CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH, COURT NO. IV

Excise Appeal No. 52892 of 2018

[Arising out of the Order-in-Appeal No. BHO-EXCUS-001-APP-102-18-19 dated 30/05/2018 passed by The Commissioner (Appeals) of CGST, Customs & Central Excise, Bhopal (M.P.).]

M/s Trimula Industries Limited **Appellant**
Singrauli Road, Godvali, Tehsil Deodar,
Distt. Singrauli (Madhya Pradesh) – 486 892.

Versus

The Commissioner **Respondent**
Central Goods, Service Tax
Central Excise and Customs,
178, Bhagya Bhavan, M.P. Nagar,
Zone – II,
Bhopal (Madhya Pradesh).

APPEARANCE

Shri Vivek Shukla, Advocate – for the appellant

Shri H.C. Saini, Authorized Representative (DR) – for the Respondent

CORAM: **HON'BLE SHRI ASHOK JINDAL, MEMBER (JUDICIAL)**
HON'BLE SHRI C.L. MAHAR, MEMBER (TECHNICAL)

FINAL ORDER NO. 51863/2019

DATE OF HEARING : 26/04/2019.
DATE OF DECISION : 26/04/2019.

C.L. MAHAR :-

The appellant is registered under central excise and is engaged in the manufacturer of Sponge Iron falling under Chapter heading No.72031000 of the first schedule to Central Excise Tariff Act, 1985 and is liable to payment of duty on its finished products. They are also availing Cenvat credit of duty paid on inputs/raw materials, capital goods and input services and utilizing such Cenvat credit towards payment of duty on their final products. In the present case the appellant is in appeal before us against the confirmation of demand in dispute in terms of Rule 6(3) Cenvat Credit Rules, 2004 by which before the department has sought to recover. The disputed amount under Rule 6(3) of the Cenvat Credit Rules, 2004 is on account of on the sale of electricity which was generated from the waste heat produced during the manufacture of sponge iron.

2. Briefly stated facts are that the appellant had generated electricity from waste heat generated(flue gases) in DRI plant (Sponge iron plant) during the process of manufacture of Sponge Iron. The said waste heat, otherwise refuse, is treated with water and diverted to the Turbines installed by the appellant to produce power for its captive consumption. It is claimed by the appellant that no input, on which Cenvat credit is claimed, is consumed in generation of such electricity from such waste heat. During the relevant period from 01/04/2013 to 31/10/2015. The appellant had sold some quantity of the electricity to M.P Power Management Co. Ltd. The present dispute pertains to demand raised under rule 6(3) of Cenvat Credit Rules, 2004 vide show cause notice dated 24/05/2017 on the basis of an audit objection under which the Department has calculated @ 6% of value realized from the transfer of such electricity from April, 2013 to October, 2015. The demand of Rs. Rs. 41,22,563/- was confirmed by the adjudicating authority alongwith interest and imposition of penalty under Section 11AC read with Rule 15 of Cenvat Credit Rules, 2004 and the same was upheld by the Commissioner (Appeals) vide the impugned order on the ground that the Noticee have availed Cenvat credit on various input and input services which are commonly used for manufacture of dutiable goods viz. Sponge Iron as well as Exempted Electricity. In the adjudication order penalty was imposed equivalent to 100% of the amount demanded which has been reduced by the Commissioner (Appeals) to 50% of the demand in case where the

records of such Cenvat credit are maintained in electronic form for the period upto assent to Finance Act, 2015 (i.e. 13th May, 2015).

3. In the appeal memorandum as well during the course of hearing, the learned Counsel appearing on behalf of the appellants has vehemently agitated the confirmation on the ground that the waste heat coming out of the Sponge unit plant is not a final product, but is waste and refuse and such waste heat is unintended outcome of melting process. Since the waste heat is not a final product, its use in generation of electricity is not liable for Reversal of any Cenvat Credit and there is no application of rule 6 in the present case. That during the process of manufacturing activity, waste heat is released by the DRI Plant (Sponge Iron kilns). Such waste heat is utilized for generating electricity by treating it with water in the Waste Heat recovery Plant installed in the factory premises. In Waste Heat Recovery based power plant(WHRB), no other input, except waste heat generated from the manufacture of sponge iron, is used. The waste heat is generated out of the flue gas which comes out of the Sponge Iron Kilns and is used as raw material for generation of the power. He explained the process of manufacture as follows:

> "The waste heat recovery Boiler produce's steam at 66Kg/cm2 pressure and 4900 C temperature. The boiler used in this power plant is Water Tube Type which is operated based on the flue gases coming from the Kilns (Sponge Iron Plants) having temperature of aprox 9500C temperature flowing over these boiler tubes while the water and steam circulate within the boiler tubes. The waste Heat recovery Boiler consist of a radiation section in the first Pass, screen section, Superheat section duly divided into Primary Super heater and Secondary Super heater, and at temperator, Convection section in the second pass and another Convection section and an Economizer section in the Third pass. All section is hollow passage type for flue gasses to flow and made of water-cooled wall consist of tubes welded to each other by means of plain strips. These boiler tubes are then welded to top and bottom headers and connected to the steam drum respectively. Heat transfer occurs in this drum section. The economizer section is to provide cooling, the drum flues gases which in turn increase the boiler feed water temperature. The steam will be connected to the Steam

Turbine for generation of the power as per the Turbine capacity."

Explaining the above process of generation of electricity from waste Heat Recovery Plant, he reiterated that no input or input services are required/used in relation to generation of electricity at waste Heat recovery based power plant and since the waste heat is not a final product, its use in generation of electricity is not liable for Reversal of any Cenvat Credit and there is no application of rule 6(3) in the present case. He relied upon the Final Order No. 52737-52739/2018 dated 12.07.2018 of the Tribunal in the case of Tirupati Starch & Chemicals Ltd. Vs. CCE & ST Ujjain where the Hon'ble Tribunal has observed as under:-

> *3. The learned Counsel appearing for the appellants have taken us*
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> *to the judgment of Hon'ble Supreme Court in the case of Union of India vs. Hindustan Zinc Ltd [2014 (303) ELT 321 (SC)] wherein the question for determination before the Supreme Court was — Revenue has taken the decision with the common contention as to whether the respondent — assessee are liable to pay 8% excise duty, as an amount under Rule 57 CC of CER, 1944 or Rule 57 D ibid or Rule 6 of CCR 2004, on the value of by-product namely, sulphuric acid which was cleared to fertilizer plant under exemption, in terms of the bonds executed by the fertilizer plant.*
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> *4. The Apex court examined in detail the manufacturing process and after considering the submissions of the Revenue — that Rule 57CC and Rule 6 of the modvat/Cenvat Credit Rules respectively, which Rule require the interpretation, which needs to be applied as the language of these are unambiguous in this regard. The Court recorded that as per the general provisions of Rule 57CC or Rule 6, are common for use of inputs into final products that is one dutiable and the other exempted, for the applicability of the same. When two final products emerge out of use of common inputs, one excisable and other exempt, the provisions will apply. The question of intention ofthe assessee to manufacture the exempted product is not relevant. It may be intended or unintended, but what results in the course of a manufacturing process is a "final product" falling within the meaning of the said provisions, the provisions will apply in full with the intended consequences. Revenue also argued that Rule 57 D uses the words "waste and refuse" along with "by-products". The words by¬product will necessarily have to take its colour and meaning from the accompanying words "waste and refuse". By-product cannot in any event mean final products. This only means that modvat credit cannot be denied on the ground that in the course of manufacture of excisable goods, by-products also arise. The Hon'ble Supreme Court held as follows: —*

25. These arguments may seem to be attractive. However, having regard to the processes involved, which is already explained above and the reasons afforded by us, we express our inability to be persuaded by these submissions. We have already noticed above that in the case of Birla Copper (C.A.

No. 2337 of 2011) the Tribunal has decided the matter following the judgment in the case of Swadeshi Limited (supra). In that case, Ethylene Glycol was reacted with DMT to produce polyester and ethanol. Methanol was not excisable while polyester fibre was liable to excise duty. Credit was taken of duty paid on ethylene glycol wholly for the payment of duty on polyester. The department took a position that ethylene glycol was used in the production of methanol and proportionate credit taken on ethylene glycol was to be reversed. This Court ruled that the emergence of methanol was a technological necessity and no part of ethylene glycol could be said to have been used in production of methanol and indeed it was held that the total quantity of ethylene glycol was used for the production of polyester. The fact in all these three appeals appear to be identical to the facts and the law laid down in Swadeshi Polytex (supra). Therefore, this judgment is squarely applicable.

