CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, CHENNAI

REGIONAL BENCH – COURT NO. III

Excise [Cross Objection] Application No.00006 of 2012
and
Excise Appeal No.00075 of 2012-DB

(Arising out of Order-in-Appeal No.73/2011, dated 28.10.2011 passed by the Commissioner of Excise & Service Tax, Larger Taxpayer Unit, Chennai)

Commissioner of Central Excise & Service Tax, : **Appellant**
Larger Taxpayer Unit [LTU],
No.1775, Jawaharlal Nehru Inner Ring Road,
Anna Nagar Western Extension,
Chennai – 600 101.

VERSUS

M/s. Chennai Petroleum Corporation Ltd., : **Respondent**
Manali,
Chennai – 600 068.

APPEARANCE:

Ms. Sridevi T, Authorized Representative for the Appellant

Shri Raghavan Ramabhadran, Advocate for the Respondent

CORAM:

HON'BLE SMT. SULEKHA BEEVI C.S, MEMBER (JUDICIAL)
HON'BLE SHRI P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO. 40009 \ 2020

DATE OF HEARING: 18.11.2019
DATE OF PRONOUNCEMENT: 06.01.2020

Per Smt. Sulekha Beevi C.S:

The respondent is engaged in manufacture of petroleum products, such as, Motor Spirit, High Speed Diesel Oil, Superior Kerosene Oil etc. Since they were using common inputs for dutiable and exempted products cleared by them, they opted for Rule 6(3)(ii) of Cenvat Credit Rules, 2004 for reversal of Cenvat credit attributable to inputs and input services used in manufacture of exempted goods for the financial year 2008-09. The respondent reversed an amount of Rs.3,57,05,504/- being the credit attributable to exempted goods by applying formula s per Rule 6(3A)(c) of the said Rules. The appellant reversed Rs.3,51,24,483/- provisionally and during 2008-09 the balance of Rs.5,81,020/- was reversed. They then revised the computation of final reversal of Cenvat credit stating that they had earlier omitted to exclude the clearances made to UN, SEZ, EOU and export "under bond", which fell under Rule 6(6) of Cenvat Credit Rules, 2004. As per this final revised working, the amount to be reversed according to the respondent, was Rs.2,02,11,326/- only. They arrived at excess reversal of Rs.1,54,94,177/- and sought adjustment of the excess amount by taking credit in terms of Rule 6(3A)(f) of Cenvat Credit Rules, 2004.

2. After due process of law, the original authority observed that for the purpose of computing the amount that has to be reversed the respondents have considered only the total common input credit, whereas, as per the formula the total Cenvat credit taken on inputs/input services have to be adopted. Therefore, the final amount required to be reversed under the rule was computed by the adjudicating authority as Rs.2,86,76,731/-. After deducting the reversal already made the respondent was permitted to take the excess reversed amount to the tune of Rs.70,28,773/- in their Cenvat account as per Rules. Aggrieved by such order, they filed appeal before Commissioner (Appeals) who vide order impugned herein, set aside the order passed by the original authority. The department has filed the above appeal aggrieved by such order. Cross appeal has been filed by the respondent-assessee contending that though Commissioner (Appeals) held the issue of total Cenvat credit in their favour, a finding has been made by Commissioner (Appeals) that the value of clearances made under Rule 6(6) should not be taken into account for the purpose of applying the formula under Rule 6(3A)(c). Aggrieved by such finding, the respondent has filed the cross appeal.

3. The issues that arises for consideration in the appeal filed by the department as well as in the Cross Appeal filed by the respondent-assessee, are as follows:-

> (i) For applying the formula prescribed under Rule 6(3A), whether the entire Cenvat credit availed should be used as the numerator or whether only the credit availed on common input/input services should be taken; or whether the 'total Cenvat credit' mentioned in the formula has to be read as "total common Cenvat credit"
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> (ii) The issue that arises for consideration in the cross appeal is whether the turn-over of goods cleared as per Rule 6(6) has to be included in the denominator.

