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

Appeal No.E/10266,10267,11892,11953,12613,12788/2014-DB

[Arising out of OIO-RAJ-EXCUS-000-COM-128-129-13-14 dated 30.10.2013 passed by the Commissioner – Rajkot]
[Arising out of OIO-RAJ-EXCUS-000-COM-186-13-14 dated 20.02.2014 passed by the Commissioner – Rajkot]
[Arising out of OIO-RAJ-EXCUS-000-COM-003-14-15 dated 29.04.2014 passed by the Commissioner – Rajkot]
[Arising out of OIO-RAJ-EXCUS-000-COM-003-14-15 dated 01.05.2014 passed by the Commissioner – Rajkot]

Appeal No.E/10126/2016-DB

[Arising out of OIO-RAJ-EXCUS-000-PR-COM-03-15-16 dated 30.10.2015 passed by the Commissioner– Rajkot]

M/s Bombay Minerals Ltd. Appellant
C.C.E. & S.T. Rajkot

Vs

C.C.E. & S.T. Rajkot Respondent
Bombay Minerals Ltd.

Represented by:
For Appellant: Mr. S.S. Gupta (C.A.)
For Respondent: Mr. Sameer Chitkara (AR)

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

Date of Hearing:04.09.2018
Date of decision:02.01.2019

Final Order No. A/ 10017-10023 /2019

Per: Ramesh Nair

Brief facts of the case are that the appellant M/s Bombay Minerals Ltd. is engaged in the mining of Bauxite from the mines. After the process of mining the mined bauxite is segregated into Low Grade (LG) Bauxite and High Grade (HG) Bauxite at the mines itself. The appellant directly sells Low Grade Bauxite from the mines itself without bringing the same to their factory whereas High Grade bauxite is sent to the factory for calcination. High Grade Bauxite is then cleared from the factory on payment of duty. The appellant has availed cenvat credit on various common input service such as Insurance Service, Telephone Service, Audit

Charges etc. These services are used for mining as well as manufacturing process carried at factory. Accordingly, SCN dated 29.03.2011 was issued to the appellant for the period March 2006 to March 2010, alleging that the Low Grade Bauxite is an exempted product under Notification No. 4/2006-CE. Since the appellant had availed cenvat credit in respect of common input service which are used for both dutiable and exempted product the appellant is required to pay an amount @ 10%/ 5% of the value of exempted goods in terms of Rules 6(3) of Cenvat Credit Rules, 2004 for the period 2005-2006 onwards. Similar SCNs were issue for the subsequent periods. The adjudicating authority i.e. Commissioner vide various orders confirmed the demand along with interest and penalty. Aggrieved by the said orders, the appellant filed different appeals. The department has also filed two separate appeals with respect to reduce penalty. The details of all the appeals are given as under:-

S. No.	Appeal NO.	Period	Amount	Penalty	Appeal filed by
1	E/10266/2014-Ex(DB)	Mar. 06 to Mar 10	11,39,22,977/-	11,39,22,977/-	Assesse
2	/2014-Ex(DB)	Apr. 10 to Mar 11	20,788/-	20,788/-	Assesse
3	/2014-Ex(DB)	Oct. 12 to Mar 13	1,72,96,840/-	5,00,000/-	Assesse
4	/2014-Ex(DB)	Oct. 12 to Mar 13	0	-	Revenue appeal
5	/2014-Ex(DB)	Apr. 13 to Sept. 13	64,77,619/-	5,00,000/-	Assesse
6	/2014-Ex(DB)	Apr. 13 to Sept. 13	0	-	Revenue appeal
7	/2014-Ex(DB)	Oct 13 to Mar 14	1,99,44,969/-	40,00,000/-	Assesse
			Total	15,76,63,193/-	11,89,43,765/-

2. Sh. S. S. Gupta, Ld. CA appearing on behalf of the assesse submits that it is admitted in para 2 of SCN that the appellant

segregated Low Grade Bauxite and same is sold from the mining area to the buyers. The Low Grade Bauxite is not transferred to the factory, therefore, no process is carried out on the Low Grade Bauxite. Hence, the same is not an excisable goods. He relies upon the following judgments wherein it has been held that process of mining is not a manufacture of goods, therefore, the said goods are not excisable.

