

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. II

Excise Restoration of Appeal Application No. 50069 of 2021

(on behalf of appellant)

in

Excise Appeal No. 50692 of 2017

(Arising out of order-in-original No. 23-32/COMMR/JBP/CEX/2016 dated 21.12.2016 passed by the Commissioner, Customs, Central Excise & Service Tax, Jabalpur).

**Commissioner of Central Goods And
Service Tax, Customs And Excise,
Jabalpur**

Appellant

GST Bhawan, Mission Chowk, Napkier
Town, Jabalpur-482001,
Madhya Pradesh

VERSUS

Maihar Cement

Respondent

Sarla Nagar, Maihar,
Satna, M.P.

With

Excise Appeal No. 50703 of 2017

(Arising out of order-in-original No. 23-32/COMMR/JBP/CEX/2016 dated 21.12.2016 passed by the Commissioner, Customs, Central Excise & Service Tax, Jabalpur).

**Commissioner of Central Goods And
Service Tax, Customs And Excise,
Jabalpur**

Appellant

GST Bhawan, Mission Chowk, Napkier
Town, Jabalpur-482001,
Madhya Pradesh

VERSUS

Maihar Cement

Respondent

Sarla Nagar, Maihar,
Satna, M.P.

With

Excise Appeal No. 50704 of 2017

(Arising out of order-in-original No. 23-32/COMMR/JBP/CEX/2016 dated 21.12.2016 passed by the Commissioner, Customs, Central Excise & Service Tax, Jabalpur).

**Commissioner of Central Goods And
Service Tax, Customs And Excise,
Jabalpur**

Appellant

GST Bhawan, Mission Chowk, Napkier
Town, Jabalpur-482001,
Madhya Pradesh

VERSUS

Maihar Cement

Respondent

Sarla Nagar, Maihar,
Satna, M.P.

With

Excise Appeal No. 50705 of 2017

(Arising out of order-in-original No. 23-32/COMMR/JBP/CEX/2016 dated 21.12.2016 passed by the Commissioner, Customs, Central Excise & Service Tax, Jabalpur).

**Commissioner of Central Goods And
Service Tax, Customs And Excise,
Jabalpur**

Appellant

GST Bhawan, Mission Chowk, Napkier
Town, Jabalpur-482001,
Madhya Pradesh

VERSUS

Maihar Cement

Respondent

Sarla Nagar, Maihar,
Satna, M.P.

With

Excise Appeal No. 50706 of 2017

(Arising out of order-in-original No. 23-32/COMMR/JBP/CEX/2016 dated 21.12.2016 passed by the Commissioner, Customs, Central Excise & Service Tax, Jabalpur).

**Commissioner of Central Goods And
Service Tax, Customs And Excise,
Jabalpur**

Appellant

GST Bhawan, Mission Chowk, Napkier
Town, Jabalpur-482001,
Madhya Pradesh

VERSUS

Maihar Cement

Respondent

Sarla Nagar, Maihar,
Satna, M.P.

With

Excise Appeal No. 50707 of 2017

(Arising out of order-in-original No. 23-32/COMMR/JBP/CEX/2016 dated 21.12.2016 passed by the Commissioner, Customs, Central Excise & Service Tax, Jabalpur).

**Commissioner of Central Goods And
Service Tax, Customs And Excise,**

Appellant

Jabalpur

GST Bhawan, Mission Chowk, Napkier
Town, Jabalpur-482001,
Madhya Pradesh

VERSUS

Maihar Cement

Sarla Nagar, Maihar,
Satna, M.P.

Respondent

With

Excise Appeal No. 50708 of 2017

(Arising out of order-in-original No. 23-32/COMMR/JBP/CEX/2016 dated 21.12.2016 passed by the Commissioner, Customs, Central Excise & Service Tax, Jabalpur).

**Commissioner of Central Goods And
Service Tax, Customs And Excise,
Jabalpur**

GST Bhawan, Mission Chowk, Napkier
Town, Jabalpur-482001,
Madhya Pradesh

Appellant

VERSUS

Maihar Cement

Sarla Nagar, Maihar,
Satna, M.P.

