

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL
BANGALORE**

REGIONAL BENCH - COURT NO. 1

Appeal(s) Involved:

Central Excise Appeal No. 26156 and 26157 of 2013

(Both appeals arising out of common Order-in-Original No.1 & 2/2013-CE dated 4.1.2013 passed by the Commissioner of Central Excise, Customs and Service Tax, Cochin.)

AND

Central Excise Appeal No. 26616 of 2013

(Arising out of Order-in-Original No.8/2013-CE dated 14.2.2013 passed by the Commissioner of Central Excise, Customs and Service Tax, Cochin.)

**The Fertilizers and
Chemicals Travancore
Limited**

Udyogamandal Division,
Udyogamandal,
Cochin - 683 501.

Appellant(s)

Versus

**The Commissioner of Central
Excise**

C.R. Building, I. S. Press Road,
Cochin - 682 018.

Respondent(s)

Appearance:

Mr. Kuriyan Thomas, Advocate

For the Appellant

Mr. H. Jayathirtha,
Superintendent (AR)

For the Respondent

CORAM:

HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)

HON'BLE MRS. R. BHAGYA DEVI, MEMBER (TECHNICAL)

Final Order No. 20825 - 20827 /2023

Date of Hearing: 22.06.2023

Date of Decision: 22.06.2023

Per : R. BHAGYA DEVI

The Fertilisers and Chemicals Travancore Limited are the appellants in the present appeal who are engaged in the manufacture of fertilizers and chemicals. Fertilizers manufactured by the appellant were exempted from duty of excise under the Central Excise Act, 1944 up to 28.02.2011. The above exemption which was available to was withdrawn with effect from 1.3.2011 vide Notification No.1/2011-CE dated 1.3.2011 and duty at the rate of 5% *ad valorem* was introduced vide Notification No.2/2011-CE dated 1.3.2011. Later vide Notification No.19/2012-CE dated 17.3.2012 the rate of duty was increased to 6% *ad valorem*. Simultaneously, another Notification No.1/2011-CE dated 1.3.2011 (Sl. No.40) was introduced wherein concessional rate of duty of 1% was available on fertilizers on the condition that no CENVAT credit was availed on input and input services.

2. The details of the appeals are furnished below:

Appeal No.	E/26156/2013	E/26157/2013	E/26616/2013
SCN date	19.03.2012	26.04.2012	07.12.2012
OIO No.	No.1&2/2013 dt. 4.1.2013	No.1&2/2013 dt. 4.1.2013	No.8/2013 dt. 14.2.2013
Amount of duty	Rs.4,41,90,728/-	Rs.11,74,74,630/-	Rs.4,48,18,867/-
Amount of Penalty	Rs.4,41,90,728/-	Rs.11,74,74,630/-	Rs.4,48,18,867/-
Period Involved	03/2011 to 06/2011	07/2011 to 12/2011	01/2012 to 03/2012

2.1 During the above periods, the appellant had claimed the benefit of Notification No.1/2011-CE and paid duty at the rate of 1% for utilising the accumulated credit arising from final products exported by them. The Department issued show-causes denying the benefit of the Notification since the condition of the Notification was violated by utilising the credit for payment of duty. The impugned orders confirmed the demands during the said periods by denying the benefit of the Notification referred above.

3. The learned counsel on behalf of the appellant argued that the restriction under Notification No.1/2011 dated 1.3.2011 is only with regard to availment of credit on input and input services used for manufacturing of the final products. Admittedly, he has not availed or utilised the CENVAT credit on input and input services which were used for manufacture of the fertilizers. He claimed that the accumulated credit on the inputs utilised in the manufacture of export goods was utilised for payment of 1% duty which was legally correct. He alleged that under Rule 3(4) of CENVAT Credit Rules, the restrictions contained therein would not be applicable to him as the credit was the accumulated credit on exports which is governed by Rule 5 of the CENVAT Credit Rules, 2004.

3.1 He also stated that Notification No.12/2012 dated 17.3.2012, the legislature and the appropriate government never intended to keep the effective rate of duty on fertilizers over and above 1% and no restriction was intended in utilising

the credit for payment of duty on fertilizers while availing the concessional rate of duty.

