CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.I

Excise Appeal No.70019 of 2020

(Arising out of Order-in-Appeal No.206-207/CE/Alld/2019 dated 03.10.2019 passed by Commissioner (Appeals), CGST & Central Excise, Allahabad)

M/s Saraswati Engineering Limited, ...Appellant
(D-12, Site-I, Panki Industrial Area,
Kanpur Nagar-208002)

VERSUS

Commissioner of CGST & Central Excise, Kanpur

....Respondent

WITH

Excise Appeal No.70020 of 2020

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(D-12, Site-I, Panki Industrial Area, Kanpur Nagar-208002)

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APPEARANCE:

Shri Nishant Mishra for the Appellant
Shri Anupam Kumar Tewari, Authorised Representative for the Respondent

CORAM:
Hon'ble MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)

FINAL ORDER NO. 70186-70187 / 2021

DATE OF HEARING : 04 August, 2021
DATE OF DECISION : 04 August, 2021

<u>ANIL CHOUDHARY:</u>

The issue in these appeals is whether exemption is rightly called for the goods manufactured by the appellant under order received from BHEL which were to be finally used for mega/super power, projects owner- Damodar Valley Corporation, in view of the exemption availed under Notification No.06/2006-CE dated 01.03.2006. Further, in view of the exemption availed and upheld by the learned Commissioner (Appeals) vide Order-in-Appeal dated 13th September, 2010 (which have attained finality as no further appeal was filed by Revenue), thus the cenvat credit on the inputs for output- products supplied to BHEL was rightly taken.

2. Further the issue is whether Rules 14 was rightly invoked by Revenue demanding reversal of cenvat credit on inputs used for the output goods supplied to BHEL, under their job work order, which were destined to be used in the mega power project of Damodar Valley Corporation.

3. The brief facts of the case are that the Appellant is a Company incorporated under the erstwhile Companies Act, 1956, having its registered office and factory situated at D-12, Site-I, Panki Industrial Estate, Kanpur. Appellant is engaged in the business of manufacture and sale of Rotor, Starter and Column Component, container bin, etc., falling under CH 85119000, 72163200 and 94032010 respectively of the Central Excise Tariff Act, 1985.

4. Further, during the year 2007, appellant entered into Rate Contracts with M/s Bharat Heavy Electricals Limited., Boiler Auxilliary Plant, Ranipet (hereinafter referred to as **BHEL**), a public sector undertaking of the Central Government, for fabrication and supply of various Iron and Steel Products.

5. Further, the Rate Contracts were placed by BHEL, in the capacity of 'International Bidder' for Damodar Valley Corporation, Mega Power Project. The relevant clauses of

contract regarding excise duty/cenvat are reproduced hereunder:-

> *"10.4 Excise duty invoices have to be generated for the dispatches made and a copy of Excise invoices including relevant copies of raw material excise invoices are to be enclosed. Since BHEL is issuing raw materials as free issue basis sub-contractor has to ensure that 100% raw material CENVAT credit is passed on to BHEL in their invoices. On this basis only, their bills will be processed. Any balance CENVAT credit not passed on will be recovered from their running bills.*
>
> *15.3 01. The CENVAT credit should be availed on the free issue materials from BHEL (SAIL, Vendors of BHEL, BHEL works) by the vendor and the same should be passed on to BHEL.*
> *04.For ICB and MEGA Projects (as per the advice of BHEL), the final product is exempted from payment of excise duty. The same shall be availed by the Fabricators at the time of dispatch of final product for which necessary document will be furnished by BHEL.*
>
> *Excise duty exemption for mega power projects on international competitive bidding under Central Excise Notification No. 6/2006-CE dated 1.3.2006 Sl. No. 19 shall be availed by the fabricators. BHEL shall furnish necessary documents to the fabricator."*

6. In view of the aforesaid clauses in the Rate Contract, Appellant was instructed by BHEL to claim cenvat credit and also avail exemption in respect of the goods-meant for use in projects under 'International competitive bidding' under Notification No. 6/2006-CE dated 1.3.2006.

7. In pursuance to the aforesaid Rate Contracts, Appellant was provided inputs by BHEL/its vendors <u>on invoices evidencing payment of duty. Upon receipt of duty paid inputs, Appellant took cenvat credit of the duty paid on inputs.</u> The fabricated goods were then supplied by Appellant to BHEL, without payment of duty by claiming exemption under Notification No. 6/2006-CE dated 1.3.2006.