Respondent

With

Excise Appeal No. 50709 of 2017

(Arising out of order-in-original No. 23-32/COMMR/JBP/CEX/2016 dated 21.12.2016 passed by the Commissioner, Customs, Central Excise & Service Tax, Jabalpur).

**Commissioner of Central Goods And
Service Tax, Customs And Excise,
Jabalpur**

GST Bhawan, Mission Chowk, Napkier
Town, Jabalpur-482001,
Madhya Pradesh

Appellant

VERSUS

Maihar Cement

Sarla Nagar, Maihar,
Satna, M.P.

Respondent

And

Excise Appeal No. 50710 of 2017

(Arising out of order-in-original No. 23-32/COMMR/JBP/CEX/2016 dated 21.12.2016 passed by the Commissioner, Customs, Central Excise & Service Tax, Jabalpur).

**Commissioner of Central Goods And
Service Tax, Customs And Excise,**

Appellant

Jabalpur

GST Bhawan, Mission Chowk, Napkier
Town, Jabalpur-482001,
Madhya Pradesh

VERSUS

Maihar Cement

Sarla Nagar, Maihar,
Satna, M.P.

Respondent**Appearance**

Shri Sanjay Kumar Singh, Authorized Representative – for the
Department

Shri Sanjay Grover, Advocate – for the Respondent

CORAM :

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)

HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO. 50786-50794 / 2022

DATE OF HEARING : 04.08.2022

DATE OF DECISION: 31.08.2022

ANIL CHOUDHARY:

These appeals have been filed against common order-in-original dated 22/12/2016 by which 10 show cause notices were adjudicated on the common issue whereby the learned Commissioner have been pleased to drop the proposed demand for reversal of Cenvat Credit, proposed under Rule 6(3)(b) of Cenvat Credit Rules.

2. The brief facts are as follows:

2.1. M/s Maihar Cement- Unit-I(the Noticee) and M/s Maihar Cement Unit-2 are two sister units both situated at Maihar on same plot having separate registration in Central Excise and are two divisions of the same proprietor viz. M/s. Century Textiles and Industries Ltd. Both the units are using limestone for the manufacture of Cement. All the mines are either owned by Century

Textiles & Ind. Ltd. (lease is in the name of Maihar Cement prop. Century Textiles & Ind. Ltd). The captive limestone mines are managed by Unit-I, which set up in 1973. Unit-2 was set up in 1995-96. There is no mine in the name of M/s Maihar Cement Unit-2. Royalty on limestone is also paid to the State Government by Unit-I only, as M/s Maihar Cement Unit-2 do not have any explosive license in their name.

2.2 M/s Maihar Cement with the help of explosives (on which they are availing Cenvat Credit) excavate limestone, part of which they are utilizing in their own factory to manufacture clinker and cement which are chargeable to duty. Part of the limestone so excavated is transferred by them to their sister unit-M/s Maihar Cement Unit-2 from the mines itself without payment of duty, being exempted. Thus the cenvatable inputs (explosives) are used by Maihar Cement Unit I in the manufacture of dutiable products (clinker and cement), as well as exempted goods i.e., limestone. M/s Maihar Cement Unit I have not maintained separate accounts for inputs used in the manufacture of dutiable and exempted goods.

2.3 Respondent is cement manufacturing units being Maihar Cement-Unit 1 (hereinafter referred to as 'Unit 1') and Maihar Cement Unit 2 (hereinafter referred to as 'Unit 2'). Both the units were registered separately under the erstwhile Central Excise Rules, 1944 and they are located adjacent to each other. Both Unit 1 and Unit 2 are sister units and managed by common managerial personnel from common factory office.

2.4 Both the units are owned by of Century Textile & Industries, which was granted a mining lease upto year 2038 for mining of limestone which is the basic raw material for the manufacture of cement. Limestone excavated from the captive mines is used as a raw material for both the units.