- CCE vs Steel Authority of India Ltd. 2003 (154) ELT 65 (Tri. Kol)
- Hyderabad Industries Ltd 195 (78) ELT 641 (SC)
- Mineral and Metals Trading Corp. of India 1983 (13) ELT 1542 (SC)
- Wolkem India Ltd. 1997 (92) ELT 219 (Tri.)

3. He further submits that Rule 6 of Cenvat Credit Rules 2004 does not apply for non-excisable goods. As per definition of exempted goods given in Rule 2(d) of Cenvat Credit Rules, 2004, the exempted goods are only those goods which are excisable goods. Since Low Grade Bauxite is not an excisable goods it cannot considered as exempted goods also. Hence, provisions of Rule 6 does not apply. Consequently, the demand of 10% of the value of Low Grade bauxite is not legal and correct. For this proposition, he relies upon the following judgments:

- Sahni Strips & Wires (P) Ltd. 2012 9283) ELT 418 (Tri. Del.)
- SCI India Ltd. 2008 (221) ELT 565 (Tri.)
- S D Fine Chem Ltd. 2012 (27) STR 106 (Tri.)

4. Without prejudice to the above submission, he further submits that the assesse have availed credit on general insurance,

telephone, audit fees etc., these service are commonly utilized at the factory as well as at the mining area. Hon'ble Tribunal in the case of Orion Appliances Ltd. 2010 (19) STR 205 (Tri. Amd.) with regard to trading activity held that the appellant is only required to reverse the credit availed in respect of trading activity. Similarly in this case also the assesse are only required to reverse the proportioned amount of common credit which were utilized for both the activities, namely, mining and also process carried out in the factory.

5. He also submits that even in respect of Rule 6 it has been consistently held that only proportionate credit is required to be reversed in the following judgments:

(a) Commissioner of Central Excise, Mumbai Vs. IVP Ltd, 2017 (349) ELT 18 (BOM)
(b) Shree Rama Multi Tech Ltd Vs. Union of India 2011 (267) ELT 153 (Guj)

6. As per the above judgments the same principal can be applied for reversal of credit attributable to use of input services in mining area. As per Ld. Commissioner finding in para 17 of the order that subsequent reversal of credit does not amount to compliance of provisions of rule 6(1). In the following judgment it has been consistently held that subsequent reversal of credit is equivalent to non-availment of the credit.

(a) Hello Minerals Water (P) Ltd Vs. Union of India 2004 (174) ELT 422 (All.)
(b) CCE V/s Ashim Dyecot Ltd 2008 (12) ARE 701 (Guj)

(c) CCE Vadodara Vs. Ram Krishna Travels Pvt. Ltd, 2010 (17) STR 487 (Tri. Ahmd)

(d) Face Ceramics Pvt Ltd Vs. CCE., Rajkot 2010 (249) ELT 119 (Tri. Ahmd)

7. Ld. Commissioner also observed in para 21 of the order that option under rule 6(3A) can be exercised only after intimating the same to jurisdictional range officer. He submitted that even if the subsequent intimation was not given, proportionate reversal of credit shall be allowed. In this regard, he placed reliance on the following judgments:

(a) Mercedez Benz India (P) Ltd V. Commissioner of C.Ex. Pune-1, 2015 (40) STR 381 (Tri. Mumbai)

