notice issued by the Revenue for subsequent period, the Department itself excluded credit relatable to the input services falling under Rule 6(5) of CENVAT Credit Rules, 2004 from the total amount of input service credit. The recovery of credit on pro rata basis of service tax paid on common input service used other than those fall under Rule 6(5) of CENVAT Credit Rules, 2004.

4.2 On the issue of calculation of CENVAT Credit on pro rata basis attributable to trading of imported cars, the learned Sr. Advocate has submitted that the formula prescribed w.e.f. 01.04.2011 rests on the sound logic and could be made applicable to the past period also. Referring to the Explanation (I)(c) under Rule 6(3) of CENVAT Credit Rules, 2004, he has submitted that the "value" for the purpose of sub-rule (3) and (3A) in the case of service on trading of goods it shall be the difference between the sale price and the cost of the goods sold, or 10% of the cost of the goods sold whichever is more.

4.3 He has further submitted that Rule 3(1) of CENVAT Credit Rules, 2004 enumerates the types of duties/taxes available as CENVAT Credit and Rule 3(4) prescribes the manner of utilization of CENVAT Credit. Rule 6(1) states that no CENVAT Credit would be available for the quantity used in exempted goods or services. He has vehemently argued that all these fundamental provisions continue to remain un-altered by an amendment made in April 2011.

Therefore, the amendment and the formula prescribed w.e.f. 01.04.2011 achieve the same object enacted under Rule 6(1) i.e. CENVAT Credit of input/input services will not be allowed when used in exempted goods/services. It is his contention that thus applying the said explanation in the formula prescribed under Rule 6(3A)(c)(ii) of CENVAT Credit Rules, 2004, the reversal of credit formula for trading would be numerator consisting of margin of trading, denominator consisting of margin of trading + turnover of dutiable goods and taxable service and the multiplier consist of common input service credit. It is his contention that the formula provided in April 2011 is a well-known method of attribution. Since the said formula being procedural in nature, needs to be applied for the past assessment years also. Referring to the judgment of this Tribunal in the case of Sumitomo Corporation India Pvt. Ltd Vs CST – 2017 (50) STR 299 (T) and TFL Quinn India Pvt. Ltd Vs CCE – 2016 (6) TMI 230 (CESTAT Hyderabad), he has submitted that in absence of any formula for the period prior to 01.04.2011, to determine the turnover for the traded goods, the said formula could be applied for the past period also.

4.4 The learned Advocate has submitted that the suggested formula provided for reversal of credit post 01.04.2011 is defective; the correct formula could be the numerator should consist of value addition of trading and denominator should consist of value addition of trading and manufacturing and the multiplier should consist of common input service credit. It is his contention that this formula is more accurate because the multiplier has contributed to value addition in trading and value addition in manufacturing of taxable

goods. The common input services do not contribute to the value of material purchased for trading and also to the value of material purchased for manufacture of finished goods. It is their contention that if the said formula is applied, the amount required to be reversed comes to around Rs.7,57,800/- (including the credit and service covered by the Rule 6(5). The learned Advocate further submitted that the Department has not taken into account the sale of scrap and value of taxable output service.

4.5 The Learned Sr. Advocate has further submitted that the Appellant had provided taxable output service and paid the service tax on the same. They had also cleared the scrap generated from the factory on payment of duty. The Department, while computing the reversal of credit, has taken the total sales value of traded goods in numerator and the total sales value of trading goods value of manufactured goods in denominator. The Department has ignored the value of taxable service and also the value of scrap cleared on payment of duty. Therefore, the value of taxable output service and also the value of scrap should be included in the denominator while computing the reversal of credit under Rule 6 of CENVAT Credit Rules, 2004.

4.6 Further, they have submitted that the Show Cause Notice dt.18.03.2009 issued for recovery of the credit for the period 01.03.2005 to 31.03.2009 is barred by limitation. It is their contention that the fact of importing and selling of CBUs were disclosed to the Department. Permission was sought for import and sale of the said vehicles and necessary permission was granted by the Department on 04.06.2001 and extended later on 02.08.2002.

Further, he has submitted that the learned Commissioner (Appeals) in the case of *Faber Heatkraft Industries Ltd - 2008 (232) ELT 182*, while dealing with the similar issue, observed that the credit of service tax paid on input services is admissible as long as they are not exclusively used for trading. The Appellant's letter dt. 29.10.2009 indicated department's acceptance of the aforesaid Orderof the learned Commissioner (Appeals) and also the same reply was furnished during his statement on 08.10.2009 by Shri Anantharaman, GM. It is their contention that therefore, the issue of reversal of CENVAT Credit on traded goods since involve interpretation of law at the relevant time, hence, extended period of limitation cannot be invoked. In support, they have referred to the judgment of this Tribunal in the case of *Krishna Auto Sales Vs CCE – 2015 (50) STR 1121 (T), CCE Vs Thermax Ltd - 2016 (6) TMI 592 (T)*. Further, they have submitted that the Appellant had maintained regular books of accounts and also the transactions are recorded by them in routine course of business. Therefore, no fact was suppressed from the knowledge of Department. Accordingly, invoking extended period of limitation and also imposition of penalty on the Appellant is unwarranted and unjustified.

5. Per contra, the learned AR for the Revenue has submitted that the Appellants are engaged in the manufacture of motor vehicles as well as trading during the period 2004-05 to 2010-11, a dispute arose about reversal of input service tax credit utilized in respect of exempted services i.e trading. He has contended that from 01.04.2011, in the definition of 'exempted service', an explanation

was added where-under, the activity of trading also included in the scope of 'exempted service'. This Tribunal in the Appellant's own case, held that trading was not a service at all and directed apportioning of credit attributable to turnover value of the cars imported and traded and that of manufactured cars. The Hon'ble High Court, on appeal, remanded the matter to work out suitably the numerator and denominator for apportioning inputservice credit utilized towards exempted service. It is his contention that in remanding the case, Hon'ble High Court, in a way, affirmed the findings of the Tribunal that the activity of trading was not a service and hence, cannot be considered as exempted service.

