CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. IV

EXCISE APPEAL No. 52554 of 2019

(Arising out of Order in Appeal No. IND-EXCUS-000-APP-032-19-20 dated 30.04.2019 passed by Commissioner (Appeals), Central Excise & Central Goods and Service Tax, Indore)

M/s. RSPL Limited (Dhar Unit-III) **...Appellant**
Plot No.123, Sector-III, Industrial Area Pithampur
Dist.Dhar (M.P.) - 454774

Versus

Commissioner of Customs, **....Respondent**
Central Excise & Central GST, Ujjain
29, Bharat Puri Administrative Area,
Ujjain (M.P.) - 456006

APPEARANCE:
Mr. R.K. Ambwani, Consultant for the appellant
Mr. P. Juneja, Authorized Representative for the Respondent

CORAM : HON'BLE Ms. RACHNA GUPTA, MEMBER (JUDICIAL)

Date of Hearing/ Decision: **18/06/2021**

FINAL ORDER No. 51624/2021

RACHNA GUPTA

Appellant has filed the appeal to assail the Order-in-Appeal No. 032-19-20 dated 30.04.2019. The facts in brief for the adjudication of appeal are as follows:-

That the appellant is engaged in the manufacture of Alfa Olefin Sulphonate (AOS), Sulphuric Acid and LAB and is availing the facility of Cenvat Credit under Cenvat Credit Rules, 2004 (CCR 2004). During the course of audit of records of the appellant for the period from April 2015 to March, 2017, Department observed that Central Excise Duty of Rs.3,08,966/- has not been paid by the appellant despite the appellant has transferred machine to RSPL

Ltd., Patna Unit. Appellant was also alleged to have failed to pay an amount of Rs.47,094/- on clearance of the exempted/ non-excisable goods from the factory, apparently the left over packing material. The appellant was also alleged to have wrongly availed the Cenvat Credit of Rs.7827.77 on ineligible input services. Accordingly, a Show Cause Notice bearing No.410 dated 19.04.2018 was served upon the appellant proposing the recovery of aforesaid amounts alongwith the appropriate interest and the proportionate penalties. The said proposal was initially confirmed by Order-in-Original No.20/AC/Demand/Cex/Pith-II/2018-19 dated 04.12.2018. The appeal thereof has been rejected vide the order under challenge. Being still aggrieved, the appellant is before this Tribunal.

2. I have heard Shri R.K. Ambwani, learned Consultant for the appellant and Shri P. Juneja, learned Departmental Representative for the Revenue.

3. It is submitted on behalf of the appellant that M/s. RSPL Ltd. has 33 number of sister units. All have one common PAN Card No. It is submitted that appellant has been transferring the stock machines or stock raw materials etc among these units. The said transfer cannot be called as sale by M/s. RSPL, it being a transfer from one unit of the appellant company to the other. Accordingly, the excise duty as has been demanded on stock transfer of old machine by appellant to its sister unit is a wrong demand. It is submitted that this issue is no more *res-integra*. The final order of **CESTAT, Allahabad bearing No.71032/2017 dated 11th September, 2017** has been impressed upon. Learned Counsel

has also invited my attention to the invoice-cum-challans for the impugned stock transfer impressing upon that the due compliance of Rule 3 (5 A) (II) has been made by properly deducting 2.5% of the credit availed for each quarter of a year or part thereof. It is submitted that the said provision has wrongly been invoked by the Department.

4. With respect to another issue of the payment of amount on clearance of non-excisable waste i.e. left over packing materials, learned Counsel has impressed upon that the left over packing material is out of the scope of Rule 6 (3) (1) of CCR 2004. Circular No.721/37/2003 – CX dated 6th June, 2003 has been impressed upon, which stand amended by Notification No.6/2015-CE dated 1st March, 2015. It is submitted that this issue is also no more *res-integra* as stands decided by Hon'ble Apex Court in the case of **M/s. West Cost Industrial Gases Ltd. vs.CCE – 2003 (04) TMI 110**. It is based upon this judgement itself that the aforesaid circular No.721 was issued by Central Board of Excise and Customs. The issue with respect to wrong availment of Cenvat Credit on ineligible input services is also impressed upon to be no more *res-integra*. The Final order of this Tribunal bearing **No.A/50546-50547 of 5th February, 2018** has been impressed upon. Based upon the submissions, learned Counsel has prayed for the order under challenge to be set aside and appeal to be allowed.

