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

REGIONAL BENCH- COURT NO.3
Excise Appeal No.10506 of 2013
(Arising out of OIO-70-COMMR-2012 dated 09/11/2012 passed by Commissioner of Central Excise-RAJKOT)

Sanstar Bio Polymers Limited ……**Appellant**
Santosh Dham, Sukhpar Road,
Post Morgar Taluka Bhachau
Kutch, 370020

VERSUS

C.C.E. & S.T.-Rajkot ………**Respondent**
Central Excise Bhavan,
Race Course Ring Road...Income Tax Office,
Rajkot,Gujarat-360001

APPEARANCE:
Shri. Amal Dave, Advocate for the Appellant
Shri Vinod Lukose, Superintendent (AR) for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. RAJU

Final Order No. A/ 12475 /2021

DATE OF HEARING: 26.10.2021
DATE OF DECISION: 29.10.2021

RAMESH NAIR

The issue involved in the present case is that whether the appellant is required to pay 5%/10% of the value of exempted goods in terms of Rule 6(3) of Cenvat Credit Rules, 2004, when the appellant have reversed the Proportionate Cenvat credit along with interest for the period post 01.04.2008. The case of the department is that the retrospective amendment in Rule 6 was effective only up to 31.03.08, therefore, subsequent to that period since, the appellant has availed the Cenvat Credit on common input/input service for the manufacture of exempted and dutiable final products. Therefore, they are required to pay 5%/10% in terms of Rule 6(3) of Cenvat Credit Rules, 2004.

2. Shri Amal Dave, learned counsel appearing on behalf of the appellant submits that even for the period which is not covered under the retrospective amendment brought under Finance Act, 2010, if the assessee reversed the proportionate Cenvat Credit in respect of input/input service attributed to exempted goods even though belatedly but with interest, the

demand of 5%/10% of the value of exempted goods is not sustainable as held in the following judgments:-

- 2009 (244) ELT 321 (Bom) - CCE, Thane-I Vs. Nicholas Piramal (I) Ltd
- 2009 (240) ELT 661 (SC) -CCE Vs. Gujarat Narmada Fertilizers Co Ltd
- 2018 (17) GSTL 422 (Del) - Lally Automobiles P Ltd Vs. Commissioner (Adjudication)
- 2018 (17) GSTL 181 (Gu) - CCE, Vadodara-II Vs. Unimed Technologies Ltd
- 2018 (16) GSTL 257 (Raj) - Modern Insulators Ltd Vs. Additional CCE, Jodhpur
- 2014 (33) STR 440 (Tri-Kol) - Tata Steel Ltd Vs. CCE, JSR
- 2004 (178) ELT 55 (SC) - State of Jharkhand Vs. Ambay Cements
- 2017 (5) GSTL 225 (Mad) - Ruchika Global Interlinks Vs. CESTAT, Chennal
- High Court of Gujarat in Appeal No. R/Tax No. 571/2019 - CGST Vs. Bombay Minerals Ltd
- 2008 (221) ELT 481 (SC) - Mathania Fabrics Vs. CCE, Jaipur
- 2010 (256) ELT 369 (Guj) - CCE, Surat-I Vs. Neminath Fabrics Pvt Ltd

3. Shri Vinod Lukose, learned Superintendent (Authorized Representative) appearing on behalf of the revenue reiterates the finding of the impugned order.

4. We have carefully considered the submissions made by both the sides and perused the records. We find that there is no dispute in the fact that the appellant even though belatedly, but admittedly reversed the Cenvat credit in respect of input/input service attributed to exempted goods along with interest. Even though, the appellant initially availed the Cenvat Credit but subsequently reversed the proportionate credit along with interest, the situation is as if the Cenvat credit was not availed right from the taking credit, therefore, the demand of 5%/10% under Rule 6(3) of Cenvat Credit Rules, 2004 is not sustainable. This issue is no longer *res-integra* as the same has been decided in catena of judgements. Some of the judgments are reproduced below:

- **Bombay Minerals Ltd Vs. CCE, Rajkot-2019 (29) GSTL 361 (Tri.-Ahmd.)**

> "**13.** In view of the above judgment, we are of the considered view that once the appellant have opted reversal of the credit in respect of service attributed to the exempted goods and in case of delay, the interest is also paid then the demand of 5%/10% under Rule 6(3) cannot be made. In the present case since the Ld. Commissioner has demanded 5%/10% of the value of exempted goods, he has not verified the correctness of actual Cenvat credit attributed to exempted goods as reversed by the assesse. Therefore, only for the purpose of verification of such quantification of reversal, the matter in case of assessee's appeals is remanded to the original authority. As regard the Revenue's appeal since the penalty is consequential to demand and final outcome can be arrived at only after verification of reversal, the Revenue's appeal are also remanded to the original authority. All the appeals are disposed of by way of remand to the original authority in the above terms for passing a fresh *de novo* order."

- **Welspun Corp. Ltd Vs. CCE, Kutch-2019 (368) ELT 179 (Tri. Ahmd.)**

6. We have carefully considered the submissions made by both the sides and perused the records. The limited issue to be decided by us is that in a case where at the time of receipt of input services, the appellant availed Cenvat credit on the entire service and on pointing out by the audit party they reversed the Cenvat credit in respect of input services attributed to the exempted goods/non-excisable goods along with interest, whether the demand confirmed by the Revenue under Rule 6(3) i.e. 5%/10% on value of exempted goods is legal and proper. The appellant is not disputing that the Cenvat credit in respect of input services attributed to exempted goods namely Steam, Fly-Ash and non-excisable goods i.e. electricity sold outside their factory, is not admissible and they have admittedly reversed the proportionate Cenvat credit and also paid the interest from the date of taking credit till the date of reversal. For ease of reference, we reproduce below the Rule 6(3) of Cenvat Credit Rules, 2004 :

(3) Notwithstanding anything contained in sub-rules (1) and (2), the manufacturer of goods 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.

From the plain reading of the Rule 6(3), it can be seen that the law provided three options to the assessee (I), (II) accordingly the assessee has option either to pay 5%/10% of value of exempted goods or pay an amount determined under sub-rule (3A) i.e. proportionate credit attributed to the exempted goods. The appellant rightly availed the option of sub-rule (3A) of Rule 6 of CCR, 2004, the only lapse on the part of the appellant is that the payment of Cenvat credit was made belatedly, however the appellant have paid interest for the period right from availing the Cenvat credit till the payment/reversal of proportionate Cenvat credit which create a position as if the appellant have not availed Cenvat credit right from the date when Cenvat credit was availed. Therefore there is no reason for imposing option under Clause (i) of Rule 6(3) i.e. payment of 5%/10% of the value of exempted goods. This issue has been considered by this Tribunal time and again, though the appellant have relied upon almost 20 judgments on this issue which are directly applicable. However, we are referring some of the judgments as under :

- The Hon'ble Tribunal in the case of *Jay Balaji Industries Ltd.* - 2017 (352) E.L.T. 86 (T) held in para 5 that :

"5. The Hon'ble Supreme Court in the case of *Chandrapur Magnet Wires (P) Ltd.* v. *CCE, Nagpur* - 1996 (81) E.L.T. 3 (S.C.) which has been followed in many other decisions of the High Court as well as the Tribunal has held that once Cenvat credit is reversed, it is to be considered *ab initio* not availed. In the light of this judgment of the Hon'ble Supreme Court, the reversal of Cenvat credit already made by the appellant is to be considered as not taken *ab initio*.

