IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST BLOCK NO.2, R.K. PURAM, NEW DELHI-110066

BENCH-DB

COURT –II

**Excise Appeal No. E/50097/2018-Ex [DB]**

[Arising out of Order-in-Appeal No. ALW-EXCUS-000COM-01-5-17-18 dated 03.10.2017 passed by the Commissioner of CGST, Alwar.]

**M/s. PCM Strescon Ventures Ltd. …Appellant(s)**
**Vs.**

**C.G.S.T & C.E., Alwar … Respondent**

Present for the Appellant : Mr. G.K. Sarkar, & Mr. Prashant Shrivastava(Advocates)
Present for the Respondent: Mr. M.R. Sharma, D.R.

**Coram: HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)**
**HON'BLE MR. V. PADMANABHAN, MEMBER (TECHNICAL)**

**Date of Hearing/Decision: 08.03.2018**

**FINAL ORDER NO. _51661/2018__**

**PER: S.K. MOHANTY**

This appeal is directed against the impugned order dated 03.10.2017, passed by the Commissioner of CGST & Excise – Alwar.

2. Brief facts of the case are that the appellant was engaged in the manufacture of Pre-stressed Cement Concrete Sleepers, classifiable under Chapter 68 of the First Schedule to the Central Excise Tariff Act, 1985.The appellant was awarded a contract for manufacture of the said goods by M/s. Larsen & Toubro Limited, involving the construction of Railway Line/ Track in the Western Dedicated Freight Corridor (WDFC) between Rewari to Haryana.

The appellant claimed benefit of exemption Notification No. 12/2012-CE dated 17.03.2012 (Sl. 186), to clear the goods without payment of duty. The jurisdictional Assistant Commissioner vide communication dated 22.12.2014, directed that the appellant is not eligible for exemption benefit for the reasons that the goods produced by it are not meant for use in the site of manufacture and the appellant would clear the goods on payment of duty. Accordingly, the appellant cleared the goods on payment of duty under protest and availed Cenvat Credit benefit on the inputs and capital goods under the provisions of the Cenvat Credit Rules, 2004. The Central Board of Excise & Customs vide Circular No. 1036/24/2016-CX dated 06.07.2016 clarified that the expression "site" appearing in Notification No. 12/2012-CE dated 17.03.2012 cannot be given a restrictive meaning. The appellant vide its letter dated 12.07.2016 informed the Assistant Commissioner that since all the required conditions of the Circular dated 06.07.2016 have been fulfilled, it would clear the goods at the "site" for use in the Project, without payment of duty. The appellant had also surrendered its registration certificate. A Show Cause Notice dated 07.01.2017 was issued by the Commissioner of Central Excise, alleging that the appellant had wrongly availed and utilized Cenvat Credit on the clearance of final products i.e. PSC Slippers during the period 01.11.2014 to 31.07.2016, in contravention of Rule 6(1) and Rule 6(4) of the Cenvat Credit Rules, 2014. By the impugned Order, the Learned Commissioner of Central Excise has confirmed the demand of

Cenvat Credit of Rs. 5,22,87,970/- alongwith interest and also imposed penalty of Rs. 5,22,879/- under Rule 15(1) of the Rules, 2004 read with Section 11AC (1) (a) of the Central Excise Act, 1944. Hence, the appellant has filed this appeal before the Tribunal.

3. The Learned Advocate on behalf of the appellant submitted that the appellant paid the duty as per direction of the Assistant Commissioner of Central Excise vide letter dated 22.12.2014. It is submitted that the department had taken a view that the goods were not exempted and therefore, Rule 6(1) of the Cenvat Credit Rules, 2004 cannot be invoked. It is further submitted that the appellant paid the duty as per direction of the department and availed Cenvat Credit and therefore, the Cenvat Credit cannot be denied as the duty was not refunded to them. In support of above submissions, the Learned Advocate has relied upon the judgment of Hon'ble Bombay High Court, in the case of CCE, Pune-III Vs. Ajinkya Enterprises – 2013 (294) ELT 203 (Bom.) and also the decisions of this Tribunal, in the case of Vinayak Industries Vs. Commissioner of Central Excise, Rajkot - 2003 (159) ELT 456 (Tri-Mum.), Asian Colour Coated Ispat Ltd. Vs. CCE, Delhi-III – 2015 (317) ELT 538 (Tri.-Del.), Hi-Tech Blow Moulders Pvt. Ltd. Vs. CCE, Bangalore-1 – 2016 (341) ELT 419 (Tri-Bang.).

