

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

REGIONAL BENCH- COURT NO.3

Excise Appeal No.10137 of 2013

(Arising out of OIO-82&83/COMMR/2012 dated 24/12/2012 passed by Commissioner of Central Excise-RAJKOT)

Shree Digvijay Cement Co Ltd

.....Appellant

Digvijay Gram,
Jamnagar, Gujarat

VERSUS

C.C.E. & S.T.-Rajkot

.....Respondent

Central Excise Bhavan,
Race Course Ring Road...Income Tax Office,
Rajkot, Gujarat-360001

APPEARANCE:

Shri J.C. Patel & Shri Rahul Gajera, (Advocates) for the Appellant
Shri. Tara Prakash, Assistant Commissioner (AR) for the Respondent

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

Final Order No. A/ 10008 /2023

DATE OF HEARING: 20.12.2022
DATE OF DECISION: 05.01.2023

RAMESH NAIR

The issue involved in the present case is that whether the benefit of captive consumption exemption notification no.67/95-CE dated 16.03.1995 can be denied to the quantity of Clinker which was used within the factory to manufacture of the part of the cement which was cleared against International competitive bidding with duty exemption under Serial No. 91 of Notification No.6/2006-CE dated 01.03.2006..

02. Shri J.C. Patel, learned counsel appearing on behalf of the appellant at the outset submits that this issue has been considered by this tribunal in the appellant's own case and also other judgments. He placed reliance on the following judgments:-

- SHREE DIGVIJAY CEMENT CO LTD- 2018 (11) TMI-300-CESTAT-Ahmedabad
- THERMO CABLES LTD.- 2013 (292) ELT 412
- KEI INDUSTRIES LTD.- 2017 (357) ELT 1230

- BHARAT ALUMINIUM CO LTD.- 2017 (345) ELT 685
- ULTRATECH CEMENTS LTD.- 2016 (343) ELT 164

03. Shri Tara Prakash, learned Assistant Commissioner (AR) appearing on behalf of the revenue reiterates the finding of the impugned order.

04. We have carefully considered the submissions made by both the sides and perused the records. We find that the identical issue in the appellant’s own case has been considered by this tribunal and by detailed order the appeal was allowed. The relevant order portion is reproduced below:-

4. We have carefully considered the submissions made by both the sides and perused the records, we find that the appellant have manufactured Clinker which is an intermediate product and the same was consumed in the manufacturing of other final product i.e. Cement. The said final product i.e. Cement has been cleared against "International Competitive Bidding" in terms of Exemption Notification No. 6/2006-CE dated 01.03.2006, according to which the rate of duty is nil. The appellant availed Exemption Notification in respect of the Clinker under notification 67/95-CE which reads as under:

"In exercise of the powers conferred by subsection (1) of section 5A of the Central Excise Act, 1944 (1 of 1944), read with sub-section (3) of section 3 of the Additional Duties of Excise (Goods of Special Importance Act, 1957 (58 of 1957), (herein after referred to as the said Special Importance Act), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts.

i) capital goods as defined in rule 3 of the CENVAT Credit Rules, 2002, manufactured in a factory and used within the factory of production;

(ii) goods specified in column (1) of the Table hereto annexed (hereinafter referred to as 'inputs') manufactured in a factory and used within the factory of production in or in relation to manufacture of final products specified in column (2) of the said Table;

from the whole of the duties of excise leviable thereon which is specified in the Schedules to the Central Excise Tariff Act, 1985 (5 of 1986) or additional duty of excise leviable thereon, which is specified in the Schedule to the said Special Importance Act:

Provided that nothing contained in this notification shall apply to inputs used in or in relation to the manufacture of final products which are exempt from the whole of the duty of excise or additional duty of excise leviable thereon or are chargeable to nil rate of duty, other than those goods which are cleared :-

i. to a unit in a Special Economic Zone, or

ii. to a hundred per cent Export Oriented Undertaking or

iii. to a unit in an Electronic Hardware Technology Park, or

iv. to a unit in a Software Technology Park, or

v. under notification No. 108/95-CE, dated the 28th August, 1995, or

vi. by a manufacturer of dutiable and exempted final products, after discharging the obligation prescribed in rule 6 of the CENVAT Credit Rules, 2001.