5.1. Referring to the method under Rule 6 of CENVAT Credit Rules, 2004 during the period 2004-05 to 2010-11, the learned AR for the Revenue has submitted that during the period 2004-05 to 2006-07, Rule 6 provided that the provider of output service shall utilize the CENVAT Credit of an amount not exceeding 20% of the service tax payable on the taxable output service. For the first time, i.e. from 01.04.2007, the concept of proportionate reversal of input service credit has been introduced in Rule 6 and from 2008-09, the limit of utilization of credit has been done away with and sub-rule (3A) in Rule 6 has been introduced prescribing the formula for determination of CENVAT Credit attributable to exempted service. It is his contention that all these formulae take into account the total value of the exempted services which necessitates the method to determine the value of service concerned with activity of trading. Referring to the explanation (I), he has submitted that the 'value' for the purpose of sub-rule (3) and (3A) of 01.04.2011 has been

explained, which was not in the statute book prior to 01.04.2011 and the activity of trading itself was not recognized as service. Therefore, applying the definition for the earlier period, is incorrect in view of the judgment in the case of *Kasturi & Sons Ltd Vs UOI – 2011 (22) STR 129 (Mad), D.P. Jain Company Infrastructure P Ltd Vs UOI - 2016 (43) STR 507 (Bom)*. He has submitted that appropriate formula could be adopted for ascertaining the value of exempted service is under Rule 6(3A)(c)(ii) of CCR,2004. It is his contention that the said explanation stipulates the method of computing value for services like trading, which cannot be made applicable prior to 01.04.2011 for the reason that it is substantive in nature and affects the quantum of tax liability, hence, not retrospective in nature. It is his contention that prior to 01.04.011, the activity of trading was not a service and the new formula prescribed does not lead to distortion as option is available to reverse the credit to the extent of 6%/8% or 10% of the value of exempted service or proportionate reversal of credit as per the formula prescribed under Rule 6(3A) as the case may be. The dispute relates as to what should be the value of service in the form of trading. The question that would be whether the value of 'trading is a service' be equal to the 'margin of profit' in 'trading'? Trading of imported cars involves buying and procuring the imported cars and on selling and delivering the cars to the buyers. Though during the impugned period, trading was not a service and became deemed to be exempted service afterwards, the value of trading should invariably be equal to the value of exempted service. It may reasonably be agreed that proportionate apportionment may be capped at 6% or 8% of the value of the traded cars in line with Rule

6(2) of CENVAT Credit Rules, 2004. He has further submitted that analogy may safely be drawn from such cases where packing and re-packing amounts to manufacture in which duty is leviable on the value inclusive of price of the goods on which packer/repacker has procured such goods.

5.2 He has further submitted that the activity of import of cars involves many services from the stage of choosing the model, ordering the model on behalf of the client. Packaging and shipping from the overseas to transportation to the buyers/dealerspremises or show-room. It is a fact that all these costs incurred will be incorporated into the price of the goods but host of services get consumed in making the cars available to the buyers. Therefore, while computing the value of exempted services like trading of imported cars for the relevant period, the turnover value of imported cars for trading is appropriate to consider for calculation of amount to be paid under Rule 6(3A) of CCR,2004.

5.3 As far as the applicability of Rule 6(5) of CCR,2004 is concerned, this is an exception to other sub-rules of Rule 6 and that eligibility of credit is defined under Rule 3 read with definition of input service under Rule 2(l) of CENVAT Credit Rules, 2004. It is only after the eligibility to take credit, under Rule 3 read with Rule 2(l), the exception of applicability of Rule 6 would arise. Therefore, Rule 6(5) of CENVAT Credit Rules, 2004 must be read and understood in the context of admissibility of credit and scheme of CENVAT Credit Rules and in respect to the activities of manufacture and provision of output services. The dispute in the present case between the trading activity and manufacturing activity and during

the relevant period, the trading was not considered as provision of service at all, therefore, contention of eligibility to Rule 6(5) ought to be rejected in totality. In support, he has referred to the judgment of this Tribunal in the case of *M/s SKF India Ltd – 2016 (41) STR 737 (Tri-Bom.).*

6. Heard both sides and perused the records.

7. The undisputed facts relevant to determine the issues are that during the relevant period 2005-06 to 2010-11, the appellants are engaged in the manufacture and sale of cars and also import and sale of cars. The sales turnover of imported cars had been around 5% to 19% of the total sales turnover of the Appellant during the said period. The appellant had availed CENVAT Credit on inputs, capital goods and input services during the relevant period. The appellant had not availed CENVAT Credit on the CVD component of imported cars and also on input services exclusively used in providing exempted taxable output services. The credit attributable exclusively in providing exempted services amounting to Rs.7,21,058/- had been reversed with interest of Rs.1,60,260/- by the Appellant and not subject matter of the dispute.

8. The Appellant however have availed Credit on common input services used for manufacture and sale of cars, providing taxable output service and also sale of imported cars. The major dispute relates to computation of proportionate credit availed on common input services attributable to sale of imported cars, as the appellant

failed to maintain separate account of input services namely, advertisement services, event management services, professional services, renting of premises, telecommunication services etc. used in the manufacture and sale of cars, providing taxable output services and sale of imported cars. Consequently, demand notices were issued for recovery of the amount in accordance with Rule 6(3) of the CENVAT Credit Rules, 2004 from time to time. The first show-cause notice was issued for extended period of limitation and subsequent show-cause notices were issued within normal period of limitation. On adjudication the same were confirmed with interest and penalty.

