# CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
## <u>ALLAHABAD</u>

REGIONAL BENCH - COURT NO.I

**Service Tax Appeal No.70366 of 2024**

(Arising out of Order-In-Original No.13-ST-PC-CGST-NOIDA-2023-24, dated 27.12.2023 passed by Commissioner (Appeals) CGST & Central Excise, Noida)

**Bharat Heavy Electricals Limited** **.....Appellant**
($10^{th}$ Floor, Plot No C-20-1A/1,
Joy Tower Sector-62,
Noida Uttar Pradesh 201301)

*VERSUS*

**Commissioner, CGST & Central Excise, Noida**
**....Respondent**
(GST Bhawan, IRCON Building, Plot No.-C-232,
A/2-A/3, Sector-48, Noida, Uttar Pradesh 201301)

**<u>APPEARANCE:</u>**

Shri Atul Gupta, Advocate for the Appellant
Mrs. Chitra Srivastava, Authorised Representative for the Respondent

**CORAM:** **HON'BLE MR. P. K. CHOUDHARY, MEMBER (JUDICIAL)**
**HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)**

**FINAL ORDER NO.70361/2026**

DATE OF HEARING : 01.09.2026
DATE OF DECISION : 10.09.2026

**<u>P. K. CHOUDHARY:</u>**

The present appeal has been filed by the Appellant-Company assailing the Order-In-Original No.13-ST-PC-CGST-NOIDA-2023-24, dated 27.12.2023 passed by Commissioner (Appeals) CGST & Central Excise, Noida.

2. Briefly stated, the facts of the case are that the Appellant is a public sector undertaking and is engaged *inter alia* in providing 'Works Contract Services', 'Repair and Commissioning Services' and other taxable services. The Appellant was registered with the

Service Tax Department and has duly filed its Service Tax Returns for the relevant period.

3. The Appellant, being a provider of output service, avails CENVAT credit in accordance with provisions of the Credit Rules. The Appellant, during the relevant period, has opted for reversal of proportionate CENVAT credit in terms of Rule 6(3A) of the Credit Rules and has accordingly filed intimations with the Department. For computing the reversal of CENVAT credit, the Appellant took into consideration ***only amount of Common CENVAT credit instead of amount of Total CENVAT credit***. Further, the Appellant was also engaged in the trading activity which was treated as exempted service. The total CENVAT credit included the amount of CENVAT credit in respect of inputs/input services, which were exclusively used in providing taxable output service/ supply of dutiable goods, and such amount CENVAT Credit was not included into the amount of Common CENVAT Credit. The Appellant considered that common CENVAT credit, which pertained to inputs and input services which were commonly used in providing taxable as well as exempted services/goods, for computing the proportionate amount of reversal of credit.

4. The reversal of the amount of CENVAT Credit under Rule 6(3) was regularly disclosed in the ST-3 Returns. At various times, audits and enquiries were made by the different departmental officers at the premises of the Appellant. The last investigation was made by DGGI Gurugram zonal unit.

5. Such last investigation culminated into issuance of the impugned **Show Cause Notice[1] dated 17.09.2020** proposing the demand and recovery of Service tax amounting to Rs. 10,99,10,976/- under Section 73 of the Finance Act, read with Rule 14 of the CENVAT Credit Rules ("CCR"), by **invoking the extended period of limitation**, along with interest thereon under Section 75 ibid, read with Rule 14 of the CCR, and penalty under Section 78 ibid, read with Rule 15(3) CCR, in respect of alleged short-payment of amount under Rule 6(3A) of CCR.

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[1] SCN

6. The SCN alleged that trading is covered under the exempted services. **The main allegation in the SCN is that in terms of Rule 6(3A)(c)(iii), for the purpose of computing the amount of CENVAT credit to be reversed, the Total CENVAT credit is required to be taken into consideration instead of the common CENVAT credit**. It was alleged that as the Appellant took into consideration only common CENVAT credit for computing the proportion of CENVAT credit for reversal in respect of exempted service/goods, therefore, the reversed amount of CENVAT credit was less and accordingly, alleged excess CENVAT credit availed (or short CENVAT Credit reversed) has been computed in the SCN.