26. Furthermore, the provisions of Rule 57CC cannot be read in isolation. In order to understand the scheme of Modvat credit contained in this Rule, a combined reading of Rules 57A, 57B and 57D along with Rule 57CC becomes inevitable. We have already reproduced Rule 57D above. It can be easily discerned from a combined reading of the aforesaid provisions that the terms used are 'inputs', 'final products', 'by-product', 'waste products', etc. We are of the opinion that these terms have been used taking into account commercial reality in trade. In that context when we scan through Rule 57CC, reference to final product being manufactured with the same common inputs becomes understandable. This Rule did not talk about emergence of final product and a by-product and still said that Rule 57CC will apply. The appellant seeks to apply Rule 57CC when Rule 57D does not talk about application of Rule 57CC to final product and by-product when the by-product emerged as a technological necessity. Accepting the argument of the appellant would amount to equating by-product and final product thereby obliterating the difference though recognised by the legislation itself. Significantly this interpretation by the Tribunal in Sterlite (supra) was not appealed against by the department.

27. We are also unable to agree with the submission of the learned Solicitor General that judgment in GAIL's case is not applicable. Significantly, the question as to whether Rule 57CC will apply when by-products are cleared without payment of duty came for discussion in that case. It was held that so long as the lean gas was obtained as a by-product and not as a final product, Rule 57CC will not apply. We are, therefore, of the view that the respondent's case is squarely covered by the judgment in GAIL's case.

The Tribunal relying upon the Supreme Court judgment in the case of **Union of India Vs. Hindustan Zinc Ltd. [2014 (303) E.L.T. (S.C.**] has observed as under :

> "He further argued that before 01.03.2015, the definition of exempted goods under Rule 2(d) of the Central Excise Rules did not cover non excisable goods and since no rate of duty is specified under the Central excise Tariff on electricity even though classified under tariff item 2716000, the same was a non-excisable item and no reversal was required under rule 6(3) of Cenvat Credit Rules, 2004. He also argued that even on limitation, the demand is not sustainable as it is an established law that where the issue pertains purely to interpretation of a statute, charge of willful suppression does not sustain and the extended period cannot be invoked. He further stated that the reliance placed by the Commissioner (Appeals) in the cases of Maruti Suzuki Ltd, NTPC ltd. And Jai Balaji Ltd. Was misplaced as all these cases were distinguishable and are not relevant to the issue at hand. He argued that the issue in the case of Maruti Suzuki (supra) was relating to input credit on fuel used in manufacture of electricity. In case of NTPC Sail Power Co Pvt Ltd, the issue was whether electricity is goods or services? In case of Jai Balaji Industries Limited, the issue was whether where credit on inputs used in electricity has been reversed by the appellant suo-moto, the provisions of rule 6(3) can be invoked?"

4. On the other hand the learned Departmental representative has argued supporting the findings of the learned Commissioner (Appeals) and stated that the demand was fully maintainable on merits as well limitation.

5. We have carefully gone through the rival arguments. We fully agree to the findings of the Tribunal in the case of *Tirupati Starch & Chemicals Ltd. Vs. CCE & ST Ujjain* as discussed supra. We find that though number of amendments have taken place from time to time to define "exempted goods" under the Cenvat Credit Rules, 2004 to include non-excisable products/ exempted products in the definition but in Rule 6(2) of the Cenvat Credit Rules, 2004, the expression "final products" have remained unchanged during these years. Thus it is very clear that the legislation has intended to include only those inputs/ services which are used during the manufacture of "final products" and not unintended "by-products" which are a necessity of the manufacturing products. We fail to accept that the heat entrapped in flue gases which emerge during the process as waste or by-product can be regarded as a "final product" which is beneficially used by the appellant for manufacture of electricity. It is not the case where the appellant has deliberately used some inputs by adopting a process to manufacture electricity.

Therefore, the case laws relied upon by the learned Commissioner (Appeals) are not relevant in so far as the heat emerges as a waste product is concerned. The ratio of the Hon'ble Supreme Court judgment in the case of **Union of India Vs. Hindustan Zinc Ltd. [2014 (303) E.L.T. (S.C.)**] is squarely applicable to the issue in hand.

6. Further even on limitation as the issue is squarely based on interpretation of law, we hold that the charge of willful suppression does not sustain and extended period of limitation is not applicable.

7. The appeal is allowed accordingly with consequential benefits if any.

(Operative part of the order pronounced in the open court.)

(Ashok Jindal)
Member (Judicial)

(C.L. Mahar)
Member (Technical)

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