Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad

REGIONAL BENCH- COURT NO.3

Excise Appeal No. 11692 of 2013

(Arising out of OIO-AHM-CEX-003-COMMR-018-13 dated 21/03/2013 passed by Commissioner of Central Excise-AHMEDABAD-III)

Hindustan Coca Cola Beverages Ltd ......Appellant
Village : Goblej,
Taluka : Matar,
Kheda, Gujarat

VERSUS

C.C.E. & S.T.-Ahmedabad-iii ....Respondent
Custom House... 2nd Floor,
Opp. Old Gujarat High Court, Navrangpura,
Ahmedabad, Gujarat - 380009

WITH

Excise Appeal No. 11691 of 2013

(Arising out of OIO-AHM-CEX-003-COMMR-018-13 dated 21/03/2013 passed by Commissioner of Central Excise-AHMEDABAD-I)

Amit Radheshyam Gupta ......Appellant
Zonal Finance Head Of Gujarat And Rajasthan Of M/S, Hindustan Coca Cola Beverages Ltd,
Village : Goblej, Taluka : Matar
Kheda, Gujarat

VERSUS

C.C.E.-Ahmedabad-I ....Respondent
C. Ex Bhavan,
Nr Panjrapole & Polytechnic, Ambavadi,
Ahmedabad, Gujarat - 380015

APPEARANCE:
Shri Vikaram Nankani, Sr. Advocate & Shri Hardik Modh, Advocate appeared for the Appellant
Shri T.G Rathod, Additional Commissioner (Authorized Representative) for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. P.ANJANI KUMAR

Final Order No . A/10225-10226/2022

DATE OF HEARING: 15.11.2021
DATE OF DECISION: 08.03.2022

RAMESH NAIR

The present appeals have been filed by M/s Hindustan Coca Cola Beverages Ltd. and Shri Amit Radheshyam Gupta, Zonal Finance Head of

Company, against the Order-in-Original No. AHM-CEX-003-COMMR-018-13 dated 21.03.2013

2. Briefly stated the facts of the case are that the appellants are engaged in the manufacture of aerated water, Fruit Juice, Fruit Pulp based drinks falling under chapter heading No. 22 of the Central Excise Tariff Act, 1985. The finished goods manufactured by the Appellant were fully exempted prior to 01.03.2011, which thereafter became dutiable under Notification No. 02/2011-C.E. dated 01.03.2011. From 01.03.2011 onwards appellant have opted for paying duty. On scrutiny of ER-1 returns for the month of March 2011 and April 2011, it appears that appellant had taken Cenvat Credit amounting to Rs. 8,50,01,449/- paid on capital goods and also utilized the same towards payment of duty on clearance of goods i.e. Maaza. Further, on Scrutiny of Goods Receipts Notes it is apparently seen that they have received capital goods in factory during the period from 13.10.2010 to 28.02.2011. A show cause notice was issued to them for recovery of Cenvat credit availed on the capital goods alleging that the said credit on the capital goods is not admissible being received by them during the period when the final product manufactured were exempted from payment of duty. On adjudication, the demand was confirmed with equal amount of penalty imposed under Rule 15(2) of Cenvat Credit Rules, 2004 read with Section 11AC of Central Excise Act, 1944 and Penalty of Rs. 1 Lakh was also imposed on Shri Amit Radheshyam Gupta, Zonal Finance Head. Aggrieved by the impugned order dated 21.03.2013, present Appeals have been filed.

3. Shri Vikaram Nankani, Learned Senior Counsel and Shri Hardik Modh, Learned Counsel appeared for the appellant. Shri Vikram Nanakani submits that appellant had received the capital goods i.e. Parts, Components and sub

sets of the new 600 BPM Pet Bottling Line during the period 13.10.2011 to 28.02.2011. The said Capital goods was purchased by the Appellant for utilization of the same in manufacturing of final product i.e 'maaza'. Installation of the machinery and trial run production were completed during the period 14.03.2011 and commenced commercial production from 29.03.2011. Therefore the Appellant had rightly availed the Cenvat Credit in the month of March 2011 in terms of Rule 4(2)(b) read with Rule 2(a) and Rule 6(4) of the said Rules. Upon perusal of the provisions of CCR, 2004 it is clear that the main condition for eligibility of Cenvat Credit on Capital Goods are being used in manufacture of dutiable final products.

