CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT No. I

Excise Appeal No.70493 of 2019

(Arising out of Order-in-Appeal No.131-CE/APPL/LKO/2019 dated 28/02/2019 passed by Commissioner (Appeals) Customs, Central Excise & Service Tax, Lucknow)

M/s Dalmia Chini Mills, **.....Appellant**

(Unit- Nigohi, PO-Areli, Tehsil, Shahjahanpur)

VERSUS

Commissioner of Central Excise &

CGST, Lucknow **....Respondent**

(3/194, Vishal Khand, Gomti Nagar, Lucknow)

APPEARANCE:

Shri Nishant Mishra, Advocate for the Appellant
Shri A.K. Choudhary, Authorised Representative for the Respondent

CORAM: HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO.70414/2024

DATE OF HEARING : 15 March, 2024
DATE OF DECISION : 15 March, 2024

SANJIV SRIVASTAVA:

This appeal is directed against Order-in-Appeal No.131-CE/APPL/LKO/2019 dated 28/02/2019 passed by Commissioner (Appeals) Customs, Central Excise & Service Tax, Lucknow. By the impugned order Commissioner (Appeals) has held as follows:-

"5. I have gone through the case record. It is apparent from the record that the appellant are intentionally misreading the provisions of rule 6(3A)(b)(ii) of CCR. The said rule expressly uses the expression "total Cenvat credit" which is intentionally misread by the appellant as "Common Cenvat credit". I do not find any scope for such

interpretation when the words employed are very clear in meaning. In Keshavji Ravji and Company v. CIT (1990) 183 ITR 1 (SC), it was observed that as long as there is no ambiguity in the statutory language, resort to any interpretative process to unfold the legislative intent becomes impermissible.

6. However, the said rule has been amended by notification No. 13/2016- CE (NT) dated 1.3.2016. The amended rule provides for new formula for the purpose of reversal of the Cenvat credit. As the said amendment is effective from 01.4.2016, its provisions will be applicable for the FY 2016-17. Thus, the demand of Cenvat credit is sustainable but the quantum of demand for FY 2016-17 has to be re-calculated by the department in terms of the amended rule 6(3A) (b)(ii) as mentioned above. The appellant will pay the Cenvat credit along with interest and penalty. However, in respect of second show cause notice the quantum of penalty will be 10% of the re- calculated Cenvat liability.

7. As the appellant deliberately violated the provisions of rule 6(3A) (b)(ii) of CCR and suppressed this fact from the department, the extended period has been correctly invoked."

2.0 The facts of the case as stated in the impugned order are as follows:-

"2. During audit of their record it was noticed that the appellant reversed incorrect amount of Cenvat credit under rule 6 (3A) (b)(ii) of the CCR 2004. The expression "Total Cenvat credit" used in the said rule was treated as "Common Cenvat credit resulting in short reversal of Cenvat credit. Consequently, two show cause notices dated 09.11.2016 (for the period FY 2012-13 to FY 2014-15) and dated 19.4.2017 (for the period FY 2015-16 to FY 2016-17) were issued to demand Cenvat credit amounting to Rs. 14,62 296/- and Rs. 17,91,728/-, respectively. The adjudicating authority has confirmed the demand of abovementioned Cenvat credit under rule 14 of CCR 2004 along with interest and penalty of Rs 731148/- and Rs 179173/-, respectively, under rule 15(1) of CCR."

3.0 We have heard Shri Nishant Mishra Advocate for the appellant and Shri A.K. Choudhary, Authorized Representative appearing for the revenue.

4.1 We have considered the impugned orders along with the submissions made in appeal and during the course of argument.

4.2 We find that the issue involved in the present case is only vis-à-vis interpretation of the phrase **"Total Cenvat credit"** used under Rule 6 (3A) (b)(ii) of the Cenvat Credit Rules, 2004. Whether the said phrase refers to the total Cenvat credit or to the Cenvat credit availed against inputs and input services used both for clearance of exempted as well as dutiable goods.