9. We find that it is the second round before this Tribunal. Initially, against the Order of the Commissioner the Appellant as well the Revenue approached this Tribunal and vide order dated 20.2.2014 the assessee's Appeal Nos. E/370/11 & 385/11 were dismissed and Revenue's Appeal no. E/456/11 was allowed for enhancement of penalty; another Appeal no. E/1019/12 filed by the assessee was remanded for computation of the demand.. The Hon'ble Bombay High Court remanded the matter to the Tribunal for reconsideration of the issues raised, observing as follows:

> **"19.** The Tribunal gives an illustration and tries to work out a denominator. However, in doing so we find that at page 103 of the paperbook, in Paragraph 17 of its order, the Tribunal has misdirected itself completely. We reproduce that part of the order.
>
> "17. ... In fact, we have gone through clause (c) of Explanation 1 added with effect from 1-4-2011 and are of the view that perhaps the said new method has been adopted to encourage the trading of the goods *rather* than the manufacturing of the goods (otherwise criterion should have been same viz. Based upon turnover or value addition). We, therefore, hold that for the period under dispute the credit of service tax paid on the common input services should be apportioned in the same ratio as the turnover of the manufactured and traded cars."

**20.** We had put it to Mr. Bhate as to how in the teeth of such finding could the Tribunal then sustain the formula and the working of the denominator arrived at by it. The Tribunal must firstly refer to the substantive Rule and as operative prior to 1st April, 2011 and then arrive at a conclusion in relation to the Explanation introduced with sub-clauses with effect from 1st April, 2011. On its introduction and even prior thereto, we do not find any justification then to hold that the Parliament intended to encourage trading of goods rather than manufacturing of the same.

**21.** The Parliamentary intent has to be gathered from the language used. If the words are plain, simple and clear, there is no scope for interpretation or applying any principle thereof. Once the Tribunal is bound to decide the controversy in the backdrop of the object and purpose sought to be achieved but has not arrived at any conclusion bearing in mind the same, then, we are required to step in. We cannot sustain this part of the finding and conclusion. Even Mr. Bhate found it difficult to support the same.

**22.** We are of the view that as far as working of the denominator is concerned (and even the numerator, technically speaking) and to apportion the input credit, it would be appropriate to send the matter back to the Tribunal. This course is also adopted because we do not find any discussion in the Tribunal's order insofar as questions (c) and (d) reproduced above.

**23.** Insofar as questions (f), (g) and (h) are concerned, the same are consequential and in the event the numerator/denominator as suggested by the assessee is eventually upheld, then, the extended period of limitation would not be applicable. However, that part of the controversy need not be gone into as the essential question is going back for a fresh answer to the Tribunal.

**24.** In the light of above conclusion and by keeping open contentions of both sides, we allow this appeal by setting aside the impugned order to the extent the same fails to deal with questions (c) and (d).

**25.** As far as questions (f), (g) and (h) are concerned, they are incidental and arise out of question (e). That essential question and controversy being remitted back in the aforesaid terms, the Tribunal will have to answer them as well.

**26.** However, we clarify that the Tribunal should not reopen everything that is concluded in favour of the assessee and particularly the relief granted in Appeal No. E/1019 of 2012. Once the Revenue has not challenged the conclusion in that appeal by way of a substantive appeal, we conclude that against it and in favour of the assessee.

**27.** The other aspects and as clarified above shall go back to the Tribunal. However, the Tribunal should not arrive at a conclusion that the amendment has been adopted to encourage trading in goods rather than manufacturing of the same."

10. In the present proceeding, the learned Sr. Advocate Shri V. Sridharan, however, advanced his argument mainly on two principal issues, that is, whether the appellants are eligible to CENVAT Credit on common input services described under Rule 6(5) of the CENVAT Credit Rules, 2004 and in calculating the proportionate CENVAT Credit attributable to sale of cars; secondly in the formulaprescribed

under Rule 6(3A) of CCR,2004, it is only the margin of value addition of the traded cars be considered or otherwise.

11. With regard to the first issue, the contention of the learned Advocate is that since sub-rule (5) of Rule 6 of CENVAT Credit Rules, 2004 begins with non-obstante clause, therefore, the services prescribed in the said sub-rule could not be subjected to the provisions contained in sub-rule (1), (2), (3), (4) of the CENVAT Credit Rules, 2004. The said provision read as follows: -

> "5.Notwithstanding anything contained in sub-rules (1), (2) & (3), credit of the whole of service tax paid on taxable service as specified in sub-clause (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."

12. On a plain reading of the said sub-rule, it is clear that credit on whole of Service Tax paid on taxable input services mentioned in the said sub-rule(5) shall be allowed unless such service is used exclusively in or in relation to the manufacture of exempted goods or providing exempted services. In the present case, the appellant had categorically submitted that as and when the aforementioned listed services were used exclusively in providing exempted services or manufacture of the exempted goods, they have reversed the credit availed on such input services. No contrary finding has been recorded by the authorities below to the said claim of the assessee. Therefore, the input services on which CENVAT Credit availed in the present case mentioned under sub-rule (5) of Rule 6 of the CENVAT Credit Rules, 2004 would be admissible, even if the same are used both for exempted services as well as taxable output

services giving due effect to the non-obstante clause mentioned under the said Sub-rule. The Revenue's contention, on the other hand, is that if the CENVAT Credit is not used in providing taxable output services, hence credit availed on such services cannot be allowed in view of Rule 3 of the CENVAT Credit Rules, 2004, hence, application of sub-rule (5) of Rule 6 does not arise. In our opinion, there is fundamental fallacy in the approach and would be at the cost ofmis-interpretation of the said rules. No doubt, CENVAT Credit on input services would be allowed only when it is used in the taxable output services and/or dutiable manufactured goods; but when common input services are used in both taxable and exempted services or non-taxable services, the appropriate rule prescribed under CENVAT Credit Rules is Rule 6 of the CENVAT Credit Rules, 2004. It prescribes a procedure/mechanism to separate the inadmissible quantum of cenvat credit used in the exempted services and/or exempted goods. To simplify the procedure further in case of input service credit, sub-rule(5) lays down a fiction whereby services mentioned under the said Rule deemed to have been used in providing only taxable service, and consequently the rigour of Sub-Rule (1),(2),(3) of CENVAT Credit Rules, 2004 has been made inapplicable. This reasoning is further supported when under the said sub-rule it is specifically laid down that when input services are exclusively used in providing exempted service, credit is inadmissible. Besides, the department seems to have extended the said benefit for certain period in computing the demand.