3.1. He submits that the decisions passed in case of CC Vs. Surya Roshni reported in 2003(155)ELT 481 relied upon by the respondent was challenged before the Hon'ble Supreme Court and the same was dismissed on the ground of lack of jurisdiction. The said assessee subsequently filed Reference Application bearing No. MCC No. 2/2004 under Section 35(H) (1) of the Act before the Indore Bench of the Hon'ble High Court of Madhya Pradesh whereby the Hon'ble High Court directed the Hon'ble Tribunal to frame question of law stated in the application arising from the order of the Tribunal. Since the Hon'ble High Court allowed the application and directed the Tribunal to frame questions of law, it cannot be said that the decision in the case of Surya Roshini has attained finality. The decision passed in the case of CCE Vs Gujarat Propack reported in 2009 (234) ELT 409(Guj) squarely covers the present case. The decision of Grasim Industries Ltd. (Supra) which has been heavily relied upon by the respondent is not applicable in the present case as the same was delivered in context of Rule 57Q(3) read with Rule 57R(1) of the Central Excise Rules, 1944. The said decision has become irrelevant after introduction of Cenvat Credit Rules,

2004. Identical issue involved in the present case arose in the case of Kaleesuwari Refinery Pvt. Ltd. Vs. CESTAT, Chennai- 2016 (340)ELT 630 wherein the Hon'ble Madras High Court after considering the decision of Surya Roshini (Supra), Grasim Industries Ltd. (Supra) and Spenta International Ltd. (Supra) held that all the above decisions are not applicable after introduction of Cenvat Credit Rules, 2002 as the language used in Rule 4(2)(a) and Rule 6(4) of Cenvat Credit Rules, 2002 was completely different from the language used in Rule 57Q read with Rule 57R of Central Excise Rules, 1944.

3.2 He further submits that Rule 4(2)(a) of CCR, 2004 allows a manufacturer to take Cenvat Credit only for an amount not exceeding 50% of duty paid on such capital goods in the same financial year. Rule 6(4) provides that Cenvat Credit on capital goods will not be allowed which are used exclusively in manufacture of exempted goods. In the present case appellant received the capital goods during the period between October 2010 and February 2011 and availed cenvat credit in March 2011 and April 2011. Since it is undisputed fact that the final products manufactured by the Appellant became dutiable with effect from 01.03.2011 and the said capital goods were used in manufacture of final products during the same financial year, conditions provided to avail Cenvat Credit has been complied with. He also submits that amendment introduced by way of substitution in Rule 6(4) applies retrospectively.

4. On other hand Shri T.G. Rathod, Learned Additional Commissioner (AR) defended the impugned order by reiterating the findings of Commissioner and pleaded that Cenvat Credit of the duty paid on capital goods can be allowed only when on the date of receipts of such capital

goods, the final product to be manufactured is dutiable. Revenue relies upon the following decisions:

- 2016(332) ELT 831(Tri, Bang) – Andhra Polymers Pvt. Ltd Vs. CCE Hyderabad -II
- 2016(341) ELT 351 (Tri-Del) – Ankit Roofings Pvt. Ltd. Vs CCE, Jaipur
- 2003(155) ELT 481(Tri-Del)-CCE, Indore Vs Surya Roshni Ltd.
- 2003(158)ELT A273(SC) – Surya Roshni Ltd. Vs Commissioner
- 2007(216)ELT133(Tri-LB) Spenta International Ltd. Vs CCE Thane
- 2012(286)ELT639(Tri-Ahmd)-CCE, Surat Vs Aneri Construction
- 2013(291)ELT 365 (Tri. Del) – CCE, Meerut-I Vs. Backwell Agro Ltd.
- 2010(256) ELT 148 (Tri-Del) -ACC Ltd Vs. CCE, Chandigarh
- 2004 (176)ELT 265 (Tri- Chennai) -Grasim Industries Ltd. Vs. CCE, Trichy
- 20402(143) ELT 577 (Tri. Del) – Binani Cement Ltd. Vs. CCE, Jaipur -II,
- 2007(212) ELT 483(Tri-Chennai) -CCE, Coimbatore Vs. Precot Mills Ltd.
- 1998(99) ELT 409(Tri) -CCE, Coimbatore Vs. Sengunthar Spinning Mills.