8. However, Appellant was directed by Range Superintendent to reverse the credit taken, since in his

opinion, no duty was paid on the final products and hence Appellant was not eligible for claiming cenvat credit on inputs. Following the directions, Appellant while filing ER-1 returns for the months of Oct'2008, Dec'2008 & Jan'2009, reversed cenvat credit in respect of inputs used for BHEL. As Appellant was not aware of the phraseology to be used for such reversal, Appellant mentioned the words:

a) Oct 2008: Duty reverted on inputs- as such

b) Dec 2008: Duty reverted due to Column Despatch

c) Jan 2009: Duty reverted due to column despatch - Inputs cleared as such' while filing ER-1 returns of related months.

9. However on seeking legal advice subsequently, Appellant came to know that, since the <u>goods cleared for BHEL were eligible for exemption under Serial No. 91 of Notification No. 6/2006-CE dated 1.3.2006, as amended, 'as goods supplied against International Competitive Bidding'</u>, hence in view of Rule 6 (6) of Cenvat Credit Rules, 2004 (hereinafter referred to as '**CCR**'), Rule 6(1) will not be applicable and therefore there was no requirement for the Appellant to reverse cenvat credit. The same opinion was expressed by BHEL also vide letter dated 14.9.2009.

10. Accordingly, Appellant vide letter dated 5.10.2009 informed Ld. Assistant Commissioner and Ld. Superintendent, the circumstances in which cenvat credit of Rs 18,86,138/- was reversed and also informed that Appellant is taking credit of the same amount in RG-23A Part II. Along with the letter, Appellant also submitted the details of credit taken earlier and reversed wrongly. Upon receipt of letter dated 5.10.2009, Ld. Superintendent issued letter dated 26.10.2009 advising Appellant not to take suo-moto credit. By letter dated 21.1.2010, Ld. Superintendent requested Appellant to provide copies of RG-23A Part-II, which were supplied by Appellant vide letters dated 15.2.2010 and 12.3.2010.

11. Further in the meantime, Demand cum Show Cause Notice dated 14.7.2009 was issued to Appellant alleging that the goods cleared by Appellant to BHEL without payment of duty, are not eligible for exemption under Notification No. 6/2006-CE dated 1.3.2006 and therefore duty on such goods amounting to Rs 26,51,689/- is liable to be recovered from Appellant along with interest and penalty.

12. The aforesaid Demand cum Show Cause Notice was adjudicated by Ld. Additional Commissioner, Central Excise, Kanpur on ex-parte basis, and it was held that benefit under Notification No. 6/2006dated 1.3.2006, is available only to the 'international bidder', whereas Appellant is not an international bidder but only a vendor of International Bidder. The Order-in-Original thus confirmed demand of duty of Rs 26,51,689/- along with interest in equivalent amount of penalty.

13. The aforesaid Order-in-Original dated 30.11.2009 was challenged by Appellant in statutory appeal before Ld. Commissioner (Appeals) and by Order-in-Appeal No. 470-CE/APPL/KNP/2010 dated 13.9.2010, the appeal filed by Appellant was allowed and it was held that benefit of exemption Notification No. 6/2006-CE dated 1.3.2006, as amended, is available to the Appellant.

14. The aforesaid Order-in-Appeal dated 13.9.2010 was accepted by Revenue and the same was not challenged, hence the findings recorded in the Order-in-Appeal dated 13.9.2010 have become final and binding between the parties.

15. Further once the final product cleared by Appellant to BHEL, was held to be rightly exempted, <u>Show Cause Notice dated 21.9.2010 was issued alleging that</u> during the months of Oct'2008, Dec'2008 & Jan'2009, Appellant has cleared goods and recovered credit of cenvat describing the same as "duty reversed on input as such" and thus Appellant had rightly reversed CENVAT Credit on inputs cleared as such. It

was further alleged that suo-moto credit taken by the Appellant, is contrary to law and hence CENVAT Credit amounting to Rs 18,86,116/- along with interest and penalty is liable to be recovered for the Appellant (For Mega Power Project).

16. The aforesaid show cause notice was duly replied by Appellant, wherein amongst other objections, it was submitted that inputs were not removed as such, but were used for final products cleared to BHEL.

17. That even though Appellant had already filed its reply and requested for personal hearing, then also adjudicating authority proceeded to adjudicate the SCN ex-parte, after framing the following issue:-

> "*Whether the suo-moto Cenvat Credit taken by the party without any document is admissible to them or not*"

18. After framing the aforesaid issue, the adjudicating authority held that since the inputs were removed as such, hence in terms of Rule 3 (4) (b) of CCR, cenvat credit was rightly reversed by Appellant and subsequently suo-moto credit of the same cannot be taken.

19. The aforesaid Order-in-Original dated 24.1.2011 was then challenged by Appellant in statutory appeal before Ld. Commissioner (Appeals), who dismissed the appeal vide Order-in-Appeal No. 222-CE/APPL/KNP/2011 dated 28.9.2011, by affirming the findings recorded in Order-in-Original.