13. Now, coming to the second issue on the applicability of sub-rule (3A) of Rule 6 of the CENVAT Credit Rules, 2004 in apportioning

the CENVAT Credit availed on common input services used in providing taxable output services as well as manufactured goods cleared on payment of duty and also in the sale of imported cars, the contention of the learned Advocate for the appellant that it is the trade margin or value addition on imported cars on its sale in India should be the factor in the numerator and denominator of the formula prescribed under the said sub-rule. Alternatively, it is their argument that in any case the total turnover of the traded goods which includes, the value of the cars, cannot be considered as the value of the traded goods in the numerator and denominator of the formula to apportion the credit attributable to the sale of imported cars. The contention of the Revenue on the other hand is that the total turnover of the sale of the cars including the cost of the imported cars ought to be considered for determination of the amount of credit required to be reversed when common input services used in taxable and non-taxable or exempted services.

14. To appreciate the argument advanced by both sides, it is necessary to consider the relevant rules developed from time to time under CENVAT Credit Rules, 2004, which read as under:

**RULE 6 OF CENVAT CREDIT RULES, 2004 PRIOR TO 01.04.2008**:

**Obligation of manufacturer of dutiable and exempted goods and provider of taxable and exempted services.-**

(1) The CENVAT Credit shall not be allowed on such quantity of input or input service which is used in the manufacture of exempted goods or exempted services, except in the circumstances mentioned in sub-rule (2).

**Provided** that the CENVAT Credit on inputs shall not be denied to job worker referred to in Rule 12AA of the Central Excise Rules, 2002, on the ground that the said inputs are used in the manufacture of goods cleared without payment of duty under the provisions of that rule.

(2) Where a manufacturer or provider of output service avails of CENVAT credit in respect of any inputs or input services, and manufactures such final products or provides such output service which are chargeable to duty or tax as well as exempted goods or services, then, the manufacturer

or provider of output service shall maintain a separate accounts for receipt, consumption and inventory of input and input service meant for use in the manufacture of dutiable final products or in providing output service and the quantity of input meant for use in the manufacture of exempted goods or services and take CENVAT Credit only on that quantity of input or input service which is intended for use in the manufacture of dutiable goods or in providing output service on which service tax is payable.

(3) Notwithstanding anything contained in sub-rules (1) and (2), the manufacturer or the provider of output service, opting not to maintain separate accounts, shall follow either of the following conditions, as applicable to him, namely:-

(a) if the exempted goods are –

(i) goods falling within heading No.22.04 of the First Schedule to the Excise Tariff Act (hereinafter in this rule referred to as the said Fresh Schedule);

(ii) Low Sulphur Heavy Stock (LSHS) falling within Chapter 27 of the said First Schedule used in the generation of electricity;

(iii) Naphtha (RN) falling under Chapter 27 of the said First Schedule used in the manufacture of fertilizer;

(iv) Naptha (RN) and furnace oil falling within Chapter 27 of the said First Schedule used for generation of electricity;

(v) newsprint, in rolls or sheets, falling within heading No.48.01 of the said First Schedule;

(vi) final products falling within Chapters 50 or 63 of the said First Schedule;

(vii) goods supplied to defence personnel or for defence projects or to the Ministry of Defence for official purposes, under any of the following notifications of the Government of India in the Ministry of Finance (Department of Revenue), namely :-

(1) No.70/92-Central Excise, dated the 17th June, 1992, G.S.R. 595 (E), dated the 17th June, 1992;

(2) No.62/95-Central Excise, dated the 16th March, 1995, G.S.R. 254 (E), dated the 16th March, 1995;

(3) No.63/95-Central Excise, dated the 16th March, 1995, G.S.R. 255 (E), dated the 16th March, 1995;

(4) No.64/95-Central Excise, dated the 16th March, 1995, G.S.R. 256 (E), dated the 16th March, 1995;

(viii) Liquefied Petroleum Gas (LPG) falling under tariff items 2711 12 00, 2711 13 00 and 2711 19 00 of the said First Schedule;

(ix) Kerosene falling within heading 2710 of the First Schedule, for ultimate sale through public distribution system.

the manufacturer shall pay an amount equivalent to the CENVAT Credit attributable to inputs and input services used in, or in relation to, the manufacture of such final products at the time of their clearance from the factory;

or

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

(c) the provider of output service shall utilize credit only to the extent of an amount not exceeding twenty per cent of the amount of service tax payable on taxable output service.

**Explanation I**. – The amount mentioned in conditions (a) and (b) shall be paid by the manufacturer or provider of output service by debiting the CENVAT Credit or otherwise.

**Explanation II**. – If the manufacturer or provider of output service fails to pay the said amount, it shall be recovered along with interest in the same manner, as provided in rule 14, for recovery of CENVAT Credit wrongly taken.

**Explanation III**. – For the removal of doubts, it is hereby clarified that the credit shall not be allowed on inputs and inputs services used exclusively for the manufacture of exempted goods or exempted services.

(4) No CENVAT Credit shall be allowed on capital goods which are used exclusively in the manufacture of exempted goods or in providing exempted services, other than the final products which are exempt from the whole of the duty of excise leviable thereon under any notification where exemption is granted based upon the value or quantity of clearances made in a financial year.

(5) Notwithstanding anything contained in sub-rules (1), (2) & (3), credit of the whole of service tax paid on taxable service as specified in sub-clause (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.