5. While rebutting these arguments, learned D.R. has relied upon para No.7 of the Order-under-challenge as the reasonable justification as far as the issue of taking transaction value oon the

stock transfer of old machine by appellant to its sister unit is concerned. It is mentioned that the adjudicating authority below has clarified that the actual sale of goods is not the requirement of law but clearance/removal of goods from the factory is sufficient.

6. With respect to second issue of payment on clearance of non-excisable waste, learned D.R. has laid emphasis on para 11 of the order-under-challenge where it has been specified that the left over packing material cleared by the appellant are covered under the definition of exempted goods for the purpose of Rule 6 of Cenvat Credit Rules. Hence the amount of 6% on clearance value of these goods is payable by the appellant. Impressing upon that there is no infirmity in the above said findings and that the compliance of Rule 3(5) as is mentioned in the invoice relied upon by the appellant is nothing but a mere book entry, ld. D.R. has prayed for the dismissal of the impugned appeal.

7. After hearing the parties and going though the record of the appeal I am of the considered view as follows;-

Three issues are involved herein are as mentioned below:-

A. Payment of duty on stock transfer of capital goods i.e. Old machine cleared to sister unit after their use.

B. Payment of amount on clearance of non-excisable waste and scrap such as wooden pallets, rotten gunny bags, broken packing material etc. from the factory.

C. Wrong availment of cenvat credit on ineligible input services.

8. Apparently and admittedly the appellant M/s. RSPL Ltd is a company having several sister units. There is no denial of department to the fact that all units share one common PAN. As far as first issue is concerned, admittedly appellant unit at Dhar, Madhya Pradesh has cleared capital goods that is an old machine to its sister unit at Patna valued at Rs.73,90,773/- on reversal of Cenvat Credit amounting to Rs.6,14,881/-. The invoice for the same is very much on record bearing No.70 dated 29.04.2016. The same has been issued on Form 'F' which admittedly is a document through which goods can be transferred/delivered from one state to another without recognizing it as sale. This document makes it abundantly clear that the transfer of the old machine in question is not sale by RSPL Ltd., Dhar to RSPL Ltd., Patna. Both being the sister concerns and transfer of goods from one to another is not sale.

9. No doubt the adjudicating authority below has confirmed the demand on this issue holding that the sale is not the relevant criteria for assessing the duty, it is the clearance of the goods which is sufficient. However, I am of the opinion that the adjudicating authority has miserably failed to realize that the clearance has to be of the manufactured goods and for some value which has to be taken as the transaction value. None of these aspects are present in the impugned transfer of old machine by appellants one unit to its another unit. The issue is no more *res-integra* as is apparent from the decision of CESTAT Bench, Allahabad in the case of CCE & ST, Ghaziabad vs. M/s. RSPL Ltd.

The decision is announced in the appellant's own case and the Department's appeal has been dismissed by holding that the transfer of machine between two sister units is not a trading activity. It being merely a stock transfer of inputs interse sister units which cannot be categorized as sale. It has also been held in the said decision that for the said reasons even Rule 6 (3) (b) of CCR 2004 is not applicable to such a transfer. From the invoice, it is also observed that the requirement of Rule 3 (5A) of CCR 2004 has fully been met by the appellant though the Department has alleged the said mention in the invoice as a mere book-entry but apparently and admittedly there is no evidence on record to falsify the said compliance for it being a mere book entry.

