

**CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
ALLAHABAD.**

REGIONAL BENCH.

EXCISE APPEAL NO. 1517 OF 2011

[Arising out of the Order-in-Original No. 42-43/Commr./Gzb/2010-11 dated 21/03/2011 passed by The Commissioner, Customs, Central Excise & Service Tax, Ghaziabad.]

M/s Hamdard (Wakf) Laboratories

Appellant

B-1/2, Meerut Road, Industrial Area,
Ghaziabad.

VERSUS

**The Commissioner,
Customs, Central Excise & Service Tax,**

Respondent

C.G.O. Complex II, Kamla Nehru Nagar,
Ghaziabad.

WITH

EXCISE APPEAL NO. 1961 OF 2012

[Arising out of the Order-in-Original No. 02-06/COMMR/GZB/2011-12 dated 19/04/2012 passed by The Commissioner of Central Excise, Customs & Service Tax, Ghaziabad.]

M/s Hamdard (Wakf) Laboratories

Appellant

B-1/2, Meerut Road, Industrial Area,
Ghaziabad – 201 003 (U.P.).

VERSUS

**The Commissioner,
Customs, Central Excise & Service Tax,**

Respondent

C.G.O. Complex II, Kamla Nehru Nagar,
Ghaziabad – 201 002.

APPEARANCE

Shri B.L. Narasimhan, Advocate and Ms. Purvi Asati, Advocate – for the appellant.

Shri T.M. Siddiqui, Authorized Representative (DR) – for the Department.

CORAM : **HON'BLE SHRI JUSTICE DILIP GUPTA, PRESIDENT**
HON'BLE SHRI P.V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO. 70247-70248/2021

DATE OF HEARING : 22.09.2021.

DATE OF DECISION : 05.11.2021.

P.V. SUBBA RAO

Excise Appeal No. 1517 of 2011 is filed assailing order-in-original dated 21.03.2011¹ whereby show cause notice² dated 14.12.2009 covering the period 16.05.2005 to 31.03.2009 and show cause notice dated 23.04.2010 (covering period 01.04.2009 to 31.12.2009) have been decided confirming a demand of Rs. 9,27,88,204/-.

2. Excise Appeal No. 1961 of 2012 is filed assailing order-in-original dated 19.04.2012³ whereby SCN dated 07.02.2011 (covering period 01.01.2010 to 11.02.2010), SCN dated 09.03.2011 (covering period 12.02.2010 to 28.02.2010), SCN dated 06.04.2011 (covering period 01.03.2010 to 31.03.2010), SCN dated 06.05.2011 (covering the period 01.04.2010 to 31.05.2010) and SCN dated 01.06.2011 (covering the period 01.06.2011 to 31.03.2011) have been decided confirming the demand of Rs.3,51,96,966/-.

3. Thus, in these two impugned orders covering the period 16.05.2005 to 31.03.2011, a total demand of Rs. 12,79,85,170/- has been confirmed under Rule 6 read with Rule 14 of the Cenvat Credit Rules, 2004 along with interest under Rule 4 of Cenvat Credit Rules read with Section 11AB of the Central Excise Act and penalty under Rule 15 of Cenvat Credit Rules read with Section 11AC of the Central Excise Act.

¹ **First impugned order**

² **SCN**

³ **Second impugned order**

4. We have heard both sides and perused the records.

5. The appellant manufactures edible preparations falling under Chapter 21, Unani medicines falling under Chapter 30 and Cosmetics and Toilet preparations falling under Chapter 33 of the First Schedule to the Central Excise Tariff Act, 1985⁴. Some of these goods are dutiable and others are exempted from duty. The appellant availed the benefit of Cenvat credit on the inputs used exclusively in manufacture of dutiable goods and had not availed the benefit of Cenvat credit on inputs used in manufacture of exempted goods. However, there was one common input, viz., furnace oil, which was used to generate steam which was captively consumed by the appellant to manufacture sugar syrup and extracts of herbs and flowers both of which were used in manufacture of the final products. The quantity of furnace oil in stock at the beginning of every month, the quantity during the month and the closing balance were maintained in the computer system which showed how much furnace oil was used during each month. Since furnace oil is used to generate steam which was further used to manufacture final products, it was impractical for the appellant to maintain separate accounts of furnace oil or generate steam separately for manufacture of dutiable goods and separately for manufacture of exempted goods. Based on the daily production of dutiable goods and exempted goods and actual consumption of furnace oil computed as per running time and usage of furnace oil every

⁴ the Tariff Act

day, the appellant took credit of furnace oil only on that proportion of the furnace oil which went into manufacture of dutiable goods.