(6) The provisions of sub-rules (1), (2), (3) and (4) shall not be applicable in case of the excisable goods removed without payment of duty are either -

(i) cleared to a unit in a special economic zone; or

(ii) cleared to a hundred per cent export-oriented undertaking; or

(iii) cleared to a unit in an Electronic Hardware Technology Park or Software Technology Park; or

(iv) supplied to the United Nations or an international organization for their official use or supplied to projects funded by them, on which exemption of duty is available under notification of the Government of India in the Ministry of Finance (Department of Revenue) No.108/95-Central Excise, dated the 28th August, 1995, number G.S.R. 602 (E), dated 28th August, 1995; or

(v) cleared for export under bond in terms of the provisions of the Central Excise Rules, 2002; or

(vi) gold or silver falling within Chapter 71 of the said First Schedule, arising in the course of manufacture of copper or zinc by smelting; or

(vii) all goods which are exempt from the duties of customs

leviableunder the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) and the additional duty leviable under Section 3 of the said Customs Tariff Act when imported into India and supplied against International Competitive Bidding in terms of notification No.6/2002-Central Excise dated the 1st March, 2002 or Notification No.6/2006-Central Excise, dated the 1st March, 2006, as the case may be.

**RULE 6 OF CENVAT CREDIT RULES, 2004 AFTER TO 01.04.2008**:

**Obligation of manufacturer of dutiable and exempted goods and provider of taxable and exempted services.-**

(1) The CENVAT Credit shall not be allowed on such quantity of input or input service which is used in the manufacture of exempted goods or for provision of exempted services, except in the circumstances mentioned in sub-rule (2).

**Provided** that the CENVAT Credit on inputs shall not be denied to job worker referred to in Rule 12AA of the Central Excise Rules, 2002, on the ground that the said inputs are used in the manufacture of goods cleared without payment of duty under the provisions of that rule.

(2) Where a manufacturer or provider of output service avails of CENVAT credit in respect of any inputs or input services, and manufactures such final products or provides such output service which are chargeable to duty or tax as well as exempted goods or services, then, the manufacturer or provider of output service shall maintain a separate accounts for receipt, consumption and inventory of input and input service meant for use in the manufacture of dutiable final products or in providing output service and the quantity of input meant for use in the manufacture of exempted goods or services and take CENVAT Credit only on that quantity of input or input service which is intended for use in the manufacture of dutiable goods or in providing output service on which service tax is payable.

(3) Notwithstanding anything contained in sub-rules (1) and (2), the manufacturer or the provider of output service, opting not to maintain separate accounts, shall follow either of the following options, as applicable to him, namely:-

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

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

**Explanation I**. If the manufacturer of goods or the provider of output service, avails any of the option under this sub-rule, he shall exercise such option for all exempted goods manufactured by him or, as the case may be, all exempted services provided by him, and such option shall not be withdrawn during the remaining part of the financial year.

**Explanation II**. For removal of doubt, it is hereby clarified that the credit shall not be allowed on inputs and input services used exclusively for the manufacture of exempted goods or provision of exempted service.

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

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

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

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

(iii) description of dutiable goods or taxable services;

(iv) description of exempted goods or exempted services;

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

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

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

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

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

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

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

(ii) the amount of CENVAT Credit attributable to inputs used for provision of exempted services = (J/K) multiplied by L, where J denotes the total value of exempted services

provided during the financial year, K denotes the total value of dutiable goods manufactured and removed plus the total value of taxable services provided plus the total value of exempted services provided, during the financial year and L denotes total CENVAT Credit taken on inputs during the financial year minus H;

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

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

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

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

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

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

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

(iii) amount short paid determined as per condition (d), along with the date of payment of the amount short-paid,

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

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

(h) where the amount equivalent to CENVAT Credit attributable to exempted goods or exempted services cannot be determined provisionally, as prescribed in condition (b), due to reasons that

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

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

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

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

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

(4) No CENVAT Credit shall be allowed on capital goods which are used exclusively in the manufacture of exempted goods or in providing exempted services, other than the final products which are exempt from the whole of the duty of excise leviable thereon under any notification where exemption is granted based upon the value or quantity of clearances made in a financial year.

(5) Notwithstanding anything contained in sub-rules (1), (2) and (3), credit of the whole of service tax paid on taxable service as specified in sub-clause (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.

(6) The provisions of sub-rules (1), (2), (3) and (4) shall not be applicable in case of the excisable goods removed without payment of duty are either -

(i) cleared to a unit in a special economic zone or to a developer of a special economic zone for their authorized operations; or

(ii) cleared to a hundred per cent exported-oriented undertaking; or

(iii) cleared to a unit in an Electronic Hardware Technology Park or Software Technology Park; or

(iv) supplied to the United Nations or an international organization for their official use or supplied to projects funds by them, on which exemption of duty is available under notification of the Government of India in the Ministry of Finance (Department of

Revenue) No.108/95-Central Excise, dated the 28th August, 1995, number G.S.R. 602 (E), dated the 28th August, 1995; or

(v) cleared for export under bond in terms of the provisions of the Central Excise Rules, 2002; or

(vi) gold or silver falling within Chapter 71 of the said First Schedule, arising in the course of manufacture of copper or zinc by smelting; or

(vii) all goods which are exempt from the duties of customs leviable under the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) and the additional duty leviable under section 3 of the said Customs Tariff Act when imported into India and are supplied against International Competitive Bidding in terms of notification No.6/2002-Central Excise, dated the 1st March, 2002 or Notification No.6/2006-Central Excise, dated the 1st March, 2006, as the case may be.