Table

Description of inputs	Description of final products
(1)	(2)
All goods falling under the First	All goods falling under the

<i>Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), other than light diesel oil, high speed diesel oil and motor spirit, commonly known as petrol</i>	<i>First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986),</i>
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5. From the plain reading of the above notification, it is observed that as per the above Notification, exemption is available in respect of goods used captively in the factory, within the factory of production in relation to manufacturing of final product. The Proviso to above notification provides that nothing contain in this Notification shall apply to inputs used in or relation to the manufacture of final product which are exempted from the whole duty of excise or chargeable to nil rate of duty, however the exception to this Proviso is provided in respect of supplies meant as mentioned in Clause I to V and also under Clause (VI) when the obligation prescribed in Rule 6 of Cenvat Credit Rule, 2001 is discharged. The Exemption is available in respect of inputs used captively even though the final product is cleared under exemption as per Rule 6(6)(vii) of Cenvat Credit Rules, 2004 since the appellant's supply of final product is under Notification no. 6/2006-CE. The appellant has discharged the obligation prescribed in Rule 6 of Cenvat Credit Rules, 2004, therefore, even though the final product of the appellant is cleared under exemption from the whole of the duty but since it is under Notification 6/2006-CE in terms of Rule 6(6)(vii) of Cenvat Credit Rules, the Notification No.67/95-CE is legally eligible to the supply made by the appellant. This issue has been considered in the case of Thermo Cables Ltd (Supra) wherein the Tribunal has passed the following order:

"4.After considering the submissions, we have found great force in the submissions made by the learned counsel. It is not in dispute that the final products were cleared without payment of duty under Notification No.6/2006 CE which, at Sl.No.91 thereof, prescribed "nil" rate of duty for all goods (falling under any chapter) supplied against international competitive bidding. This exemption was subject to the condition that the goods were exempted from basic customs duty and additional duty of customs when imported into India. It is not in dispute that the final products cleared by the assessee without payment of duty during the relevant period satisfied this condition. Against this backdrop, one has to read the provisions of Rule 6(6)(vii) of the CENVAT Credit Rules 2004. This sub-rule reads as follows:-

(6) The provisions of sub-rules (1), (2), (3) and (4) shall not be applicable in case the excisable goods removed without payment of duty are either

(i) -----

(ii) -----

(iii) -----

(iv) -----

(v) -----

(vi) -----

(vii) all goods which are exempt from the duties of customs leviable under the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) and the additional duty leviable under Section 3 of the said Customs Tariff Act when imported into India and supplied against International Competitive Bidding in terms of Notification No.6/2002-Central Excise dated the 1st March, 2002 or

Notification No.6/2006-Central Excise dated the 1st March, 2006, as the case may be.

*From the above provision, it is clear that the appellant did not have any liability under sub-rule (2) to maintain separate accounts for receipt, consumption and inventory of inputs meant for use in the manufacture of dutiable final products and inputs meant for use in the manufacture of exempted goods, nor did the assessee have alternative liability under sub-rule (3) to pay an amount equal to 10% of the value of the exempted goods. This is because their final products were cleared against international competitive bidding in terms of Notification No.6/2006 CE *ibid*.*

5. Against the above backdrop, one has to examine the scope of Notification No.67/95 CE dt. 16/03/1995 (as amended) in so far as the present case is concerned. The opening paragraph of this Notification exempts from payment of CE duty any inputs manufactured in a factory and used within the same factory in or in relation to the manufacture of final products. Input must be one of those specified in the first column and the final product must be one of those specified in the second column of the table annexed to the Notification. Admittedly, copper wire is one of the inputs and the power cables manufactured and cleared by the assessee are final products covered by the Notification. However, the Department would like to deny the benefit of this Notification to copper wire manufactured by the assessee and captively consumed in their factory for the manufacture of insulated (power) cables. According to the Revenue, the assessee's claim is hit by the proviso to the Notification, which reads as under:

Provided that nothing contained in this notification shall apply to inputs used in or in relation to the manufacture of final products which are exempt from the whole of the duty of excise or additional duty of excise leviable thereon or are chargeable to nil rate of duty, other than those goods which are cleared, -