6. The appellant's records were audited by the department and the audit party observed that the appellant had used furnace oil in manufacture of dutiable and exempted goods and had not maintained separate accounts and therefore it was required to pay an amount equal to 10% of the value of exempted goods, Rule 6 (3) (d) of Cenvat Credit Rule, 2004 until 29.02.2008 and as per Rule 6 (3) (i) of Cenvat Credit Rule, 2004 w.e.f. 01.04.2008. Accordingly, SCN dated 14.12.2009 was issued followed by the remaining SCNs for subsequent periods.

7. At this stage, it would be profitable to examine the relevant legal provisions. The Cenvat Credit Rules 2004 were framed by the Central Government under Section 37 of the Central Excise Act and Section 94 of the Finance Act superseding the earlier Cenvat Credit Rules, 2002 (which dealt with Cenvat credit only for manufacture) and Service Tax Credit Rules, 2002 (which dealt with only credit for service providers). The Cenvat Credit Rules, 2004 integrated the two sets of rules and provided for credit of excise duty paid on inputs and service tax paid on input services used in or in relation to manufacture of dutiable final products or provision of taxable services. It has been the principle of these rules as well as the erstwhile Modvat Credit Rules, that credit shall be allowed only on inputs which go into manufacture of

dutiable goods. No credit shall be allowed in respect of inputs which go into manufacture of exempted goods.

8. However, there are always inputs which go into manufacture of both dutiable and exempted goods such as the furnace oil used in the present case is one such. **Rule 6 of the Cenvat Credit Rules, 2004 deals with "*Obligations of manufacturer of dutiable and exempted goods and provider of taxable and exempted services*".** Rule 6 (1) states that credit shall not be allowed on such quantity of input or input service which is used in the manufacture of exempted goods or provision of exempted services. Rule 6 (2) requires separate accounts to be maintained and it reads as follows:-

"6 (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 receipt, consumption and inventory of input and input service meant for use in the manufacture of dutiable final products or in providing output service and the quantity of input meant for use in the manufacture of exempted goods or services and take CENVAT credit only on that quantity of input or input service which is intended for use in the manufacture of dutiable goods or in providing output service on which service tax is payable".

9. Rule 6 (3) states that the manufacturer or provider of output service opting not to maintain separate accounts shall follow any of the following conditions applicable to him. It has three clauses: (a), (b) & (c), of which the one in dispute is (b) which reads as follows :-

"6 (3) (b) if the exempted goods are other than those described in condition (a), the manufacturer shall pay an amount equal to ten per cent of the total price, excluding sales tax and other taxes, if any, paid on such goods, of the exempted final product charged by

the manufacturer for the sale of such goods at the time of their clearance from the factory ;

10. This Rule 6 (3) was amended w.e.f. 01.03.2008 and a new Rule 6 (3A) was also introduced. After amendment, Rule 6 (3) & Rule 6 (3A) which read as follows :-

"6 (3) Notwithstanding anything contained in sub-rules (1) and (2), the manufacturer of goods or the provider of output service, opting not to maintain separate accounts, shall follow either of the following options, as applicable to him, namely :-

- (i) the manufacturer of goods shall pay an amount equal to ten per cent of value of the exempted goods and the provider of output service shall pay an amount equal to eight per cent of value of the exempted services ; or
- (ii) the manufacturer of goods or the provider of output service shall pay an amount equivalent to the CENVAT credit attributable to inputs and input services used in, or in relation to, the manufacture of exempted goods or for provision of exempted services subject to the conditions and procedure specified in sub-rule (3A).

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.

Explanation II – For removal of doubt, it is hereby clarified that the credit shall not be allowed on inputs and input services used exclusively for the manufacture of exempted goods or provision of exempted service.