2.5 Unit 1 has an 'explosives licence' and buys the explosives which are used for excavation of limestone from captive mines. Unit 1 takes the entire cenvat credit of the explosives. A part of the limestone excavated from the mines is used at Unit 1 for the manufacture of cement while part of the limestone excavated is cleared from mines to Unit 2 for the manufacture of cement. Undisputedly, Cement is taxable and both Unit 1 and Unit 2 are paying Central Excise Duty on the manufacture and clearance of cement.

2.6 In the above background, ten (10) different show cause notices were issued to the Respondent, wherein it was alleged that common inputs (explosives) were used by Unit 1 in the manufacture of dutiable goods (cement) and non dutiable goods (limestone) and no separate accounts (of explosive) were maintained for the same. Therefore, respondent i.e. Unit 1 has violated Rule 6(3)(b) and/or Rule 6(3)(i) of Cenvat Credit Rules, 2002/2004 and is liable to pay 10%/5%/6% of the sale value/value of limestone (exempted product) cleared to Unit 2. Penalty was also proposed to be imposed upon the respondent.

2.7 The Respondent filed separate replies to all the show cause notices and contested the demand both on merits and limitation i.e. demand is time barred.

2.8 Commissioner of Central Excise passed a common order in original being no. 23-32/Commr/JBP/CEX/2016 dated 21.12.2016 and adjudicated all the show cause notices. The Ld. Commissioner held that there was no 'sale' of goods i.e. limestone from unit 1 to unit 2 is as much as both the units belong to one company only. Thus, the essential ingredient of Rule 6(3)(b) of Cenvat Credit Rules 2002/2004, i.e. 'sale' of limestone (exempted product) from unit 1 to unit 2 is not satisfied. In other words, Commissioner held that it is only an internal transfer of limestone from unit 1 to unit 2. The Commissioner also relied upon an earlier decision of the Tribunal being Final order no. A/53065/2016-EX(DB) dated 11.8.2016, in the respondent's own case, wherein the department's appeal was dismissed on same issue, which has attained finality (as was not appealed against).

2.9 Aggrieved by the Adjudication order, department have filed appeals before the Tribunal being the present batch matters. These set of appeals were dismissed by the Tribunal vide its final order dated 17.1.2018. Department further filed appeals before the Hon'ble Madhya Pradesh High Court at Jabalpur. The Hon'ble High Court vide its order dated 9.1.2020 remanded the matters back to the Tribunal to examine the issue on the point that-once word 'sale' does not find a mention in amended Rule 6(3)(i) after 1.3.2008, whether the Tribunal judgment is correct (as Rule 6(3) was

substituted w.e.f. 01.04.08). The period in dispute is March 2007 to July, 2015?

3. Learned AR appearing for appellant-revenue urges that the issue involved is that the respondent/Unit-I have cleared exempted excavated limestone from their mines to M/s Maihar Cement Unit II, both owned by a single proprietor i.e., Century Textiles and Industries Limited, without reversing the CENVAT Credit @ 10%, 5% & 6% during the period March 2007 to July 2015 (they were manufacturing dutiable as well as exempted goods). The Hon'ble High Court in its remand order has observed that the issue should be re-examined for the period of March 2008 onwards in view of the changes brought in Rule 6(3) (b) of Cenvat Credit Rules, 2004 w.e.f. 01.03.2008 vide Notification 10/2008 C.E. (N.T.)

