IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
EAST REGIONAL BENCH : KOLKATA

Excise Appeal No.76122 of 2016

(Arising out of Order-in-Original No.104-107/Commr./DGP/DGP-I/15-16 dated 10.03.2016 passed by Commissioner of Customs, Central Excise & S.Tax, Durgapur)

M/s Philips Carbon Black Ltd.
27, R.N.Mukherjee Road, Durgapur-713201

Appellant

VERSUS

CCEx & Service Tax, Durgapur
Nanoor Chandidas Road, SIAN, Bolpur, Dist.-Birbhum, Pin-731204

Respondent

WITH

Excise Appeal No.75799 of 2017

(Arising out of Order-in-Original No.104-107/Commr./DGP/DGP-I/15-16 dated 10.03.2016 passed by Commissioner of Customs, Central Excise & S.Tax, Durgapur)

M/s Promode Kumbhakar
C/O M/s Philips Carbon Black Ltd.
27, R.N.Mukherjee Road, Durgapur-713201

Appellant

VERSUS

CCEx & Service Tax, Durgapur
Nanoor Chandidas Road, SIAN, Bolpur, Dist.-Birbhum, Pin-731204

Respondent

AND

Excise Appeal No.78861 of 2018

(Arising out of Order-in-Appeal No.165/DGP-CE/2018 dated 11.07.2018 passed by Commissioner (Appeals) of CGST & Excise, Siliguri)

CGST & Excise, Bolpur
Nanoor Chandidas Road, SIAN, Bolpur, Dist.-Birbhum, Pin-731204

Appellant

VERSUS

M/s Philips Carbon Black Ltd.
27, R.N.Mukherjee Road, Durgapur-713201

Respondent

Appearance:

S/Shri Arvind Baheti & Rahul Dhankar, both C.A. for Philips Carbon Black Ltd.
Shri H.S.Abedin, Authorized Representative for the Revenue

Ex.Appeal Nos.76122/16,75799/17 & 78861/18

CORAM:

HON'BLE SHRI P. K. CHOUDHARY, JUDICIAL MEMBER
HON'BLE SHRI BIJAY KUMAR, TECHNICAL MEMBER

FINAL ORDER NO.76973-76975/2019

DATE OF HEARING : 06.08.2019

DATE OF DECISION/PRONOUNCEMENT : 17.12.2019

PER P.K.CHOUDHARY :

Excise Appeals bearing No. E/76122/2016 and E/75799/2017 have been filed by M/s Philips Carbon Black Ltd i.e. the assessee and its employee, Mr.Promode Kumbhakar respectively, challenging the Order-in-Original (OIO) No. 104-107 dated 10.3.2016 passed by the adjudicating authority for the period December 2008 to September 2015. By the said OIO dated 10.03.2016, the adjudicating authority has confirmed differential duty demand of Rs. 8,89,40,509 under Rule 6(3)(i) of the Cenvat Credit Rules (CCR) with equivalent penalty and interest thereon upon against the assessee and a personal penalty of Rs. 1,00,000 upon its employee. On the other hand, Excise Appeal No. E/78861/2018 has been filed by the department against the Order-in-Appeal (OIA) No. 165 dated 11.07.2018 for the subsequent period i.e. October 2015 to June 2016 dropping the demand of Rs. 1,23,81,352 confirmed under Rule 6(3)(i) vide OIO dated 27.02.2017. Since the appeals filed by the assessee and the department involves a common issue covering different periods, these are being taken-up together for disposal by a common order.

2. Briefly stated the facts of the case are that the assessee is engaged in the manufacture and sale of Carbon Black, a dutiable final product, from its factory premises at Durgapur, West Bengal. Within the said factory premises, the assessee has also installed a 30 MW Captive Power Plant with surplus power being wheeled out to the State

for a consideration which is not subject to any excise duty. The inputs required for manufacturing Carbon Black are Carbon Black Feed Stock (**CBFS**), Tar Oil and certain catalysts. On the other hand, the inputs used in the Power Division are DM water and processed chemical. These inputs are separately accounted for through its SAP Software having separate Plant Codes for the Carbon Black Division and Power Division. During the period under dispute, the assessee had taken credit of the respective inputs in the respective division. Further, to the extent power generated in the power division was sold to the State grid, the assessee had made proportionate reversal of the credit of inputs availed in the power division at the end of each month in proportion to the power consumed vis-à-vis power sold. Such proportionate reversals were duly reflected in the statutory monthly returns filed by the assessee and the same remains undisputed.

