

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI**

PRINCIPAL BENCH COURT NO.IV

Excise Appeal No. 52778 / 2019

[Arising out of Order-in-Appeal No. 219 (SM) CE//JPR/19 dated 12.7.2019 passed by the Commissioner (Appeals) Central Excise & Central Goods and Service Tax, Jaipur]

DALAS BIOTECH LTD

APPELLANT

Vs.

**COMMISSIONER OF CENTRAL EXCISE,
CENTRAL GOODS AND SERVICE TAX, ALWAR**
New Central Revenue Building, Statue Circle
'C' Scheme, Jaipur 302 005.

RESPONDENT

APPEARANCE:

Ms Jwaria Kainath, Advocate for the Appellant
Shri Yashbir Singh, Authorised Representative for the Department

CORAM:

HON'BLE MRS RACHNA GUPTA, MEMBER (JUDICIAL)

**DATE OF HEARING: April 07, 2021
DATE OF DECISION: 03.08. 2021**

FINAL ORDER No. 51695 / 2021

PER RACHNA GUPTA

M/s. Dalas Biotech has filed the impugned appeal to assail the Order-In-Appeal No. 219/JPR/19 dated 12.7.2019.

2. The relevant facts of the appeal are that the appellant is engaged in the manufacture of organic compound and enzymes. During the course of audit, the Department observed that the appellant has sent 1,41,396.180 litres of chemical for job work

under job work Challan for processing. They have received only 90620.290 litres of chemicals. The chemical not received by the appellant i.e. 50775.890 litres is alleged to have the value of Rs. 1,01,15,903/- involving Central Excise duty of Rs.16,22,501/- from their job worker. The quantity of process loss i.e. the quantity of waste/ scrap unrecoverable was also found missing from either job Challan or in the job register maintained for the purpose. The said amount of excise duty during the period from 1.3.2003 to 31.3.2005 has accordingly been alleged to have not been paid in contravention to the provisions of Rule 4(5) of CENVAT Credit Rules, 2002 (herein after referred to as CCR). Resultantly, a show cause notice No. V(29)15/off148/2009/4180 dated 13.12.2005 was served upon the appellant proposing the recovery of Central Excise duty amounting to Rs.16,22,501/- along with the appropriate interest and proportionate penalty. The said proposal was initially confirmed vide Order-in-Original No. 08/18-19 dated 29.6.2018. The appeal thereof has been rejected by the order under challenge.

3. I have heard Ms Jwaria Kainath, learned Counsel appearing for the Appellant and Shri Yashbir Singh, learned Authorised Representative appearing for the Department.

4. It is submitted on behalf of the appellant that in the manufacture of organic compound into antibiotic and enzymes, the appellant has used Hexa methyl Di-Silioxane (HMDS). After the manufacture of said antibiotic, there remain a by-product namely, (Hexa-Methyl Di-Silixane) HMDSO which contains 75% of HMDS, the raw material for the appellants final product and about 25% Toluene. The appellants did not have recovery plant in their factory premises to recover said 75% of HMDS from the said by-product HMDSO. Accordingly, the said product is given to the job worker with an agreement that the yield returnable product would be 90% calculated on 100% basis of HMDS in case the purity is more than 80%. However, if the purity is less than

80%, the yield returnable would be 85%. It is submitted that it is because of that difference in yield returnable that quantity of HMDS received back by the appellant from the job worker was less by about 32-36% of total quantity of HMDSO.

5. To support the submission, the appellant has relied upon their in house test and preparation certificate and also on the test report by M/s. ARBRO Pharmaceuticals Ltd., a Government approved test house. It is submitted that Rule 4(5) of Cenvat Credit Rules has wrongly been invoked by the Department as appellant neither has sent input as such nor has sent the same after partial processing. But what infact has been sent is by-product (HDMSO) generated during the manufacture of final product from the raw material (HDMS). It is impressed upon that otherwise the inputs on which CENVAT Credit was taken has been fully used in or in relation to manufacture of the finished product. As such, the amount equivalent to the CENVAT Credit cannot be demanded from the appellant. Rule 4(5) of CENVAT Credit Rules is not actually required as the goods have been received back within 180 days from the job worker and in the process with job worker loss and generation of non-useable waste was not available. Hence equal quantity of by product sent to the job worker used not to be received back. The demand confirmed is therefore not sustainable. It is further submitted that there is no suppression on the part of the appellant as the appellant had been informing the Department regularly about non return of total quantity of HDMSO by the job worker due to generation of waste / Toluene. Hence, no question arises for imposition of penalty. The order under challenge is therefore prayed to be set aside and appeal is prayed to be allowed.

6. To rebut the said contention, paragraph 9 of the order is impressed upon as reasonable finding with no infirmity. Appeal is accordingly, prayed to be dismissed.

7. After hearing the parties and perusing the record, I observe and hold as follows:-

The moot controversy to be adjudicated is as to whether Rule 4(5) of CCR is applicable to the given facts and circumstances. The said Rule reads as follows:

“ (a) The CENVAT credit shall be allowed even if any inputs or capital goods as such or after being partially processed are sent to a job worker for further testing, repair, re-conditioning or any other purpose, and it is established from the records, challans or memos or any other document produced by the assessee taking the CENVAT credit that the goods are received in the factory within one hundred and eighty days of their being sent to a job worker and if the inputs or the capital goods are not received back within one hundred eighty days, the manufacturer shall pay an amount equivalent to the CENVAT Credit attributable to the inputs or capital goods by debiting the CENVAT Credit or otherwise, but the manufacturer can take the CENVAT Credit again when the inputs or capital goods are received back in his factory.