4.3 We find that the issue is no longer res integra and stands adjudicated by the Tribunal in the following cases:-

(A) Commissioner of Central Excise & Service Tax, Rajkot Vs Reliance Industries Ltd. 2019 (28) GSTL 96 (Tri.-Ahmd), wherein Tribunal has held as follows:-

> ***8.*** *From the reading of Rule 6(1), it is clear that only in respect of input or input service used in exempted goods are not allowed. That means input or input service used in taxable service/dutiable goods, Cenvat credit is allowed. Sub-rule (2) of Rule 6 is only as an option that if any input or input services used in exempted goods, credit should not be allowed and only with this intention some mechanisms for expunging Cenvat credit attributed only to the exempted goods are provided. As per clause (b)(ii) & (iv), it is clearly provided that entire credit in respect of receipt and use of inputs/input service is allowed when such input and input service is used in dutiable final products and taxable service. However, nowhere in Rule 6 it is provided that the input or input service used in dutiable goods shall not be allowed. The Revenue is only interpreting the term "total Cenvat credit" provided under the formula. If the whole Rule 6(1), (2) and (3) is read harmoniously and conjointly, it is*

clear that "Total Cenvat Credit" for the purpose of formula under Rule 6(3A) is only total Cenvat credit of common input service and will not include the Cenvat credit on input/input service exclusively used for the manufacture of dutiable goods. If the interpretation of the Revenue is accepted, then the Cenvat credit of part of input service even though used in the manufacture of dutiable goods, shall stand disallowed, which is not provided under any of the Rule of Cenvat Credit Rules, 2004.

9. *An amendment made in Rule 6(3A) by Notification No. 13/2016-C.E. (N.T.), dated 1-3-2016. The amended sub-rule (3A) of Rule 6 of Cenvat Credit Rules, 2004 is reproduced below:-*

> ***Sub-rule (3A) as per Notification No. 13/2016-C.E. (N.T.), dated 1 Mar., 2016***
>
> *(d) for sub-rule (3A), the following sub-rule shall be substituted, namely :-*
>
> *"(3A) For determination of amount required to be paid under clause (ii) of sub-rule (3), the manufacturer of goods or the provider of output service shall follow the following procedure and conditions, namely :-*
>
> *(a) the manufacturer of goods or the provider of output service shall intimate in writing to the Superintendent of Central Excise giving the following particulars, namely :-*
>
> *(i) name, address and registration number 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 inputs and input services used exclusively in or in relation to the manufacture of exempted goods removed or for provision of exempted services and description of such exempted goods removed and such exempted services provided;*

(iv) description of inputs and input services used exclusively in or in relation to the manufacture of non-exempted goods removed or for the provision of non-exempted services and description of such non-exempted goods removed and non-exempted services provided;

(v) CENVAT credit of inputs and input services lying in balance as on the date of exercising the option under this condition;

(b) the manufacturer of final products or the provider of output service shall determine the credit required to be paid, out of this total credit of inputs and input services taken during the month, denoted as T, in the following sequential steps and provisionally pay every month, the amounts determined under sub-clauses (i) and (iv), namely :-

(i) the amount of CENVAT credit attributable to inputs and input services used exclusively in or in relation to the manufacture of exempted goods removed or for provision of exempted services shall be called ineligible credit, denoted as A, and shall be paid;

(ii) the amount of CENVAT credit attributable to inputs and input services used exclusively in or in relation to the manufacture of non-exempted goods removed or for the provision of non-exempted services shall be called eligible credit, denoted as B, and shall not be required to be paid;

(iii) credit left after attribution of credit under sub-clauses (i) and (ii) shall be called common credit, denoted as C and calculated as, -

$$C = T - (A + B);$$

Explanation. - Where the entire credit has been attributed under sub-clauses (i) and (ii), namely ineligible credit or eligible credit, there shall be left no common credit for further attribution;

(iv) the amount of common credit attributable towards exempted goods removed or for provision of exempted services shall be called ineligible common credit, denoted as D and calculated as follows and shall be paid, -

D = (E/F) x C;

where E is the sum total of -

(a) value of exempted services provided; and

(b) value of exempted goods removed, during the preceding financial year;

where F is the sum total of -

(a) value of non-exempted services provided,

(b) value of exempted services provided,

(c) value of non-exempted goods removed, and

(d) value of exempted goods removed, during the preceding financial year :

Provided that where no final products were manufactured or no output service was provided in the preceding financial year, the CENVAT credit attributable to ineligible common credit shall be deemed to be fifty per cent. of the common credit;

(v) remainder of the common credit shall be called eligible common credit and denoted as G, where, -

G = C - D.

Explanation. - For the removal of doubts, it is hereby declared that out of the total credit T, which is sum total of A, B, D, and G, the manufacturer or the provider of the output service shall be able to attribute provisionally and retain credit of B and G, namely, eligible credit and eligible common credit and shall provisionally *pay the amount of credit of A and D, namely, ineligible credit and ineligible common credit;*

(vi) where manufacturer or the provider of the output service fails to pay the amount determined under sub-clause (i) or sub-clause (iv), he shall be liable to pay the interest from the due date of payment till the date of payment of such amount, at the rate of fifteen per cent. per annum.

