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

REGIONAL BENCH – COURT NO.2

Ex.Appeal No.75961 of 2014

(Arising out of Order-in-Original No.25/Commr./CE/Kol.III/2013-14 dated 24.03.2014 passed by Commr. of Central Excise, Kol.III)

M/s Emami Ltd.
13, B.T.Road,
Kolkata-700056.

Applicant (s)

VERSUS

CCEx., Kol.III
180, Shanti Pally,
Rajdanga Main Road,
Kolkata-700107.

Respondent (s)

APPERANCE :

Shri A. Baheti, C.A. for the Appellant
Shri D. Halder, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. P.K.CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR.P.VENKATA SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO.76190/2019

DATE OF HEARING : 25.06.2019
DATE OF DECISION : 25.06.2019

PER P.K.CHOUDHARY :

The instant appeal has been filed by the Appellant against demand of central excise duty confirmed by the Adjudicating Authority along with penalty and applicable interest vide Order-in-Original dated 24.03.2014 for the period 2008-09 and 2009-10.

2. Briefly stated, the facts of the case are that the Appellant is engaged in manufacture of excisable goods as well non-excisable goods. Central excise duty is being paid as applicable on the dutiable excisable goods claiming the benefits of CENVAT credit as per the provisions of CENVAT Credit Rules, 2004. The case of the department is that the

Appellant is liable to pay the amount as per proviso to Rule 6(3)(i) of the aforesaid Rules since the Appellant is manufacturing dutiable as well as exempted goods. The non-excisable goods which are manufactured by the Appellant are goods manufactured with the use of alcohol which is outside the purview of central excise but is subject to levy of state excise.

3. The Ld. C.A. for the Appellant submitted that the subject goods cannot be said to be “excisable goods” and hence, not “exempted goods” within the meaning of the Cenvat Credit Rules. He submitted that the said goods are specifically excluded from the purview of Central Excise Tariff Act, as stated in Note no. 5 and Note no. 1(d) of the Chapter 30 and 33. The said goods are covered under the Medicinal and Toilet Preparations (Excise Duties) Act, 1955. Since the said goods are not covered under the Schedule to Central Excise Tariff, they are not ‘excisable goods’ as per Section 2(d) of the Central Excise Act, 1944. He further submitted that in order to be treated as ‘exempted goods’ as per Rule 2(d) of the Credit Rules, the goods have to be first excisable goods which is not the case herein. Since the goods are not ‘excisable goods’ *per se,* they cannot be said to be ‘exempted goods’ for the purpose of Credit Rules and accordingly, the question of reversal of credit as per Rule 6 of the Credit Rule does not arise at all.

4. It was also submitted that though credit is not reversible for the aforesaid reasons, the Appellant has already reversed the proportionate credit of Rs. 3,55,713/- and paid interest of Rs. 2,80,507/- thereon which is on record and therefore, the demand of Rs. 1,33,06,208/- is harsh and unsustainable. He also submitted that the actual credit involvement is only of Rs. 31,10,738/- which is the common credit availed for manufacture of dutiable and non-excisable goods in dispute. He relied on the decisions in the cases of Mercedes Benz India (P) Ltd vs. CCE Pune [2015 (40 STR 381 (Tri-Mum)] and Mahindra and Mahindra Ltd vs. CCE Jaipur [2016 (8) TMI 436 CESTAT New Delhi] to contend that the demand of disproportionate credit is not legal

inasmuch as the assessee cannot be saddled with the huge duty demand when he has not availed the benefit of credit of that amount.

5. He also pointed out to the amendment made in the Credit Rules in March 2015, i.e. subsequent to the period in dispute, vide Notification no. 6/2015- C.E.(NT) dated 1st March, 2015 whereby Explanation has been added to provide that even the non-excisable goods would be treated as 'exempted goods' for the purpose of availment and reversal of credit as per the Credit Rules. He submitted that this Tribunal in the cases of CCE Ranchi vs. Parial Hydrocarbons & Chemicals Pvt Ltd [2016 (4) TMI 1335] and Sathavahana Ispat Ltd vs. Tirupati GST [2019 (3) TMI 100] has already held that the above amendment will only be considered as prospective in nature and not retrospective. Therefore, the subject goods would not be treated as exempted goods in their case which related to the period prior to the aforesaid amendment.

6. The Ld. C.A. also pointed out the findings made by the Ld. Commissioner in the impugned order wherein the Ld. Commissioner has applied the test of marketability which is not in dispute inasmuch as the fact that the goods, since manufactured with the use of alcohol, are clearly outside the purview of Central Excise Tariff have not been disputed anywhere in the order. Lastly, he also contested the demand on the ground of limitation.