The Government has introduced the facility of proportionate reversal w.e.f. 1-4-2008 to mitigate the difficulties faced by manufacturers to maintain separate accounts for inputs/input services as well as when the same are commonly used for dutiable as well as exempted products/services. Though detailed procedure starting with an option to be exercised by manufacturer has been prescribed, in the present case, the appellant has not followed the same. However, it is on record that they have already reversed an amount claimed to be proportionate. It is also pertinent to record that this has been done by the appellant even before the issue of the show cause notice in this case. We are of the considered view that the failure of the appellant to follow the procedure perfectly should not come in the way of extending the substantial benefit of proportionate reversal. However, we find that in the order passed by the lower authority, he has not given any finding as to whether the reversal already made satisfies the test of proportionate reversal in terms of quantum of reversal. Hence, we are of the considered opinion that the matter is to be remanded to the original adjudicating authority to verify whether the amount of Cenvat credit already reversed along with interest satisfies the requirement of proportionate reversal. We also make it clear that there is no justification for demand of the amount equivalent to 10%/5% of the value of electricity wheeled out. The appellant should be given an opportunity to argue their case before the original adjudicating authority who is directed to pass order expeditiously within a period of three months of the date of receipt of this order."

- The Hon'ble Tribunal in the case of *Swiss Parental Pvt. Ltd.* - 2014 (308) E.L.T. 81 (T) held in para 7.3 that :

"7.3 We find that the ratio of the above case laws is squarely applicable to the appellant's case. We, therefore, hold that if Cenvat credit attributable to inputs used in the manufacture of exempted final products is reversed along with interest subsequent to removal of exempted final products, then the appellant cannot be said to have taken credit of inputs used in or in relation to the manufacture of exempted final products, and they need not pay an amount @ 8% or 10% of the sale price of exempted final products. The adjudicating authority has worked out the demand of Rs. 88,41,543/- on the basis of 8% or 10% of the sale price of exempted final products cleared by the appellant during the material period, while the respondent claims that the input credit attributable to manufacture of exempted final products is only Rs. 7,85,573/-, which they have reversed. In the present case we observed from the case records that the appellant has furnished relevant data/documents available at pages 372 to 396 of the appeal papers filed in Appeal No. E/449/2011 showing Cenvat credit reversed/required to be reversed on inputs used in the manufacture of exempted final products during the material period. The appellant has also placed on record copies of 21 invoices at pages 349 to 370 of the appeal papers of Appeal No. E/449/2011 showing receipt of exempted input (Alpha Beta Arteether) of value of about three crore rupees during the material period, for which no Cenvat credit could be taken. In view of these facts on record, we find that the method adopted by the adjudicating authority for working out of the demand of Rs. 88,41,543/-, on the basis of 8% or 10% of the sale price of dutiable and exempted final products, is not maintainable. We, therefore, remand the matter to the adjudicating authority for proper verification of appellant's claim of reversal of Cenvat credit on inputs attributable to manufacture of exempted final products on the basis of appellant's records after affording opportunity to the appellant to explain their case before deciding the issue of quantum of Cenvat credit in remand proceedings."

- The Hon'ble Supreme Court in the case of *Bombay Dyeing & Mfg. Co. Ltd.* - 2007 (215) E.L.T. 3 held in para 8 that :

"8. There is no merit in this civil appeal. Under the notification, mode of payment has not been prescribed. Further, exemption is given to the final product, namely, grey fabric under the Central Excise Act, 1944, levy is on manufacture but payment is at the time of clearance. Under the Act, payment of duty on yarn had to be at the spindle stage. However, when we come to the Exemption Notification No. 14/2002-C.E., the requirement was that exemption on grey fabrics was admissible subject to the assessee paying duty on yarn before claiming exemption and subject to the assessee not claiming Cenvat credit before claiming exemption. The question of exemption from payment of duty on grey fabrics arose on satisfaction of the said two conditions. In this case, payment of duty on yarn on deferred basis took place before clearance of grey fabrics on which exemption was claimed. Therefore, payment was made before the stage of exemption. Similarly, on payment of duty on the input (yarn) the assessee got the credit which was never utilized. That before utilization, the entry has been reversed which amounts to not taking credit. Hence, in this case, both the conditions are satisfied. Hence item no. 1 of the table to Notification No. 14/2002-C.E. would apply and accordingly the grey fabrics would attract nil rate of duty."