3. Proceedings were initiated against the assessee for alleged failure to maintain separate accounts in respect of inputs used in the manufacture of dutiable final product and electricity wheeled out to the State grid by issuance of 5 different Show-cause Notices covering the period December 2008 to June 2016 demanding payment of 5% / 6% as applicable of the sales value of electricity cleared to the State grid under Rule 6(3)(i) of the Cenvat Credit Rules. The Notices proceeded on the premise that if the assessee was maintaining separate records under Rule 6(2) of the CCR as claimed, there could be no question of proportionate reversals being made by the assessee at the end of each month.

4. All the 5 Notices were adjudicated against the Appellant vide 2 different Orders bearing No. 104 - 107 dated 10 March 2016 covering the period December 2008 to September 2015 and Order-in-Original No. 100 dated 27 February 2017 for the period October 2015 to June 2016. Both the adjudication Orders have treated off/lean gas emerging as a byproduct in the course of generation of the Carbon Black further used in the generation of electricity, as an intermediate

product. Therefore, both the adjudicating authorities have entertained a view that CBFS is a common input. Moreover, the proportionate reversals made by the assessee at the end of each month were held to be not incompliance within the procedural requirements of Rule 6(3A) of the CCR thereby requiring the assessee to pay 5% / 6% as applicable on the sale value of electricity under Rule 6(3)(i) of the CCR. However, 'O-I-O' No. 100 dated 27.02.2017 was reversed by the appellate commissioner vide Order-in-Appeal bearing No. 165 dated 11.07.2018 against which the department is in appeal before us.

5. The Learned A.R. appearing on behalf of the assessee and its employee, has assailed the 'O-I-O' No. 104 – 107 dated 10.03.2016 and supports the 'O-I-A' No. 165 dated 11.07.2018 on the following grounds:

(a) CBFS cannot be said to be a common input in the manufacture of Carbon Black and power and that the provisions of Rule 6(3)(i) of the CCR do not get attracted in the case of the assessee is no more res integra in view of the following Orders passed by the Ahmedabad Bench of the CESTAT in respect of its other Plants in Western India with selfsame operations:

(i) Philips Carbon Black Ltd. vs. CCE, Rajkot [2015 (10) TMI 338 (CESTAT AHMEDABAD)]

(ii) Philips Carbon Black Ltd. vs. C.C.E. & S.T., Rajkot [Final Order No. A/11653/2018 (CESTAT AHMEDABAD)]

(b) Within the power division, it was impossible for the assessee to maintain separate account and inventory of the inputs meant for power generation, which was consumed captively vis-à-vis sold outside as this could be done only if two different final products were involved and not for the same product. It is well settled that the law cannot compel a person to do an impossibility. Therefore, reversal of proportionate credit attributable to inputs consumed in the Power Division in proportion to the quantum of power consumed captively vis-à-vis the quantum sold to the state grid meticulously at the end of each month is sufficient compliance with the provisions of Rule 6(2) of the CCR in letter and spirit, drawing support from the following decisions:

(i) CCE., Jaipur-I/Jallandhar vs Goyal Proteins Ltd. [2015 (325) E.L.T. 165 (Tri. - Del.) – para 8] ;

(ii) CCE Vs. Gland Pharma - [2016 (343) ELT 502 (Tri. – Bang.) – para 4] ;

(iii) Chandrapur Magnet - 1996 (81) ELT 3 (SC).

(c) Assuming without admitting that such proportionate reversals at the end of each month militates against the requirement of Rule 6(2), there is no provision in law that if an assessee does not follow any of the options prescribed in Rule 6(3) of the CCR then payment of 5% / 6% under Rule 6(3)(i) of the CCR will be automatically applied as Rule 6 of the CCR is not aimed at revenue maximization but only to ensure that no credit is allowed of inputs used in the manufacture and clearance of the exempted goods. Reliance in this regard is placed on the following decisions:

(i) Cranes & Structural Engineers Vs. CCE – 2017 (347) ELT 112 *(para 4.1) ;*

(ii) Mahindra & Mahindra Vs. CCE – 2016 (8) TMI 436 *(para 5).*

(d) Rule 6 of the CCR, 2004 in any event, was not applicable to non-excisable goods up to 1 March 2015 when an explanation was inserted through a prospective Notification No. 6/2015 dated 1 March 2015 so as to apply even to non-excisable goods. Given that electricity has been held to be non-excisable goods by none other than the Apex Court, the question of applicability of Rule 6(3)(i) to the sale value of electricity during the period upto 1 March 2015 does not apply in any eventuality.