6 (3A) For determination and payment of amount payable 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) while exercising this option, 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 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;
- (b) The manufacturer of goods or the provider of output service shall, determine and pay, provisionally, for every month, -
 - (i) The amount equivalent to CENVAT credit attributable to inputs used in or in relation to manufacture of exempted goods, denoted as A;
 - (ii) The amount of CENVAT credit attributable to inputs used for provision of exempted services (provisional) = (B/C) multiplied by D, where B denotes the total value of exempted services provided during the preceding financial year, C denotes the total value of dutiable goods manufactured and removed plus the total value of taxable services provided plus the total value of exempted services provided, during the preceding financial year and D denotes total CENVAT credit taken on inputs during the month minus A;
 - (iii) The amount attributable to input services used in or in relation to manufacture of exempted goods or provision of exempted services (provisional) = (E/F) multiplied by G, where E denotes total value of exempted services provided plus the total value of exempted goods manufactured and removed during the preceding financial year, F denotes total value of taxable and exempted services provided, and total value of dutiable and exempted goods manufactured and removed, during the preceding financial year, and G denotes total CENVAT credit taken on input services during the month;
- (c) The manufacturer of goods or the provider of output service, shall determine finally the amount of CENVAT credit attributable to exempted goods and exempted services for the whole financial year in the following manner, namely :-
 - (i) The amount of CENVAT credit attributable to inputs used in or in relation to manufacture of exempted goods, on the basis of total quantity of inputs used in or in relation to manufacture of said exempted goods, denoted as H;
 - (ii) The amount of CENVAT credit attributable to inputs used for provision of exempted services = (J/K) multiplied by L, where J denotes the total value of exempted services provided during the financial year, K denotes the total value of dutiable goods manufactured and removed plus the total value of taxable services provided plus the total value of exempted services provided, during the financial year and L denotes total CENVAT credit taken on inputs during the financial year minus H;

- (iii) The amount attributable to input services used in or in relation to manufacture of exempted goods or provision of exempted services = (M/N) multiplied by P, where L denotes total value of exempted services provided plus the total value of exempted goods manufactured and removed during the financial year, M denotes total value of taxable and exempted services provided, and total value of dutiable and exempted goods manufactured and removed, during the financial year, and N denotes total CENVAT credit taken on input services during the financial year ;
- (d) The manufacturer of goods or the provider of output service, shall pay an amount equal to the difference between the aggregate amount determined as per condition (c) and the aggregate amount determined and paid as per condition (b), on or before the 30th June of the succeeding financial year, where the amount determined as per condition (c) is more than the amount paid ;
- (e) The manufacturer of goods or the provider of output service, shall, in addition to the amount short-paid, be liable to pay interest at the rate of twenty-four per cent per annum from the due date, i.e., 30th June till the date of payment, where the amount short-paid is not paid within the said due date;
- (f) Where the amount determined as per condition (e) is less than the amount determined and paid as per condition (b), the said manufacturer of goods or the provider of output service may adjust the excess amount on his own, by taking credit of such amount;
- (g) The manufacturer of goods or the provider of output service shall intimate to the jurisdictional Superintendent of Central Excise, within a period of fifteen days from the date of payment or adjustment, as per condition (d) and (f) respectively, the following particulars, namely :-
 - (1) details of CENVAT credit attributable to exempted goods and exempted services, monthwise, for the whole financial year, determined provisionally as per condition (b) ;
 - (2) CENVAT credit attributable to exempted goods and exempted services for the whole financial year, determined as per condition (c),
 - (3) Amount short paid determined as per condition (d), alongwith the date of payment of the amount short-paid,
 - (4) Interest payable and paid, if any, on the amount short-paid, determined as per condition (e), and
 - (5) Credit taken on account of excess payment, if any, determined as per condition (f) ;

- (h) Where the amount equivalent to CENVAT credit attributable to exempted goods or exempted services cannot be determined provisionally, as prescribed in condition (b), due to reasons that no dutiable goods were manufactured and no taxable service was provided in the preceding financial year, then the manufacturer of goods or the provider of output service is not required to determine and pay such amount provisionally for each month, but shall determine the CENVAT credit attributable to exempted goods or exempted services for the whole year as prescribed in condition (c) and pay the amount so calculated on or before 30th June of the succeeding financial year.
- (i) Where the amount determined under condition (h) is not paid within the said due date, i.e., the 30th June, the manufacturer of goods or the provider of output service shall, in addition to the said amount, be liable to pay interest at the rate of twenty four per cent per annum from the due date till the date of payment.

Explanation I – “Value” for the purpose of sub-rules (3) and (3A) shall have the same meaning assigned to it under Section 67 of the Finance Act, 1994 read with rules made thereunder or, as the case may be, the value determined under Section 4 or 4A of the Central Excise Act, 1944 read with rules made thereunder.

Explanation II – The amount mentioned in sub-rules (3) and (3A), unless specified otherwise, shall be paid by the manufacturer of goods or the provider of output service by debiting the CENVAT credit or otherwise on or before the 5th day of the following month except for the month of March, when such payment shall be made on or before the 31st day of the month of March.

Explanation III – If the manufacturer of goods or the provider of output service fails to pay the amount payable under sub-rule (3) or as the case may be sub-rule (3A), it shall be recovered, in the manner as provided in Rule 14, for recovery of CENVAT credit wrongly taken.]”