(b) Sahyadri Starch & Industries Pvt. Ltd. Final Order – A/85556/16/EBH

(c) Ciron Drugs & Pharma P. Ltd. 2016-TIOL-1415-CESTAT-MUM

8. He further submits that the rule 6 was retrospectively amended by Section 72 of Finance Act, 2010, according to which the provision for proportionate reversal in respect of the common input credit was brought. Therefore, the intention of the legislature was always that even the proportionate credit attributed to non-excisable, exempted goods is made no further demand can be raised. He submitted that even for proportionate reversal of credit it should be confined to the common credit like telephone, audit fees etc. While computing the proportionate amount of reversal. The credit which has been exclusively used in the factory for manufacture of high grade bauxite which is cleared on payment of duty should not be considered while computing the proportionate amount of credit. He submits that rule 6

of Cenvat Credit Rules, 2004 was amended w.e.f. 1-4-2008 whereby the reversal of credit on proportionate basis was introduced. At the time of introduction of proportionate reversal under Rule 6(3), the TRU Circular no. F. No. 334/1/2008-TRU New Delhi, dated 29th February, 2008 clarified that Rule 6 "is being amended to provide the following options to a provider of output services, for providing taxable as well as exempted services and opting not to maintain separate accounts, namely:-

i. Either reverse the credit attributable (to be worked out in a manner prescribed in the rule) to the inputs and input services used for providing exempted service, or

ii. pay 8% of value (to be determined in accordance with section 67 of the Finance Act, 1994) of the exempted service.

9. He also placed reliance on the Hon'ble CESTAT order in the case of IBM India Pvt Ltd vide No. 20300/2015 dated 11th February 2015 wherein it has been held that credit reversal is not required to be made in case of input services which are used exclusively for dutiable services. He further submits that Rule 6 was amended w.e.f 01-04-2016 to clearly provide that proportionate reversal of credit shall be computed for common credit only. He referred to CBEC DOF letter No. 334/8/2016-TRU dated 29-2-2016. He submits that right from the beginning though the Rule has been amended from time to time but the intention of the legislature was that if the proportionate credit attributable to the exempted goods/ services made, no further demand can be raised. In the present case the appellant have already reversed the entire amount of the common credit and intimated the same to the department from time to time. He relied upon the judgment of Hon'ble Gujarat High Court in the case of Maan

Pharmaceuticals 2011 (263) ELT 661 (Guj.) and Maize Products 2009 (234) ELT 431 (Guj.) wherein it was held that when entire credit is reversed, the provision of rule 6 does not apply. The department's appeal to Supreme Court against order of High Court in the case of Maize Product has been dismissed. He further submits that since assessee have reversed the Cenvat Credit with interest in the case wherever there has been delay in reversal of credit, the demand under Rule 6 that is 10%/ 5% of value of exempted goods does not sustain. Consequently, the penalty under Rule 15 of Cenvat Credit Rules, read with section 11AC of Central Excise Act, 1944 also not survive.

10. Shri. Sameer Chitkara, Ld. Additional Commissioner (AR) appearing on behalf of the Revenue reiterates the findings of the impugned order as regard appeal filed by the assessee. As regard the Revenue's appeal, he submits that since, the entire demand has been confirmed invoking extended period. The Ld. Commissioner ought to have imposed penalty equal to the amount confirmed invoking section 11AC, therefore, Revenue's appeal seeking increase in the penalty equivalent to the demand confirmed deserve to be allowed.

11. We have considered the submissions made by both the sides and perused the records. The case of the department is that since the assesse has availed the cenvat credit in respect of common input service used in the manufacture of Low Grade Bauxite which is cleared without payment of duty and also for manufacture of High Grade Bauxite which was cleared on payment of duty, the appellant is required to pay 10%/5% of the value of the goods cleared without payment of duty (exempted goods). From the facts it is undisputed that the appellant have been reversing cenvat

credit proportionate to the credit on input service used for exempted goods along with interest, therefore, first the credit though availed at the time of receipt of input service but after reversal thereof along with interest the position is if credit was not availed. Moreover this issue has been consistently considered in various judgments wherein it was held that if the assesse reversed the cenvat credit in respect of common input service used in the manufacture of dutiable and exempted goods the demand equal to 10%/ 5% will not sustain. In the case of Mercedez Benz (India) Pvt. Ltd. (supra) this Tribunal has, dealing with identical issue, passed the following order:

> ***"5.*** *We have considered the submissions made by both sides. From the facts and circumstances of the case and arguments put forth by rivals, we find that the issue to be decided by us is whether appellant is required to pay 5% of total sale value of the goods traded by them in terms of Rule 6(3)(i) when the appellant paid the actual credit attributed to the quantum trading sale in terms of Rule 6(3A) alongwith interest following the option available under Rule 6(3)(ii). Provisions for payment of 5% of the sale value of exempted goods is provided as one of the option given in Rule 6(3) of Cenvat credit Rules which is reproduced below :-*
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> ***RULE 6. Obligation of a manufacturer or producer of final products and a [provider of output 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.*

Explanation 1. - For the purposes of this rule, exempted goods or final products as defined in clauses (d) and (h) of Rule 2 shall include non-excisable goods cleared for a consideration from the factory.

Explanation 2. - Value of non-excisable goods for the purposes of this rule, shall be the invoice value and where such invoice value is not available, such value shall be determined by using reasonable means consistent with the principles of valuation contained in the Excise Act and the rules made thereunder.

(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 of goods 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 percent 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 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 [six per cent.] of the value so exempted.

Provided also that in case of transportation of goods or passengers by rail the amount required to be paid under clause (i) shall be an amount equal to 2 per cent. of value of the exempted services.

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.

Ld. Adjudicating Authority demanded 5% of the total sale of the trading turnover of goods on the ground that option

provided under Rule 6(3)(i) is applicable on the ground that claim of the appellant on the option provided under Rule 6(3)(ii) is not available for the reason that appellant has not complied with condition provided under sub Rule (3A) of Rule 6 which provides that manufacturers of the goods shall follow certain procedure and conditions as provided under sub-rule (3A)(a)(i) to (iv) inasmuch as the appellant have not given said information in writing to the Jurisdictional Superintendent of Central Excise. Secondly the appellant, as provided under Claus (b) of sub-rule (3A) have not paid the amount of Cenvat on monthly basis and paid after almost 11 months.

5.1 *We have observed that in Rule 6(3) prevalent at the relevant time, two options have been provided :-*

(i) Payment of 5% on value of exempted services.

(ii) Payment of an amount equal to the Cenvat Credit amount attributed to input services used in or in relation to manufacture of exempted goods or provision of exempted services as provided under sub rule (3A)(b).

It is observed that the appellant has availed the option provided under sub-rule (3)(ii) of Rule 6 and paid an amount as per sub-rule (3A) along with interest and intimated the same to the jurisdictional superintendent in writing vide letter dated 14-3-2012. From the perusal of the said letter, we observed that the appellant categorically stated in the said letter that payment of Cenvat Credit, which they have made alongwith interest is in accordance with Rule 6 (3A) of Cenvat Credit Rules. With this act of the appellant, it is clear that the appellant opted for the option as provided under Rule 6(3)(ii) of the Cenvat Credit Rules, 2004, in accordance to which, the appellant are supposed to an amount equivalent to Cenvat Credit on input service attributed to the exempted service in terms of Rue 6(3A). In the present case, the appellant has availed Cenvat credit in respect of common input services, which has been used in relation to the manufacture of the final product as well as for trading of bought out cars. Therefore they are supposed to pay an amount equivalent to Cenvat credit which is attributed to the input service used for exempted service i.e. sale of car. In our view, three options have been provided under Rule 6(3) and it is up to the assessee that which option has to be availed. Revenue could not insist the appellant to avail a particular option. In the present case the appellant have admittedly

availed option as provided under Rule 6(3)(ii) and paid an amount as required under sub-rule (3A) of Rule 6. As regard the compliance of the procedure and conditions as laid down for availing option as provided under sub-rule (3)(ii), we find that foremost condition is that the appellant is required to pay an amount as per the formula provided under sub-rule (3A) on monthly basis. However, we find that as per the provision, payment on monthly basis is provisional basis, therefore it is not mandatory that whole amount or part of the amount was required to be paid on every month. The appellant though belatedly calculated the amount required to be paid in terms provided under sub-rule (3A) of Rule 6, therefore to fulfill the condition, assessee should pay the said amount, which has been complied by the appellant.

