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

Appeal No. E/138/2011

[Arising out of Order-in-Original No.32/2010 dt.23.12.10 passed by the Commissioner of Central Excise, Chennai-IV]

Hindustan Coca Cola Beverages Pvt. Ltd., Appellant

Versus

Commissioner of Central Excise, Chennai IV Respondent

Appearance:

Shri M.Karthikeyan, Advocate,
For the Appellant

Shri P.Hemavathy Commr. (AR),
For the Respondent

CORAM :

Hon'bleMs.SulekhaBeevi C.S. Member (Judicial)
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of hearing / decision: 22.12.2017

Per Bench

FINAL ORDER No. 43373/2017

The appellants are manufacturers of aerated waters (dutiable product) and Maaza Mango (exempted product). The appellants used furnace oil as common input for manufacture of both exempted as well as dutiable product. As per Rule 6(1) of Cenvat Credit Rule, 2004, Cenvat Credit shall not be allowed on such quantity of inputs which is used in the manufacture of exempted goods except in the circumstances prescribed in Rule 6(2). As per this Rule, the assessee is required to maintain separate account of the common input used in manufacture of exempted and dutiable goods in order to avail credit.

As per Rule 6(3) (b), a manufacturer who does not maintain separate account as in Rule 6(2) is required to pay an amount equal to 8% (up to August 2004) and 10% (from September 2004 on wards) of the value of the clearances of exempted goods. Through furnace oil was used as common input by appellants for manufacture of both dutiable and exempted product, they did not maintain separate account. They availed credit of entire duty paid on furnace oil and thus availed excess Cenvat Credit. The department was of the view that for the period 4/2003 to 5/2005 appellants cleared exempted product to the tune of Rs.17,18,17,016 and therefore appellant is liable to pay Rs. 1,43,70,779 as under Rule 6(3)(b). SCN was issued dt.08.09.2006 which after adjudication culminated in the confirmation of demand of Rs. 1,43,70,779 along with interest and imposed equal penalty. Aggrieved appellant is now before the Tribunal.

2. On behalf of appellant, the Ld. Counsel submitted that during the relevant period there was much confusion as to the interpretation of Rule 6(2). The Rule was very clear in Cenvat Credit Rule, 2002 wherein there was no need to maintain separate records in respect of inputs used as fuel. Sub rule (2) of Rule 6 was amended with effect from 16.05.2005 vide notification No. 27/2005- NT whereby the words 'except inputs intended to be used as fuel' was deleted. The issue travelled up to the Supreme Court, and vide decision reported in the case of CCE vs Gujarat Narmada Fertilizers Co. Ltd (GNFC) 2009 (240) ELT 661 (S.C) the Hon'ble Apex Court held that credit is not admissible on fuel input used for exempted product. He submitted that however, the appellant has reversed the credit pertaining to Furnace Oil to the tune of Rs. 2,67,551/- along with interest. The department has made a huge demand which is absurd and inflated. The entire credit availed on Furnace Oil is much less. He pleaded that since the appellant has already reversed the credit, the penalties may be set aside. The Ld. Counsel stated that the decision in the case of GNFC (supra) has been doubted by the S.C and the issue has been referred to Larger Bench,

as reported in 2012 (286) ELT 481(S.C). That the Hon'ble Apex Court in the earlier decision had opined that the litigation arose on account of conflicting decisions given by various benches of CESTAT and because the Cenvat Credit Rules were not properly drafted. That appellant had availed credit on bonafide belief and that the penalties may be set aside.