11. Rule 6(3A) was further modified changing the formula for calculation.

12. The first submission of learned Counsel for the appellant was that if credit has been taken and thereafter reversed, it is good as not having taken the credit at all. He relies on the judgment of the Supreme Court in **Chandrapur Magnet Wires**

(P) Ltd. versus Collector of Central Excise, Nagpur⁵.

Paragraph 7 of the judgment reads as follows:-

"7. In view of the aforesaid clarification by the Department, we see no reason why the assessee cannot make a debit entry in the credit account before removal of the exempted final product. If this debit entry is permissible to be made, credit entry for the duties paid on the inputs utilised in manufacture of the final exempted product will stand deleted in the accounts of the assessee. In such a situation, it cannot be said that the assessee has taken credit for the duty paid on the inputs utilised in the manufacture of the final exempted product under Rule 57A. In other words, the claim for exemption of duty on the disputed goods cannot be denied on the plea that the assessee has taken credit of the duty paid on the inputs used in manufacture of these goods".

13. Learned Counsel submits that Rule 6(2) does not require separate stocking of the common inputs into those to be used for manufacture of dutiable goods and those to be used to be manufacture of exempted goods. It only requires the appellant to maintain separate accounts for receipt, consumption and inventory of inputs and input services used in manufacture of dutiable final products and manufacture of exempted goods. Since they receive the furnace oil and also use it for generation of steam, which in turn, they use to manufacture syrup and to extracts from herbs, the only practical way of maintaining separate accounts is to calculate proportion of furnace oil which has gone into generation of steam which was used to manufacture dutiable goods. They have been taking credit only on such quantity of the furnace oil. Therefore, they are meeting the requirements of Rule 6(2) and therefore the question of paying an amount equal to 5% or 8% or 10% of the value of the exempted products does not apply to their case.

⁵ 1996 (81) E.L.T. 3 (S.C.)

14. The second submission is that the various alternatives given under Rule 6 are the options available to the assessee who wishes to avail Cenvat credit on inputs which are used in manufacture of dutiable and exempted products. The rule nowhere empowers the Departmental officers to choose one of the options for the assessee and enforce it. If the assessee does not choose any of the options under Rule 6 and still avails the Cenvat credit on common inputs/input services it would be taking credit in violation of Cenvat Credit Rules, 2004 and such wrongly availed Cenvat credit can be recovered under Rule 14. But in no circumstances can the Department foist a particular choice upon the appellant and demand an amount under Rule 6 (3) as has been done in these show cause notices. He relies on the judgment of the High Court of Andhra Pradesh and Telangana in the case of **M/s Tiara Advertising versus Union of India**⁶. He also relies on the following other case laws :-

(i) **Star Agriwarehousing & Collateral Management Ltd. versus CCE & ST, Jaipur (Rajasthan) – 2020 (10) TMI 198 – CESTAT NEW DELHI**

(ii) **M/s Mercedes Benz India (P) Limited versus Commissioner of Central Excise, Pune – I – 2015 (8) TMI 24 – CESTAT Mumbai**

(iii) **The Oberoi Rajvillas versus CCE, Jaipur – 2018 (5) TMI 1715 – CESTAT New Delhi**

15. The third submission of learned Counsel is that in order to clear the confusion, Finance Act, 2010 had made a retrospective

⁶ 2019 (10) TMI 27

amendment to cover the period 16.05.2005 to 31.03.2008. This reads as follows :-

"Amendment of rule 6 of CENVAT Credit Rules, 2004. —

73. (1) In the CENVAT Credit Rules, 2004, made by the Central Government in exercise of the powers conferred by section 37 of the Central Excise Act, as published in the Official Gazette *vide* notification of the Government of India in the Ministry of Finance (Department of Revenue) number G.S.R. 600(E), dated the 10th September, 2004, rule 6 shall stand amended and shall be deemed to have been amended retrospectively, in the manner specified in column (3) of the Eighth Schedule, on and from and up to the corresponding date specified in column (4) of that Schedule against the rule specified in column (2) of that Schedule.

(2) Where a person opts to pay the amount in accordance with the provisions as amended by sub-section (1), he shall pay the amount along with interest specified thereunder and make an application to the Commissioner of Central Excise along with documentary evidence and a certificate from a Chartered Accountant or a Cost Accountant, certifying the amount of input credit attributable to the inputs used in or in relation to the manufacture of exempted goods, within a period of six months from the date on which the Finance Bill, 2010 receives the assent of the President.

