IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA

EASTERN ZONAL BENCH: KOLKATA

Appeal No.E/76127/2017

(Arising out of Order-in-Original No.CCE/Shillong No.03/2017 dated 07.04.2017 passed by the Commissioner of Central Excise & Service Tax, Shillong)

M/s. Numaligarh Refinery Ltd.

Applicant (s)/Appellant (s)

Vs.

Commissioner of Central Excise & Service Tax, Shillong

Respondent (s)

<u>Appearance:</u>

Shri Ravi Raghavan, Advocate and Shri H.Shukla, CA for the Appellant (s)
Sri H.S.Abedin, AC(AR)for the Respondent (s)

CORAM:
Hon'ble SHRI P.K.CHOUDHARY, Member (Judicial)
Hon'ble SHRI C.J.Mathew, Member (Technical)

Date of Hearing/Decision:- 12.03.2018

ORDER NO.FO/76643/2018

Per C.J.Mathew,

1. Appellant, M/s Numaligarh Refineries Limited, is a manufacturer of various petroleum products and sulphur-some of these are cleared on payment of duty while others, admittedly, are exempt within the meaning of rule 2(d) of CENVAT Credit Rules, 2004. They also render certain services which are taxable under Finance Act, 1994; likewise, they are recipients of

certain taxable services on which they, in terms of Service Tax Rules, 1994, are 'persons liable to pay tax', albeit partly, subject to certain conditions. Of particular relevance, is the liability under 'goods transport agency' service for which they discharge only a quarter subject to providers of service not availing CENVAT credit of 'inputs'/' input services'.

2. During 2011-2012 and 2012-2013, the appellant, under the impression that the abated payment as 'person liable to pay tax' is an exempt service, referred to in rule 2(e) of Service Tax Rules, 2004, considered itself obliged to comply with rule 6(3) of CENVAT Credit Rules, 2004 and, with effect from 1st April 2011, exercised the option under sub-clause (ii) of the said rule. With the finding that appellant was restricted only to two of the three options in rule 6(3) of CENVAT Credit Rules, 2004, Commissioner of Central Excise, Shillong *vide* order-in-original no. CCE//Shillong No.03/2017 dated 07.04.2017, confirmed recovery of Rs 126,85,10,223/- being the amount payable at 6% of the value of exempted goods as obligated under rule 6(3)(i) of CENVAT Credit Rules, 2004. Aggrieved by this order, appellant is before us.

3. Having perused the records, it is seen that the impugned order has held the appellant ineligible for recourse to payment of such amount as is prescribed in rule 6(3)(ii) of CENVAT Credit Rules, 2004 owing to non-compliance with the conditions in rule 6(3A) of the said Rules. Before proceeding to evaluate the findings of the original authority, we find it worthwhile to tarry and recollect the relevant conditions.

4. Essentially, rule 6(3A) of CENVAT Credit Rules, 2004 is the machinery for provisional payment of tax in the especial circumstances described in the

said rule. Among the conditions are the reporting of intention to exercise the option, along with prescribed data, as well as the method of computing provisional, and final adjustment of tax. In consonance with the obligation imposed under rule 6 of CENVAT Credit Rules, 2004, devised to bar the accumulation of credit of duty/tax paid on input/input services used in or attributable to, manufacture of exempt goods/rendering of exempt services, a formula for ascertaining the quantum of duty/tax form on such inputs/input services to be reversed has been specified in addition to requiring reversal of the inputs used in the manufacture of exempted final product. The formula has been designed separately for inputs, as well as input services, used in common for manufacture of exempt goods and/or for rendering exempt services along with dutiable goods and/or taxable service. The specifics of the formula are critical to this appeal and must needs reproduction here:

"Rule 6(3A) (b) (c)

(3A) For determination and payment of amount payable under clause (ii) of sub-rule (3), the manufacturer of goods or the provider of output service shall follow the following procedure and conditions, namely:-

(a) while exercising this option, the manufacturer of goods or the provider of output service shall intimate in writing to the Superintendent of Central Excise giving the following particulars, namely:-

(i) name, address and registration no. Of the manufacturers of goods or provide a default service;

(ii) date from his the option under this clause is exercised or proposed to be exercised;

(iii) description of duty when goods are taxable services

(iv) description of exempted goods or exempted services;

(v) CENVAT credit of inputs and input services lighting and balance as on the date of exercising the option under this condition;