- In the case *of Aster Pvt. Ltd.* - 2016 (43) S.T.R. 411, it was held that :

"The above Rule 6(3A) states that while exercising the option, the manufacturer of goods or the provider of output service shall intimate in writing the department regarding the option exercised. In the present case, admittedly there is no intimation given by the appellant informing his exercise of option. The contention of the department is that when the appellant has not intimated his option in writing then the appellant is bound to pay the duty amount calculated under the first option. I am afraid I cannot endorse this contention. The said rule does not say that on failure to intimate, the manufacturer/service provider would lose his choice to avail second option of reversing the proportionate credit. Rule 6(3A), as seen expressly stated is nothing but a procedure contemplated for application of Rule 6(3). Therefore, the argument of the Revenue that the requirement to intimate the department about the option exercised, is mandatory and that on failure, the appellant has no other option but to accept and comply Rule 6(3)(i) and make payment of 5%/10% of sale price of exempted goods/value of exempted services is not acceptable or convincing. The Rule does not lay down any such restriction. The procedure and conditions laid in Rule 6(3A) is intended to make Rule 6(3) workable and not to take away the option available to the assessee. In any case, at no stretch of imagination can it be said that on failure to intimate the department, Rule 6(3)(i) would automatically come into application."

- The Hon'ble Tribunal in the case of *Cranes & Structural Engineers* - 2017 (347) E.L.T. 112 (T) held in para 4.1 that :

"4.1 On analysis of Rule 6(3A), I find that while exercising the option, the manufacturer of goods or the provider of output service shall intimate in writing to the Department regarding the option exercised. In the present case, admittedly there is no intimation given by the appellant informing the exercise of his option.

> The argument of the Department is that when the appellant has not intimated his option in writing then the appellant is bound to pay the duty amount calculating under the first option. According to me, this argument is devoid of merit, because the said Rule does not say anywhere that on failure to intimate, the manufacturer/service provider would lose his right to avail second option of reversing the proportionate credit. Sub-rule (3A) of Rule 6 is only a procedure contemplated for application of Rule 6(3). Consequently, the argument of Revenue is that the appellants exercising option is mandatory and on its failure, the appellant has no other option but to accept and apply Rule 6(3)(i) and make payment of 5%/10% of the sale price of the exempted goods or exempted services is not acceptable, because the Rule does not lay down any such restriction and this has been held in the judgments cited supra. It has been held in the judgment cited supra that the condition in Rule 6(3A) to intimate the Department is only a procedural one and that such procedural lapse is condonable and denial of substantive right on such procedural failure is unjustified. Therefore, keeping in view the facts and evidence on record, the demand raised by the Revenue is not legal and proper. Moreover, the demand raised by the Revenue is also hit by limitation as the appellant reversed the *pro rata* credit with interest on 31-7-2010 itself and communicated to the Department whereas the show cause notice was issued only on 13-3-2012 which is beyond the period of one year and the allegation of the Department regarding suppression of fact is also not tenable because the appellant has disclosed these facts in their periodical ER1 returns filed by them. Therefore, the impugned order is not sustainable on merit as well as on limitation and therefore, I set aside the impugned order by allowing the appeal of the appellant with consequential relief, if any."

7. In view of the above, the issue is no longer *res integra*, therefore, the demand confirmed equal to 5%/10% of value of the exempted goods is not sustainable. As regard the submission of Ld. Counsel regarding the limitation, we find that firstly, the appellant had not utilized the Cenvat credit attributed to the exempted goods, secondly the fact regarding the availment of credit and manufacture and clearance of exempted and non-excisable goods are very much on record, therefore, the suppression of fact cannot be attributed on the part of the appellant. We also find that since the issue regarding reversal of Cenvat credit under Rule 6(3) is contentious and various cases on the same issue have been made out which can be seen from such of judgment given above, therefore, on the issue related to Rule 6(3) particularly in the facts of the present case it cannot be said that the appellant had *mala fide* intention to evade payment of duty. Therefore, demand for the extended period is also hit by limitation for the same reason the penalties imposed are also unsustainable.