- (i) to a unit in a Free Trade Zone, or*
- (ii) to a hundred per cent Export Oriented Undertaking, or*
- (iii) to a unit in an Electronic Hardware Technology Park, or*
- (iv) to a unit in a Software Technology Park, or*
- (v) under notification No.108/95-Central Excise, dated the 28th August, 1995, or*
- (vi) by a manufacturer of dutiable and exempted final products, after discharging the obligation prescribed in Rule 6 of the CENVAT Credit Rules, 2001.*

*6. From the above proviso to Notification No.67/95-CE *ibid*, it appears that the bar created therein is not applicable to the inputs used in or in relation to the manufacture of exempted final products cleared by a manufacturer of such exempted final products as well as dutiable final products. In other words, where the manufacturer manufactures both dutiable and exempted final products and uses the inputs in question in the manufacture of the exempted final products, he is entitled to the benefit of exemption from payment of duty on such inputs in terms of the opening paragraph of the Notification. This right is not hit by the opening portion of the proviso to the Notification as the manufacturer is squarely covered by the exception carved out of the proviso *vide* clause (vi) under the proviso. The Department, it appears, would like to drive the assessee out of the purview of this exception on the ground that the latter had not discharged the obligation prescribed in Rule 6 of the CENVAT Credit Rules 2004. We have already held that the assessee did not have any liability under sub-rules (1) to (4) of Rule 6 inasmuch as these sub-rules were not applicable, by virtue of sub-rule (6), to the assessee who were clearing their exempted final products against international competitive bidding in terms of Notification No.6/2006-CE *ibid*.*

In other words, a conjoint reading of sub-rule (6) of Rule 6 of the CENVAT Credit Rules 2004 and clause (vi) under the proviso to Notification No.67/95-CE ibid would show that the assessee's claim for exemption from payment of duty on copper wire under the Notification was not hit by the opening portion of the proviso to the Notification.

7. In the result, the assessee was not liable to pay CE duty on copper wire manufactured and captively used in the manufacture of insulated (power) cables in the factory during the material period. The impugned demands and the connected penalties are, therefore, liable to be set aside. It is ordered accordingly.

8. Both the appeals are allowed."

The same issue has also been considered by Tribunal in the case of Kei Industries Ltd (Supra) wherein the Coordinate Bench of this Tribunal following the Thermo Cables Ltd judgment passed following order:

"7. On careful consideration of submissions of both the sides, the short issue emerges before us is whether the appellants are liable to pay the duty on intermediate product i.e. armoured cable, which has been used for manufacture of power cables which is ultimately cleared on payment of duty in the open market and to Mega Power Projects without payment of duty. 8. An identical issue came up before the Tribunal in the case of Thermo Cables Ltd. (supra) wherein this Tribunal observed as under: 4. After considering the submissions, we have found great force in the submissions made by the learned counsel. It is not in dispute that the final products were cleared without payment of duty under Notification No. 6/2006-C.E. which, at Sl. No. 91 thereof, prescribed "nil" rate of duty for all goods (falling under any chapter) supplied against international competitive bidding. This exemption was subject to the condition that the goods were exempted from basic customs duty and additional duty of customs when imported into India. It is not in dispute that the final products cleared by the assessee without payment of duty during the relevant period satisfied this condition. Against this backdrop, one has to read the provisions of Rule 6(6)(vii) of the CENVAT Credit Rules, 2004. This sub-rule reads as follows :-

(6) The provisions of sub-rules (1), (2), (3) and (4) shall not be applicable in case the excisable goods removed without payment of duty are either

(i)-----

(ii)-----

(iii)-----

(iv)-----

(v)-----

(vi)-----

(vii) all goods which are exempt from the duties of customs leviable under the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) and the additional duty leviable under Section 3 of the said Customs Tariff Act when imported into India and supplied against International Competitive Bidding in terms of Notification No. 6/2002-Central Excise, dated the 1st March, 2002 or Notification No. 6/2006-Central Excise, dated the 1st March, 2006, as the case may be.

From the above provision, it is clear that the appellant did not have any liability under sub-rule (2) to maintain separate accounts for receipt, consumption and inventory of inputs meant for use in the manufacture of

dutiable final products and inputs meant for use in the manufacture of exempted goods, nor did the assessee have alternative liability under sub-rule (3) to pay an amount equal to 10% of the value of the exempted goods. This is because their final products were cleared against international competitive bidding in terms of Notification No. 6/2006-C.E. ibid.

