

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH - COURT NO. 1

E/ROM/50926/2018 in
A.No. E/51150/2017

(Arising out of CESTAT Final No. 51388/2018 dated 18.04.2018)

DATE OF HEARING : 30.11.2018
DATE OF DECISION : 19.02.2019

M/s Texmo Pipes & Products Ltd.		Appellants
		(Rep by Sh. Rohit Choudhary, Adv.)
	VERSUS	
CCE, Indore		Respondent
		(Rep. by Sh. S.K. Bansal, DR)

CORAM : HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. BIJAY KUMAR, MEMBER (TECHNICAL)

MISC. ORDER NO. 50110/2019

Per Anil Choudhary :

The present miscellaneous application is filed by the Appellants for rectification of mistake in the Final Order No. 51388/2018 dated 18/04/2018 in terms of Section 35(2) of Central Excise Act read with Rule 41 of the CESTAT Procedure Rules, 1982.

2. During the course of arguments, the learned counsel for the Appellants submitted that the instant Application relates to the part of order under heading "*Non Payment of an amount equivalent to 6% of the value of exempted goods cleared during July 2014 to March 2015*". He submitted that the Appellants were maintaining separate records from 01.07.2014 and stopped availing credit on inputs/inputs services exclusively used for the manufacture of exempted goods. This change was duly intimated to the

Department vide letter dated 29th August, 2014. The Department never took any objection for opting out of 6% payment scheme and, therefore, continued till 26.09.2015. He also submitted that the Appellants are maintaining separate account as per the requirement of sub-rule(2) of Rule 6 of the Cenvat Credit Rules, 2004 and accordingly filed return with the Department. It was further submitted by the learned counsel that they have changed the option exercised with effect from 01.07.2014. However, in the final order this Tribunal held that in view of Explanation (I) under Rule 6(3) forbidding such change, during the financial year, any change can be given effect from 01.04.2015, thus the Appellants are required to pay an amount at the rate of 6% till the end of financial year 2014-2015, leading to error of law in the Final Order dated 18.04.2018.

3. To support his arguments, he submitted that the correct legal position is that, under Rule 6(2) of the Cenvat Credit Rules, 2004, an assessee is obliged to maintain separate accounts in the manner as prescribed in said Rule 6(2)(a) of the Rules, and the law provides an option to the assessee, that if it so desire, he may maintain common account, exercise one of the options, as contemplated in *non-obtante* clause, contained in Rule 6(3) of the Cenvat Credit Rules, 2004. He also emphasised that the said Rule 6(3) contains Explanation I. The conjoint reading of said Rule 6(3) would reveal that, it is for the Department that once assessee exercised one of the options as prescribed under Rule 6(3) of the Rules, then the Department is restrained from withdrawing such option exercised by the assessee during the remaining financial year. However, no such restriction is contemplated under the said Rule 6(3) of the Cenvat Credit Rules, 2004 restricting the assessee from dropping such

option and maintain records in terms of the Rules 6(1) or 6(2) of the Cenvat Credit Rules, 2004. He submitted that in view of the said Rule, demand upheld by the Tribunal as per Explanation I to Rule 6(3), is wrong and needs to be rectified and, it be held, the Appellants are free to resort to Rule 6(2) and maintain the separate records. To strengthen his arguments, he relied upon the ratio of the judgment in the case of **Mercedes Benz India(P) limited Vs CCE, Pune**, 2015(40) S.T.R 381(Tri-Mumbai), wherein it was held that:

*“5.3 As regard the contention of the adjudicating authority that this option should be given in beginning and before exercising such option, we are of the view that though there is no such time limit provided for exercising such option in the rules but it is a common sense that intention of any option should be expressed before exercising the option, however the delay can be taken as procedural lapse. We also note that trading of goods was considered as exempted service from 2011 only, thus it was initial period. We are also of the view that there is no condition provided in the rule that if a particular option, out of three options are not opted, then only option of payment of 5% provided under Rule 6(3)(i) shall be compulsorily made applicable, therefore we are of the view that Revenue could not insist the appellant to avail a particular option. In the present case admittedly it is appellant who have on their own opted for option provided under Rule 6(3)(ii). The meaning of the option as argued by the Ld. Sr. Counsel is that “option of right of choosing, something that may be or is chosen, choice, the act of choosing”. From the said meaning of the term ‘option’, **it is clear that it is the appellant who have liberty to decide which option to be exercised and not the Revenue to decide the same.**”*

[emphasis supplied]

4. The learned counsel also submitted that Explanation cannot interfere with or change the enactment and there is no mention in Rule 6(3) itself that change only be effective at the beginning of the Financial Year. To support his argument, he placed reliance on the decision of the Hon’ble Supreme

Court in the case of **S. Sundaram Pillai Vs. Pattabiraman**, (1985) 1 SCC 591, wherein while considering the object of an Explanation, it was observed that:

“52. In *Dattatraya Govind Mahajan v. State of Maharashtra*, Bhagwati, J. Observed thus (SCC p.563, para 9) :

It is true that the orthodox function of an Explanation is to explain the meaning and effect of the main provision to which it is an Explanation and to clear up any doubt or ambiguity in it..... Therefore, even though the provision in question has been called an Explanation, we must construe it according to its plain language and not on any priori considerations.

53. Thus from a conspectus of the authorities referred to above, it is manifest that the object of an Explanation to a statutory provision is—

- (a) to explain the meaning and intendment of the Act itself,
- (b) where there is any obscurity or vagueness in the main enactment, to clarify the same so as to make it consistent with the dominant object which it seems to subserve,
- (c) to provide an additional support to the dominant object of the Act or in order to make it meaningful and purposeful,
- (d) an Explanation cannot in any way interfere with or change the enactment or any part thereof but where some gap is left which is relevant for the purpose of the Explanation, in order to suppress the mischief and advance the object of the Act it can help or assist the Court in interpreting the true purport and intendment of the enactment, and
- (e) it cannot, however, take away statutory right with which any person under a statute has been clothed or set at naught the working of an Act by becoming hindrance in the interpretation of the same.”

5. On the other hand, the learned AR for the Department justified the final order. He submitted that the final order was passed after considering all the facts and circumstances of the case. He also submitted

that by the present application, the Appellant is seeking a review of the final order passed by the Tribunal.

6. Heard both sides.

7. After considering the submissions made by both sides, we are of the view that the Appellants have only reverted or changed to compliance as per Rule 6(2) of Cenvat Credit Rules, 2004 by maintaining separate accounts.

8. We find the same is permissible, as the Explanation I under sub-Rule 3 restricts opting out of one of the options availed, out of the options, and availing the other option, within sub-Rule 3 of Rule 6. For more clarification, we reproduce the Explanation I which reads as under :

“Explanation I – If the manufacturer of goods or the provider of output service, avails any of the option under the sub-rule, he shall exercise such option for all exempted goods manufactured by him or, as the case may be, all exempted services provided by him, and such option shall not be withdrawn during the remaining part of the financial year.”

9. Further, it has been clarified by the Hon'ble Supreme Court in **S. Sundaram Pillai's** case (supra), that an Explanation cannot override the main provision, and is for a limited purpose to clarify, or fill in any gap, or provide additional support to the dominant object of Rule/Section.

10. In view of our findings, we hold that there have been a mistake of law in the final order dated 18.04.2018, leading to miscarriage of justice.

11. Accordingly, we deem it fit and appropriate to allow the ROM application filed by the Appellants and modify the final order to the

effect that we hold that the Appellants have rightly exercised the option under Rule 6(2) w.e.f. 01.07.2014. Accordingly, the appeal is allowed with consequential benefits.

(Pronounced in the open court on 19.02.2019)

(Anil Choudhary)
Member (J)

(Bijay Kumar)
Member (T)

ckp