3.2 He also relied on the following judgments:

- (i) Union of India vs. Sharp Menthol India Ltd.: 2011 (270) ELT 212 (Bom.)
- (ii) Commr. Of GST & Central Excise, Chennai vs. Sutherland Global Services Pvt. Ltd.: 2021 (47) GSTL 454 (Mad.)
- (iii) CCE, Visakhapatnam vs. Gautami Textiles Indus. & Sales Coprn.: 2006 (197) ELT 87 (Tri. - Bang.)

3.3 It is also stated that the Commissioner also erred in imposing penalty under Section 11AC read with Rule 25 of Central Excise Rules, as there was no contravention with intention to evade payment of duty. The appellant had *bona fide* belief that he is entitled to utilise the CENVAT credit arising out of exports and had utilised the credit. In view of the fact that it was only accumulated credit meant for exports. It is also alleged that show-cause notice and Order-in-Original do not specifically mention the exact clauses of the Act from the Rules that are violated for imposition of penalty. To substantiate his above argument, he relied on following case laws:

- (i) Hawkins Cookers Ltd. vs. Commissioner of Service Tax, Mumbai-II: 2020 (43) GSTL 513 (Tri. - Mumbai);
- (ii) Commissioner of Income Tax vs. Samson Perinchery: 2017 (392) ITR 0004 (Bom.)

4. The learned Authorised Representative on behalf of the Revenue stated that the Commissioner was right in denying the benefit of concessional rate of duty inasmuch as they were not eligible to utilise the CENVAT credit for payment of concessional rate of duty in terms of the Notification No.1/2011 and as per Rule 3(4) of CENVAT Credit Rules, 2004. He also stated that

CENVAT Credit Rules were amended vide Notification No.3/2011 dated 1.3.2011 where specifically forbids any assessee from using CENVAT credit for payment of any duty of excise on the goods in respect of which the benefit of exemption Notification No.01/2011-CE is availed. Emphasising the fact that Rule 3(4) of the CENVAT Credit Rules, specifies that CENVAT Credit shall not be utilised for payment of any duty of excise on goods in respect of which the benefit of exemption Notification No.01/2011-CE dated 1.3.2011 availed. He further submits that the fact that they have taken credit on inputs / input services used in the manufacture of said products is immaterial.

5. Heard both sides and on perusal of records it is observed that the limited issue before us is as to whether the appellants are eligible for exemption Notification No.01/2011-CE and No.2/2011 both dated 1.3.2011. The said Notifications are extracted below:

Effective rate of duty of 1% on specified goods when no Cenvat credit availed on inputs or input services

In exercise of the powers conferred by sub-section (1) of section 5A of the Central Excise Act, 1944 (1 of 1944), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts the excisable goods of the description specified in column (3) of the Table below and falling under Chapter, heading, sub-heading or tariff item of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), specified in the corresponding entry in column (2) of the said Table, from so much of the duty of excise leviable thereon under the said Central Excise Act, as is in excess of the amount calculated at the rate of 1% *ad valorem* :

Provided that nothing contained in this notification shall apply to the goods in respect of which credit of duty on inputs or tax on input services has been taken under the provisions of the CENVAT Credit Rules, 2004.

Table

....

40. Chapter 31 – All goods, other than those which are clearly not to be used as fertilizers.

Notification No.2/2011 – Central Excise dated 1.3.2011:

Effective rate of duty of 5% on specified goods

In exercise of the powers conferred by sub-section (1) of section 5A of the Central Excise Act, 1944 (1 of 1944), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts the excisable goods of the description specified in column (3) of the Table below and falling under Chapter, heading, sub-heading or tariff item of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), specified in corresponding entry in column (2) of the said Table, from so much of the duty of excise leviable thereon under the said Central Excise Act, as is in excess of the amount calculated at the rate of 5% *ad valorem* :

TABLE

Chapter 31 – All goods, other than those which are clearly not to be used-

- (a) As fertilizers; or
- (b) In the manufacture of other fertilizers,

Whether directly or through the stage of an intermediate product.

5.1 Admittedly, as per this Notification, the appellant cannot take credit of duty on inputs or input services which are used in the manufacture of fertilisers on which the concessional rate of duty of 1% is availed.

5.2 The Notification No.3/2011 dated 1.3.2011 is reproduced below:

Effective rate of duty on specified goods on Chapters 1 to 24 — Amendment to Notification No. 3/2006-C.E.

In exercise of the powers conferred by sub-section (1) of section 5A of the Central Excise Act, 1944 (1 of 1944), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby makes the following further amendments in the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 3/2006-Central Excise, dated the 1st March, 2006, published in the Gazette of India, Extraordinary, vide number G.S.R. 93(E), dated the 1st March, 2006, namely :-

1..