8. As per our above discussion, we hold that proportionate credit paid by the appellant along with interest is sufficient compliance under Rule 6(3), accordingly the same is maintained. The demand under Rule 6(3)(i) i.e. 5%/10% of value of the exempted goods and all the penalties are set aside. The appeal is allowed in the above terms.

- **CESTAT Ahmedabad Final Order No. A/12299/2021 dated 04/08/2021 in case of M/s. P&B Pharmaceuticals Limited.**

4. We have carefully considered the submissions made by both the sides and perused the record. We find that there is no dispute about reversal of credit on input services attributed to exempted goods. It is also observed that appellant have paid Cenvat credit and wherever there is delay in such payment, the appellant paid interest. In this position, it should be considered as if the appellant have not availed Cenvat credit. Accordingly, Rule 6(3) of Cenvat Credit Rules, 2004 shall not be invoked. We find that in the appellant's own case, this Tribunal vide order dated 26.08.2010 decided the same issue as under:-

> 4. After appreciating the submissions made by both the sides, we find that the law on the disputed issue is clear by the various decisions referred supra. As regards the fact of reversal of modvat credit, we find from the impugned order in original passed by the Additional

> Commissioner that the factum of reversal of credit amount relatable to the inputs used in the manufacture of exempted final product stands accepted by him and there is no dispute about the same, in which case there is no need for remanding the matter for verification of reversal amount.
>
> 5. In view of the above, the impugned orders have been set-aside and appeals allowed with consequential relief to the appellants.

5. In view of the above decision, the issue is no more res-integra. Accordingly, we, following the above referred Tribunal decision in the appellant's own case, in order dated 26.08.2010, set-aside the impugned order and allow the appeal.

- **CCC, Ahd-II Vs. Maize Products-2009 (234) ELT 431 (Guj.)**

3. The brief facts necessary for the present are that the respondent-Company manufactures certain dutiable products narrated in paragraph No. 3(a) of the impugned order of the Tribunal. In the course of manufacturing process, two inputs, namely, Caustic Soda Lye and Hydrochloric Acid are used, resulting in manufacture of both dutiable and non-dutiable products. The Revenue took a view that no duty was payable on some of the final products and hence, duty at the rate of 8% of the value of such final products was required to be paid and CENVAT credit was wrongly availed of. Four show cause notices relating to an exempted product and nine show cause notices relating to bye-products were issued, the period being from April 2000 to March 2004. The four show cause notices were dropped by the Commissioner himself, while in case of nine show cause notices, the proposal to levy duty was confirmed. The matter was carried in appeal before the Tribunal.

4. After hearing the parties, the Tribunal has issued the following directions.

> "(6) We have carefully considered the submissions. We are convinced that the demand is highly disproportionate to the credit availed on the common inputs which could be attributed to goods which have been cleared without payment of duty. We are not going to the merits of the decision of the Commissioner in so far as the same relates to dropping of the demand in the four show cause notices as the Department is not in appeal before us. We are inclined to accept the offer of the appellant-company to reverse the entire credit attributable to the exempted product covered in the nine show cause notices and accordingly we set aside the order of the Commissioner confirming the demand in respect of the nine show cause notices with the direction to consider and accept their offer to reverse the entire credit on the common inputs i.e. caustic soda lye and hydrochloric acid. The department shall re-determine the credit taken on the common inputs i.e., caustic soda lye and hydrochloric acid in so far as they relate to demand proposed in the 9 show cause notices. The assessee shall produce the necessary evidence in the form of chartered accountant's certificate for the relevant period. If any further credit is to be reversed, the same shall be reversed within four weeks from the date of receipt of the communication from the department."

5. The appellant has produced relevant extracts from the relevant Rule of Cenvat Credit Rules, 2002 which relates to obligation of manufacturer of dutiable and exempted products. Under sub-rule (2) of the said Rules, a manufacturer is required to maintain separate accounts regarding inputs used for manufacturing of dutiable products and inputs used for manufacturing of exempted products. However, sub-rule (3) stipulates that, in a case where the manufacturer opts not to maintain separate accounts, the manufacturer shall follow either condition (a) or condition (b), as the case may be. Under the Rule, *Explanation-I* provides that the amount mentioned in any of the conditions shall be paid by the manufacturer by debiting the Cenvat credit or otherwise.