4. The learned Authorised Representative for the Revenue Ms. Sridevi T, JC(AR) reiterated the grounds stated in the appeal filed by the department. She submitted that the appellate Commissioner has erroneously held that there is no need to take into account the Cenvat credit taken on inputs and input services that were exclusively used for manufacture of dutiable goods and rendering taxable services for applying the formula prescribed under Rule 6(3A)(c)(iii) of Cenvat Credit Rules, 2004. She argued that Rule 6(2) clearly provides an option to the manufacturer to maintain separate accounts and to avail credit only on the quantity of inputs/input services, which is intended for use in the manufacture of dutiable goods or providing output services, which are taxable. If the tax payer does not opt to function under Rule 6(2) by maintaining separate accounts, the only other remedy is to operate under Rule 6(3) of the said Rules. In such case, the assessee has no other option except to take into account the entire credit availed on inputs and input services in the financial year. While applying the formula, the entire credit availed on inputs and input services have to be applied in the numerator. The respondent in the revised calculation has reduced their liability to reverse the credit by applying the total credit availed on common inputs and input services, which is against the provision of law. The letter 'P' in the formula prescribed under the said rules denotes total Cenvat credit taken on input services during the financial year. The definition does not convey any meaning so as to exclude the credit taken on input services used in the manufacture of dutiable goods/taxable services. The plain reading of the formula as well as the definition conveys the meaning that the entire Cenvat credit taken during the financial year has to be reckoned for the purpose of calculation. The Commissioner (Appeals) has, therefore, erred to hold that only the total Cenvat credit availed on common inputs/input services has to be reckoned for the purpose of calculation of the amount that has to be reversed. With regard to the issue raised in the cross appeal, the learned Authorised Representative reiterated the discussions in para 9.1 of the impugned order.

5. The learned counsel Shri Raghavan Ramabhadran appeared for the respondent. The respondent clears finished product for home consumption on payment of excise duty as well as by availing exemptions. They also cleared goods for export and to customers

located in SEZ/110% EOU without payment of excise duty. They maintained separate accounts for inputs and input services used exclusively in the manufacture of dutiable final products and exempted final products. They did not maintain separate account for common inputs and input services. As regards inputs and input services used commonly in the manufacture of dutiable and exempted final products, the respondent has availed only credit of the amount proportionate to the turn-over of the dutiable final products. The Cenvat credit proportionate to the turn-over of exempted final products was reversed by adopting the formula prescribed under Rule 6(3A)(c)(ii) of the Cenvat Credit Rules, 2004. The said formula is as under:-

$$\frac{\text{Total value of exempted service X } \textbf{Total Cenvat Credit}}{\text{Total value of dutiable goods + Total value of exempted services}}$$

6. The Commissioner (Appeals) has rightly considered that 'total Cenvat credit' used in the formula means "total common Cenvat credit" and that it cannot include the credit availed on dutiable goods. He submitted that an amendment was brought forth w.e.f.01.03.2016, whereby, it is clarified that the credit availed on exempted goods and exempted services shall only be ineligible credit. The amendment is by way of substitution and, therefore, clarificatory in nature. He relied on the decision of *CCE &ST Vs M/s. Reliance Industries Ltd.,* reported in *2019 (3) TMI 784.*

7. With regard to the relief claimed in Cross Appeal, the learned counsel explained that the respondent had initially reversed the amount of Rs.3,57,05,504/-. Subsequently, they realised that the aforesaid amount included credit of Rs.83,93,857/- pertaining to dutiable goods manufactured for exports and clearances made to UN Unit in SEZ and 100% EOUs. Since the said credit is protected under Rule 6(6) of Cenvat Credit Rules from reversal under Rule 6(3A), they realized that they had reversed excess Cenvat credit of Rs.83,93,857/- This fact was informed to the department vide letter dated 20.01.2010. While computing credit amount they have inadvertently omitted to exclude the CT-2 clearances which are also protected under Rule 6(6) of Cenvat Credit Rules. This fact was intimated to the department vide letter dated 30.06.2010. They thus requested for adjustment of excess credit reversed by them to the tune of

Rs.1,54,94,177/-. The learned counsel furnished the details of the said amount as under:-

Sl. No.	Particulars	Amount [in Rs.}
01	Value of dutiable goods cleared	23769,31,32,996
02	Value of exempted goods cleared	4040,79,63,722
03	Value of clearances covered under Rule 6(6) of CCR	4173,99,26,112
04	Value of taxable services	8,04,26,832
05	Value of exempted services	26,33,415
06	Total value of clearances	31992,40,83,077
07	Common input service credit	6,07,66,456
08	Numerator for proportionate reversal [8 = 2+5]	4041,05,97,137
09	Denominator for proportionate reversal [9 = 1+2+3+4+5]	31992,40,83,077
10	Cenvat credit amount to be reversed under Rule 6 (3A) of CCR	76,74,803
11	Cenvat credit amount on inputs and input services exclusively used for exempted clearances	1,25,36,523
12	Amount already reversed under Rule 6(3A) of CCR	3,57,05,504
13	**Excess amount reversed [13 =12 – 11 -10]**	**1,54,94,177**

8. Though, Commissioner (Appeals) granted relief to the respondent holding that only the common Cenvat credit has to be reckoned for the purpose of application of the formula has erred in rejecting the contention of the respondent that the credit pertaining to dutiable goods cleared for export and clearances to UN, SEZ etc., are protected under Rule 6(6) of Cenvat Credit Rules and has incorrectly concluded that such turn-over should not be considered in the formula prescribed under Rule 6(3A) of Cenvat Credit Rules.