(3) The Commissioner of Central Excise shall, on receipt of an application under sub-section (2), verify the correctness of the amount paid within a period of two months from the date of receipt of the application and in case the amount so paid is found to be less than the amount payable, he shall call upon the applicant to pay the differential amount along with interest, which shall be paid within a period of ten days from the date of receipt of the communication from the Commissioner in this regard.

(4) Notwithstanding anything contained in any judgment, decree or order of any court, tribunal or other authority, any action taken or anything done or purported to have been taken or done, at any time during the period commencing on and from the 10th day of September, 2004 and ending with the 31st day of March, 2008, relating to the provisions as amended by sub-section (1), shall be deemed to be and deemed always to have been, for all purposes, as validly and effectively taken or done as if the amendment made by sub-section (1) had been in force at all material times.

(5) For the purposes of sub-section (1), the Central Government shall have and shall be deemed to have the power to make rules with retrospective effect as if the Central Government had the power to make rules under section 37 of the Central Excise Act, retrospectively, at all material times.

Explanation. — For the removal of doubts, it is hereby declared that no act or omission on the part of any person shall be punishable as an offence which would not have been so punishable had this section not come into force.

16. Learned Counsel submits that it is undisputed that they had filed a declaration under this amendment along with details of the debit made which has been recorded by the Commissioner and paragraph 6.15 in the first impugned order. He, however, rejected the same stating that the appellant had not done the calculations correctly. The relevant portion of the impugned order is as follows :-

"6.15 I find that the party opted for the provisions of Section 73 (2) of the Finance Bill 2010 on 07.06.2010 i.e. within the stipulated period. I also find that they have submitted a certificate of the Chartered Accountant certifying the amount of credit attributable to exempted goods.

6.16 To verify the correctness of their calculations, a report in this regard was requested from the experts of IIT, Roorkee by making a reference vide this office letter dated 06.01.2011. The experts from IIT Roorkee paid a visit to the unit and submitted their comments which are as under :-

1. The basic calculation done by Hamdard Laboratories seem to be applicable in the determination of consumption of Furnace oil except for inclusion of efficiency factor (which as mentioned by them is 75% and not 100%). This may be taken into consideration for exact calculation.
2. As far as division of consumption of furnace oil of dutiable and non dutiable items is concern, it will depend on the monthly production of those items. In conclusion, it may be stated that 75% boiler efficiency should be considered in calculation for determining consumption of furnace oil.

6.17 From the above report of IIT Roorkee, I find that the method of calculation of use of furnace oil in dutiable as well as exempted goods has not been found in order by the experts. The factor namely actual boiler efficiency has not been taken into account by the party. As such I feel that the formula of calculation of use of FO in both type of products cannot be relied upon and is not acceptable. As such the request of the party for regularization of credit during the period upto 31.03.2008 cannot be acceded to and they are liable to pay an amount @ 10% of the value of exempted goods in terms of rule 6 (3) (b) of the Cenvat Credit Rules, 2004 as they existed at the material time. From the calculation sheet as per RUD 7 of the SCN, I find that during this period, party cleared exempted goods valued at Rs. 50,70,45,760/- and as such they are liable to pay an amount of Rs. 5,07,04,576/- for this period in terms of Rule 6 (3) (b) of the said rules".

17. Learned Counsel submits that the Finance Act, 2010 gave the assessee the option to pay an amount in accordance with the provision of sub-Section (1) along with interest and make an application. It is undisputed that they made an application. The Commissioner of Central Excise shall, as per the Finance Act, "on receipt of an application verify the correctness of the amount paid within a period of two months and if the amount paid is found to be the less than the amount payable shall call upon the applicant to pay the differential amount along with interest". The Commissioner has no discretion under the Finance Act, 2010 to reject the application even if the amount paid is found to be insufficient. In the first impugned order, the learned Commissioner has mis-conceived the provision and rejected the application assuming that power which has not been conferred under the Act on the ground the amount paid was insufficient. He, therefore, demanded an amount equal to 10% of the value of the exempted goods as per another option which the appellant had not chosen. The Commissioner has chosen to foist upon the appellant an option, which is impermissible.

18. On the specific observation of the Commissioner pointing out the deficiencies in the calculations, learned Counsel submits that the learned Commissioner had sought opinion of experts from IIT, Roorkee and the observations, cited in paragraph 6.16 of the first impugned order are as follows.