20. The aforesaid Order-in-Appeal was then challenged by Appellant before this Tribunal in Appeal No. E/3026/2011-EX-(SM). Along with the appeal, Appellant also filed stay and waiver application, which was rejected vide order dated 23.5.2012. The said order was challenged by Appellant before Hon'ble Allahabad High Court in Central Excise Appeal No. 650 of 2012 and during pendency of the same, Appellant deposited an amount of Rs 18,86,138/- on 25.7.2012.

21. That by Order dated 14.11.2017, this Tribunal allowed the appeal filed by Appellant with the following directions:-

> *"5. It is seen that the issue on merits does not stand discussed by the Lower Authorities, i.e. as to whether the appellants was liable to pay the Cenvat Credit or not. If such debit entry was not in fact, required to be made, the facts taking Suo-moto credit under intimation to the Revenue would be a correction of the accounts. There are many decisions of the Tribunal lying down that such accounting correction will not require filing of refund claims. In as much the credit entry was made under intimation to the Revenue, the same will have the effect of seeking, Revenues permission. As such, I deem fit to set aside the impugned order and remand the same to the Original Adjudicating Authority for examining the issue afresh, first on merits and then on the issue of Suo-moto taking of credit."*

22. In remand proceedings, Appellant filed submissions vide letter dated 6.12.2018, reiterating that the Appellant had received input material from BHEL for manufacturing and processing as per the Job Work order, and have supplied after processing the same and converting them into different shapes and size as per the specification mentioned in the Job Work order to BHEL/DVC. The Appellant further submitted that the issue of benefit of exemption Notification No. 6/2006 dated 1.3.2006, as amended has already been allowed by Ld. Commissioner (Appeals) vide order dated 13.09.2010 and the same has also attained finality. Thus the debit entry made by the Appellant, was not in fact required to be made and thus the suo-moto credit taken subsequently by the Appellant is merely a correction of accounts, as observed by this Tribunal vide order dated 14.11.2017. As appeal filed by appellant was allowed and demand was set-aside, hence appellant also filed application for refund.

23. By Order-in-Original (in refund proceedings) dated 2.2.2019, the Adjudicating Authority rejected the refund claim of the Appellant by holding that since the inputs were removed as such, hence CENVAT Credit was rightly reversed by the Appellant and consequently taking Suo-moto credit of the same is illegal. The adjudicating authority has also held that CENVAT Credit can be taken only on the strength of documents prescribed under Rule 9(1), and the Appellant has taken Suo-moto credit, without any documents or authority. Refund claim was also rejected on the ground that Cenvat Credit was wrongly taken.

24. The aforesaid order(s)-in-original dated 2.2.2019 & 15.03.2019 was then challenged by the Appellant on various grounds before Ld. Commissioner (Appeals). During the course of hearing, Appellant was directed to file the sample copies of contract between Appellant and BHEL, sample copies of invoices, ER-1 returns, invoices and correspondence with BHEL, which were filed by Appellant before Ld. Commissioner (Appeals) on 16.7.25019.

25. However, by impugned Order-in-Appeal dated 3.10.2019, the appeals filed by Appellant have been dismissed and the order-in-original dated 2.2.2019 along with demand and recovery of cenvat credit, interest and penalty has been affirmed, on the reasoning that the claim of Appellant of exemption under Notification No. 6/2006 dated 1.3.2006 is not admissible and hence removal of inputs as such is covered under Rule 3(4)(b) of the CCR. On

this reasoning, it has been held that re-credit of the said amount by the Appellant is unlawful and hence recoverable under Rule 14 of Cenvat Credit Rules, 2004. Rejection of refund claim vide Order-in-Original dated 15.03.2019 has also been upheld.

26. Aggrieved with the common impugned Order-in-Appeal dated 3.10.2019, Appellant has filed the present appeal

27. It is urged by counsel for the Appellant that- Notification No. 6/2006-CE dated 1.3.2006 provides exemption from duty in respect of all goods supplied against International Competitive Bidding, subject to condition no. 19 specified in the notification i.e. 'if the goods are exempted 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 sub-section (1) of section 3 of the said Customs Tariff Act when imported into India'.

28. Further urges there is no dispute that the goods imported for supply to mega projects are entitled to whole duty exemption under the Customs Tariff Act. Now when the goods fabricated by the appellant were actually supplied through BHEL, who are the bidders in International Competitive Bidding, then the appellant was entitled for benefit of exemption notification. This Tribunal in **CST Ltd. v. Commissioner of Cus. & C. Ex. Hyderabad-I** 2007 (217) ELT 513 (Tri-Bang.) and **CST Ltd. v. Commissioner of Central Excise, Hyderabad** 2008 (230) ELT 85 (Tri-Bang.) has consistently held that goods supplied by sub-contractor to main contractor who is executing mega (project by International Competitive Bidding), is entitled to benefit of similar exemption notifications.

