IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH AT CHENNAI
[COURT : Division Bench B1]

Appeal No.: E/42576/2014

[Arising out of Order-in-Original No. 06/2014 (C.Ex.) Commissioner dated 20.06.2014 passed by the Commissioner of Central Excise, Salem]

M/s. JPP Mills Pvt. Ltd., **: Appellant**
S.F. No. 411 & 412, Sankagiri Main Road,
Patharai, Uppupalayam, Sowthapuram Post,
Erode – 638 008

Versus

The Commissioner of G.S.T. & Central Excise, **: Respondent**
Salem Commissionerate

Appearance:-
Shri. M. Kannan, Advocate
for the Appellant
Shri. A. Cletus, ADC (AR)
for the Respondent

CORAM:
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)
Hon'ble Shri P. Dinesha, Member (Judicial

Date of Hearing: 13.12.2018

Date of Pronouncement: 28.12.2018

Final Order No. 43167 / 2018

Per P. Dinesha :

In this appeal, the assessee has questioned the liability of Excise Duty of Rs. 7,19,72,721/- raised by the Commissioner of Central Excise Salem vide Order-in-Original dated 20.06.2014.

2. Alleging contravention of the provisions of Rule 6(1), 6(2) and 6(3) of the CENVAT Credit Rules (CCR), 2004, a Show Cause Notice dated 06.05.2013 was issued by the Original Authority since the appellant appeared to have cleared the final products on payment of duty under Notification No. 29/2004-CE dated 09.07.2004 as well as without payment of duty under Notification No. 30/2004-CE dated 09.07.2004; that the appellants have availed common input/input service Credit; that they have not exercised their option as per the requirements of Rule 6(3A) of CCR, 2004 and that therefore, they are liable to pay an amount equivalent to 5%/10% of the value of exempted goods cleared during the period from 01.04.2008 to 30.09.2010 in terms of Rule 6(3)(i) ibid, etc. The impugned Order came to be passed after considering the plea of the appellant whereby the proposals came to be confirmed against which the assessee has preferred the present appeal.

3. Today when the matter came up for hearing, Ld. Advocate Shri. M. Kannan appeared on behalf of the assessee while Ld. ADC (AR) Shri. A. Cletus appeared on behalf of the Revenue.

4.1 During the course of arguments, Ld. Advocate submitted that the appellants had availed common input/input service Credit, but however, they had voluntarily reversed the proportionate

input/input service Credit of Rs. 39,01,927/- along with interest of Rs. 7,45,348/- (Rs. 7,16,902/- + Rs. 28,446/-) which was relating to the exempted goods, which fact was duly intimated to the Department as early as 18.11.2010 much before the issuance of Show Cause Notice. He also submitted that in view of the above, the Show Cause Notice issued on 06.05.2013 is clearly beyond the period of limitation for which the Department has no justification.

4.2 He further pointed out that the allegations in the Show Cause Notice are made after considering the regular ER-1 returns filed by the assessee for and during the period of dispute which were audited and therefore, the invocation of extended period of limitation is improper; that the Credit availed on common inputs during the entire period covered was only Rs. 58,22,288/- whereas the demand raised is Rs. 7,19,72,721/- , which is arbitrary and contrary to the provisions of law, etc.

4.3 He also submitted that the requirements of Rule 6(3)/6(3A) are not mandatory but procedural; a lapse in not following the procedure is condonable and the denial of a substantial benefit for non-compliance of the procedure is unjustified. He placed reliance on a recent Order of this very Bench of the Tribunal in the case of

Castrol India Ltd. Vs. Commissioner of Central Excise, Chennai – 2018 (7) T.M.I. 315 – CESTAT Chennai.

5. *Per contra*, Ld. AR supported the findings of the lower authorities.

6. We have heard the rival contentions, perused the documents placed on record and have also gone through the judgements/Orders referred to during the course of arguments.

