CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD
Division Bench
Court – I

Appeal No. E/766 & 767/2009

(Arising out of Order-in-Original No. 09/2009 (C.Ex) (PNR) dated 25.05.2009 passed by Commissioner of Customs, Central Excise & Service Tax, Tirupati)

M/s Lakshmi Balaji Bottling Pvt. Ltd.,
Shri P. Nagaraj, General Manager …..**Appellant(s)**

Vs.

Commissioner of Customs & Central
Excise, Tirupati …..**Respondent(s)**

Appearance
Shri G. Shivadass, Advocate for the Appellant.
Smt. B. V. Shiva Naga Kumari, Commissioner (AR) for the Respondent.

Coram:
Hon'ble Mr. M.V. RAVINDRAN, MEMBER (JUDICIAL)
Hon'ble Mr. P. VENKATA SUBBA RAO, MEMBER (TECHNICAL)

Date of Hearing: 26/07/2018
Date of Decision: 27/08/2018

FINAL ORDER No. A/31040-31041/2018

[Order per: P. Venkata Subba Rao]

These appeals are filed against Order-in-Original No. 09/2009 dated 25.05.2009 passed by the Commissioner of Central Excise, Tirupati. Appeal No. 766/2009 is filed by the appellant/assessee while appeal No. 767/2009 was filed by Shri P. Nagaraj, General Manager of the assessee against the personal penalty imposed on him.

2. Heard both sides and perused the records.

3. The appellant herein manufacturers both carbonated and non-carbonated beverages. While carbonated beverages are liable to Central Excise duty non-carbonated beverages such as Maaza, Minute Maid, Pulpy Orange, etc., are exempted from payment of duty. The appellant has three production lines in their factory of manufacture. Line 1 is used to manufacture carbonated soft drinks in returnable bottles and Line 2 to manufacture carbonated soft drinks in pet bottles and there is no dispute about the entitlement of CENVAT credit of capital goods on these two lines. As far as Line 3 is concerned, it was audited in 2004-2005 and found that it is capable of manufacturing for both carbonated and non-carbonated soft drinks i.e., both dutiable goods and exempted goods. The appellant had taken CENVAT credit on the machinery used in Line 3 but during the periods 2004-2005 and 2005-2006 but used this line exclusively for manufacture of exempted non-carbonated beverages. Officers of the Central Excise Department gathered information and investigated the matter and found that they had appellant had used the equipment in Line 3 exclusively for manufacture of non-carbonated beverages

exempted during the period 2004-2005 and 2005-2006. It was also found that the irregularly taken CENVAT credit on this machinery in violation of Rule 6 (4) of the CENVAT Credit Rules. Statements of the concerned officials of the appellants were recorded. In 2008 a show cause notice dated 19.09.2008 was issued seeking to deny the CENVAT credit of Rs. 1,40,08,601/- taken on Line 3 capital goods which were used exclusively for manufacture of exempted products during the relevant period. It was proposed to recover the same under Rule 14 of the CENVAT Credit Rules, 2004 read with proviso to Section 11A of the Central Excise Act along with interest. It was also proposed to impose penalty equal to the CENVAT Credit under Section 11AC read with Rule 15(2) of the CENVAT Credit Rules, 2004. After following due process of law, the Learned Commissioner, vide the impugned order confirmed the demands along with interest and imposed penalties has proposed. Aggrieved by this order, the appellants preferred these appeals before this Bench.

4. The facts of the case are not in dispute; the appellant had taken CENVAT credit on the capital goods in Line 3 of the plant. Appellants had not used for manufacture of dutiable goods during the period 2004-2005 & 2005-2006 and that, the appellant had used Line 3 for manufacture of dutiable goods during 2006-2007 for total period of 19 days only. Learned Commissioner observed that the impugned capital goods were used exclusively for manufacture of exempted

goods during the period relevant to the show cause notice and therefore, they are not entitled to the credit of the capital goods in terms of Rule 6(4) of the CENVAT Credit Rules, 2004. Thereafter, during the months of June, 2006 to July, 2006 and October, 2006 the machinery was used in manufacture of dutiable goods for a total period of 19 days only. The Learned Commissioner has relied on the case of *Surya Roshni Ltd.,* [2003 (155) ELT 481 (Tri. – Del.)] in which, it was held that in respect of the capital goods used exclusively in manufacture of exempted products Modvat credit will not be admissible to the manufacturer. Subsequently, if the exempted products becomes dutiable on account of withdrawal of exemption or the manufacturer puts the capital goods to other use such acts would not revive the question of Modvat credit which stands determined at the time the capital goods was received. This order of the Hon'ble Tribunal of Delhi was upheld by the Hon'ble Apex Court by dismissing the Civil Appeal against it as not maintainable [2003 (158) ELT A273 (S.C.)] .