5.2 *As regard the delay in payment, if any, the appellant have discharged the interest liability on such delay. Regarding the compliance as provided under Clause (a) of sub-rule (3A) of Rule 6 the appellant while exercising this option is required to intimate in writing to the Jurisdictional Superintendent, Central Excise, 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.

As per the submission of the appellant and perusal of their letter along with enclosed details, it is found that more or less all these particulars were intimated to the Jurisdictional Superintendent. The appellant has been filing their returns regularly on monthly basis to the department. On perusal of the copies of the such return submitted along with appeal papers, it is observed that the particulars, as required under clause (a) of sub-rule (3A) of Rule 6 has been produced to the range superintendent. Therefore all the particulars which are required to be intimated to the Jurisdictional superintendent while exercising option stand produced. Though these

particulars have not been submitted specifically under a particular letter, but since these particulars otherwise by way of return and some of the information under their letters has admittedly been submitted, we are of the view, as regard this compliance of Rule 6(3A), it stood made.

5.3 *As regard the contention of the adjudicating authority that this option should be given in beginning and before exercising such option, we are of the view that though there is no such time limit provided for exercising such option in the rules but it is a common sense that intention of any option should be expressed before exercising the option, however the delay can be taken as procedural lapse. We also note that trading of goods was considered as exempted service from 2011 only, thus it was initial period. We are also of the view that there is no condition provided in the rule that if a particular option, out of three options are not opted, then only option of payment of 5% provided under Rule 6(3)(i) shall be compulsorily made applicable, therefore we are of the view that Revenue could not insist the appellant to avail a particular option. In the present case admittedly it is appellant who have on their own opted for option provided under Rule 6(3)(ii). The meaning of the option as argued by the Ld. Sr. Counsel is that "option of right of choosing, something that may be or is chosen, choice, the act of choosing". From the said meaning of the term 'option', it is clear that it is the appellant who have liberty to decide which option to be exercised and not the Revenue to decide the same.*

5.4 *We find that the appellant admittedly paid an amount of Rs. 4,06,785/- plus interest, this is not under dispute. Therefore in our view, the appellant have complied with the condition prescribed under Rule 6(3)(ii) read with sub-rule (3A) of Rule 6 of Cenvat Credit Rules, therefore demand of huge amount of Rs. 24,71,93,529/- of the total value of the vehicle amounting to. Rs. 494,38,70,577/- sold in the market cannot be demanded. We are also of the view that Rule 6 of the Cenvat Credit Rules is not enacted to extract illegal amount from the assessee. The main objective of the Rule 6 is to ensure that the assessee should not avail the Cenvat Credit in respect of input or input services which are used in or in relation to the manufacture of the exempted goods or for exempted services. If this is the objective then at the most amount which is to be recovered shall not be in any case more than Cenvat Credit attributed to the input or input services used in the exempted goods. It is also observed that*

in either of the three options given in sub-rule (3) of Rule 6, there is no provisions that if the assessee does not opt any of the option at a particular time, then option of payment of 5% will automatically be applied. Therefore we do not understand that when the appellant have categorically by way of their intimation opted for option provided under sub-rule (3)(ii), how Revenue can insist that option (3)(i) under Rule 6 should be followed by the assessee.

