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

Appeal No. E/11941/2013-DB
[Arising out of OIO-36-COMMISSIONER-2013 dated 15.03.2013 passed by the Commissioner of Central Excise-KUTCH (GANDHIDHAM)]

M/s Welspun Corp Ltd — Appellant

Vs

C.C.E.,- Kutch (Gandhidham) — Respondent

Represented by:
For Appellant: Shri Vikram Nankani & Hardik Modh (Advocate)
For Respondent: Shri J. Nagori (A.R.)

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

Date of Hearing: 08.08.2018
Date of Decision: 03.12.2018

Final Order No. A / 12697 /2018

Per: Ramesh Nair

The issue involved in the present case are as under:

A. Having reversed the proportionate cenvat credit on input services used in relation to generation of Steam and Fly-Ash (exempt goods), is the demand under Rule 6(3) of Cenvat Credit Rules, 2004 valid and sustainable?

B. Having accepted the reversal of proportionate credit on input services used in relation to the electricity (non excisable), can the department take a different stand, and demand amount under Rule 6(3) of Cenvat Credit Rule, 2004 in relation the same in common input services used for generation of Steam and Fly-Ash exempted goods?

C. Whether the demand is barred by limitation under Proviso to Section 11A of Central Excise Act, 1944 read with Rule 14 of Cenvat Credit Rules, 2004?

D. Whether the demand under Rule 6(3) of Cenvat Credit Rules for the period prior to April, 2010 is sustainable in view of the retrospective amendment by the Finance Act, 2010.

2. The brief facts of the case are that the appellant is interalia engaged in the manufacture of excisable goods namely, Hot Rolled Steel Plates, Hot Rolled Steel Coils and MS Pipes. For the purpose of manufacture of said final product, the appellant set up their own Captive Power Plant within the same premises. The appellant consumed substantial amount of electricity and Steam generated by them in manufacture of final product and sold balance amount of electricity to independent buyers. The appellant have availed cenvat credit in respect of common input services which were used in manufacture of their dutiable final product and also generation of electricity, Steam and Fly-Ash which are sold outside the factory to individual buyers without payment of duty, either as the exempted goods or as non excisable goods. During the audit conducted of the appellant's record, it was noticed that the appellant have availed cenvat credit in respect of common input services and used in the manufacture of dutiable final goods as well as exempted goods i.e. Steam and Fly-Ash and non excisable goods namely, electricity sold to independent buyers outside the factory. It was contended by the Revenue that with regard to the exempted goods i.e. Steam and Fly-Ash, the appellant is liable to pay 5% / 10% of the value of such goods in Terms of Rule 6(3) of Cenvat Credit Rules, 2004 and equivalent cenvat credit attributing to the electricity sold outside the factory on the ground that the electricity is not excisable goods and credit can be availed only in respect of input used in excisable goods in terms of Rule 2K of Cenvat Credit Rules, 2004. A SCN was issued whereby the demand of Rs. 12,11,80,520/- was proposed under

Rule 6(3) of Cenvat Credit Rules, 2004 for the period 2007-08 to 2010-11 in respect of Steam and Fly-Ash sold outside the factory. A demand of cenvat credit amounting to Rs. 86,89,075/- was also proposed which is attributed to input services used in or relation to the generation of electricity sold outside the factory for the period 2007-08 to 2010-11 under Rule 14 of Cenvat Credit Rule, 2004 read with Proviso to Section 11A(1) of Central Excise Act, 1944. The adjudicating authority confirmed the proposal made in the SCN, therefore, the appellant filed present appeal.

3. Sh. Vikram Nankani Ld. Senior Advocate with Sh. Hardik Modh Ld. Advocate appeared on behalf of the appellant. He submits that significantly, at the time when common input services are used, it is not possible to predicate how much electricity and Steam shall be used in the manufacture of final product (excisable goods) and what would be the balance electricity and Steam available for sale to third parties. As such, at the time when the credit on common inputs services is taken, the same is correctly availed by the appellant in accordance with law. He submits that the appellant had already reversed the proportionate amount of cenvat credit on input services used in relation to generation of Steam and Fly-Ash and therefore, demand under Rule 6(3) of Cenvat Credit Rules cannot be sustained for manufacture of final product namely, Hot Rolled Steel Plates, Hot Rolled Steel Coils and MS Pipes. The appellant set up individual power plant inside the factory. As the appellant could not store excess electricity and Steam, the appellant sold the excess quantity of electricity and Steam to outsiders. On being pointed out by the Audit Wing of the department about violation of the provisions of cenvat credit Rules, the appellant immediately reversed proportionate amount of cenvat credit of common input services used in

relation to electricity, Steam and Fly-Ash along with interest and informed to the department vide letter dated 30.05.2011 about reversal of the credit. He submits that when the credit attributed to the Steam, Fly-Ash and electricity has been reversed along with interest right from the date of taking credit till the date of reversal. The position is as if the cenvat credit not at all availed from day one, therefore, no contravention of the Rule can be alleged against the appellant. In support of his submission he placed reliance on the following judgments:

- Jay Balaji Industries Ltd 2017 (352) ELT 86 (T)
- Chandrapur Magnet Works (P) Ltd 1996 (81) ELT 3(SC)
- Swiss Parental P. Ltd 2014 (308) ELT 81 (T)
- Maize Products 2009 (234) ELT 431 (Guj)
- Anil Products Ltd 2010 (260) ELT 54 (Guj)
- Ashima Dyecot Ltd 2008 (232) ELt 280 (Guj)
- Maan Pharmaceuticals Ltd 2011 (263) ELT 661 (Guj)
- Star India Private Ltd (2005) 7 SCC 203
- Bombay Dyeing & Mfg. Co. Ltd reported in 2007 (215) ELT 3
- Star Coolers & Condensers (P) Ltd 2017 (352) ELT 77 (T)
- Genus Electrotech Ltd 2013 (296) ELT 175 (Guj)
- Mercedes Benz India (P) Ltd reported in 2015 (40) STR 381
- Aster P. Ltd reported in 2016 (43) STR 411
- Rathi Daga 2015 (38) STR 213 (Tri.Mum)
- Foods, Fats & Fertilisers Ltd 2009 (247) ELT 209 (Tri.Bang)
- Cranes & Structural Engineers reported in 2017 (347) ELT 112 (Tri.Bang)
- IVP Ltd 2017 (349) ELT 18 (Bom)
- INd. Power Ltd 2017 (347) ELT 352 (T)
- ICMC Corp. Ltd 2015 (315) ELT 388 (Mad)

He further submits that the demand is not sustainable for the reason that during the period up to 2010, due to serious ambiguity in operation of Rule 57CC and subsequently Rule 6 for providing mechanism for reversal of cenvat credit attributed to exempted goods/ services, the retrospective amendment was brought in the Finance Act, 2010, whereby it was provided that the dispute can be settled by reversing the proportionate cenvat credit attributing to the exempted goods, therefore on that basis also the reversal made by appellant along with payment of interest is sufficient to comply with the provision of Cenvat Credit Rules, hence no further demand is sustainable against appellant. He further submits that the demand is clearly hit by limitation inasmuch as a SCN for the period April 2007 to Sep 2011 was issued on dated 24.04.2012. He submits that the appellant have been filing their statutory returns regularly and shown availment of credit of various inputs, input services and capital goods installed/used and consumed in their units. The appellant disclosed all requisite information in the returns, they did not suppress any fact from the department. In this regard he placed reliance on the following judgment:

- Meghmani Dyes & Intermediates Ltd 2013 (288) ELT 514 (Guj)
- Central Warehousing Corpoation 2016 (41) STR 106 (T)
- Adani Gas Pvt. Ltd affirmed by the Hon'ble Gujarat High Court 2017 (356) ELT 541)
- Adani Gas Ltd. 2016 (356) ELT 541 (Guj.)

4. The appellant being Public Limited Company, profit & loss and balance sheet are in public domain, in terms of section 211(2) of the Companies Act read with Note 4C of part II Schedule VI of the Companies Act, 1956. The appellant disclosed the licensed and installed capacity of their Captive Power Plant and production and sales figure of

electricity and Steam by their unit and the amount realized by them from such sales in their profit & loss account, the appellant made all the disclosure mandated under applicable law. They did not suppress any fact from the departmental authority and therefore, it cannot be said that the appellant suppressed or attempted to suppress any particulars that they sold Steam and electricity during the disputed period, therefore, the demand for extended period is not sustainable. He submits that on the basis of the above fact since no suppression is involved, the imposed penalty is also unsustainable. Without prejudice to the above aforesaid submission, it is submission of the Ld. Counsel that the appellant reversed the cenvat credit since the omission was pointed out by the audit wing, till then the appellant had not utilized cenvat credit availed of common input services used in generation of electricity and Steam. Availment of wrongful amount of cenvat credit was always lying unutilized during disputed period, therefore, it cannot be said that the appellant had any intention to evade payment of central excise duty. In the following decision it is held that penalty under Rule 15 cannot be imposed if wrongful availment of credit is lying undisputed in the Cenvat Credit Register.

- Grasim Bhiwani Textiles Ltd 2016 (332) ELT 865 (T)
- Strategic Engineers (P) Ltd 2014 (310) ELT 509 (Mad.)
- Tata Business Support Service Ltd 2017 (52) STR 346 (T)
- Multiservice Rolls Ltd 2007 (215) ELT 119 (T)

5. Sh. J Nagori Ld. Additional commissioner (AR) appearing on behalf of the Revenue reiterates the findings of the impugned order.

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:-*
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> *(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 percent. of value of the exempted services; or*
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> *(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 specifiedin sub-rule (3A).*
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> ***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.*
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> ***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 option 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 3(A) 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) ELT 86 (T) held in para 5 that:

> *"**5.** The Hon'ble Supreme Court in the case of Chandrapur Magnet Works (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.*
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> *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) ELT 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) ELT 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) STR 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) ELT 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 malafide 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.

(Pronounce in the open court on 03.12.2018)

(Raju)
Member (Technical)

(Ramesh Nair)
Member (Judicial)

Seema