**RULE 6 OF CENVAT CREDIT RULES, 2004 AFTER TO 01.04.2011**:

**Obligation of manufacturer or producer of final products and a provider of taxable service.-**

(1) The CENVAT Credit shall not be allowed on such quantity of input used in or in relation to the manufacture of exempted goods or for provision of exempted services, or input service used in or in relation to the manufacture of exempted goods and their clearance upto the place of removal or for provision of exempted services, except in the circumstances mentioned in sub-rule (2).

**Provided** that the CENVAT Credit on inputs shall not be denied to job worker referred to in Rule 12AA of the Central Excise Rules, 2002, on the ground that the said inputs are used in the manufacture of goods cleared without payment of duty under the provisions of that rule.

(2) Where a manufacturer or provider of output service avails of CENVAT credit in respect of any inputs or input services and manufactures such final products or provides such output service which are chargeable to duty or tax as well as exempted goods or services, then, the manufacturer or provider of output service shall maintain separate accounts for –

(a) the receipt, consumption and inventory of inputs used –

(i) in or in relation to the manufacture of exempted goods;

(ii) in or in relation to the manufacture of dutiable final products excluding exempted goods;

(iii) for the provision of exempted services;

(iv) for the provision of output services excluding exempted services; and

(b) the receipt and use of input services –

(i) in or in relation to the manufacture of exempted goods and their clearance upto the place of removal;

(ii) in or in relation to the manufacture of dutiable final products, excluding exempted goods, and their clearance upto the

place of removal;

(iii) for the provision of exempted services; and

(iv) for the provision of output services excluding exempted services,

and shall take CENVAT Credit only on inputs under sub-clauses (ii) and (iv) of clause (a) and input services under sub-clauses (ii) and (iv) of clause (b).

(3) Notwithstanding anything contained in sub-rules (1) and (2), the manufacturer or the provider of output service, opting not to maintain separate accounts, shall follow any one of the following options, as applicable to him, namely:-

(i) pay an amount equal to five per cent of value of the exempted goods and exempted services; or

(ii) pay an amount as determined under sub-rule (3A); or

(iii) maintain separate accounts for the receipt, consumption and inventory of inputs as provided for in clause (a) of sub-rule (2), take CENVAT Credit only on inputs under sub-clauses (ii)and (iv) of the said clause (a) and pay an amount as determined under sub-rule (3A) in respect of input services. The provisions of sub-clauses (i) and (ii) of clause (b) and sub-clauses (i) and (ii) of clause (c) of sub-rule (3A) shall not apply for such payment:

**Provided** that if any duty of excise is paid on the exempted goods, the same shall be reduced from the amount payable under clause (i):

**Provided** further that if any part of the value of a taxable service has been exempted on the condition that no CENVAT Credit of inputs and input services, used for providing such taxable service, shall be taken then the amount specified in clause (i) shall be five per cent of the value so exempted.

**Explanation I**. If the manufacturer of goods or the provider of output service, avails any of the option under this sub-rule, he shall exercise such option for all exempted goods manufactured by him or, as the case may be, all exempted services provided by him, and such option shall not be withdrawn during the remaining part of the financial year.

**Explanation II**. For removal of doubt, it is hereby clarified that the credit shall not be allowed on inputs used exclusively in or in relation to the manufacture of exempted goods or for provision of exempted services and on input services used exclusively in or in relation to the manufacture of exempted goods and their clearance upto the place of removal or for provision of exempted services.

**Explanation III**. No CENVAT Credit shall be taken on the duty or tax paid on any goods and services that are not inputs or input services.

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

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

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

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

(iii) description of dutiable goods or taxable services;

(iv) description of exempted goods or exempted services;

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

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

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

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

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

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

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

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

(iii) the amount attributable to input services used in or in relation to manufacture of exempted goods and their

clearance upto the place of removal or provision of exempted services = (M/N) multiplied by P, where M denotes that total value of exempted services provided plus the total value of exempted goods manufactured and removed during the financial year, N denotes total value of taxable and exempted services provided, and total value of dutiable and exempted goods manufactured and removed, during the financial year, and P denotes total CENVAT Credit taken on input services during the financial year;

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

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

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

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

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

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

(iii) amount short paid determined as per condition (d), along with the date of payment of the amount short-paid,

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

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

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

(i) where the amount determined under condition (h) is not paid within the said due date, i.e. , the 30th June, the manufacturer of goods or the provider of output service shall, in addition to the

said amount, be liable to pay interest at the rate of twenty four per cent per annum from the due date till the date of payment.

(3B) Notwithstanding anything contained in sub-rules (1), (2) and (3), a banking company and a financial institution including a non-banking financial company, providing taxable service specified in sub-clause (zm) of clause (105) of section 65 of the Finance Act, shall pay for every month an amount equal to fifty per cent of the CENVAT Credit availed on inputs and input services in that month.

(3C) Notwithstanding anything contained in sub-rules (1), (2), (3) and (3B), a provider of output service providing taxable services as specified in sub-clauses (zx) and (zzzzf) of clause (105) of section 65 of the Finance Act, shall pay for every month an amount equal to twenty per cent of the CENVAT Credit availed on inputs and input services in that month.

(3D) Payment of an amount under sub-rule (3) shall be deemed to be CENVAT Credit not taken for the purpose of an exemption notification wherein any exemption is granted on the condition that no CENVAT Credit of inputs and input services shall be taken.

**Explanation I.** - "Value" for the purpose of sub-rules (3) and (3A), -

(a) shall have the same meaning as assigned to it under Section 67 of the Finance Act, read with rules made thereunder or, as the case may be, the value determined under Section 3, 4 or 4A of the Excise Act, read with rules made thereunder;

(b) in the case of a taxable service, when the option available under sub-rules (7), (7B) or (7C) of the Rule 6 of the Service Tax Rules, 2007 has been availed, shall be the value on which the rate of service tax under Section 66 of the Finance Act, read with an exemption notification, if any, relating to such rate, when applied for calculation of service tax results in the same amount of tax as calculated under the option availed; or

(c) in case of trading, shall be the difference between the sale price and the cost of goods sold (determined as per the generally accepted accounting principles without including the expenses incurred towards their purchase) or ten per cent of the cost of goods sold, whichever is more.