10. *From the above it can be seen that when anomaly was noticed, the Government has substituted the sub-rule (3A). The legislators very consciously substituted the Rule with intention to give a clarificatory nature to the provision of sub-rule (3A) so as to make it applicable retrospectively. It was all along not the intention of the Government to deny Cenvat credit on the input/input service even though used in the dutiable goods. Keeping the said view in mind, the substitution in sub-rule (3A) of Rule 6 was made. Therefore, the substituted provision of sub-rule (3A) shall have retrospective effect being clarificatory."*

(B) **M/s Toshiba JSW Power Systems Pvt. Ltd. Vs Commissioner of GST & Central Excise 2023 (12) Centax 222 (Tri.-Mad),** wherein following has been held:-

"12. The issue is with regard to formula that has to be adopted for reversing the credit as required under Rule 6 (3) of CCR 2004. The said sub rule has already been reproduced above. The only dispute is whether the total cenvat credit on input services availed by the appellant has to be taken for computation of amount that has to be reversed or whether the total cenvat credit availed on common input services has to be applied. This issue is no longer res integra and has been decided by the Tribunal in the case of CCE & ST, Chennai Vs Chennai Petroleum Corporation Ltd. vide Final Order No.40009/2020 dated 06.01.2020. Relevant paragraphs of the said Tribunal decision are reproduced below:

"12.0 The first issue is with regard to whether the letter "P" used in the formula prescribed in Rule 6 (3A) (c) (iii) denotes total Cenvat credit or total credit availed on

common inputs and input services. Sub-clause (c) of Rule 6(3A) states that the manufacture of goods shall determine finally the Cenvat credit attributable to exempted goods/exempted services in the manner prescribed. Thus, the formula prescribed is for arriving at the amount that is availed in respect of exempted goods and services, which has to be reversed by the assessee. The formula is not for determining the eligible credit on inputs and input services used for dutiable goods or taxable services. While appreciating this answer, we can understand that "P" denotes the total common Cenvat credit and not the total credit availed by the assessee during the financial year. This issue has been analysed by the Tribunal in the case of CCE &ST, Rajkot Vs. M/s. Reliance Industries Ltd., [2019 (3) TMI 784 CESTAT AHMEDABAD].

"We have carefully considered the submissions made by both the sides and perused the record. The limited issue is to be decided in this case is that for the purpose of calculating the Cenvat credit for reversal in terms of Rule 6(3A) as per the formula given therein, whether the total Cenvat credit means it is including the Cenvat credit of input services exclusively used for dutiable product should be taken or total Cenvat credit of only common input service should be taken.

From the reading of Rule 6(1), it is clear that only in respect of input or input service used in exempted goods are not allowed. That means input or input service used in taxable service/dutiable goods. Cenvat credit is allowed. Sub-rule (2) of Rule 6 is only used as an option that if any input or input services used in exempted goods, credit should not be allowed and only with this intention some mechanisms for expunging Cenvat credit attributed only to the exempted goods are provided. As per clause (b)(ii) & (iv), it is clearly provided that entire credit in respect of receipt and use of the inputs/input service is allowed when such input and input service is used in dutiable final products and taxable service. However, nowhere in Rule 6 it is provided that the input or input

> *service used in dutiable goods shall not be allowed. The Revenue is only interpreting the term "Total Cenvat credit" provided under the formula. If the whole Rule 6(1)(2)(3) is read harmoniously and conjointly, it is clear that "Total Cenvat Credit" for the purpose of formula under Rule 6(3A) is only total Cenvat credit of common input service and will not include the Cenvat credit on input/input service exclusively used for the manufacture of dutiable goods. If the interpretation of the Revenue is accepted, then the Cenvat credit of part of input service even though used in the manufacture of dutiable goods shall stand disallowed, which is not provided under any of the Rule of Cenvat Credit Rules, 2004."*
>
> *12.1 In the said case, has also considered the Notification No.13/2016-CE(NT), dated 01.03.2016. It is concluded by Tribunal that amendment made by substitution is clarificatory in nature and, therefore, applicable retrospectively. Following the said decision, we do not find any error in the view of the Commissioner (Appeals) that the computation has to be done by adopting the 'total common Cenvat credit' and not "total Cenvat credit". The first issue is held against the Revenue."*