4. Reiterating the grounds of appeal, he urges that it is an admitted fact that the respondent is engaged in manufacture of both dutiable as well as non-dutiable goods, as part of limestone was used in the manufacture of cement and clinker, which are dutiable goods as well as limestones (exempted goods), which was transferred in part to its sister unit (Maihar Cement Unit II). The respondent unit-I is not keeping a separate account of inputs (explosives) used exclusively for manufacture of dutiable and non-dutiable products, as stipulated under Rule 6(3)(i) of Cenvat Credit Rules. As such their liability arises to pay duty on the exempted product cleared (by reversal of Cenvat credit) under Rule 6(3) (i) which have been substituted the erstwhile Rule 6(3)(b). Prior to amendment of Rules, 6(3)(b) provided that the manufacturer shall pay an amount equivalent to Cenvat credit attributable to the

inputs, and input services used in, or in relation to, the manufacture of such exempt final product at the time of their clearance from the factory, or

(Clause b) or pay an amount at the specified percentage of the total price, excluding taxes, if any, on the final exempted product charged by the manufacturer for the sale of such goods, at the time of their clearance from the factory.

5. The amended Rule 6(3)(b) of CCR w.e.f. 01/03/2008 provides that the manufacturer shall follow any one of the options, applicable to him, namely;

i) pay an amount equal to 6% (or as specified) of value of the exempted goods, subject to a maximum of the sum total of opening balance of the Cenvat credit of input and input services available at the beginning of the period to which the payment relates, and the credit of input, and input services taken during that period, or

ii) pay an amount as determined under sub Rule (3A).

6. Further sub Rule (3A) provides that the manufacturer shall intimate in writing to the Range Superintendent of their intention to reverse Cenvat credit as per sub-Rule 3(A), giving details of input and outputs etc. and shall determine the proportionate credit required to be paid out of the total credit of input and input services taken during the month or period. Thus, the assessee will be required to reverse the proportionate credit as per the formula given.

7. It is further urged by Learned AR that in the amended provision, the reference to value with respect to 'sale price' for determination of the quantum of reversal of Cenvat credit, has been omitted. As a result, it is immaterial for the period under dispute (from 01/3/08) whether or not the exempted goods are removed pursuant to sale.

8. Accordingly, it is urged that the appellant is required to pay duty at the specified rate as applicable during the period of dispute, towards reversal of Cenvat credit. Accordingly, he prays for allowing the appeal(s) and confirmation of the proposed demand under Rule 6(3)(i) of CCR.

9. Opposing the appeal, respondent submits that the scheme of Cenvat Credit is such that even after the amendment of Rule 6(3)(b) of Cenvat Credit Rules 2004 on or w.e.f 1.3.2008, the position of law does not change. In so far as the demand prior to March 2008 is concerned, the same does not stand since the word used in Rule 6(3)(b) is 'sale value' and there is no sale by unit 1 to unit 2. The Commissioner in his order in original have given a finding of fact that it is also undisputed that both unit 1 and unit 2 belong to one company i.e. Century Textile & Industries Ltd. In other words, limestone is only transferred and not sold by unit 1 to unit-2, therefore Rule 6(3)(b) is not satisfied and thus no demand arises for the period prior to March 2008. Thus, the department appeal for the demand period to 1.3.2008 deserves to be dismissed.

10. Respondent further submits that even if limestone i.e. exempted product is cleared by unit 1 to unit 2, the demand under Rule 6(3)(i) is incorrect because the limestone is not a final product by itself. In other words, limestone is an intermediate product which is in turn used in the manufacture of dutiable final product i.e. cement. Assuming, that respondent had paid duty on limestone treating it as a final product, it would have been still eligible for credit of the same, since limestone is an intermediate product used in the manufacture of dutiable final product i.e. cement. Thus, it would have been a 'revenue neutral' situation and an academic exercise altogether, and there is no loss of revenue to the department. In support of the same, respondent relied upon the judgment of Hon'ble Supreme Court in the case of Escorts Ltd. Vs. CCE reported at 2004 (171) ELT 145 wherein identical facts were involved-the assessee cleared exempted tractor parts to its other unit and credit was sought to be denied under Rule 57C of the erstwhile Modvat Rules. The Hon'ble Supreme Court held that merely parts are cleared from one unit to another, it does not make them a final product by itself. The fact that parts are used in the manufacture of taxable-tractor are good enough. It further held that idea of Rules is to streamline the process of payment of duty and prevent cascading effect of duty on both inputs and final products. The Hon'ble Supreme Court took recourse to Rule 57D and held that even if some exempted intermediate product comes into existence, still entire credit would be eligible so long as the final product is taxable. This judgment applies in full force to the facts of present case in as much as the limestone is used in the