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

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

**Explanation IV.** - In case of a manufacturer who avails the exemption under a notification based on the value of clearances in a financial year and a service provider who is an individual or proprietary firm or partnership firm, the expressions, "following month" and "month of March" occurring in sub-rules (3) and (3A) shall be read respectively as "following quarter" and "quarter ending with the month of March.

(4) No CENVAT Credit shall be allowed on capital goods which are used exclusively in the manufacture of exempted goods or in providing exempted services, other than the final products which are exempt from the whole of the duty of excise leviable thereon under any notification

where exemption is granted based upon the value or quantity of clearances made in a financial year.

(5) Omitted (w.e.f. 1.4.2011) by Notification No.3/2011-CE(NT), dt.01.03.2011.

(6) The provisions of sub-rules (1), (2), (3) and (4) shall not be applicable in case of the excisable goods removed without payment of duty are either -

(i) cleared to a unit in a special economic zone or to a developer of a special economic zone for their authorized operations; or

(ii) cleared to a hundred per cent exported-oriented undertaking; or

(iii) cleared to a unit in an Electronic Hardware Technology Park or Software Technology Park; or

(iv) supplied to the United Nations or an international organization for their official use or supplied to projects funds by them, on which exemption of duty is available under notification of the Government of India in the Ministry of Finance (Department of Revenue) No.108/95-Central Excise, dated the 28th August, 1995, number G.S.R. 602 (E), dated the 28th August, 1995; or

(iv-a) supplied for the use of foreign diplomatic missions or consular missions or career consular offices or diplomatic agents in terms of the provisions of notification No.6/2006-Central Excise dated the 1st March, 2006, number G.S.R. 96(E), dated the 1st March, 2006; or

(v) cleared for export under bond in terms of the provisions of the Central Excise Rules, 2002; or

(vi) gold or silver falling within Chapter 71 of the said First Schedule, arising in the course of manufacture of copper or zinc by smelting; or

(vii) all goods which are exempt from the duties of customs leviable under the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) and the additional duty leviable under sub-section (1) of section 3 of the said Customs Tariff Act when imported into India and are supplied, -

(a) against International Competitive Bidding; or

(b) to a power project from which power supply has been tied up through tariff based competitive bidding; or

(c) to a power project awarded to a developer through tariff based competitive bidding,

in terms of notification No.6/2006-Central Excise, dated the 1st March, 2006.

(6A) The provisions of sub-rules (1), (2), (3) and (4) shall not be applicable in case the taxable services are provided, without payment of service tax, to a Unit in a Special Economic Zone or to a Developer of a Special Economic Zone for their authorized operations.

15. Sub-rule (3) of the Rule 6 of CCR, 2004 as was existent prior to 1.4.2008 prescribed that the manufacturer or provider of output

services , who opt not to maintain separate accounts, which was required in relation to the provider of output services to utilize only the amount not exceeding 20% of the Service Tax payable on taxable output services. There was no formula prescribed for apportionment of CENVAT Credit attributable to exempted or non-taxable output services. However, w.e.f. 01.4.2008, a formula has been prescribed under Rule (3A) of the CENVAT Credit Rules, 2004. Sub-clause (iii) of clause (c) of said rules lays down that the CENVAT Credit attributable to exempted goods, exempted services would be determined as per the formula M/N x P, where M denotes the value of exempted services provided + the total value of exempted goods manufactured and removed during the Financial year, N denotes the total value of taxable and exempted services provided and total value of dutiable and exempted goods during the financial year and P denotes the total CENVAT Credit taken on input services during the financial year. The meaning and scope of 'value' as mentioned in the said sub-rule for taxable and non-taxable service be equivalentto as defined under Section 67 of the Finance Act, 1994 and the Rules made thereunder.

16. The Explanation-I to sub-rule 3A, has been amended by issuance of Notification no.3/2011-CE(NT) dt.01.3.2011 proposed to be effective from 01.04.2011. In Explanation-I the scope of 'value' in case of trading has been prescribed for the first time by inserting clause (c) laying down that in case of trading the value shall be the difference between the sale price and the purchase price of the goods traded. However, it is immediately substituted by Notification No. 13/2011-CE (NT) dated 31.3.2011before being brought into

force from 01.4.2011, prescribing that it shall be the difference between the sale price and the cost of goods (determined as per generally accepted accounting principles without including the expenses incurred towards purchase) sold or 10% of the cost of the goods sold, whichever is more. Learned Advocate for the appellant though challenged the said meaning of value for traded goods, alternatively argued that in apportioning the quantum of credit that has been utilized in providing trading services, is being reasonable over the approach of the adjudicating authority, hence, be adopted retrospectively.

17. The contention of the Revenue is that in absence of the meaning of 'value' of traded goods as laid down w.e.f 01.4.2011, hence for the period prior to 01.4.2011 for the purpose of determination of the quantum of credit attributable to the exempted or non-taxable services, it should be the gross value of traded goods i.e. it should include both the value of the imported cars and the value of the non taxable service.