13. The Tribunal in the case of CCE Vs Reliance Industries Ltd. - 2019 (3) TMI 784 CESTAT Ahmedabad had considered the issue as to interpreting the term "total cenvat credit" given in the formula. It was held that whole Rule 6 (1) (2) (3) has to be read harmoniously and conjointly and it would be clear that total cenvat credit for the purpose of formula under Rule 6 (3A) is only the total cenvat credit on common input services and will not include cenvat credit on input / input services exclusively used for the manufacture of dutiable goods. If the interpretation of the Revenue is accepted, it would result in an anomaly that the cenvat credit which is availed for manufacture of dutiable goods also will get disallowed. Relevant paragraphs of the said order are noticed as under :

> *"8. From the reading of Rule 6(1), it is clear that only in respect of input or input service used in exempted goods are not allowed. That means input or input service used in taxable service/dutiable goods, Cenvat credit is allowed.*

> *Subrule (2) of Rule 6 is only as an option that if any input or input services used in exempted goods, credit should not be allowed and only with this intention some mechanisms for expunging Cenvat credit attributed only to the exempted goods are provided. As per clause (b)(ii) & (iv), it is clearly provided that entire credit in respect of receipt and use of inputs/input service is allowed when such input and input service is used in dutiable final products and taxable service. However, nowhere in Rule 6 it is provided that the input or input service used in dutiable goods shall not be allowed. The Revenue is only interpreting the term "total Cenvat credit" provided under the formula. If the whole Rule 6(1), (2) and (3) is read harmoniously and conjointly, it is clear that "Total Cenvat Credit" for the purpose of formula under Rule 6(3A) is only total Cenvat credit of common input service and will not include the Cenvat credit on input/input service exclusively used for the manufacture of dutiable goods. If the interpretation of the Revenue is accepted, then the Cenvat credit of part of input service even though used in the manufacture of dutiable goods, shall stand disallowed, which is not provided under any of the Rule of Cenvat Credit Rules, 2004. … … …*
>
> *10. From the above it can be seen that when anomaly was noticed, the Government has substituted the sub-rule (3A). The legislators very consciously substituted the Rule with intention to give a clarificatory nature to the provision of sub-rule (3A) so as to make it applicable retrospectively. It was all along not the intention of the Government to deny Cenvat credit on the input/input service even though used in the dutiable goods. Keeping the said view in mind, the substitution in sub-rule (3A) of Rule 6 was made. Therefore, the substituted provision of sub-rule (3A) shall have retrospective effect being clarificatory."*

14. The said decision was appealed by the Revenue before the Hon'ble High Court of Gujarat at Ahmedabad vide R/Tax Appeal No.850 of 2019. The Hon'ble High Court vide order dated 23.01.2020 dismissed the plea of the department in regard to *the issue whether Tribunal was correct in holding that total cenvat credit for the purpose of formula under rule 6 (3A) is only total cenvat credit of common input service and will not include the cenvat credit on input/input service exclusively used for manufacture of dutiable goods."*

(C) **M/s JSW Steel Ltd. Vs Commissioner of Central Tax and Central Excise, Belgaum 2024 (14) Centax 340 (Tri.-Bang)**, wherein following has been held:-

"17. The dispute in the appeal is regarding the interpretation of the term total Cenvat credit provided in the formula in Rule 6(3A)(b)(ii). According to the Department, the total Cenvat credit should include even those services used exclusively in taxable services, including the common service while according to the appellant it should include only common input services and services used in exempted services and not the services used exclusively in rendering taxable output service.

18. It would be clear from a conjoint reading of sub-rules 6(1), (2) and (3) of Rule 6 that the total Cenvat credit for the purpose of formula under Rule 6(3A) is only total Cenvat credit of common input service and cannot include Cenvat credit on input service exclusively used for the manufacture of dutiable goods.

19. This position is also clear from the underlying object of the amendment made in Rule 6(3A) of the Rules by Notification dated March 1, 2016, to consider only common input services and not total input service credit, for the purpose of computing the amount of reversal.

20. Such amendment was also clarified by the Tax Research Unit Circular dated February 29, 2016 to apply retrospectively inasmuch as the clarification clearly mentions that the provisions of Rule 6 providing for reversal of credit in respect of input services used in exempted services, is being redrafted with the objective to simplify and rationalize the same without altering the established principles of reversal of such credit. It has been further clarified at paragraph (iv) of the Circular that the purpose of the rule is to deny credit of such part of *the total credit taken, as is attributable to the exempted services and under no circumstances this part can be greater than the whole credit."*

4.4 In view of the above decisions, we do not find any merits in the impugned order and the same is set aside.

5.1 Appeal is allowed.

(Operative part of the order pronounced in open court)

(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

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