7. We find that the issue of applicability of Rule 6(3)/6(3A) has already been discussed by this Bench in the case of *Castrol India Ltd. (supra)* and in the light of the findings therein, we see that the present issue is no more *res integra*. The relevant observations of this Bench read as under :

> *"6. The allegation is that the appellant had not maintained separate accounts under Rule 6(2) of Cenvat Credit Rules and had not exercised the option to reverse the credit as provided under Rule 6(3). As provided in Rule 6 (3A), the appellant on being pointed out, has reversed the proportionate credit along with interest. In the SCN itself, it is noted that the appellant has reversed the credit in proportion to the credit availed in respect of trading activity / traded goods. The only reason for raising the demand to the extent of 10% / 8% / 6% of traded goods for the disputed period, is that the appellants have not filed declaration as contemplated in Rule 6 (3A). The said issue has been settled by the decisions relied by the Ld.Counsel for appellant. The Tribunal in the case of Dalmia Bharat Sugar & Industries Ltd., vs. CCE-2017-TIOL-113-CESTAT-DEL has followed the decision in the case of Mercedes Benz India Pvt Ltd (supra), wherein it was observed as under :-*
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> > *" 8. We find that the coordinate Bench of this Tribunal in the case of Mercedes Benz India Pvt. Ltd. v. C.C.E., Pune I - 2015 (40) STR 381 (Tri-Mum.) = 2015-TIOL-1550-CESTAT-MUM has held that the condition given in Rule 6(3A) to intimate the Department is only procedural matter and the delay of such procedural matter is condonable and therefore, substantive right given in the said Rule cannot be denied for such procedural lapse. The Tribunal has also held that Commissioner*

cannot insist that assessee should reverse only as per Rule 6(3)(i) but it is the option of the assessee. Tribunal in that case held that as follows:

> *"5.3 As regard the contention of the adjudicating authority that this option should be given in beginning and before exercising such option, we are of the view that though there is no such time limit provided for exercising such option in the rules but it is a common sense that intention of any option should be expressed before exercising the option, however the delay can be taken as procedural lapse. We also note that trading of goods was considered as exempted service from 2011 only, thus it was initial period. We are also of the view that there is no condition provided in the rule that if a particular option, out of three options are not opted, then only option of payment of 5% provided under Rule 6(3)(i) shall be compulsorily made applicable, therefore we are of the view that Revenue could not insist the appellant to avail a particular option. In the present case admittedly it is appellant who have on their own opted for option provided under Rule 6(3)(ii). The meaning of the option as argued by the Ld. Sr. Counsel is that "option of right of choosing, something that may be or is chosen, choice, the act of choosing". From the said meaning of the term 'option', it is clear that it is the appellant who have liberty to decide which option to be exercised and not the Revenue to decide the same."*

9. In the light of the above decision of the coordinate Bench we find that the Commissioner is not justified in insisting that appellant reverse cenvat credit in terms of Rule 6(3)(i) of Cenvat Credit Rules. The claim of the appellant is that they have already reversed on proportionate basis, the cenvat credit along with interest amount payable in terms of Rule 6(3A). However, the Department is entitled to verify whether reversal of the amount already made by the appellant satisfies the requirement of Rule 6(3)(ii) notwithstanding the fact that the procedural formalities have not been satisfied. For this purpose, we remand the matter to the original authority to carry out verification."

7. Similar view has been taken in all the cases relied by the Ld.Counsel for appellant. Following the same, we are of the considered opinion that the demand cannot sustain and requires to be set aside which we hereby do. The appeal succeeds on merits.

8. The Ld.Counsel has also argued on the ground of limitation. The appellants have been issued show cause notices for earlier periods on identical issue. The appellants have disclosed the credit availed in the returns filed by them. They had submitted all the documents called for by the department and we do not find any evidence to saddle the appellants with wilful suppression of facts with intention to evade payment of duty. In para 2.12 of the order, it is noted that the jurisdictional Commissioner had passed an order holding that the credit was to be reversed on clearing and forwarding agency service based on proportionate value of traded goods. Based on the above order, the appellants had been reversing the credit availed on common input services and informed the department whenever the details were asked for. Thus the department was

fully aware that the appellants were conducting trading activity. We therefore find that the demand raised invoking the extended period is without any factual or legal basis. The appeal succeeds on limitation also.

9. In the result, the impugned orders are set aside both on merits as well as on limitation. The appeals are allowed with consequential reliefs, if any. "

8. From the above, we find that the ratio laid down in the above case squarely applies to the present case as well. Therefore following the above *ratio decidendi,* we set aside the impugned Order and allow the appeal on merits as well as on limitation with consequential benefits, if any, as per law.

*(Pronounced in open court on **28.12.2018**)*

(P Dinesha)
Member (Judicial)

(Madhu Mohan Damodhar)
Member (Technical)

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