3. The Ld. AR Ms. Hemavathy reiterated the findings in the impugned order. She submitted that appellant availed 100% credit on Furnace Oil and used the same for manufacture of dutiable and exempted products. They did not maintain separate accounts as required in Rule 6(2). Therefore they are liable to pay 8%/10% of the value of clearances of exempted goods during the period. The Hon'ble Apex Court in the case of GNFC reported in 2009 (240) ELT 661 (S.C) had held that credit in not admissible on fuel input used for manufacture of exempted product. The contention of the appellant that they have reversed proportionate credit cannot be accepted. The Finance Act, 2010 brought forth retrospective amendment to these provisions dealing with the subject of maintaining separate account for common inputs. The assessees were given an option to calculate and reverse the proportionate credit attributable to exempted product within a period of 6 months from the date of Presidential Assent of Finance Bill 2010, i.e; on or before 07.11.2010. The assessee exercised the option in respect of input services pending in three other SCNs. But did not exercise any option in respect of this case / Furnace Oil. The one time concession given by government is lost to the assessee who has to pay 8%/10% of the value of clearances. The assessee cannot take the shelter of the retrospective amendment after 7.11.2010. That the demand as well as penalties are legal and proper.

4. Heard both sides.

5. The period involved is from April 2003 to 15th May 2005. As per Notification 27/2005 dated 16.05.2005, the words 'except inputs intended to be used as fuel' was omitted from Rule 6(2).

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Prior to that, the said Rules read as under.

(1) The CENVAT credit shall not be allowed on such quantity of input which is used in the manufacture of exempted goods, except in the circumstances mentioned in sub-rule (2).

(2) "Where a manufacturer avails of CENVAT credit in respect of any inputs, except inputs intended to be used as fuel, and manufacture such final products, which are chargeable to duty as well as exempted goods, then the manufacture shall maintain separate accounts for receipt, consumption and inventory of inputs meant for use in the manufacture of dutiable final products of in the manufacture of exempted goods and take CENVAT credit only on that quantity of inputs which is intended for use in the manufacture of dutiable goods.

(3) The manufacturer opting not to maintain separate accounts shall follow either of the following conditions, as applicable to him, namely:-

(a) If the exempted goods are;

(vii)............

(vii)............

(b) If the exempted goods are other than those described in condition (a), the manufacturer shall pay an amount equal to eight 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."

Explanation I.-.............

Explanation II.-............

6. The appellant was restricting the credit availment to 85% on inputs other than Furnace Oil. They availed 100% credit of duty paid on Furnace Oil. The Hon'ble Apex Court has held that credit is not admissible on fuel input used for manufacture of exempted product. The appellants contend that they have reversed proportionate credit and therefore may not be compelled to pay the 8%/10% of value of clearances. This is opposed by department stating that the government had given a concession to exercise option within a time frame. The appellant having not exercised the option cannot now contend to have complied with requirement of the provision of law.

7. In similar set of fact, the Tribunal in the case of CCE, Trichy vs Tamil Nadu News Print & Paper Ltd 2014 (309) ELT 279(Tri- Chennai observed that when proportionate credit is reversed there is no

requirement to pay 8%/10% of value of clearance. The Tribunal relied on the decision of Hon'ble High Court of Karnataka in Commissioner vs Himalaya Drug Company 2012 (27) STR 95. Similar view was taken by Hon'ble Gujrat High Court in Shree Rama Muthi Tech Ltd vs UOI 2011 (267) ELT 153(Guj). In the present case the appellant was bonafidely prosecuting the issue by his appellate remedy. Therefore the contention that appellant had not filed application to exercise option does not find favour with us. However, it needs to be verified whether the amount reversed would be the actual proportionate credit or not. For this limited purpose the matter requires to be remanded to the adjudicating authority.

8. As regard, the penalty, the arguments put forward by the Ld. Counsel is not without substance. The issue is an interpretational one and had travelled up to the Hon'ble Supreme Court. Further the period involves pre as well as post amendment. Taking these facts into consideration, we are of the views that the penalty imposed is unwarranted and requires to be set aside which we hereby do.

9. In the result, the impugned order is modified to the extent of upholding the irregularity in availing credit on Furnace Oil used in manufacture of exempted product but however, it is held that reversal of proportionate credit would suffice. For the limited purpose of calculation of proportionate credit, the matter is remanded to the adjudicating authority. The penalty imposed is set aside entirely. Appeal partly allowed in above terms.

(Dictated and pronounced in open court)

(Madhu Mohan Damodhar)
Member (Technical)

(SulekhaBeevi C.S)
Member (Judicial)

Rkp