(b) the manufacture of goods are the providing of output service shall, determine and pay, provision merely for every month,-

(i) the amount equivalent to CENVAT credit attributable to inputs used in order in relation to manufacture of exempted goods, denoted as A;

(ii) the amount of CENVAT credit attributable to inputs used for the provision of exempted services (provisional) = (B/C) multiplied by D, fair B denotes the total value of exempted services provided during the preceding financial year, C denotes the total value of duty where goods manufactured and removed plus the total value of taxable services provided just the total value of exempted services provided during the financial year, C space denotes the total value of duty when goods manufactured and removed plus the total value of taxable services provide cluster total value of exempted services provided, doing the preceding financial year and D denotes total CENVAT credit taken on the inputs during the month minus A;

(iii) the amount attributable to input services used in or in relation to relation to manufacture of exempted goods or provision of exempted service (provisional) = (B/C) multiplied by D, where B denotes the total value of exempted services provided during the preceding financial year, C denotes the total value of dutiable goods manufactured and removed plus the total value of taxable services provided plus the total value of exempted services and removed plus the total value of taxable services provided cluster total value of

> *exempted services provided during the preceding financial year and D denotes total CENVAT credit taken on inputs during the month minus A;"*

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5. From the above, there can be no doubt that the scheme of provisional payment of tax at the end of each month with adjustment for actuals at the end of the year attaches significance to the proportion that the credit of inputs/input services bears to that the exempted output/output services has with that of the total output/output services. While the provisional tax is to be based on the data of the previous financial year, the final adjustment is based on data for the relevant financial year. Accordingly, rule 6(3A) of Cenvat Credit Rules, 2004, while assuming that inputs used exclusively for manufacturing of exempt goods, can be isolated, acknowledges that inputs utilised for rendering of exempt services and input services used for provision of exempt services and exempted of input goods are not easily segregated. Recourse to the formula in (b) and (c) for computation provides an approximate for computing provisional tax based on data of the preceding year and final adjustment based on current year. It is in this background that the dispute of the appellant needs to be examined.

6. It is contended by Learned Counsel for the appellant that they do not render any exempt services and that, in relation to the inputs used for manufacture of exempt goods, they had maintained separate accounts without availing ineligible credits. However, under the erroneous belief that abatement of liability devolving on them on reverse charge for availment of "goods transport agency service" and other similar services was 'exempted service' within the meaning of rule 2(c) of CENVAT Credit Rules, 2004, they, in accordance with sub-clause (b)

and (c) of rule 6(3A) of the CENVAT Credit Rules, 2004 discharged liability. The jurisdictional Central Excise authorities held that they were not in the business of providing any exempt services rendering application of sub-clause (b) of rule 6(3A) of CENVAT Credit Rules, 2004 inoperable and, therefore, precludes them from exercise of the option in rule 6(3)(ii) of CENVAT Credit Rules, 2004. To arrive at that conclusion, the impugned order asserts that the formula in rule 6(3A) would come 'zero' to be the numerator which while having a mathematical outcome was a practical impossibility in discharging of tax liability.

5. It would appear that the adjudicating authority has, in his wisdom and with his knowledge of mathematics, come to such conclusion. We, despite our limited knowledge, are unable to agree. The formula is a summation of credit of input used in exempt goods, the product of credit of inputs and proportion of value of exempted services to total turnover of services and dutiable goods and the product of credit of input services and proportion of exempted services and goods to total turnover. Consisting as it does of summation of three sub-components, 'zero' in any of them will not render it a practical impossibility. To the extent that input services have been used in common for dutiable and exempted goods, option of recourse to rule 6(3A) of CENVAT Credit Rules, 2004 cannot be denied.

7. It is obvious that the adjudication order is based on the incorrect appreciation of the reasoning for such apportionment in the rules and the principle underlying the formula. The denial of the facility of reversal of proportionate credit is not consistent with law. The appellant is entitled to such reversal as an alternative to payment of 6% of the value of exempted goods. The appellant has, in its rights, exercised the former option which cannot be

faulted. Intimation as prescribed has also been made to the jurisdictional authorities.

8. Accordingly, the impugned order is set aside and the appeal is allowed with consequential relief.

(Operative Portion of the order already pronounced in the Open Court)

S/d.
(C.J.Mathew)
Member (Technical)

S/d.

(P.K.Choudhary)
Member (Judicial)

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