18. A close analysis of the arguments advanced by both sides it is clear that the nerve chord of the dispute lies in the determination and scope of determination of the 'value'of the traded goods for the purpose of Sub-rule (3A) of Rule 6 of CCR,2004. We find that under the sub-rule (3A) of Rule 6 of CENVAT Credit Rules, 2004 as was in force between 01.04.2008 and 31.03.2011, there is no mention about determination of value of 'traded' goods. In the said explanation, it is prescribed that the value for the traded goods be

determined in accordance with Section 67 of the Finance Act, 1994. The said Section 67 reads as follows: -

> **SECTION [67. Valuation of taxable services for charging service tax.** —
>
> (1) Subject to the provisions of this Chapter, where service tax is chargeable on any taxable service with reference to its value, then such value shall, —
>
> (i) in a case where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such service provided or to be provided by him;
>
> (ii) in a case where the provision of service is for a consideration not wholly or partly consisting of money, be such amount in money as, with the addition of service tax charged, is equivalent to the consideration;
>
> (iii) in a case where the provision of service is for a consideration which is not ascertainable, be the amount as may be determined in the prescribed manner.
>
> (2) Where the gross amount charged by a service provider, for the service provided or to be provided is inclusive of service tax payable, the value of such taxable service shall be such amount as, with the addition of tax payable, is equal to the gross amount charged.
>
> (3) The gross amount charged for the taxable service shall include any amount received towards the taxable service before, during or after provision of such service.
>
> (4) Subject to the provisions of sub-sections (1), (2) and (3), the value shall be determined in such manner as may be prescribed.
>
> ***Explanation***. — For the purposes of this section, —
>
> (a) "consideration" includes any amount that is payable for the taxable services provided or to be provided;
>
> (b) "money" includes any currency, cheque, promissory note, letter of credit, draft, pay order, travelers cheque, money order, postal, remittance and other similar instruments but doe not include currency that is held for its numismatic value * * * * * ]
>
> (c) "gross amount charged" includes payment by cheque, credit card, deduction from account and any form of payment by issue of credit notes or debit notes and [book adjustment, and any amount credited or debited, as the case may be, to any account, whether called "Suspense account" or by any other name, in the books of account of a person liable to pay service tax, where the transaction of taxable service is with any associated enterprise.]

19. A plain reading of Section 67 of Finance Act,1994 along with Service Tax (Determination of Value) Rules, 2006, and principles of

law settled in this regard, it can easily be construed that the value of taxable services cannot include the value of the material/goods used in rendering the taxable services. Simultaneously, it is an accepted principle that the cost of all ancillary and incidental services for providing the taxable service be part of the value of the taxable service. Applying the said principles to the present case also, that is, in determining the value of non taxable service i.e. 'trading' of imported cars, it cannot include the value of the imported cars while apportioning the quantum of credit availed on common input services and attributable to the sale of imported cars, but the total value of the services/expenses incurred in trading of the imported cars ought to be considered as part of "value" for the purpose of the formula prescribed at sub-rule 3A(c) (iii) for the period 01.4.2008 to 31.3.2011.

20. More or less similar principle has been incorporated in understanding the value of traded goods under amended provisions of sub-rule 3(iv) of the CENVAT Credit Rules, 2004 w.e.f. 01.04.2011.

21. However, we do not find merit in the contention of the learned Advocate for the appellant in assailing the methodology/formula prescribed after 01.4.2011 in support of his argument that only the value addition or the trade margin i.e. the margin earned by sale of imported cars be considered as 'value' in the numerator as well as denominator of the formula prescribed under Sub-rule 3A(c)(iii) for apportioning the CENVAT Credit attributable to exempted services i.e. sale of imported cars. In our view, to arrived at the 'value' of

trading, in order to apportion CENVAT Credit attributable to the said activity, the same cannot be limited to the trade/profit margin earned from the activity of trading; it should also include the value incidental and ancillary services incurred in the said activity.

22. The learned Advocate has also challenged the computation of demand submitting that the value of the scrap sold on payment of duty and also the value of taxable output services, during the relevant period, was not considered in the impugned Order resulting into error in the confirmation of demand. We find that this aspect has not been considered by the Ld. Commissioner even though the Appellant raised the issue before him, hence to be scrutinized by the Learned Commissioner while calculating the liability.

23. Learned Advocate has also assailed the confirmation of demand against the first Show Cause Notice for the period 01.03.2005 to 31.03.2008 on the ground that the same is barred by limitation. He has submitted that the appellant had obtained trading permission from the Department which was granted to them way back on 04.06.2001 and extended thereafter. Also, the Learned Commissioner (Appeals), Pune-III, in the case of *Faber Feedcraft Industries 2008(232) ELT 182* observed that the credit on service tax paid on common input services can be availed if the same are used for manufacturing and also in trading activity. Therefore, their contention is that the issue since relates to interpretation of law and judgments on the issue are also in favour of the assessee during the relevant period, credit on common input services was taken under a

*bonfide* belief, hence extended period of limitation is not attracted. We find force in the contention of the learned Advocate for the appellant. At the first instance there is no suppression as the fact of trading was communicated much earlier to the department i.e. in 2001 and necessary permission was granted to them. Also, the issue whether trading is an exempted service or otherwise was in dispute in the context of Rule 6 of CCR,2004 during the relevant period and judgments are delivered in support of the trade also. In these circumstances since the issue involves a pure question of interpretation of law, and relevant facts neither suppressed nor mis-declared, invocation of extended period of limitation and imposition of penalty, in our view, is unwarranted and unjustified. Only the amount of credit availed on inputs service attributable to the activity of trading/sale of imported cars for the normal period could be sustained. Consequently, the Revenue's Appeal filed for enhancement of penalty being devoid of merit is rejected.

24. Thus, to apportion the quantum of CENVAT Credit availed on various common input services and attributable to sale of the imported Cars as per the formula prescribed at Rule 6(3A)(c )(iii) of CCR, 2004, for the period 01.4.2008 to 31.3.2011 the matter needs to be remanded to the adjudicating authority, who would determine the said amount by applying the principles discussed above and other factors for the normal period of limitation. We make it clear that no penalty is imposable in the present circumstances.

25. In the result, the impugned Orders are modified, Revenue's Appeal is rejected and the Appeals filed by the assessee are disposed of by way of remand to the adjudicating authority. Cross Objection also stands disposed of.

(Order pronounced in the open court on 31.01.2020)

**(Dr. D.M. Misra)**
**Member (Judicial)**

**(P. Anjani Kumar)**
**Member (Technical)**

Sinha