7. It was alleged that prior to amendment made in the rule 6(3)(a) with effect from 01.04.2016, the requirement was to take into consideration the total CENVAT credit and only from 01.04.2026, common CENVAT credit is to be taken into consideration for the purpose of computation. The Appellant filed a detailed reply on 24.09.2020 rebutting all the allegations contained in the SCN.

8. The Adjudicating Authority confirmed the demand adopting the same reasoning as alleged in the SCN. The following computation was made in the SCN as well as in the impugned order.

| **For year 2014-15** | | | |
|---|---|---|---|
| **Sr. No.** | **Description** | | **Amt.** |
| **1** | Total services turnover | A | 1,72,29,199.51 |
| **2** | Exempted services turnover **including trading** | B | 76,00,12,659 |
| **3** | Percentage of exempted services | C= D x 100/A | 44.11 |
| **4** | Total CENVAT Credit taken | D | 9,60,19,548 |
| **5** | Total common CENVAT credit taken | E | 1,05,18,340 |

| | | | |
|---|---|---|---|
| **6** | Amount already paid on proportionate basis taking into account **only common** CENVAT Credit | F= E x C% | 46,39,641 |
| **7** | Amount Due on proportionate basis taking into account **Total CENVAT** Credit | G= D x C% | 4,23,56,043 |
| **8** | Differential amount to be paid | H= G - F | 3,77,16,402 |

| **For year 2015-16** | | | |
|---|---|---|---|
| **Sr. No.** | **Description** | | **Amt. in Rs.** |
| **1** | Total services turnover | A | 2,28,36,45,446 |
| **2** | Exempted services turnover **including trading** | B | 1,17,75,82,398 |
| **3** | Percentage of exempted services | C= D x 100/A | 51.57 |
| **4** | Total CENVAT Credit taken | D | 14,88,96,306 |
| **5** | Total **common** CENVAT credit taken | E | 88,91,098 |
| **6** | Amount already paid on proportionate basis taking into account **only common** CENVAT Credit | F= E x C% | 45,85,141 |
| **7** | Amount Due on proportionate basis taking into account t**otal CENVAT Credit** | G= D x C% | 7,67,79,714 |
| **8** | Differential amount to be paid | H= G - F | 7,21,94,573 |

| **Summary** |
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| Sr. No. | Description | Amt. Rs. |
|---|---|---|
| **1** | Differential amount to be paid for 2014-15 | 3,77,16,402 |
| **2** | Differential amount to be paid for 2015-16 | 7,21,94,573 |
| **3** | Total amount to be paid | 10,99,10,976 |

9. Further, the demand has been confirmed for the extended period of limitation mainly on the ground that the Appellant suppressed the material facts as the correct amount of reversal was not disclosed and only investigation by DGGI brought into light the correct facts. Hence, the present appeal before the Tribunal.

10. The learned Advocate appearing on behalf of the Appellant submits that it is a settled jurisprudence that for computing proportionate CENVAT credit for reversal, only common CENVAT credit is required to be taken into consideration and not the total CENVAT credit availed, which includes the CENVAT credit on input services which were used exclusively in providing taxable output services. It has been held that even prior to 01.04.2016, only common CENVAT Credit is to be taken into consideration for the purpose of proportionate reversal of CENVAT Credit. He places reliance upon the decision of the Tribunal in the case of **CCE & ST v. Reliance Industries Ltd. - 2019 (28) G.S.T.L. 96 (Tri. - Ahd.).**

11. It is his submission that demand is beyond extended period of limitation. In this regard reliance is placed upon following judgments:-

- M/s KEC International Versus Commissioner of CGST & Central Excise, Panchkula, Service Tax Appeal No. 60226 of 2023 - CESTAT Chandigarh

- ABB LTD Versus C.C.E & C.S.T. Bangalore Service Tax-I, ST/2469, 2861, 2862/2011-DB; ST/22034/2014, CESTAT Bangalore

12. Learned Departmental Representative appearing on behalf of the Revenue has justified the impugned order and prayed that the appeal filed by the Appellant, being devoid of any merits, may be dismissed.