(e) Imposition of penalty upon the assessee and its employee cannot sustain as there was no mala fide.

6. The Learned departmental representative supports the O-I-O dated 10 March 2016 and re-iterates the findings of the adjudicating authority.

7. Heard both sides and perused the appeal records. The short issue involved in this case is whether the assessee is required to pay 5%/6% of the sale value of electricity wheeled out to the state grid, under Rule 6(3)(i) of the CCR. The assessee claims to have maintained separate records in respect of the inputs consumed in its Power Division and Carbon Black Division, having no common inputs. On the other hand, the revenue alleges CBFS to be a common input for the two divisions on the premise that lean gas emerging as a by-product in the course of manufacture of carbon black is further used in the generation of electricity. It is also claimed by the revenue that the reversal of proportionate credit of inputs by the assessee on a monthly basis itself evidences that separate records were not maintained. We find that the self-same issue in similar set of facts had fallen for consideration of Ahmedabad Bench of the CESTAT, in the assessee's own case in respect of its other plant in the Western region for a substantially similar period in the following reported decisions:

(i) 2015 (10) TMI 338 : Philips Carbon Black Ltd. Vs. CCEx. & S.Tax, Rajkot (CESTAT, Ahmedabad) ;

(ii) Final Order No. A/11653/2018 (CESTAT, Ahmedabad) (Philips Carbon Black Ltd. Vs. CCEx. & S.Tax, Rajkot)

In the above decisions, the Ahmedabad Bench has taken a categorical view that CBFS cannot be construed as a common input in the manufacture of Carbon Black and Electricity while holding that payment of 5%/6% of the sale value of electricity is un-warranted. Revenue has not invited our attention to any stay operating against these decisions and neither is there any whisper in the order-in-original dated 10.03. 2016 as to why these decisions are not applicable to the factual matrix at hand. Therefore, following judicial discipline we are inclined to not take any different view of the matter.

8. *Lex non cogit ad impossibilia* is a well settled legal principle and we see merit in the contentions of the assessee that separate records in respect of common inputs could be maintained only when two final products are manufactured. Within the power division it was not possible to segregate the inputs at the stage of receipt itself, based on the ultimate use of the power post its production/generation. It is undisputed that the assessee had been making reversal of the proportionate cenvat credit attributable to inputs consumed in the power division to the extent power was sold to the State grid, at the end of each month and the same is also evident from the annexure to the notices. Therefore, respectfully following the ratio of the decisions rendered in the Goyal Proteins (para 8) & Gland Pharma case (para 4) supra we concur that reversal of such proportionate cenvat credit in respect of inputs used within the power division at the end of each month is sufficient compliance with the provisions of **Rule 6(2) of the CCR** in letter and spirit.

9. The issue can be looked at from another angle as well. Rule 6(1) of the CCR interalia provides that cenvat credit shall not be made available in respect of inputs used in the manufacture and clearance of exempted goods. The reason being that there is no tax cascading requiring elimination in such a situation. Therefore, the said Rule 6(1) is clearly not aimed at revenue maximization but credit neutralization. Rule 6(2) and Rule 6(3) of the CCR are only aimed at securing compliance with the substantive provision contained in Rule 6(1) of the CCR where common inputs are used in the manufacture of a dutiable and exempted final product. Reversal of proportionate cenvat credit in respect of the common input used in the manufacture of exempted goods is an option duly permitted under Rule 6(3)(ii) of the CCR itself. Non-compliance with the procedure prescribed under Rule 6(3A) of the CCR does not result in the manufacturer losing his substantive right to

avail the option of reversing proportionate credit, as such procedural lapse is condonable and denial of substantive right on such procedural failure is unjustified in light of the decision of the Tribunal in the **Cranes & Structural Engineers Case (supra).** Therefore, the imposition of Rule 6(3)(i) of the CCR for demanding payment of 5%/6% of the sales value of electricity is even otherwise un-sustainable.

10. Having allowed the appeal of the assessee on merits, we refrain from examining the other alternate contentions advanced before us on behalf of the assessee and its employee. Accordingly, we allow the appeal of the assessee and its employee by setting aside the OIO dated 10.3.2016 and reject the departmental appeal by upholding the OIA dated 11.07.2018.

11. All the three appeals are disposed on the above terms.

(Pronounced in the open court on **17.12.2019**)

Sd/

(P. K. Choudhary)
Member (Judicial)

Sd/
(Bijay Kumar)
Member (Technical)

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