(b) The CENVAT Credit shall be allowed in respect of jigs, fixtures, moulds and dies sent by a manufacturer of final products to a job worker for the production of goods on his behalf and according to his specifications.”

8. CENVAT Credit Rules, 2004 permits the Cenvat Credit of the duty paid on inputs. A bare perusal of above provisions makes it clear that: (i) where the manufacturer need to sent those inputs for any kind of processing either inputs as such or after partially processing those inputs, then also those inputs shall be eligible for Cenvat Credit to the extent of duty paid on those inputs provided job workers returned the reprocessed inputs within one hundred eighty days, else the manufacturer shall be liable to pay the amount equivalent to the Cenvat Credit attributable to such inputs by debiting the Cenvat Credit or otherwise. (ii) It also stand, abundantly clear from this provisions that this Rule applies to such inputs which have been sent to the job worker before the manufacturer is able to manufacture its final product. (iii) This provision applies Thus to a situation where final product cannot be manufactured unless and until the inputs has to undergo such

further processing, testing, repairing, reconditioning or any other such treatment which is not available with the manufacturer himself and it has to be got down from the job worker that Rule 4(5) of CCR is invokable. That too in case when Job worker fails to return the processed input within 180 days of receipt thereof.

8. Now coming to the facts of the present case, it is clear that the appellant who is manufacturer of organic compound antibiotic, precisely the inputs used by him is HMDS while processing such inputs, the appellant not only gets the final product, the antibiotic but also gets a by-product / waste called HMDSO.

9. There is no denial to the fact that it is the by-product / waste (HMDSO) which has emerged with the final product (antibiotic/ organic compound) of the appellant from the inputs HMDS is sent to the job worker for the reason that this by-product has a potential of releasing the inputs i.e. HMDS by further recovery process as 75% of such HMDS is still contained in the said by-product i.e. HMDSO.

10. This perusal, to my opinion, is sufficient to hold that Rule 4(5) of Cenvat Credit Rules is not applicable to the given facts and circumstances. Because what has been sent to the job worker is not the inputs as such, but the by-product emerging along with final product. The above report on record is sufficient to show that the said by-product still has potential of releasing 75% of HMDS, the input. Rest 25% is an absolute waste namely, toluene which is of no relevance to the appellant and thus is not returned to the appellant. There is no rebuttal of the said test report. Hence, it is clear that there is no possibility of 100% reversal of HMDSO given to the job worker. This apparent admission that the job worker has returned the returnable yield of HMDS to the appellant from HMDSO received, within 180 days thereof. Seeing from this angle also, I do not find applicability of Rule 4(5) of Cenvat Credit Rules is justified to the given facts and circumstances. It remains unrebutted that what has been

given to the job worker was the waste which emerged along with final product and not the inputs as such, used by the appellant for manufacturing anti-biotic as a final product. I rely upon the decision of this Tribunal Mumbai Bench in the case of **Rocket Engineering Corporation Pvt. Ltd. vs. CC Pune** reported in [2005 (191) ELT 483] which has been based upon the earlier decision of this Tribunal in the case of **Preetam Enterprises vs. CCE** reported in [2004 (173) ELT 26]. It was held in these decisions that Rule 4(5)(a) of the Cenvat Credit Rules, 2002 does not cover the return of waste and scraps.

11. The Commissioner (Appeals) has rejected the appeal solely on the ground that Rule 4(5) does not differentiate between product and by-product. The findings are apparently wrong on the face of it. In view of the above quoted provision itself, it is clear that Rule 4(5) apparently talks about the inputs as such or about partially processed inputs being sent to the job worker that too at a stage, prior to manufacture of final product from the input. Admittedly and apparently same is not the fact in the present case. The findings of the Commissioner (Appeals) are, therefore, not sustainable. Also the findings are liable to be set aside due to catena of judgments about a by-product emerging inevitably at the time of manufacture of final product, to be out of scope of any duty liability.

12. I also observe that the impugned show cause notice initially was adjudicated by Order in Original No. 21/2006 dated 27.2.2006 confirming the impugned demand. However, Commissioner (Appeals) vide Order dated 29.5.2006 had set aside the said Order in Original holding that the generation of waste at job worker premises is not in dispute and has rather found support by chemical test report showing recoverable quantity from by-product sent to the job worker. It was held in the said order that Rule 4(5) of CENVAT Credit Rules does not speak about the returning of waste /scrap. The decision of **Preetam Enterprises** (supra) was only relied upon for non-making of

entries in Challan and job worker in this case was merely a procedural mistake for which Cenvat Credit could not be denied as held in the decision of **Modi Zerox Financial Service Ltd. Vs. CCE** reported as [2005 (191) ELT 457 (T-Del)]. In an appeal filed by the Revenue in this Tribunal, vide Final Order No. A/56521/2016 dated 18.2.2016, the matter was remanded back to the Original Adjudicating Authority on the ground that test report based on which Commissioner (Appeals) has arrived at the conclusion regarding generation of waste was not available before the Original Adjudicating Authority. A perusal of Order-in-original passed post remand has been silent about the test report. The observations of the Commissioner (Appeals) in order dated 29.5.2006 about the information being given by the appellant to the Department about the non-return of toluene by the job worker by letter dated 10.2.2003 has also been rejected merely on the ground of non-proof of submissions of said letter. However, there is nothing on record to rebut the said findings. In view thereof, I do not find that there is any suppression on the part of the appellant, so question of imposing penalty also does not arise.

13. In view of the entire above discussion, the order is hereby set aside and appeal is allowed.

(Pronounced in the open Court on 03.08. 2021)

**(RACHNA GUPTA)
MEMBER (JUDICIAL)**