9. With regard to this issue, the learned counsel submitted that if the credit pertaining to clearances for export, clearances to UN, SEZ etc., is to be excluded for applying the formula prescribed under Rule 6(3A) of Cenvat Credit Rules, the benefit granted by the law under Rule 6(6) would be otiose. He explained that the common credit pertains to the common turn-over, namely, total turn-over and exempted turn-over. Such entire turn-over includes the turn-over in respect of Rule 6(6) clearances also. This being the case, there is no rationale in not including the impugned turn-over in the denominator of formula under Rule 6(3A) of Cenvat Credit Rules. Further, the numerator, namely, total value of exempted goods manufactured cannot include the clearances under Rule 6(6). This is because if it is held to be so, then the credit amount proportionate to such clearances also would get reversed, which is contrary to the express provision of Rule 6(6) of Cenvat Credit Rules.

Customs, Excise & Service Tax Appellate Tribunal

10. Out of the total clearances under Rule 6(6) amounting to Rs.4173,99,26,112/- only turn-over amounting to Rs.128,07,89,489/- i.e., clearances made to UN Consulates is exempted. The remaining turn-over of Rs.4045,91,36,623/- are clearances made for exports and to SEZ Units/100% EOU, which cannot be said to be exempted but are clearances made without payment of duty. He adverted to the decision of the Hon'ble High Court of Bombay in *M/s. Repro India Ltd., Vs UOI* reported in *2007 - TIOL - 795 - HC - MUM - CX* to canvass the point that even though the goods are exported without payment of duty, they cannot be considered as exempted goods for the purpose of Rule 6 of Cenvat Credit Rules, 2004. These are dutiable goods cleared without payment of duty being exports and clearances to SEZ and 100% EOU. Even assuming that the clearances under Rule 6(6) of Cenvat Credit Rules is to be included in the numerator, only the turn-over of Rs.128,07,89,489/- can be included. Resultantly, only an amount of Rs.79,18,872/- will be reversible under Rule 6(3A)(c) of Cenvat Credit Rules and the balance amount of Rs.1,52,50,109/- is excess reversed by them. He prayed that the cross appeal may be allowed.

11. Heard both sides.

12.0 The first issue is with regard to whether the letter "P" used in the formula prescribed in Rule 6(3A)(c)(iii) denotes total Cenvat credit or total credit availed on common inputs and input services. Sub-clause (c) of Rule 6(3A) states that the manufacture of goods shall determine finally the Cenvat credit attributable to exempted goods/exempted services in the manner prescribed. Thus, the formula prescribed is for arriving at the amount that is availed in respect of exempted goods and services, which has to be reversed by the assessee. The formula is not for determining the eligible credit on inputs and input services used for dutiable goods or taxable services. While appreciating this answer, we can understand that "P" denotes the total common Cenvat credit and not the total credit availed by the assessee during the financial year. This issue has been analysed by the Tribunal in the case of *CCE &ST, Rajkot Vs. M/s. Reliance Industries Ltd., [2019 (3) TMI 784 CESTAT AHMEDABAD]*.

"We have carefully considered the submissions made by both the sides and perused the record. The limited issue is

> to be decided in this case is that for the purpose of calculating the Cenvat credit for reversal in terms of Rule 6(3A) as per the formula given therein, whether the total Cenvat credit means it is including the Cenvat credit of input services exclusively used for dutiable product should be taken or total Cenvat credit of only common input service should be taken.
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> From the reading of Rule 6(1), it is clear that only in respect of input or input service used in exempted goods are not allowed. That means input or input service used in taxable service/dutiable goods. Cenvat credit is allowed. Sub-rule (2) of Rule 6 is only used as an option that if any input or input services used in exempted goods, credit should not be allowed and only with this intention some mechanisms for expunging Cenvat credit attributed only to the exempted goods are provided. As per clause (b)(ii) & (iv), it is clearly provided that entire credit in respect of receipt and use of the inputs/input service is allowed when such input and input service is used in dutiable final products and taxable service. However, nowhere in Rule 6 it is provided that the input or input service used in dutiable goods shall not be allowed. The Revenue is only interpreting the term "total Cenvat credit" provided under the formula. If the whole Rule6(1)(2)(3) is read harmoniously and conjointly, it is clear that "Total Cenvat Credit" for the purpose of formula under Rule 6(3A) is only total Cenvat credit of common input service and will not include the Cenvat credit on input/input service exclusively used for the manufacture of dutiable goods. If the interpretation of the Revenue is accepted, then the Cenvat credit of part of input service even though used in the manufacture of dutiable goods shall stand disallowed, which is not provided under any of the Rule of Cenvat Credit Rules, 2004."