29. Even otherwise, the benefit of the exemption notification, was earlier sought to be denied by the revenue, but on appeal, Ld. Commissioner (Appeals) by O-I-A dated 13.09.2010 decided the issue in favour of the appellant and against the revenue. The said order dated 13^{th} September, 2010 of Commissioner (Appeals) was accepted by revenue, as the same was not challenged by revenue in further appeal. In this view of the matter, it cannot be disputed by the revenue that the condition of exemption notification is not satisfied in respect to fabricated goods supplied, through BHEL. Further, dispute in this respect is hit by doctrine of Res-Judicata.

30. Now, sub-rule (1) of Rule 6 of cenvat credit rules, 2004 prohibits availability of cenvat credit on such quantity of input which is used in or in relation to the manufacture of exempted goods. However, sub-rule (6) of Rule 6 carves an exception to the applicability of Rule 6(1) and it provides that sub-rule (1) shall not be applicable in case the excisable goods are removed without payment of duty are covered by various clauses of sub-rule (6). Clause (vii) of sub-rule (6) covers 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 sub-section (1) of section 3 of the said Customs Tariff Act, when imported into India and are supplied against International Competitive Bidding.

31. Therefore, when the condition specified under in clause (vii) of sub-rule (6) of Rule 6 is identical to condition no. 19 of Notification No. 6/2006-CE dated 1.03.2006 and the order dated 13^{th} September, 2010, entitling the appellant to benefit of exemption notification has attained finality, then it is not open for the revenue to argue that the same condition specified in clause (vii) of sub-rule (6) of

Rule 6 is not satisfied in the appellant’s case. The condition specified in notification no. 6/2006 and Rule 6(6) being one and the same, Rule 6(6)(vii) will apply in appellant’s case and hence cenvat credit was rightly taken by the appellant.

32. When the cenvat credit was rightly taken by the appellant, then reversal of the same on the instructions of the Superintendent and thereafter taking suo-moto credit of the same amount under intimation to revenue, is nothing but correction of accounts, as held by this Tribunal in Final Order No.71416/2017 in the appellant’s appeal no. E/3026/2011-EX[SM] by which the matter was remanded back to the adjudicating authority.

33. Further, such correction of accounts under intimation to revenue, would not require making an application of refund under Section 11B of the Act, as held by jurisdictional High Court in Keshav Engineering Ltd. v. CESTAT 2016 (331) ELT 391 (All).

34. As regards use of words ‘inputs removed as such’ in the three returns, it is clear that the same were erroneously used by the appellant as the appellant was a job-worker, and when asked by Superintendent to reverse credit on the reasoning that final product was exempted, the appellant used these words for reversing credit. In my opinion, when credit was legally admissible to the appellant and reversal of credit was not required, then use of words ‘inputs removed as such’ would not be fatal for the appellant, more particularly when it is not the case of revenue that any inputs were removed as such by the appellant. On the contrary, the admitted case of the revenue was that appellant was not entitled for benefit of exemption notification and it was only when the appellant succeeded in appeal before Commissioner (Appeals), this objection was taken by the revenue for the very first time.

35. Heard the Ld. DR for Revenue, who relies on impugned orders.

36. Having considered rival contentions, I find as regards, finding of Commissioner (Appeals) that credit can only be taken on the strength of documents prescribed under Rule 9(1), the same cannot be disputed. However, Rule 9(1) applies when the appellant took credit for the first time, before reversing the same on the instructions of the Superintendent. When the appellant took suo-moto re-credit, the same amounts to only correction of accounts, to which Rule 9(1) has no application.

37. In view of the above, it is held that Rule 6(6) is squarely applicable in the present case, and therefore the credit was rightly taken by the appellant. On this conclusion, it is held that reversal of credit was not required and hence the demand of cenvat credit, interest and penalty under rule 14 of the cenvat credit rules, 2004 cannot be sustained. The orders passed by the lower authorities regarding demand of cenvat credit, interest and penalty are therefore set-aside.

38. The appeals filed by the appellant are therefore allowed and the amount of Rs 18,86,138/- deposited by the appellant consequent to rejection of stay application by this Tribunal, is directed to be refunded along with interest in accordance with law. The interest is held payable u/s 35FF from the date of deposit to the date of Refund @12% P.A., as held by DB of Tribunal in Parle Agro Ltd. The Adjudicating Authority is directed to grant refund within 45 days of the receipt of order of Tribunal with interest as per Rules. It is further pointed out that the refund has to be granted in cash in terms of provisions under section 142(3) of the CGST Act.

(Dictated and pronounced in open court)

Sd/-
(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

Nihal