"(i) for consumption of furnace oil, the efficiency factor should be taken as 75% instead of 100% for calculating the exact amount of furnace oil consumed ;

(ii) the inter-se distribution of consumption of furnace oil between dutiable and non-dutiable items depend on the monthly production of these items”.

19. As far as the first objection is concerned if 75% efficiency is considered for consumption of furnace oil, more furnace oil should be consumed for the same process. For instance, if producing a certain quantity of steam at 100% efficiency 100kg of furnace oil is required, if boiler is only 75% efficient, then 133 kg. of furnace oil should be consumed to produce the same amount of steam. Therefore, more Cenvat credit should have been available to the appellant and not less. However, in the present case, the inter-se consumption between the dutiable and exempted products of the furnace oil used for generation of steam will not change. What is in dispute is whether the appellant has correctly reversed the amount of Cenvat credit attributable to the furnace oil used for steam generated and used for manufacture of exempted products. The experts from IIT, Roorkee have left this inter-se consumption of furnace oil between dutiable and exempted products to be decided as per the monthly production of those items. The appellant has exactly used this very formula for reversing the amount of Cenvat credit. It would have been a different matter if the experts had said that more steam was used for manufacture of exempted products than what was debited by the appellant. It is for this very reason, that no calculation error was pointed out in the first impugned order of the learned Commissioner. He simply rejected the calculation without indicating what, according to him, was the

correct amount of Cenvat credit to be debited and how much was the shortfall. Therefore, the order was passed without any application of mind.

20. As far as the period post 2010 is concerned, the SCNs with periodical demands were issued demanding payment of 10% of the value of exempted products ignoring the fact that they had already reversed proportionate amount of Cenvat credit as required. The findings of the Commissioner's in paragraph 37 to 39 of the second impugned order are as follows :-

"37. I find that the option exercised by the party vide their letter dated 01.04.2010 under Rule 6 (3A) of Cenvat Credit Rules, 2004 was not accepted by the department on the following ground :

- (i) they have availed Cenvat credit on FO which was used in their one common boiler for generating steam which was used simultaneously both in excisable and exempted goods.
- (ii) they were not maintaining separate records as specified under Rule 6 (2) of Cenvat Credit Rules, 2004.
- (iii) they were availing the proportionate Cenvat credit as per their own self devised calculation in respect of the FO used in the exempted goods at the end of the month.
- (iv) the calculations were not in accordance with Central Excise, Cenvat Credit Rules as the option exercised vide letter dated 01.04.2010 did not conform to the provisions as provided under Cenvat Credit Rules.
- (v) they were also not maintaining separate records as specified in Rule 6 (2) of Cenvat Credit Rules, 2004, thus they were liable to pay an amount equal to 5% of the total price of exempted clearance from 01.06.2010 and onwards in accordance with Rule 6 (3) (i) of Cenvat Credit Rules, 2004.

38. In view of the provisions of Rule 6 (3A) of CENVAT Credit Rules, 2004, I find that the party has exercised the option under Rule 6 (3A) of CENVAT Credit Rules, 2004 for Furnace Oil, but without following the procedure of quantification as provided under sub-rules (3A) (b) to (3A) (i) of Rule 6. I also find that the quantification adopted by the party under the said option was not much different from their earlier self created mechanism as already discussed in the preceding paras, which was not accepted by the department.

39. In the light of the above discussions, I find that being the similar facts & circumstances in the present case, I do not find any reason to deviate from my earlier findings vide the Order-in-Original No. 42-43/Commr./GZB/2010-11 dated 21.03.11 passed on the similar issue. I, therefore, of the considered view that the party is

not eligible to avail CENVAT Credit on FO used as fuel on proportionate basis which was used in manufacture of dutiable and exempted final products. Therefore, they were required to pay an amount @ 5% of the value of exempted goods cleared during the period from 01.10.2010 to 31.03.2011. They are, therefore, liable to pay total amount of Rs. 3,51,96,966/- for the said period in terms of Rule 6 (3) (i) of the CCR, 2004 along with interest in terms of Section 11AB of the Act”.

21. Learned Counsel submitted that without application of mind, the Commissioner simply followed his own order for the earlier period and brushed aside the reversal of Cenvat credit by holding that the same was not done correctly. In view of the above, the entire demand and interest confirmed by the two impugned orders and the penalties imposed under them need to be set aside.