5. Against the above backdrop, one has to examine the scope of Notification No. 67/95-C.E., dated 16-3-1995 (as amended) in so far as the present case is concerned. The opening paragraph of this Notification exempts from payment of CE duty any inputs manufactured in a factory and used within the same factory in or in relation to the manufacture of final products. Input must be one of those specified in the first column and the final product must be one of those specified in the second column of the table annexed to the Notification. Admittedly, copper wire is one of the inputs and the power cables manufactured and cleared by the assessee are final products covered by the Notification. However, the Department would like to deny the benefit of this Notification to copper wire manufactured by the assessee and captively consumed in their factory for the manufacture of insulated (power) cables. According to the Revenue, the assessee's claim is hit by the proviso to the Notification, which reads as under :

Provided that nothing contained in this notification shall apply to inputs used in or in relation to the manufacture of final products which are exempt from the whole of the duty of excise or additional duty of excise leviable thereon or are chargeable to nil rate of duty, other than those goods which are cleared,

- (i) to a unit in a Free Trade Zone, or*
- (ii) to a hundred per cent Export Oriented Undertaking, or*
- (iii) to a unit in an Electronic Hardware Technology Park, or*
- (iv) to a unit in a Software Technology Park, or*
- (v) under notification No. 108/95-Central Excise, dated the 28th August, 1995, or*
- (vi) by a manufacturer of dutiable and exempted final products, after discharging the obligation prescribed in Rule 6 of the CENVAT Credit Rules, 2001.*

6. From the above proviso to Notification No. 67/95-C.E. ibid, it appears that the bar created therein is not applicable to the inputs used in or in relation to the manufacture of exempted final products cleared by a manufacturer of such exempted final products as well as dutiable final products. In other words, where the manufacturer manufactures both dutiable and exempted final products and uses the inputs in question in the manufacture of the exempted final products, he is entitled to the benefit of exemption from payment of duty on such inputs in terms of the opening paragraph of the Notification. This right is not hit by the opening portion of the proviso to the Notification as the manufacturer is squarely covered by the exception carved out of the proviso vide clause (vi) under the proviso. The Department, it appears, would like to drive the assessee out of the purview of this exception on the ground that the latter had not discharged the obligation prescribed in Rule 6 of the CENVAT Credit Rules, 2004. We have already held that the assessee did not have any liability under sub-rules (1) to (4) of Rule 6 inasmuch as these sub-rules were not applicable, by virtue of sub-rule (6), to the assessee who were clearing their exempted final products against international competitive bidding in terms of Notification No. 6/2006-C.E. ibid. In other words, a conjoint reading of sub-rule (6) of Rule 6 of the CENVAT Credit Rules, 2004 and clause (vi) under the proviso to Notification No. 67/95-C.E. ibid would show that the assessee's claim for exemption from payment of duty on copper wire under the Notification was not hit by the opening portion of the proviso to the Notification.

7. In the result, the assessee was not liable to pay CE duty on copper wire manufactured and captively used in the manufacture of insulated (power) cables in the factory during the material period. The impugned demands and the connected penalties are, therefore, liable to be set aside. It is ordered accordingly”.

9. As facts of the case are not disputed that the appellant is manufacturing final products and clearing the same on payment of duty in the open market and to Mega Power Projects without payment of duty. In that circumstances, the appellant is entitled for benefit of notification No. 67/1995 ibid for intermediate product emerging during the course of manufacture of final product. Therefore, the impugned orders deserves no merits. Hence, the same are set aside.

10. Consequentially, the appeals are allowed with consequential relief, if any.”

6. In view of the above discussion and following the ratio of above judgments, the issue is no longer res-integra, therefore, the impugned orders are not sustainable, hence the same are set aside. Appeals are allowed.

From the above decision of this tribunal being the issue in the above case and in the present case is identical, the ratio of the above decision is directly applicable in the present case hence, the issue is no longer res-integra.

05. Accordingly, the impugned order is set aside. Appeal is allowed.

(Pronounced in the open court on 05.01.2023)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Mehul