4. The Learned A.R. appearing for the Revenue reiterates the findings recorded in the impugned order. It is further submitted

that as per Board Circular, the goods are exempted by Notification No. 12/2012-CE dated 17.03.2012. It is also submitted that Rule 6(1) of the Rules, 2004 provides that the Cenvat Credit shall not be allowed on Inputs or Input services, which is used in the manufacture of exempted goods. In the instant case, the appellant availed Cenvat Credit on exempted goods and therefore, the Adjudicating authority has rightly denied the benefit of Cenvat Credit.

5. Heard both sides and perused the records.

6. On perusal of the case records, we find that vide letter dated 17.11.2014, addressed to the Assistant Commissioner, the appellant had claimed the benefit of exemption notification no. 12/2012-CE (supra) in respect of pre-stressed cement concrete sleepers, to be manufactured at the construction site of Western Dedicated Freight Corridor (WDFC), Phase –I, for solely used in the construction work only. It is stated that a plot of land has been handed over to the appellant on the Project Site for setting up of plant for manufacture PSC Sleepers. The Assistant Commissioner vide letter dated 22.12.2014 informed that as per Explanation of the Entry Serial No. 186 of Notification No. 12/2012-CE, the goods manufactured at site of construction must be used in construction at such site. But the goods manufactured by the appellants are not to be used at the site of manufacture and therefore, exemption benefit is not available and directed the

appellant to clear the goods on payment of appropriate Central Excise duty. The appellant obtained Central Excise Registration from the jurisdictional Range Officer and cleared the goods on payment of duty. The appellant vide letter dated 08.04.2015, again approached the Assistant Commissioner to allow the clearance of the goods as per exemption notification. There are several correspondences between the appellant and the department on this issue. The Assistant Commissioner vide letter dated 02.06.2015, reiterated that the appellant is not eligible for exemption benefit. It is seen that the Joint Commissioner (Tech.) of the office of the Commissioner of Central Excise, Commissionerate, Jodhpur vide letter dated 14.03.2016 forwarded the copy of the letter dated 02.06.2015 of the Assistant Commissioner of Central Excise for necessary action.

7. Thereafter, CBEC vide Circular dated 06.07.2016 clarified the scope of word "site" appearing in the Notification No. 12/2012-CE. It is revealed from the said Circular dated 06.07.2016 that the representation have been made from the trade regarding the difficulties being faced in availing of benefit of exemption applicable to goods manufactured at the site of construction, for use in construction work at such site, vide Serial No. 186 of Notification No. 12/2012-CE (Supra). The Board Circular was issued particularly for Project, which runs long distance such as construction of road, laying of pipeline, laying of railway track etc. The Board has clarified that the expression

"site" cannot be given a restrictive manner and the benefit of the exemption under Serial No. 186 of the said Notification would be allowed, subject to fulfillment of condition, as laid down in the said circular. The appellant by letter dated 11.07.2016, informed the Assistant Commissioner of Central Excise and Service Tax that it fulfilled all the conditions of Para 2.2 of the said Circular dated 06.07.2016. Thereafter, the appellant started clearance the goods manufactured at site for use in the Project, without payment of duty, by availing the benefit of the exemption notification.

8. The Commissioner of Central Excise issued a Show Cause Notice dated 02.01.2017, alleging that the appellant was entitled to take benefit of Notification No. 12/2012-CE dated 17.03.2012 (Sl. No.186) unconditionally since inception of their manufacturing process on clearance of Sleeper manufactured by them for supply in the Western Dedicated Freight Corridor (WDFC) Project. Since, the exemption was available unconditionally, thus, the appellant is not entitled to avail the Cenvat Credit as per Rule 6(1) an Rule 6(4) of the Rules, 2004. It has proposed to recover the Cenvat Credit wrongly availed and utilized by it with interest and to impose penalty. The appellant in its reply to Show Cause Notice and during the Personal Hearing before the Adjudicating authority had narrated the entire facts in detail. It is categorically stated that the appellant claimed the benefit of exemption Notification, but the department refused to grant exemption and directed to take registration and clear the goods on payment of duty.