22. Learned Departmental Representative vehemently supported the impugned orders.

23. We have gone through the records of the case and considered the submissions made by both sides.

24. It is undisputed that the appellant manufactures both dutiable goods and exempted goods. So far as the inputs used in manufacture of dutiable goods is concerned, the appellant availed Cenvat credit. The appellant has not availed Cenvat credit on inputs used exclusively in manufacture of exempted goods. The dispute is regarding furnace oil which is a common input. Not only is the furnace oil a common input procured jointly for all the products, it is also used to generate steam which is further used for manufacture of dutiable as well as exempted products. The

steam is used both for extraction of herbs and for production of sugar syrup. The sugar syrup is in turn used for manufacture of goods dutiable and exempted products.

25. The case of the Department is that as per Rule 6 (2) of Cenvat Credit Rules, 2004 the appellant was required to maintain separate accounts for input used for manufacture of dutiable and exempted products which the appellant has not done. Since the appellant has not followed Rule 6 (2) it is bound pay an amount equal to 10% of the value of goods under Rule 6 (3). The demands were confirmed accordingly. For the period prior to 2010, the Finance Act, 2010 provided an option to the appellant to reverse proportionate amount of Cenvat credit attributable to the inputs used in manufacture of exempted goods. Undisputedly, the appellant opted for it and filed a declaration. The Commissioner got the declaration verified by experts from IIT, Roorkee who made two observations which were found important by the Commissioner namely (i) the efficiency must be considered as 75% for consumption of furnace oil instead of 100%; (ii) the inter-se consumption between the dutiable and exempted products depends upon the monthly production of such products. The experts do not appear to have made any other remark regarding the calculation and reversal by the appellant. The Commissioner has understood this expert opinion to mean that the appellant has not correctly reversed the Cenvat credit and, therefore, rejected the contention of the appellant. For the

subsequent periods decided in the second impugned order, the Commissioner has observed in paragraph 35 as below :-

- “(i) the party did not properly followed Rule 6 (2) of Cenvat Credit Rules, 2004 and separate records were not maintained as per the spirit of the rule.
- (ii) Rule 6 (3) of Cenvat Credit Rules, 2004 was not followed properly. Though option which was available from 01.04.2010, has been exercised by the party, but it was based on the formula which was their self created mechanism and has not been approved by the competent authority.
- (iii) Neither Rule 6 (2) of Cenvat Credit Rules, 2004 has been followed correctly nor Rule 6 (3), intentionally ;
- (iv) Proper records under Rule 9 (5) of Cenvat Credit Rules, 2004, were not maintained;”

26. The first question which arises is whether Rule 6(2) required an assessee to purchase, stock and use the common inputs separately for use in manufacture of dutiable goods and exempted goods. A plain reading of Rule 6(2) does not show that the assessee has this responsibility. Rule 6(2) only requires separate accounts to be maintained for receipt, consumption and inventory of inputs and input services used in manufacture of dutiable final products and exempted products. In many industries, the same stock of the common input is procured in bulk and is used in manufacture of several dutiable and exempted goods as required from time to time. In bulk drug industries and chemical industries, for instance, common solvents such as acetone, benzene, methanol and commonly used chemicals such as hydrochloric acid and sulphuric acid are purchased in bulk and stored in tanks. They are used as required in manufacture of the goods as per demand. Some of these

goods may be dutiable and some may be exempted. Rule 6(2) does not require these commonly chemicals to be purchased separately and stored separately and used separately for manufacture of dutiable goods and exempted goods. Accounts can be maintained in several ways and credit notes and debit notes and credit and debit entries in ledgers are common and acceptable methods of accounting. Similarly, if 100 kg of an input is procured and credit is taken on it and thereafter 20 kg is used in manufacture of exempted goods debiting 20% of the credit so taken, it would be sufficient as accounting of the inputs separately. In **Chandrapur Magnet Wires (P) Ltd.** (supra), the Supreme Court has observed as follows in paragraph 7 :-

"7. In view of the aforesaid clarification by the Department, we see no reason why the assessee cannot make a debit entry in the credit account before removal of the exempted final product. If this debit entry is permissible to be made, credit entry for the duties paid on the inputs utilised in manufacture of the final exempted product will stand deleted in the accounts of the assessee. In such a situation, it cannot be said that the assessee has taken credit for the duty paid on the inputs utilised in the manufacture of the final exempted product under Rule 57A. In other words, the claim for exemption of duty on the disputed goods cannot be denied on the plea that the assessee has taken credit of the duty paid on the inputs used in manufacture of these goods".

27. Therefore, if an entry is made taking a credit and another entry is made reversing the earlier entry, it is as good as not taking the credit at all. This is the only practical way of maintaining separate accounts for some industries such as the one of the appellant.