13. Heard both the sides and perused the appeal records.

14. Before going into the merits of the case, we would take up the issue regarding the limitation. We find that it has been held in many cases that the conditions for invoking the extended period as given under Section 11A of the Central Excise Act ,1944 are specific and put heavy burden on the revenue; "Fraud" and "collusion" denote a deliberate deception or a secret agreement to defraud the exchequer, implying a high degree of culpability and a concerted effort to mislead; "Willful misstatement" refers to a deliberate and intentional false statement made with the knowledge of its untruth, or with reckless disregard for its veracity, specifically aimed at evading duty; an incorrect statement, if made without such deliberate intent, does not automatically constitute a wilful misstatement. "Suppression of facts" the most frequently litigated ground, implies a deliberate failure to disclose full and correct information with the specific intent to evade payment of duty; crucially, mere omission, negligence, or inadvertence, without this underlying intent, does not constitute suppression. Lastly, "contravention with intent to evade duty" is a broader category encompassing any violation of the Act or Rules, but it is the accompanying intent to evade duty that is paramount for the extended period to apply.

15. We further find that it was held that *mens rea* is central to all grounds for invoking the extended period; a consistent judicial and strict stance has been taken in interpretation of the *mens rea* to prevent the authorities from invoking extended period as a default for any non-declaration. It has been consistently held that

to establish '*mens rea'* the assessee must have actively concealed, misrepresented, or taken affirmative steps to hide facts, rather than just failing to declare something they might have genuinely overlooked or misunderstood. Hon'ble Supreme Court has repeatedly held that mere negligence, *bona fide* mistakes, or divergent interpretations of law are insufficient grounds for invoking the extended period, a deliberate intent to evade duty must be conclusively proven by the revenue. One of the foundational judgments is Pushpam Pharmaceuticals Company vs. Collector of Central Excise, Bombay 1995 (78) E.L.T. 401 (S.C.) which has been instrumental in defining "suppression of facts" and "wilful misstatement" demanding deliberate intent and positive acts of evasion and placing the burden to prove the satisfaction of these pre-conditions. We find that another predominant theme emerging from the jurisprudence is that prior knowledge on part of the department, or the department's capacity to acquire such relevant knowledge (e.g., through audits, filed returns, or site visits), effectively negates any allegation of suppression.

16. We find that learned Commissioner finds that the noticee failed to disclose to the Department the fact that they were calculating the amount by considering the amount of common credit in the formula instead of total credit and only after investigation, the short payment has come to notice. We find that the logic given by the learned Commissioner is not acceptable inasmuch as when the Appellants have been filing the Returns showing the amount reversed by them, the veracity of the calculation could have been verified if need be by calling for information from the Appellants. Just because the Revenue missed that opportunity by not scrutinizing the Returns filed by the Appellants. We find that it was held, in a number of cases that extended period cannot be invoked in the absence of any positive act with intention to evade payment of duty on the part of the Appellants. We find that the Principal Bench in the case of G.D. Goenka vide Final Order No. 51088 /2023 dated 21.08.2023 has held that:

> 25. ……….

a) The Appellant assessee was required to file the ST 3 Returns which it did. Unless the Central Excise officer calls for documents, etc., it is not required to provide them or disclose anything else.

b) It is the responsibility of the Central Excise Officer with whom the Returns are filed to scrutinize them and if necessary, make the best judgment assessment under section 72 and issue an SCN under Section 73 within the time limit. If the officer does not do so, and any tax escapes assessment, the responsibility for it rests on the officer.

c) Although the Central Excise Officer is empowered to scrutinize all the Returns call for records and if necessary, make the best judgment assessment, if as per the instructions of CBIC, the officer does not conduct a detailed scrutiny of same Returns and as a result is unable to discover any short payment of tax within the period of limitation, neither the assessee nor the officer is responsible for such loss of revenue. Such a loss of Revenue is the risk taken by the Board as a matter of policy.

