**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA**
**EASTERN ZONAL BENCH: KOLKATA**

**Appeal No.E/192/2009**

(Arising out of Order-in-Original No.CCE/Commr/Kol-I/Adjn/No.9/2008 dated 24.12.2008 passed by the Commissioner of Central Excise, Kolkata-I, Commissionerate)

Commissioner of Central Excise, Kolkata-I
Applicant (s)/Appellant (s)

**Vs.**

M/s. Albert David Ltd.
Respondent (s)

Appearance:

Shri S.Mukhopadhyay, Suptd.(AR) for the Appellant (s)
Shri S.Chakraborty, Sr. Advocate and Shri A.Biswas, Advocate for the Respondent (s)

**CORAM:**
**Hon'ble SHRI P.K.CHOUDHARY, Member (Judicial)**
**Hon'ble SHRI Bijay Kumar, Member (Technical)**

Date of Hearing:- 15.05.2018

Date of Pronouncement : 06.06.2018

ORDER NO.FO/76217/2018

**Per Shri P.K.Choudhary**

1. The respondent company availed cenvat credit of duty paid on the inputs used in the manufacture of both dutiable as well as exempted final products. Show Cause Notice was issued proposing to recover ineligible credit alongwith interest and to impose penalty. The Adjudicating Authority dropped the entire proceedings vide the impugned order. Hence, the revenue is in appeal before the Tribunal.

2. Ld. D.R. reiterates the grounds of appeal and submits that there is no provision for reversal of credit so as to avoid payment of an amount @ 10% or 8%. The only residuary rule under Rule 6(6) of Cenvat Credit Rules, 2004 does not provide for such situation whereby Rule 6(3) can be exempted. He relied upon the decision of the Hon'ble Bombay High Court in the case of Commissioner of Central Excise, Thane-I vs. Nocholas Piramal (India) Ltd. [2009(244) ELT 321 (Bom.)].

3. Ld. Senior Counsel appearing on behalf of the respondent assessee submits that the decision of the Hon'ble Bombay High Court in the assessee's own case

Commissioner of Central Excise vs. Nicholas Piramal Ltd. [2017 (349) ELT 33(Bom.)] and in the case of Commissioner of Central Excise, Mumbai vs. IVP Ltd. [2017 (349) ELT 18 (Bom.)] the issue has already been settled in the assessee's own case.

4. Heard both sides and perused the appeal records.

5. We find that the issue is no more res-integra. The decision of the Hon'ble Bombay High Court in the case of Commissioner of Central Excise vs. Nicholas Piramal Ltd. (supra) has held as under:

> ***"2.*** *It is common ground that the assessee in this case had engaged itself in manufacture of dutiable as well as exempted final products under Chapter Headings 29.36 and 23.02 of the Central Excise Tariff Act, 1985. The goods falling under Chapter Heading 29.36 are chargeable to duty at 16%, whereas, the goods under Chapter Heading 23.02 are chargeable to nil rate of duty. In the process of manufacture of both these products, a common intermediate product, as set out in Para 3.1 of this memo of appeal, is used. Thus, the common input went into manufacture of dutiable as well as exempted final product. The respondent assessee also availed Modvat credit on the common inputs and reversed the credit at the rate of 8% at the time of clearance of final products in terms of Rule 57CC of the Central Excise Rules, 1944 up to 31st January, 2001. Thereafter, the assessee informed that it will not avail the credit on the entire inputs at the time of receipt in the factory and shall avail the proportionate credit on the quantity of the inputs actually consumed in the manufacture of the dutiable final product. There was, once again, a change in mind and the assessee desired to revert back.*
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> ***3.*** *This step of the respondent/assessee was in view of the Tribunal's decision in the case of Dharamsi Morarji Chemicals v. Commissioner of Central Excise - 2001 (44) RLT 411 = 2001 (138) E.L.T. 164 (Tribunal). That is how a show cause notice was issued by terming the practice as incorrect and calling upon the assessee to pay duty equivalent to 8% of the value of the final product in terms of Rule 57AD of the Central Excise Rules, 1944. The demand of Rs. 99,78,809/- was raised along with interest.*
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> ***4.*** *This demand was confirmed by the order-in-original dated 31st December, 2001. The assessee preferred an appeal before the Commissioner of Central Excise (Appeals) and first appellate authority. The Commissioner allowed that appeal on 11th April, 2002. That is how the Revenue approached the Tribunal. The Tribunal, in the impugned*

*judgment, merely relied upon the view taken in the case of Dharamsi Morarji Chemicals (supra) and some other cases and held that the facts and circumstances being identical, the issue is covered against the Revenue.*

***5.*** *The Revenue had approached this Court in the further appeal, which came to be admitted. In the meanwhile, the Division Bench of this Court, in the case of M/s. Piramal Healthcare Ltd. v. Commissioner of Central Excise - Central Excise Appeal No. 9 of 2009, passed an order on 14th August, 2009 as modified on 27th November, 2009. The court held that the assessee is liable to pay amount equal to 8% or 10% of the total price of the exempted goods as per Rule 6(3)(b) of the Cenvat Credit Rules, 2002. This rule was amended retrospectively by Finance Act of 2010. The Commissioner of Central Excise has given effect to this rule. The assessee sought a review of the order passed by this Court by filing Review Petition No. 34 of 2010. That was decided on 14th March, 2012.*

***6.*** *It is now clear from the order passed in the review petition, copy of which is at pages 13 to 15 of the compilation read with the further documents in that compilation, that the arrangement carved out by the assessee has been accepted by the Revenue. In these circumstances, we do not think that the substantial questions of law, on which the appeal was admitted, survive any longer. They stand answered against the Revenue in terms of the order passed by this Court and the earlier orders of the Tribunal. The appeal is, therefore, dismissed. There would be no order as to costs."*

6. By respectfully following the above decision we find no infirmity in the impugned order and the same is hereby sustained. Accordingly, the appeal is therefore dismissed.

(Pronounced in the Open Court on 06.06.2018)

S/d.
**(P.K.Choudhary)**
**Member (Judicial)**

S/d.
**(Bijay Kumar)**
**Member (Technical)**

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