28. The issue in the present case is a little more complex. The appellant does not have separate boilers to generate steam used

in manufacture of dutiable and exempted products. It also does not have separate machinery for generation of sugar syrup which is further used in manufacture of dutiable and exempted products. The furnace oil which has gone into production of steam is further used in manufacture of syrup, which is further used in manufacture of both dutiable and exempted products. Therefore, accounts can only be maintained by corresponding credit and debit entries reversing proportionate amount of Cenvat credit. On this very ground itself, the impugned orders must fail.

29. Secondly, since there were doubts, the retrospective amendment made by Finance Act, 2010 allowed the assessee to reverse proportionate amount of Cenvat credit. They had to file a declaration, which the appellant did. The appellant reversed the amount with interest. The Finance Act only provided for the Commissioner to verify, within a given time, the declaration and the reversal so made and if the amount debited was insufficient, then to ask the assessee to debit the remainder. The Finance Act, 2010 does not authorize the Commissioner to reject the application filed by an assessee but the Commissioner has assumed this power.

30. Of course, the Commissioner had the power to verify and for such verification, he could await technical expertise. He has rightly taken the help of experts from IIT, Roorkee. The Commissioner's objection to the debit by the assessee was that it was not as per the experts' opinion. If so, the Commissioner

should have expressed as to how much should have been debited and how much was actually debited and how much more needed to be debited. He did not do such a thing because the two points on which the Commissioner relied from the experts' report have no bearing on the amounts debited. If 75% efficiency is considered instead of 100% efficiency in generation of steam on the whole, more furnace oil would have been consumed for production of steam that would have entitled the appellant to more Cenvat credit and not less. However, such consumption would not affect the inter-se consumption of furnace oil for production of dutiable and exempted goods. The second point from the expert report cited by the learned Commissioner was that the proportion of Cenvat credit attributable to dutiable and exempted products depends upon monthly production. The appellant has, according to the learned counsel, debited the amount of Cenvat credit accordingly. The quantity of dutiable and exempted products manufactured by the appellant are a matter of record. The quantity of furnace oil attributable to unit quantity of each of those products is a technical matter. The appellant has used the technical report to debit and there is nothing in the Commissioner's order to show that the calculations were wrong and more or less of furnace oil was attributable to the production of exempted goods and if so, by how much.

31. Interestingly, in the second impugned order, the Commissioner states the appellant has not followed Rule 6 (3) of Cenvat Credit Rules, 2004 properly and that **"it was based on a**

formula which was their self-created mechanism and has not been approved by Competent Authority". We do not find anything in Rule 6(3) which designates a Competent Authority or which requires of approval of the formula by any Competent Authority or by the Commissioner. Of course, if the debit was incorrect, the Commissioner could have said why and explained what would be the correct amount. He did no such thing. Therefore, the impugned order must fail on this count as well.

32. The next issue is whether the appellant can be compelled to choose one of the options under Rule 6 of Cenvat Credit Rules, 2004. The High Court of Telangana and Andhra Pradesh in the case of **Tiara Advertising** (supra) explained the scope of Rule 6 and observed that this provides for various options in the form of Rule 6 (1), 6 (2) and 6 (3) etc. There is nothing in this Rule which authorizes the Commissioner or any Departmental Officer to choose a particular option for the assessee and force the assessee to follow it. The High Court further clarified that if the assessee does not choose any of the options and still avails Cenvat credit then it would be wrongly availing such Cenvat credit and such wrongly availed Cenvat credit can be recovered under Rule 14 of Cenvat Credit Rules. However, it is not permissible for the Department to foist an option under Rule 6 upon the assessee as has been done in the impugned orders. For this reason also the impugned orders cannot be sustained and need to be set aside. We also note that there is no provision in

the Central Excise Act or Cenvat Credit Rules, 2004 whereby an amount under Rule 6(3) can be recovered from the assessee. Section 11A of the Act provides for recovery of duty. Rule 14 of the CENVAT credit Rules provided for recovery of irregularly availed CENVAT credit. Any demand under Rule 14 of CENVAT Credit Rules, 2004 for recovery of an amount under Rule 6(3) therefore, is without the authority of law and hence needs to be set aside regardless of the merits of the case.

33. Since the confirmation of the demands cannot be sustained under Rule 6(3), the demand for interest and imposition of penalty also need to be set aside.

34. In view of the above, the impugned orders cannot be sustained and are set aside. The appeals are allowed with consequential relief, if any.

(Order pronounced in open court on 05/11/2021.)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P.V. SUBBA RAO)
MEMBER (TECHNICAL)