6. Thus, in effect, the directions issued by the Tribunal are merely in consonance with the requirement of the relevant rule, and it is not possible to state that the Tribunal has committed any error in issuing such directions. The respondent-assessee having accepted before the Tribunal to reverse the Cenvat credit as recorded by the Tribunal in paragraph No. 4 of the impugned order as regards reversal of the amount involved and any more amount that may be reversible, the Tribunal has issued directions accordingly.

7. In fact, the directions of the Tribunal primarily go to show that the direction was to re-determine the credit taken on common inputs and accept the offer to reverse such entire credit on common inputs insofar as they relate to demand proposed in the nine show cause notices. The Tribunal has also recorded the undertaking given by the respondent-assessee that if any further credit is to be reversed, the same shall be reversed within four weeks from the date of receipt of the communication from the Department. Hence, in the facts and circumstances of the case, it is apparent that the entire controversy has been decided by the Tribunal by merely remitting the matter back to the Adjudicating Authority to re-determine the credit in accordance with law. If any reversal has been made by the respondent-assessee, the same is subject to verification and adjustment if ultimately any further amount is found reversible.

8. According to the respondent-assessee, the exercise directed by the Tribunal has been carried out as recorded in order dated 2-4-2007, which statement is disputed by the learned advocate for the appellant.

9. In the circumstances, in absence of any question of law, as proposed or otherwise, much less a substantial question of law, the appeal is dismissed.

- **CCE Vs. Mann Pharmaceuticals Ltd.-2011 (263) ELT 661 (Guj.)**

7. As can be seen from the impugned order of the Tribunal, the Tribunal has merely followed the decision of the Supreme Court in the case of *M/s. Chandrapur Magnet Wires Ltd.* (supra), as well as a decision of the jurisdictional High Court in the case of *M/s. Maize Products* (supra). In the case of *Commissioner of Central Excise* v. *Maize Products*, this Court has held as follows :-

> “5. The appellant has produced relevant extracts from the relevant Rule of Cenvat Credit Rules, 2002 which relates to obligation of manufacturer of dutiable and exempted products. Under sub-rule (2) of the said Rules, a manufacturer is required to maintain separate accounts regarding inputs used for manufacturing of dutiable products and inputs used for manufacturing of exempted products. However, sub-rule (3) stipulates that, in a case where the manufacturer opts not to maintain separate accounts, the manufacturer shall follow either condition (a) or condition (b), as the case may be. Under the Rule, Explanation-1 provides that the amount mentioned in any of the conditions shall be paid by the manufacturer by debiting the Cenvat credit or otherwise.
>
> 6. Thus, in effect, the directions issued by the Tribunal are merely in consonance with the requirement of the relevant rule, and it is not possible to state that the Tribunal has committed any error in issuing such directions. The respondent assessee having accepted before the Tribunal to reverse the Cenvat credit as recorded by the Tribunal in paragraph No. 4 of the impugned order as regards reversal of the amount involved and any more amount that may be reversible, the Tribunal has issued directions accordingly.”

8. Examining the impugned order of the Tribunal in the light of the aforesaid decision of this Court, it is not possible to state that the Tribunal has committed any legal infirmity so as to warrant interference. In the circumstances, no question of law, much less, a substantial question of law can be stated to arise out of the impugned order of the Tribunal. The appeal is accordingly dismissed.

In view of the above judgments, it can be seen that on the identical facts that once the assessee reversed the proportionate credit along with interest in the case of any delay, the demand of 5%/10% under Rule 6(3) is not sustainable, accordingly, in the present case also the demand does not sustain.

5. Hence, the impugned order is set aside. Appeal is allowed.

(Pronounced in the open court on 29.10.2021)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Prachi