5. The Learned Counsel submits that the Learned Commissioner has wrongly relied on the ratio of the judgment of the Apex Court in the case of *Surya Roshni Limited*, as their case is distinguishable inasmuch as their goods were not exempted at the time they purchase the capital goods. In fact, they had every intention of using the capital goods for manufacture of dutiable and

exempted products at the time of purchase and the same was intimated to the Department. At no point of time was it indicated their machinery will be exclusively used in manufacture of exempted products only. If they were using Line 3 exclusively for exempted products credit could have been denied under Rule 6(4) of the CENVAT Credit Rules, 2004. It is not material when and to what extent the capital goods are used for manufacture of dutiable goods. As long as, the equipment or machinery is used for manufacture of dutiable goods, they are entitled to the benefit of CENVAT credit in terms of Rule 6(4). He draws our attention to the letter of their Executive Director dated 20.03.2005 intimating the expansion project and the letter of Range Superintendent dated 23.08.2005 asking for the details of goods manufactured and their reply dated 04.11.2005 explaining that till that date they had manufactured only exempted products but plan to produce dutiable products in 3rd Line by November, 2005. Further, the appellant vide letter dated 30.04.2008 sent a CD to the Commissioner showing the trial production of Carbonated Drinks (dutiable) on Line 3. The Learned Counsel argued that the Rule 6(4) of the CENVAT Credit Rules, 2004 does not apply to the capital goods in question because they are also used in manufacture of dutiable products. It is clear from the operational manual of the machinery that it is capable to manufacture of dutiable as well as exempted products. This position was maintained in the statements recorded by the Central Excise Officers from their company officials. It is not relevant that the capital goods were used in manufacture of exempted goods only at the time of receipt. He also argued that the demand is barred by limitation and penalty is not imposable on the appellant assessee as well as Shri P. Nagaraj. The Learned Counsel relied on the judgment of Hon'ble Tribunal in the case of *Brindavan Beverages Pvt. Ltd.,* [2014 (310) ELT 398 (Tri. – Del.)] in which, it was held that the decisions of the Surya Roshni Limited (supra), relied upon by the Commissioner in this case is applicable only when the manufacturer had no plans or intention to use the capital goods for manufacture of dutiable goods. He also relied on the case of *Pepsico India Holdings Ltd.,* [2005 (324) ELT 175 (Tri. – Mumbai)].

6. Learned Commissioner (AR) vehemently opposed the appeal and asserted that the Line 3 was used exclusively for manufacture of exempted products during the period in dispute i.e. 2004-2005 and 2005-2006 in violation of Rule 6(4) of the CENVAT Credit Rules. Therefore, the credit on capital goods is liable to be recovered under Section 11A of the Central Excise Act. It is her assertion that the appellant had mentioned about the use of Line 3 for manufacture of dutiable goods also whereas, in practice used this Line exclusively for manufacture of exempted products during the period of dispute. Therefore, the allegation of suppression and mis-declaration is rightly invoked and the extended period of demand

under Section 11A applies. Accordingly, the demand is sustainable and so are the penalties under Section 11AC and the personal penalty on the General Manager under Rule 15 of the CENVAT Credit Rules. It is her further submission that, even after the period of dispute, the appellant has used the machinery only for 19 days to manufacture dutiable goods after two years from the installation and not thereafter. Therefore, the appeals may be rejected. It is her further submission that the case law laid down in the case of Surya Roshni Ltd., and upheld by the Apex Court (supra) is squarely relevant to this case, as at the time of receipt of the goods they only used the Line for manufacture of exempted products. It is irrelevant that they have, after a period of two years, used for manufacture of dutiable goods for a short period of 19 days.

