CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
CHENNAI

Appeal No.E/665/2010

[Arising out of Order-in-Original 10/2010 dt.5.08.2010 passed by the Commissioner of Central Excise and Service Tax, Tiruchirapalli]

Thiru Arooran Sugars Ltd — Appellant

Versus

Commissioner of Central Excise, Trichy — Respondent

Appearance:

Shri S.Muthuvenkatraman, Advocate
For the Appellant

Shri K.Veerabhadra Reddy, JC (AR)
For the Respondent

CORAM :

Hon'ble Ms. Sulekha Beevi C.S. Member (Judicial)
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of hearing / decision : 4.4.2018

Per Bench

FINAL ORDER No. 41078 / 2018

Brief facts are that the appellants are engaged in the manufacture of sugar, molasses, rectified spirit, Denatured ethyl alcohol, and extra neutral alcohol. They were availing CENVAT credit on inputs and input services. It was noticed that the appellants were using common inputs / input services for manufacture of dutiable products (sugar and molasses) as well as exempted goods (extra neutral alcohol / rectified spirit). They were not maintaining separate accounts for the common inputs used, as required under Rule 6(2) of Cenvat Credit Rules, 2004. From the ER 1 return for the period April 2009 to July 2009, it was noticed that they had reversed the credit attributable in respect of common inputs and input services used for manufacture of exempted goods. However, the appellants had not filed the declaration mentioning their option, as required under Rule 6 (3A) of Cenvat Credit Rules, 2004. The department was of the view that having not filed the declaration by giving the option of reversing the credit attributable to manufacture of exempted products, the appellants are liable to pay 10% / 5% of the value of exempted goods cleared during the disputed period from April 2009 to July 2009.

2. Show cause notice was issued proposing to recover an amount equal to 10% / 5% of the value of exempted goods alongwith interest and also proposing to impose penalty. After due process of law, the original authority confirmed the demand, interest and also imposed penalties. Aggrieved, the appellants are now before the Tribunal.

3. On behalf of the appellant, the Ld.Counsel submitted that the appellants had reversed the proportionate credit attributable to inputs / input services used for production of exempted goods. The only allegation raised against the appellant is that they did not file the declaration as contemplated in Rule 6 (3A). The act of the appellant

in reversing the credit itself would establish the intention to avail the option of reversing proportionate credit. He argued that when the law provides for an option to the assessee, the department cannot unilaterally force the appellant to pay 10% / 5% of the value of excisable goods. He submitted that the issue is no longer res integra and decided by the judgements in the case of ***Tata Technologies Ltd Vs Commissioner of Central Excise 2016-TIOL-272-CESTAT-MUM and Cranes & Structural Engineers Vs Commr. Of C.Ex., Bangalore – I 2017 (347) E.L.T. 112 (Tri.-Bang.)***

4. The Ld.AR, Sh.K.Veerabhadra Reddy reiterated the findings in the impugned order.

5. Heard both sides.

6. The issue that arises for consideration is whether the assessee is liable to pay an amount equal to 10% or 5% of the value of excise clearance as applicable in terms of Rule 6(3)(i) of Cenvat Credit Rules, 2004 for not having filed declaration exercising option under Rule 6 (3A) ibid. The said issue has been considered by the Tribunal in the case of ***Cranes & Structural Engineers Vs Commr. Of C.Ex., Bangalore*** (supra), wherein the tribunal observed as under :-

4.1 On analysis of Rule 6(3A), I find that while exercising the option, the manufacturer of goods or the provider of output service shall intimate in writing to the Department regarding the option exercised. In the present case, admittedly there is no intimation given by the appellant informing the exercise of his option. The argument of the Department is that when the appellant has not intimated his option in writing then the appellant is bound to pay the duty amount calculating under the first option. According to me, this argument is devoid of merit, because the said Rule does not say anywhere that on failure to intimate, the manufacturer/service provider would lose his right to avail second option of reversing the proportionate credit. Sub-rule (3A) of Rule 6 is only a procedure contemplated for application of Rule 6(3). Consequently, the argument of Revenue is that the appellants exercising option is mandatory and on its failure, the appellant has no other option but to accept and apply Rule 6(3)(i) and make payment of 5%/10% of the sale price of the exempted goods or exempted services is not acceptable, because the Rule does not lay down any such restriction and this has been held in the judgments cited supra. <u>It has been held in the judgment cited supra that the condition in Rule 6(3A) to intimate the Department is only a procedural one and that such procedural lapse is condonable and denial of substantive right on such procedural failure is unjustified.</u>

Therefore, keeping in view the facts and evidence on record, the demand raised by the Revenue is not legal and proper. Moreover, the demand raised by the Revenue is also hit by limitation as the appellant reversed the *pro rata* credit with interest on 31-7-2010 itself and communicated to the Department whereas the show cause notice was issued only on 13-3-2012 which is beyond the period of one year and the allegation of the Department regarding suppression of fact is also not tenable because the appellant has disclosed these facts in their periodical ER1 returns filed by them. Therefore, the impugned order is not sustainable on merit as well as on limitation and therefore, I set aside the impugned order by allowing the appeal of the appellant with consequential relief, if any.

7. Following the same, we are of the considered view that the demand cannot sustain. The impugned order is set aside and the appeal is allowed with consequential reliefs, if any.

(Operative part of the order pronounced in open court)

(Madhu Mohan Damodhar)	**(Sulekha Beevi C.S)**
Member (Technical)	**Member (Judicial)**

Vsr/Rkp