manufacture of taxable final product i.e. cement, and as such the demand under amended Rule 6(3)(i) also does not survive. This judgment of Escorts Ltd. (supra) was followed by the larger bench of Tribunal in the case of Sterlite Industries (I) Ltd Vs CCE, Pune reported at 2005 (183) ELT 353 (Tri.LB). Thus the present department appeals for the period after 1.3.2008 also deserve to be dismissed.

11. Respondent further submits that it has reversed proportionate credit on explosives used in the excavation of limestone, which is cleared to unit 2. The above fact has also been recorded by the Commissioner in his order in original, that year after year, the respondent have followed the practice of reversing the proportionate credit on explosives used in the excavation of limestone, which is cleared to unit 2. In other words, no credit has been taken by respondent i.e. unit 1 on explosives qua limestone cleared to unit 2. Thus if the proportionate credit has been reversed, no demand can be made under Rule 6(3)(i) and present appeals deserve to be dismissed. In support of the same, respondent relies upon the judgment of Hon'ble Supreme Court in the case of Chandrapur Magnets Wires (P) Ltd. Vs. CCE reported at 1996 (81) ELT 3, wherein the Hon'ble Supreme Court in identical facts and circumstances under the erstwhile modvat rules, wherein assessee did not maintain separate records for credit of inputs taken for manufacture of dutiable and exempted goods, held that if the assessee has debited the credit taken before clearance of exempted goods, it is as good as not taking of the credit itself. In the facts of present case, the respondent having admittedly

reversed the proportionate credit on explosives used in the excavation of limestone which is cleared to unit 2, the present demand under Rule 6(3)(i) does not survive and department appeals deserve to be dismissed.

12. The Respondent submits that the present issue is also covered by the earlier judgment of Tribunal in respondent's own case being final order no. A/53065/2016-EX(DB) dated 11.8.2016, wherein the department's appeal was dismissed and the same has attained finality. In other words, the same has not been appealed against till date. Thus, department cannot take a contrary view in the facts of present case and the batch of appeals deserve to be dismissed by this Hon'ble Tribunal.

13. Having considered the rival contentions, we find that first of all, the show cause notices are misconceived for any demand under Rule 6(3)(b)/6(3)(i) due to the admitted fact that the appellant have admittedly reversed the proportionate credit on input/explosives for limestone cleared from the captive mines to Unit-2. Rule 6 provides for a mechanism to reverse Cenvat credit either proportionately, if it can be calculated, and in the alternative, if the same cannot be calculated with ease, the rule provides for reversal of Cenvat credit taken on common inputs by reversing a specified percentage of the sales/transfer value of the exempted product. Such reversal is restricted to the opening balance of credit in the Cenvat account at the beginning of the period as modified by Cenvat credit taken during the accounting period.

14. In view of the admitted fact that the appellant have reversed the proportionate credit, the facts are covered squarely by the ruling of Hon'ble Supreme Court in the case of Chandrapur Magnet Wires Pvt Ltd (Supra). In other words, the appellant have reversed the proportionate Cenvat credit in terms of Rules 6 (3)(ii) of CCR, thus, there is no application of Rule 6 (3)(i). We further find that the situation is wholly revenue neutral, as both the units under common management and ownership are paying duty on their dutiable finished product namely cement and clinker. In case, duty was paid in terms of Rule 6(3)(i), the same was available as credit to unit 2 as input credit.

15. In view of aforementioned findings and observations, we find no merit in the appeals of revenue. Accordingly, the appeals are dismissed and the impugned order is upheld. Restoration of Appeal No. E/ROA/50069/2021 is also disposed off as allowed.

(order pronounced in the open court on 31.08.2022)

(Anil Choudhary)
Member (Judicial)

(P.V. Subba Rao)
Member (Technical)