7. We have examined the arguments on both sides. The facts are not in dispute that plant is capable for manufacture of both dutiable and exempted products. The appellant had intimated his intention to use the machinery (at the time of receipt of the capital goods) to manufacture both exempted and dutiable goods but had used the plant exclusively for manufacture of exempted goods for the first two years. Thereafter, he used a plant for manufacture of dutiable products for a short period of 19 days and thereafter never used a plant for manufacture of dutiable products. The question to be decided is whether under these circumstances the assessee is

entitled to the benefit of capital goods CENVAT credit on the disputed Line 3 of the plant. A plain reading of the Rule 6(4) of CENVAT Credit Rules, 2004 shows that **no credit is admissible on capital goods used exclusively in manufacture of exempted goods** or in providing exempted services. There is no requirement of the capital goods to be used any specified extent in manufacture of dutiable goods. The Rule, as it is framed, entitles an assessee to claim credit on capital goods even if the machinery is used to manufacture a single unit of dutiable goods. This appears unfair but equity has no place in matters of taxation and we have to follow the law as it is drafted. The next question to be decided is whether the entitlement of capital goods should be decided based on how they are used at the time of receipt of capital goods. In the case of Surya Roshni Ltd., (supra) at the time of receipt of the capital goods the initial products were exempted from the payment of duty. Thereafter, they became dutiable and the assessee wanted to claim credit of MODVAT on these goods. The Tribunal did not allow the capital goods credit and this decision was upheld by the Supreme Court. In this case, the plant was capable of manufacturing both exempted and dutiable products and the appellants declared their intention to manufacture both using Line 3. They, however, never used machinery for the first time of two years to manufacture dutiable goods at all. Thereafter, the appellants used machinery to manufacture of dutiable goods for 19 days. Thus, it cannot be said that the goods are used exclusively for manufacture of exempted products. This case is similar to the case of *Brindavan Beverages Pvt. Ltd.,* [2014 (310) ELT 398 (Del.)] in which, the Tribunal held as follows in paragraphs 6, 7:

> *"**6.** The undisputed facts are that the capital goods, in question, had been received by the appellant in their Bareilly unit during September 2004 to August 2005 period. There is also no dispute about the fact that during the period till September 2006, the machinery, in question, had been used only for manufacture of fruit pulp based soft drink called MAAZA which is fully exempt from duty. However the appellant had still availed Cenvat credit amounting to Rs. 1,64,08,716/- in respect of these capital goods. According to the appellant, from October 2006 onwards they have started using these machines for manufacture of aerated waters which are dutiable final product and this fact is not disputed by the Department. According to the appellant, they are eligible for capital goods Cenvat credit, as in terms of the provisions of Rule 6(4) of the Cenvat Credit Rules, 2004, the capital goods Cenvat credit is to be denied only when the capital goods have been used exclusively for manufacture of exempted final product, not when the capital goods are used for dutiable as well as exempted final products and in this case the Cenvat credit cannot be denied as from the very beginning, the appellant's intention was to use the capital goods, in question, for manufacture of both, dutiable as well as exempted final product and that notwithstanding the fact that till September 2006, the machinery was used only for manufacture of fruit pulp based soft drinks (exempted final product), since they started using the machinery since October 2006 for manufacture of aerated waters (dutiable final product), they would be eligible for Cenvat credit. According to the appellant, the judgment of the Tribunal in the case of CCE, Indore v. Surya Roshni Ltd. (supra) is not applicable to this case, as in this case, from the very beginning their intention was to use the machinery for manufacture of dutiable as well as exempted final product and that for this purpose, it is not necessary both dutiable and exempted final products have to be manufactured simultaneously.*
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> ***7.** In terms of the provisions of sub-Rule (4) of Rule 6 of the Cenvat Credit Rules, 2004 Cenvat credit shall not be admissible on capital goods which are used exclusively in the manufacture of exempted goods or in providing exempted services, other than the final products which are exempt from the whole of the duty of excise leviable thereon under any notification, where the exemption is granted based on the value or quantity or clearances made in a financial year. From a perusal of this sub-Rule, it is clear that capital goods Cenvat credit would be admissible when the capital goods are used either only for dutiable final product or for dutiable as well as exempted final product. The capital goods Cenvat credit is also admissible when a manufacturer is availing full duty exemption based on the value or quantity of the goods cleared in a financial year, in which case, while initially the manufacturer will be availing full duty exemption (for some months or for several financial years at a stretch) but subsequently at some point of time when he crosses the threshold limit for exemption, his final product becomes dutiable and in such a case, even during the period of full exemption, the manufacture can take capital goods Cenvat credit which he can utilize when this final product becomes dutiable. A question arises as to when capital*