d) Extended period of limitation cannot be invoked unless there is evidence of fraud or collusion or willful misstatement or suppression of facts or violation of the provisions of Act or Rules with an intent.

e) Intentional and wilful suppression of facts cannot be presumed because (a) the Appellant was operating under self-assessment or (b) because the Appellant did not agree with the audit and claimed that CENVAT credit was admissible; or (c) because the Appellant did not seek any clarification from the Revenue; or (d) because the officer did not conduct a detailed scrutiny of the Returns and the availment of CENVAT credit which is alleged to be inadmissible and was discovered only during audit.

17. We find that the issue is no longer res integra having been decided in the case of Reliance Industries 2019- TIOL-1593-

CESTAT-Ahm. Wherein it was held that "if the whole rule 6(1)(2)(3) is read harmoniously and conjointly, it is clear that "total CENVAT Credit" for the purpose of formula under Rule 6(3A) is only total CENVAT Credit on common input service and will not include the CENVAT Credit on input or input service exclusively used for the manufacture of duty of goods. If the interpretation of the revenue is accepted, then the CENVAT Credit of part of input service even though used in the manufacture of dutiable goods, shall stands disallowed, which is not provided under any of the rule of CENVAT Credit Rules, 2004.

18. We further find that Rule 6 was substituted vide Notification No.13/2016-CE (NT) dated 01.03.2016; in the instant case, the Notification has substituted the reversal formula under rule 6(3A) of the CENVAT Credit Rules, 2004 in its entirety so as to bring about clarity in its interpretation; above amendment is clarificatory in nature. It is well settled legal position that the amendment which is clarificatory in nature is to be applied retrospectively, as held in Shamarao V. Parulekarv Vd the District Magistrate, Thana, Bombay & Others AIR 1952 SC 324.

19. The assumption of the department that services mentioned under section 66D (negative list of services) are exempt services is incorrect; Rule 2(e) of the CENVAT Credit Rules, 2004 defines the term 'exempted service' and the said rule does not state that services enlisted under section 66D would be exempt services; furthermore, all services are subject to service tax under section 66B of the Finance Act, 1994; the services which are excluded from the definition of the term 'service' as defined under section 65B(44) of the Finance Act, 1994 would be considered as 'exempt' for the purposes of Rule 6 and not the services enlisted under Section 66D of the Finance Act, 1994.

20. We find that "Trade" is a transfer of ownership of goods and services from one person or entity to another by getting something in exchange from the buyer which is known as consideration amount and it is pure sale when the same relates to transfer of ownership of goods; the activity of the trading of goods

is excluded from the scope of the service because the Constitution of India authorizes levy of sales tax on sale and purchase of goods and service tax on rendition of service; the distinction between the sale and purchase of goods and act of rendition of service is clearly brought out for the purpose of payment of tax; once the transaction of transfer of title in goods by way of sale is excluded from the definition of service, the same cannot be deemed to be a service for the purpose of section 66D of the Finance Act, 1994.

21. "Goods" is defined under clause (25) of Section 65B of the Act means every kind of movable property other than actionable claim and money and includes securities, growing crops grass and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale; in the common parlance, trading is buying and selling of goods; if goods are bought and sold then sales tax is levied which later becomes value added tax and now being dealt under GST; the taxable event of service tax is the act of providing service while act of sale alone is covered under taxable event of sales tax; therefore, to call trade as service is conceptually improper.

22. In view of the above observations it is our considered view that the impugned order cannot be sustained and is, therefore, set aside. Appeal filed by the Appellant is allowed with consequential relief, if any, as per law.

(Pronounced in open court on 10.09.2026)

**Sd/-**
**(P. K. CHOUDHARY)**
**MEMBER (JUDICIAL)**

**Sd/-**
**(P. ANJANI KUMAR)**
**MEMBER (TECHNICAL)**

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