7. The Ld. D.R. reiterated the findings of the Ld. Commissioner and submitted that the credit is required to be reversed when part of the goods manufactured by assessee does not attract central excise duty and that the assessee will be unjustifiably benefitted by availing common credit. He also submitted that since the Appellant did not follow the procedures contained under Rule 6 of the Rules, the Appellant will be liable to pay amount calculated @ 5% / 10% of the value of exempted goods, as was applicable during the period in dispute.

8. Heard both sides and perused the records.

9. We find that the only issue to be decided is whether the Appellant is required to reverse the credit in terms of Rule 6 of the Credit Rules. We have gone through the definition of 'exempted goods' under Rule

2(d) of the Rules, as was applicable during the period in dispute, which is as below:

> *'exempted' goods means excisable goods which are exempted from the whole of the duty of excise leviable thereon, and includes goods which are chargeable to "Nil" rate of duty.*

10. The term 'excisable goods' has been defined in Section 2(d) of the Central Excise Act to mean the goods specified in the First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985 as being subject to a duty of excise and includes salt. We find that the subject goods manufactured by the Appellant are not excisable goods. We take note of the decision in the case of Sahni Strips & Wires (P) Ltd. vs. CCE, Rohtak [2012 (283) ELT 418 (Tri-Del)], wherein the dispute pertained to the period from December 2006 to May 2008 for recovery of 10% of the value of exempted goods as alleged by the Revenue. In the said case, this Tribunal observed as below:

> ***"5.*** *We have carefully considered the rival submissions and perused the records. The provisions of Rule 6(2) read with 6(3) of Cenvat Credit Rules are applicable only when a manufacturer avails Cenvat credit in respect of any input or input services and uses such inputs and/or input service in respect of final products chargeable to duty as well as "exempted goods". Rule 6(1) provides for disallowing the Cenvat Credit in respect of the quantity of inputs and/or input service used in manufacture of "exempted goods". The term- "exempted goods" as defined under Rule 2(d) of Cenvat Credit Rules, means - "excisable goods which are exempt from the whole of the duty of excise leviable therein and includes goods which are chargeable to "nil" rate of duty". Thus, the exempted goods have to be "excisable goods" first. In this case, there is no dispute that during the period of dispute the "zinc dross" was long treated as non-excisable in view of Apex Court's judgment in case of Indian*

Aluminium Co. Ltd. (supra). Therefore, during the period of dispute, zinc dross being non-excisable was not covered by the definition of "exempted goods" and hence, neither the provisions of Rule 6(1), nor the provision of Rule 6(2) and 6(3) were applicable. In this regard, the findings of CCE (Appeals) in para 5.2 of the impugned order - "whether the products manufactured by the party are exempted or chargeable to nil rate of duty or non-excisable, the position of payment of 10% under the provisions of Rule 6(3) of Cenvat Credit Rules, 2004 remains the same", is incorrect..."

11. Thus the issue involved herein is no longer *res-integra*. We are satisfied that the credit is not liable to be reversed in view of the provisions as were applicable during the period in dispute. The reversal of credit, if at all, will be applicable for the period post amendment made vide Notification no. 6/2015- C.E.(NT) dated 1st March, 2015.

12. We have perused the finding in the impugned order wherein it has been observed that since the goods are capable of being sold, the goods would be said to be marketable and accordingly, excisable and since the said goods did not attract central excise duty, the same will be construed to be 'exempted goods'. We are of the view that merely applying the marketability test is not sufficient to bring the goods under the purview of the Central Excise Act. As per the relevant chapter notes, the goods could not be said to be covered in the schedule to the Central Excise Tariff Act, which is the basic requirement to constitute 'excisable goods' as per the definition contained in Section 2(d) of the Act. For something to enjoy exemption under the Cenvat Credit Rules, it should first qualify as 'excisable goods' under the said Rules or the Central Excise Act and Central Excise Tariff. Goods that are outside the purview of Central Excise cannot be construed as 'exempted goods' for the purpose of this Act. Simply put, something can be exempted only if it was otherwise dutiable under a particular law.

13. In view of the above discussions, we find that Rule 6 of the Cenvat Credit Rules does not find application in the instant case and hence, the Appellant cannot be saddled with the duty demand. Since, the matter is being disposed on merits, we refrain from visiting the issue of limitation.

14. Therefore, the impugned Order is set aside and the appeal filed by the Appellant is allowed.

(Operative part of the orders was pronounced in the open court)

Sd/
(P. K. Choudhary)
Member (Judicial)

Sd/
(P.V.SUBBA RAO)
Member (Technical)

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