goods are used for manufacture of dutiable as well as exempted final product, whether for availing capital goods credit, the dutiable as well as exempted final product have to be manufactured simultaneously. In our view this is not necessary, and Cenvat credit would be admissible even if the capital goods are used for manufacture of dutiable goods and exempted goods at different points of time. However, if at the time of receipt of the capital goods, the manufacturer was using the capital goods only for manufacture of fully exempted final product and had no plan or intention to use them for dutiable final products and later on, either the final product becomes dutiable or he changes his plans and starts using the capital goods for manufacture of dutiable final products, the judgment of the Tribunal in the case of CCE, Indore v. Surya Roshni Ltd. (supra) and Spenta International Ltd. v. CCE, Thane (supra) would become applicable. But, if at the time of receipt, the manufacturer had clear intention to use the capital goods for manufacture of dutiable as well as exempted final products, in such a situation just because at the time of receipt, he uses the capital goods for manufacture of exempted final product and subsequently he switches over to the manufacture of dutiable final product, the capital goods Cenvat credit cannot be denied. When at the time of receipt of capital goods, capable of use in manufacture of dutiable as well as exempted final products, there is evidence to show that the manufacturer had intention to use them for manufacture of dutiable as well as exempted final product, the eligibility of the capital goods for Cenvat credit cannot depend upon the order in which the same are used - whether first for the manufacture of exempted final products or for the manufacture of dutiable final product. We are supported in this view by the judgment of Hon'ble Gujarat High Court in case of CCE, Vadodara II v. Gujarat Propack reported in [2009 (234) ELT 409 (Guj.), wherein the Hon'ble High Court has held that when the capital goods installed in the year 2000 were used for manufacture of exempted goods on trial basis and subsequently were used for manufacture of dutiable goods when regular production was started, the Cenvat credit in respect of capital goods cannot be denied and the Tribunal's judgment in case of M/s. Surya Roshni Ltd. (supra) would not be applicable.

In a similar case, in the case of Pepsico India Holdings Limited [2015 (324) ELT 175 (Tri. – Mumbai)] it was held as follows:

*"**5.** Having considered the rival contentions, I hold that the expression exclusively used "also includes intention to use" as provided under Rule 6(4) of the Cenvat Credit Rules. As the appellant had admittedly informed the Revenue at the time of commencement of production that it will utilize the said machinery installed for manufacture of both dutiable and non-dutiable products, it cannot be said that the said machinery is exclusively used for manufacture of the exempted goods. Capital goods in question have a life over several accounting years and as such the intention at the time of installation is also the relevant factor. For the temporary use for few months in manufacture of only exempted goods will not disable the assessee in availing the Cenvat credit and utilizing the same for manufacture of dutiable goods. It is also an admitted fact that the Cenvat credit so availed have been utilized only after Nov. 2005 whereas the production of dutiable goods started admittedly in June, 2005. Thus, I hold that the respondent-assessee is entitled to Cenvat credit on the capital goods in question. The appeal of the Revenue is dismissed. The respondent-assessee will be entitled to consequential relief, if any."*

8. We respectfully follow the ratio of the above two orders and hold that the assessee is entitled to the benefit of CENVAT credit on capital goods on the Line 3 of their plant as it was:

a) Declared to be meant for manufacture of both dutiable and exempted products;

b) Used for manufacture of dutiable products although for a mere 19 days.

Consequently, the demand, interest, penalty and personal penalty are liable to be set aside and we do so.

9. The appeals are allowed and the Order-in-Original is set aside.

(Order pronounced on 27/08/2018 in open court)

P. VENKATA SUBBA RAO
MEMBER (TECHNICAL)

M.V. RAVINDRAN
MEMBER (JUDICIAL)

Lakshmi….