5. We have carefully considered the submission made by both sides and perused the records. The issue involved in the present case to be considered by us is that in case of capital goods though received and installed before the manufacture of a product which earlier was exempted but when the production started become dutiable, whether the appellant is entitled for Cenvat Credit in respect of such capital goods. As per the facts of the case the capital was received in the appellant's factory during the period 13.10.2010 to 28.02.2011. The said capital goods

were subsequently used for manufacturing of "Maaza" which was exempted before 28.02.2011. However, the same became dutiable w.e.f 01.03.2011. The case of the department is that since the capital goods were received before 01.03.2011 and at that time the product "Maaza" was exempted, the appellant is not entitled for Cenvat Credit. The contention of the revenue is that for the purpose of taking credit on capital goods the date of receipt is significant and if on that date the product is exempted then it should be treated as capital goods was used exclusively for manufacture of exempted goods. In this regards, we refer to Rule 6(4) of Cenvat Credit Rules, 2004 which is reproduced below:

> *"(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."*

From the above rule, it is clear that Cenvat Credit shall not be allowed on capital goods which are used exclusively in the manufacture of exempted said goods. As per the facts of the present case, though the capital goods were received during the period 13.10.2010 to 28.02.2011 but as per submission of the appellant the trial production on said capital goods for manufacture of goods namely "Maaza" was undertaken on 14.03.2011 and commercial production of the said goods was commenced on 29.03.2011 with this fact it clear that since this machine was not used prior to 14.03.2011 for manufacture of any goods, it cannot be said that the said machine was used exclusively for manufacture of exempted goods. It is the contention in the show cause notice as well as in the impugned order that when the capital goods in question was received, the appellant was engaged in the manufacture of exempted goods however it is not clear whether the said capital goods were used in the manufacture of exempted goods.

5.1 As per our view even if the goods per se were exempted during the receipt and installation of the capital goods but if the said capital goods were not put to use for manufacture of any exempted goods it cannot be said that the said capital goods were used exclusively for manufacture of exempted goods in terms of Rule 6(4) of Cenvat Credit Rules, 2004. The revenue has heavily relied upon the decision in the case of Surya Roshni Ltd - 2003(155) ELT 481(Tri-Del) on the ground that the same was upheld by the Supreme Court but the factual position as submitted by the Learned Senior Counsel is that though the Tribunal had decided the matter against the assessee and the appellant in that case has approached the Supreme Court. The Hon'ble Supreme Court dismissed on the ground of jurisdiction thereafter, the appellant filed an application under Section 35(H) (1) of Central Excise Act, 1944 which is not yet decided. Therefore, firstly the judgment in the case of Surya Roshni has not attained finality either by the Hon'ble High Court or Hon'ble Supreme Court. Secondly, in the facts of Surya Roshni's case at the time of receipt of capital goods the goods manufactured there upon was exempted and the capital goods was used for substantial period right from its commencement exclusively for manufacture of exempted goods and after substantial time of use the product manufactured on the said machine become dutiable. In this fact the Tribunal has taken a view that at the time of start of use of capital goods, the assessee was manufacturing exempted goods on the very same machine therefore, the capital goods when put to use the goods manufactured there from were exempted. In the fact of the present case the capital goods even though receipt earlier but when it started manufacturing the goods were dutiable i.e. from 01.03.2011. In this position, it appears that the capital goods on which the cenvat was claimed by the appellant was never used exclusively for manufacture of exempted goods. However, since the adjudicating authority has decided the case only

on the basis that at the time of receipt of capital goods the product was exempted, therefore, the fact regarding commencement of such capital goods and the status of finished goods manufactured from that capital goods whether the same was dutiable or exempted needs to be verified. Therefore, the entire matter deserves to be re-considered in view of our above observation. Accordingly we set aside the impugned order and remand the matter of Appeal No. E/11692/2013 to the adjudicating authority for passing a fresh order after giving sufficient opportunities to the appellant.

5.2 As regard Appeal No. E/11691/2013 filed by Shri Amit Radheshyam Gupta against the imposition of penalty of Rs. 1 lakh in terms of Rule 26 of Central Excise Rules, 2002. We find that the issue involved is of interpretation of Cenvat Credit Rules, 2004 hence there is no malafide involved. Therefore, in our considered view, the personal penalty in this case cannot be imposed on the employee of the appellant's company.

6. Accordingly, we set aside the penalty imposed on Shri Amit Radheshyam Gupta, Zonal Finance Head of the Company. The Appeal No. E/11691/2013 is therefore allowed. Appeal No. E/11692/2013 filed by M/s Hindustan Coca Cola Beverages Ltd is allowed by way of remand to the adjudicating authority.

(Pronounced in the open court on 08.03.2022)

RAMESH NAIR
MEMBER (JUDICIAL)

P.ANJANI KUMAR
MEMBER (TECHNICAL)

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