(a) These rules may be called the CENVAT Credit (Amendment) Rules, 2011.

(b) Save as otherwise provided in these rules, they shall come into force on the 1st day of April 2011.

...

5.3 CENVAT Credit Rules, 2004 is reproduced herein below:

3. In Rule 3 of the said Rules,-

....

(ii) in sub-rule (4)

(a) After the first proviso, the following shall be inserted with effect from the 1st day of March, 2011, namely:-

“Provided further that CENVAT credit shall not be utilised for payment of any duty of excise on goods in respect of which the benefit of an exemption under Notification No.1/2011-CE dated the 1st March 2011 is availed.”;

(b) In the second proviso, for the word “further”, the word “also” shall be substituted with effect from the 1st day of March, 2011;

6. From the above Notifications and the CENVAT Credit Rules, it is an admitted fact that the appellant cannot avail any credit on the inputs/input services utilised in the manufacture of fertilizers whenever they have availed the concessional rate of 1% duty on the final products. In addition to the above Rules and Notifications, they were denied the benefit of using CENVAT credit for payment of concessional rate of duty. Therefore, the Commissioner was right in denying the benefit of the Notifications. Therefore, the appellant had to necessarily pay standard rate of duty i.e., 5% which is applicable on the final products cleared. However, it is noticed that while demanding this 5% *ad valorem* on the clearance value of the fertilisers falling under Chapter 31, the Commissioner has not adjusted the 1% duty already paid towards this clearance value of the fertilisers. Therefore, while confirming the findings of the Commissioner, we remand the order to Commissioner to redetermine the duty demanded along with interest after adjusting the 1% which is already paid by the appellant.

Therefore, the duty needs to be redetermined after taking into account the payments already made.

7. Rule 25 of Central Excise Rules, 2002 is reproduced hereinbelow:

“RULE 25. Confiscation and penalty. — (1) Subject to the provisions of section 11AC of the Act, if any producer, manufacturer, registered person of a warehouse [or an importer who issues an invoice on which CENVAT credit can be taken] or a registered dealer,

(a) removes any excisable goods in contravention of any of the provisions of these rules or the notifications issued under these rules; or

(b) does not account for any excisable goods produced or manufactured or stored by him; or

(c) engages in the manufacture, production or storage of any excisable goods without having applied for the registration certificate required under section 6 of the Act; or

(d) contravenes any of the provisions of these rules or the notifications issued under these rules with intent to evade payment of duty,

then, all such goods shall be liable to confiscation and the producer or manufacturer or registered person of the warehouse [or an importer who issues an invoice on which CENVAT credit can be taken] or a registered dealer, as the case may be, shall be liable to a penalty not exceeding the duty on the excisable goods in respect of which any contravention of the nature referred to in clause (a) or clause (b) or clause (c) or clause (d) has been committed, or [five thousand rupees], whichever is greater.

(2) An order under sub-rule (1) shall be issued by the Central Excise Officer, following the principles of natural justice.”

7.1 The Commissioner has imposed mandatory penalty equivalent to the duty demand under Rule 25 of Central Excise Rules, 2002 for violation of Rule 6 and 8 of Central Excise Rules, 2002 and for violation of conditions of the Notification. As claimed by the appellant, there is no specific violation of clauses under Rule 25 of Central Excise Rules, 2002 are invoked. Obviously, it looks like clause (d) of Rule 25 Central Excise Rules, 2002 has been invoked without any evidence to prove intention to evade payment of duty.

8. The appellant has in his knowledge read and interpreted the provisions of law incorrectly as is evident from the observations made by the Commissioner in the impugned order as follows: *“it becomes apparent that the assessee had mistook the statute by way of interpreting Notification No.1/2011-CE and Notification No.3/2011 (NT) disjunctively which clearly is an error on their part.”* In view of the above, as there is no intention to evade payment of duty, invoking provisions of Rule 25 of Central Excise Rules, 2002 for imposing mandatory penalty does not arise and therefore, the penalty of Rs.11,74,000/- and penalty under Rule 15 of Cenvat Credit Rules, 2004 is set aside.

9. Appeals are allowed partially on above terms.

(Order dictated and pronounced in Open Court.)

(D.M. MISRA)
MEMBER (JUDICIAL)

(R. BHAGYA DEVI)
MEMBER (TECHNICAL)