9. We find that the Learned Commissioner in the impugned Order observed that the Assistant Commissioner of Central Excise, Division-Sikar vide letter dated 22.12.2014 and 02.06.2015 and the Joint Commissioner of Central Excise, Jodhpur Commissionerate vide letter dated 14.03.2016 informed the appellant that since the goods manufactured by it were not to be used at the Site, it is not entitled to take the benefit of exemption notification. Thereafter, the Adjudicating authority observed that it is not in dispute that during the period 01.11.2014 to 31.07.2016, the benefit under Serial No. 186 of the said Notification No. 12/2012-CE was available to the appellant and the appellant was not required to pay the Central Excise duty on the goods cleared to M/s. L & T Limited and therefore, the appellant had wrongly availed Cenvat Credit under Rule 6(1) and 6(4) of the Rules, 2004. In our considered view, such findings of the Commissioner are totally perverse. It is apparent on the face of record that the department directed the appellant to take registration and to pay the duty and also refused to grant exemption benefit. In this event, the findings of the Commissioner that the appellant was entitled to avail the benefit of exemption is not tenable, as it is altogether against evidence. The Order made in conscious violation of pleadings and law is a perverse Order, which is exactly happened in the present case and thus, such order cannot be sustained in the eye of law.

10. The another aspect of this matter is that the Cenvat Credit is denied for contravention of Rule 6(1) and 6(4) of Rules 2004. Rule 6 provides obligation of manufacturer of dutiable and exempted goods. Rule 6(1) says that the CENVAT Credit is not available on such quantity of input or input service, which is used in exempted goods. In the present case, the department directed the appellant to pay the duty, as it not entitled to get benefit of exemption notification. The appellant paid the duty and availed Cenvat Credit, in terms of Cenvat Credit Rules, 2004. In such situation, when the department entertained the view during the relevant period that the appellant is not entitled to get the exemption benefit, Rule 6(1) and Rule 6 (4) of the Rules, 2004 cannot be invoked. The Tribunal in the case of Vinayak Industries (supra), in an identical situation, observed that the issue was academic as the assessee was not seeking refund of duty and there was no need to reverse the credit of duty. Apart from that, the department once accepted the duty, it cannot deny the Cenvat Credit utilized for clearance of the said duty paid finished products. The Hon'ble Bombay High Court in the case of Ajinkya Enterprises (supra), observed that the assessment of the goods cleared from the factory of the assessee on payment of duty had neither been reversed nor it was held that the assessee was entitled to get refund of the duty, then availing of Cenvat Credit cannot be faulted. The relevant paragraphs in the said decision are extracted hereunder:

***9.*** *It is relevant to note that the Board in its Circular dated 7th September, 2001 had only held that the activity of cutting/slitting of HR/CR coils into sheets or strips constitutes manufacture. Admittedly, the assessee had carried on additional activities such as pickling and oiling on the decoiled HR/CR coils, which is a complex technical process involving huge investment in plant and machinery. Since these additional activities were not considered by the Board in its Circular dated 7th September, 2001, the withdrawal of the said Circular cannot be a ground to hold that the activity carried on by the assessee did not constitute manufacturing activity. It is only on 24th June, 2010, the Board has issued a Circular to the effect that the process of pickling does not amount to manufacture. Therefore, during the relevant period, that is, during the period from 2nd March, 2005 to 31st December, 2005, it could not be said that the issue was settled and that the assessee paid duty on decoiled HR/CR coils knowing fully well that the same were not manufactured goods. If duty on decoiled HR/CR coils was paid bona fide, then availing credit of duty paid on HR/CR coils cannot be faulted.*

***10.*** *Apart from the above, in the present case, the assessment on decoiled HR/CR coils cleared from the factory of the assessee on payment of duty has neither been reversed nor it is held that the assessee is entitled to refund of duty paid at the time of clearing the decoiled HR/CR coils. In these circumstances, the CESTAT following its decision in the case of Ashok Enterprises - 2008 (221) E.L.T. 586 (T), Super Forgings - 2007 (217) E.L.T. 559 (T), S.A.I.L. - 2007 (220) E.L.T. 520 (T) = 2009 (15) S.T.R. 640 (Tribunal), M.P. Telelinks Limited - 2004 (178) E.L.T. 167 (T) and a decision of the Gujarat High Court in the case of CCE v. Creative Enterprises reported in 2009 (235) E.L.T. 785 (Guj.) has held that once the duty on final* *products has been accepted by the department, CENVAT credit availed need not be reversed even if the activity docs not amount to manufacture. Admittedly, similar view taken by the Gujarat High Court in the case of Creative Enterprises has been upheld by the Apex Court [see 2009 (243) E.L.T. A121] by dismissing the SLP filed by the Revenue.*

11. In view of the above discussion and analysis, we do not find any merits in the impugned Order. Accordingly, the same is set aside and the appeal filed by the appellant is allowed.

[Dictated and pronounced in the Open Court]

(**V. PADMANABHAN**)
MEMBER(TECHNICAL)

(**S. K. MOHANTY**)
MEMBER (JUDICIAL)

Pant