12.1 In the said case, has also considered the Notification No.13/2016-CE(NT), dated 01.03.2016. It is concluded by Tribunal that amendment made by substitution is clarificatory in nature and, therefore, applicable retrospectively. Following the said decision, we do not find any error in the view of the Commissioner (Appeals) that the computation has to be done by adopting the 'total common Cenvat credit' and not "total Cenvat credit". The first issue is held against the Revenue.

12.2 The second issue is with respect to the non-inclusion of the total-turnover of clearances for export and clearances for UN, SEZ and 100% EOUs. For better appreciation Rule 6(6) is reproduced as under:-

> (6) The provisions of sub-rules (1), (2), (3) and (4) shall not be applicable in case the excisable goods removed without payment of duty are either —
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> (i) cleared to a Unit in a Special Economic Zone or to a developer of a Special Economic Zone for their authorised operations; or
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> (ii) cleared to a 100% Export Oriented Undertaking; or

(iii)cleared to a Unit in an Electronic Hardware Technology Park or Software Technology Park; or

(iv)supplied to the United Nations or an international organisation for their official use or supplied to projects funded by them on which exemption of duty is available under notification of the Government of India in the Ministry of Finance (Department of Revenue) No.108/95-Central Excise, dated 28th August, 1995, number G.S.R.602 (E), dated 28th August, 1995; or

(v) cleared for export under bond in terms of the provisions of the Central Excise Rules, 2002; or

... ...

(vi)gold or silver falling within Chapter 71 of the said First Schedule, arising in the course of manufacture of copper or zinc by smelting; or ... ..."

13. From the above portion, it can be seen that sub-rules (1), (2), (3) and (4) of Rule (6) are not applicable for the excisable goods removed without payment of duty. This is to ensure that duty is not levied even on the inputs which go into the manufacture of goods that are exported. Rule 6(6) would thus allow the assessee to take Cenvat credit on the inputs/input services used in the goods which are exported. The assessee would be able to utilise the credit so availed by him for payment of duty on other products. If such adjustments or utilisation of credit is not possible, the assessee would get refund of the Cenvat credit in cash as per Rule 5 of Cenvat Credit Rules, 2004. Thus, the bar created by Rule 6(1) that credit cannot be availed on exempted goods is not applicable to the clearances of goods mentioned in Rule 6(6). Even if the goods do not suffer duty for the particular type of clearances stated therein, they cannot be considered as exempted goods. The Hon'ble High Court in the case of *M/s. Repro India Ltd.,*(supra) has held that bar under Rule 6(1) is not applicable to the excisable goods removed without payment of duty as stated in Rule 6(6). The Commissioner (Appeals) has rightly held that the value of goods removed as under Rule 6(6) has to be excluded in computing the Cenvat credit attributable to exempted goods and exempted services. However, he erred in holding that such clearances need not be considered at all for the purpose of Rule 6(3A)(c). His observation in para 9 is as under:-

Customs, Excise & Service Tax Appellate Tribunal

"The instant case falls under Rule 6(3)(ii) of Cenvat Credit Rules, 2004 [for which the procedure is prescribed in Rule 6(3A)], the value of goods removed which are specified under Rule 6(6) has to be excluded in computing the Cenvat credit attributable to exempted goods and exempted services under Rule 6(3A). I hold that the value of such clearances

> should not be taken into account at all for the purpose of Rule 6(3A)(c) and it has to be excluded both from the numerator [M] and the denominator [N] in the aforesaid formula. Also, I find that the appellant has excluded these clearances in computing the denominator [N] while **determining finally** under Rule 6(3A)(c) of Cenvat Credit Rules, 2004, the amount of Cenvat credit attributable to exempted goods and exempted services."

14. It is an undisputed fact that inputs have been used for clearances falling Rule 6(6). If the turnover of these clearances is not adopted for computing the ineligible credit that has to be reversed, the application of formula would result in anomaly. Since they do not fall under exempted goods as discussed by Commissioner (Appeals) they should be included in the category of turnover of dutiable goods. Without such inclusion in the denominator, the amount arrived by the application of the formula would not be considering the credit attributable and eligible on the inputs gone into manufacture of clearances made under Rule 6(6). The provision under Rule 6(6) which state that sub-rule (1), (2), (3) and (4) of Rule 6 does not apply would then stand otiose. We answer the issue in favour of assessee.

15. From the foregoing discussions, we find both the issues in favour of assessee. The department appeal is dismissed. The Cross-Appeal filed by the Respondent is allowed. The adjudicating authority is directed to verify and grant adjustment of excess credit as discussed above. Cross-Appeal allowed with consequential relief, if any.

(Pronounced in the open court on 06.01.2020)

Sulekha Beevi

(SULEKHA BEEVI C.S.)
MEMBER (JUDICIAL)

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

ksr
21-11-2019

Customs, Excise & Service Tax Appellate Tribunal