10. Coming to the second issue, appellant has cleared leftovers of the packing material for the applicability of Rule 6 of CCR, 2004, as is alleged by the Department, word 'manufacture' acquires the utmost importance and Rule 6 is applicable if and only if the appellant is manufacturing exempted as well as excisable goods. Even explanation to Rule 6 of CCR 2004 does not deem "non-manufactured goods" as "exempted goods" as defined under Rule 2 (d) of CCR. **CESTAT, Delhi in the case of Kichha Sugar Company Ltd. reported as 2019 TIOL 1436 (Del.)** has held that even after insertion of the Explanation 1 to Rule 6 of CCR. The goods as that of left over packing material cannot be treated as manufactured exempted goods. The another such decision of CESTAT, Delhi itself is in the case of **Honda Motorcycle and Scooter India Pvt. Ltd. vs. CCE, Alwar** reported in **2019 (4)**

TMI 743 (Del.) Even Hon'ble Apex Court in the case of **CCE Vs. M/s. West Coast Industrial Gases Ltd**. **[2003 (155) ELT 11 (SC)**] has held that no duty can be demanded on the material which is used for the packing of the inputs on which credit has been taken when such packing material is cleared from the factory of the manufacturer. Based upon this decision there has been Department's Circular No. 721/37 of 6th June, 2003. Accordingly, I am of the view that the issue stands already settled that the left over packing material cannot be considered as non-excisable goods or the exempted goods to fall under the scope of Rule 6 of CCR, 2004. I also rely upon the case law in the case of **M/s. Balkrishna Industries Ltd. vs. CGST, Customs & Central Excise, Alwar – Final Order No.51801/2019 in Appeal No.E/50526/2019 (SM**)

11. Though Adjudicating authority below in the order has held that packing material cleared by the appellant falls under the exempted goods for the purpose of Rule 6 but the authority is opined to have failed to appreciate that the exempted goods have to be the manufactured goods of the appellant. Admittedly, it is not the case. The finding of adjudicating authority below on this issue is also not sustainable.

12. Now coming to the issue of wrong availment of cenvat credit on ineligible input services, since there has already been a decision in favour of the appellant on this issue in Final Order number A/50546-50547 of 5th April, 2018, the issue stands no

more *res-integra*. In the given circumstances, I also do not find any reason to differ from those findings. I am of the opinion that adjudicating authority has taken a wrong view. Not only this, it has failed to observe the judicial protocol by ignoring the already settled issue by this Tribunal.

13. Finally, coming to the aspect of imposition of penalty, it is a settled law that to attract the penal provisions the criminal intent is a necessary constituent as was appreciated by Hon'ble Apex Court in Three Judges Decision in the case of **Pepsi Foods Ltd. reported in 2011 (1) SCC 601**. It has also been a settled law that there has to be some positive act on part of the assessee to be called as the act of deliberate malafide intent. There is no such evidence on record. The burden was on the Department to prove the same. The absence of such evidence extends benefits to the appellant and the result remains is that there is no apparent *mensrea* on the part of the appellant to note to pay the amount of impugned demand. Above all there is evidence on record to show that appellant has made compliance of Rule 3 (5) which could not have been rebutted. There is nothing on record to prove that the said record is a mere book entry. In light of the above discussion, the impugned demand has already been held to be not sustainable. Question of imposition of penalty does not at all arise.

14. Lastly the issue of admissibility of Cenvat Credit of Service Tax paid on air travel agent service and Mandap keeper Service, I find that these issues also stand already decided that too in case of

the appellant themselves vide the same final order **No.50546-50547 dated 5th April, 2018**. I do not find any reason from the facts and circumstances of present appeal to differ from these findings. The ground taken by the adjudicating authority below to deny the said admissibility is that the CA Certificate dated 19th November, 2014 is an old Certificate and as such has no relevance. But I am of the opinion that once the issue stands settled by the Tribunal for the same appellant in the same facts and circumstances, there remains no burden of the appellant to produce CA Certificate either for the pre or the post period of the demand which stands already decided by this Tribunal.

15. Consequent to the entire above discussion the order under challenge is hereby set aside. Appeal stands allowed.

[Order pronounced in the open Court]

(RACHNA GUPTA)
MEMBER (JUDICIAL)

Anita