5.5 *As discussed above and in the facts of the case that actual Cenvat credit attributed to the exempted services used towards sale of the bought out cars in terms of Rule 6(3A) comes to Rs. 4,06,785/- where as adjudicating authority demanded an amount of Rs. 24,71,93,529/-. In our view, any amount, over and above Rs. 4,06,785/- is not the part of the Cenvat Credit, which required to be reversed. The legislator has not enacted any provision by which Cenvat credit, which is other than the credit attributed to input services used in exempted goods or services; can be recovered from the assessee.*

5.6 *We have gone through judgments relied upon by the Ld. A.R. In the arguments, we found that as regards the judgments on the issue of availment of Cenvat credit on the input or input services used in dutiable and exempted goods, the provision involved in the present case i.e. Rule 6(3) (i) (ii) (3A) has not been considered in the relied upon judgments, therefore the same are not applicable. As regard the other judgments, all these judgments having different facts and dealing with other provisions such as SSI exemption, exemption notification, etc., which are not identical to the fact of the present case, Moreover, in the present case the substantive provisions under Rule 6(3)(ii) and sub rule (3A) i.e. payment of equivalent to the Cenvat credit, which the appellant have complied with and if at all there is delay, the required interest has also been paid, therefore in the present case, there is no case of noncompliance of procedure and condition. Therefore the judgments cited by the ld. A.R. are not applicable.*

6.1 *In view of these observations, we are of the considered view that demand confirmed by the adjudicating authority has no legs and therefore the same cannot be sustained. The impugned order is set aside and Appeal is allowed."*

12. Dealing with similar issue in the case of Sahyadri Starch & Industries Pvt. Ltd. vide Final order No. A/85556/2016-DB dated 04.02.2016 passed the following order.

5. We find that it is an admitted fact that the appellants have availed credit amounting to Rs.54,01,113/-. It is not disputed by Revenue that for some of these services in respect of which credit has been taken fall under Rule 6 (5) of the Cenvat Credit Rules and in respect of those credit has to be allowed irrespective of the facts that same are used in the production of exempted goods.

5.1 The tribunal in the case of Mercedes Benz India Pvt. Ltd. (supra) has observed as follows:

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Appeal No.E/220/12

5.1 We have observed that in Rule 6(3) prevalent at the relevant time, two options have been provided :-

(i) Payment of 5% on value of exempted services.

(ii) Payment of an amount equal to the Cenvat Credit amount attributed to input services used in or in relation to manufacture of exempted goods or provision of exempted services as provided under sub rule (3A)(b).

It is observed that the appellant has availed the option provided under sub-rule (3)(ii) of Rule 6 and paid an amount as per sub-rule (3A) along with interest and intimated the same to the jurisdictional superintendent in writing vide letter dated 14-3-2012. From the perusal of the said letter, we observed that the appellant categorically stated in the said letter that payment of Cenvat Credit, which they have made alongwith interest is in accordance with Rule 6 (3A) of Cenvat Credit Rules. With this act of the appellant, it is clear that the appellant opted for the option as provided under Rule 6(3)(ii) of the Cenvat Credit Rules, 2004, in accordance to which, the appellant are supposed to an amount equivalent to Cenvat Credit on input service attributed to the exempted service in terms of Rue 6(3A). In the present case, the appellant has availed Cenvat credit in respect of common input services, which has been used in relation to the manufacture of the final product as well as for trading of bought out cars. Therefore they are supposed to pay an amount equivalent to Cenvat credit which is attributed to the input service used for exempted service i.e. sale of car. In our view, three options have been provided under Rule 6(3) and it is up to the assessee that which option has to be availed. Revenue could not insist the appellant to avail a particular option. In the present case the appellant have admittedly availed option as provided under Rule 6(3)(ii) and paid an amount as required under sub-rule (3A) of Rule 6. As regard the compliance of the procedure and conditions as laid down for availing option as provided under sub-rule (3)(ii), we find that foremost condition is that the appellant is required to pay an amount as per the formula provided under sub-rule (3A) on monthly basis. However, we find that as per the provision, payment on monthly basis is provisional basis, therefore it is not mandatory that whole amount or part of the amount was required to be paid on every month. The appellant though belatedly calculated the amount required to be paid in terms provided under sub-rule (3A) of Rule 6, therefore to fulfill the condition, assessee should pay the said amount, which has been complied by the appellant.

5.2 As regard the delay in payment, if any, the appellant have discharged the interest liability on such delay. Regarding the compliance as provided under Clause (a) of sub-rule (3A) of Rule 6 the appellant while exercising this option is required to intimate in writing to the Jurisdictional Superintendent, Central Excise, 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.

As per the submission of the appellant and perusal of their letter along with enclosed details, it is found that more or less all these particulars were intimated to the Jurisdictional Superintendent. The appellant has been filing their returns regularly on monthly basis to the department. On perusal of the copies of the such return submitted along with appeal papers, it is observed that the particulars, as required under clause (a) of sub-rule (3A) of Rule 6 has been produced to the range superintendent. Therefore all the particulars which are required to be intimated to the Jurisdictional superintendent while exercising option stand produced. Though these particulars have not been submitted specifically under a particular letter, but since these particulars otherwise by way of return and some of the information under their letters has admittedly been submitted, we are of the view, as regard this compliance of Rule 6(3A), it stood made.

5.3 As regard the contention of the adjudicating authority that this option should be given in beginning and before exercising such option, we are of the view that though there is no such time limit provided for exercising such option in the rules but it is a common sense that intention of any option should expressed before exercising the option, however, the delay can be taken as procedural lapse. We also note that trading of goods was considered as exempted service from 2011 only, thus it was initial period. We are also of the view that there is no condition provided in the rule that if a particular option, out of three

options are not opted, then only optin of payment of 5% provided under Rule 6 (3) (i) shall be compulsorily made applicable, therefore we are of the view that Revenue could not insist the appellant to avail a particular option. In the present case admittedly it is appellant who have on their own opted for option provided under Rule 6 (3) (ii). The meaning of the option as argued by the Ld. Sr. Counsel is that "option of right of choosing, something that may be or is chosen, choice, the act of choosing". From the said meaning of the term "option", it is clear that it, is the appellant who have liberty to decide which option to be exercised and not the Revenue to decide the same."

t is clear from the above decision that Revenue is not at liberty o impose any of the options given in Rule 6 (3) of Cenvat Credit Rules, on the appellant. Even if the appellants failed to exercise the option and failed to follow due procedure, such failure does not take away substantial right of the appellant. In view of the above offer of the appellant to reverse proportionate ineligible credit in terms of Rule 6 (3) (ii) of the Cenvat Credit Rules has merit.

5.1 It is seen that in the case of Maize Products (supra) the Hon'ble High Court of Gujarat has observed 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-I provides that the amount mentioned in any of the conditions shall be paid by the manufacturer by debiting the Cenvat credit or otherwise.

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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.

5.2 It is further observed that the appellants had already reversed certain amounts but they have not paid interest as yet. The Counsel for the appellant has accepted to pay the interest applicable on ineligible credit which is required to be reversed.

6. In view of the above, it is seen that no option under Rule 6 (3) can be imposed on the appellant and the appellants' offer of availing the option of proportionate credit in terms of Rule 6 (3) (ii) cannot be denied to them. However, they will be liable to pay interest on the amounts which are reversed. The order-in-original is set aside and the matter is remanded to Commissioner

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to calculate the amount required to be reversed and the interest payable thereon.

(Pronounced in Court on 4/2/16)

Sd/- Sd/-

(Ramesh Nair) (Raju)
Member (Judicial) Member (Technical)

pj

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.

(Pronounced in the open court on 02.01.2019)

(Raju)
Member (Technical)

(Ramesh Nair)
Member (Judicial)

Neha