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

Excise Appeal No.78563 of 2018

(Arising out of Order-in-Original No.04/Commissioner/CGST/Haldia/Adjn./2018 dated 19.06.2018 passed by Commr. of CGST & Excise, Haldia)

M/s Rashmi Metaliks Limited
Premlata Building, 39,Shakespeare Sarani,6th Floor, Kolkata-700017

Appellant

VERSUS

Commr. of CGST & Excise, Haldia
15/1 Strand Road, Kolkata-700001

Respondent

Appearance:

Dr.Samir Chakraborty, Sr.Advocate & Shri K.K.Acharya, Advocate for the Appellant
Shri S.Mukhopadhyay, Authorized Representative for the Respondent

CORAM:
HON'BLE SHRI P. K. CHOUDHARY, JUDICIAL MEMBER
HON'BLE SHRI P. ANJANI KUMAR, TECHNICAL MEMBER

FINAL ORDER NO.75646/2020

DATE OF E-HEARING : 08.10.2020
DATE OF PRONOUNCEMENT : 19 November 2020

Per P.K.Choudhary :

This appeal is against the adjudication order dated 19.06.2018 passed by the Commissioner, CGST and Central Excise, Haldia Commissionerate, Kolkata confirming excise duty demand of Rs.58,96,13,230/-, under Section 11A(4) of the Central Excise Act, 1944 ("the Act"), along with interest under Section 11AA of the Act read with Section 174 of the Central Goods and Service Tax Act, 2017 against the appellant. Penalty of an equivalent amount has also been imposed on the appellant under Rule 15(2) of the Cenvat Credit Rules, 2004 read with Section 11AC of the Act. The Commissioner has also ordered appropriation of the amount of Rs. 25,82,755/- deposited by the appellant during the investigation against the confirmed demand. The demand relates to the period 16.07.2012 to 31.03.2016.

2. The facts of the case in brief are:

(i) The appellant, an integrated steel plant engaged in manufacture of sponge iron and pig iron, which is further used in its factory at Shyamraipur, Kharagpur, West Bengal for manufacturing MS Billets, MS Wire, Sinter, Ductile Iron Pipes ("DI Pipes"), etc. removes some quantity of the DI Pipes without payment of duty in terms of Notification No. 12/2012-CE dated 17.03.2012, which exempts pipes and pipe fittings needed for delivery of water for human/animal consumption. However, until the time the appellant's liability in that regard was pointed out to it by the jurisdictional Range Superintendent, the appellant, until early 2012, was neither maintaining separate account of common input/input services used for manufacture of dutiable as well as exempted goods nor was it making payment of the amount equal to 5% or 6%, as the case may be, in terms of Rule 6(3) of the Cenvat Rules, 2004 (hereinafter referred to as the "Cenvat Credit Rules"). Upon being so pointed out by a letter dated June 19, 2012 of the Range Superintendent, the appellant paid Rs.2,96,31,387/-, being an amount equal to 6% of the value of the exempted DI Pipes sold out by it during the period April 2011 to June 2012 availing exemption under Notification No.12/2012-CE dated March 17, 2012, in terms of Rule 6(3)(i) of the Cenvat Credit Rules, as was in force during the relevant period. The said payment of Rs.2,96,31,387/- was duly reflected by the appellant in its ER-1 return for the month of June 2012.

(ii) Thereafter the appellant started maintaining separate account of receipt and consumption of inputs used by it for manufacture of exempted DI Pipes, by adopting apportionment method, after manufacture of the DI Pipes. This method of compliance with the provisions of Rule 6(2) of the Cenvat Credit Rules, reflected in the appellant's ER-1 returns, continued during the period after July 2012 and the same were supported by Chartered Accountant's Certificates.

(iii) Pursuant to investigation by the Directorate General of Central Excise Intelligence, Kolkata Zonal Unit ("DGCEI") initiated in July 2015, a show cause notice dated August 2, 2017 was issued by the Additional Director General, DGCEI, requiring the appellant to show cause to the Commissioner of CGST & Central Excise, Haldia Commissionerate as to why an amount of Rs.58,96,13,230/-, allegedly payable by the appellant in terms of Rule 6(3)(i) of the Cenvat Credit Rules during the said period, should not be recovered from it with interest and as to why penalty should not be imposed on the appellant under the stated provisions of the Act/Central Excise Rules, 2002. It was alleged that:

(a) the appellant had exercised the option under Rule 6(3)(iii) of the Cenvat Credit Rules, to maintain separate accounts of receipt/consumption of inputs purportedly in the month of July 2012, which being mid of the Financial Year 2012–13, is not permissible as per Explanation-1 of said Rule 6(3);

(b) though the method of apportionment was followed by the appellant for the purpose of reversal of cenvat credit attributable to manufacture of exempted goods since it was not possible on the part of the appellant to maintain separate accounts of inputs to be used for production of exempted goods for reasons undisputed, elaborated in the show cause notice, it was also not possible on the part of the appellant to segregate bills of input services, the method as adopted by the appellant of apportionment after manufacture of the final product was not in compliance with Rule 6(2) of the Cenvat Credit Rules. The appellant had also not applied the apportionment method for all invoices of common input services and therefore also the provision of Rule 6(2) of Cenvat Credit Rules was violated. Hence the provisions of Rule 6(3)(i) was applicable and the appellant was required to pay an amount equal to 6% of the value of the exempted goods;

(iv) On the appellant filing its reply dated 07.11.2017 and personal hearings in the matter during which the appellant submitted further written submissions dated 20.11.2017, 16.01.2018 and 23.04.2018, the impugned order was passed by the Commissioner, holding amongst other that the method of back calculation and approximation, as adopted by the appellant to compute the quantity of inputs used in the manufacture of exempted final products, was "*beyond the provision prescribed in the said sub-rules meant for specific purposes*" (paragraph-12.29 of the said order) and that *"the best method that can be applied in first stage is the application of provision to Rule 6(3)(i) of the Cenvat Credit Rules 2004 which stipulates payment of amount equal to 6% of value towards the exempted clearance.*

3. We have heard Dr. Samir Chakraborty, Senior Advocate on behalf of the appellant and Mr.S.Mukhopadhyay, A.R. on behalf of the Department and have carefully perused the documents on record.

4. Dr. Samir Chakraborty, Senior Advocate, appearing for the appellant company, contended that:

(a) Provisions of Rule 6(2) of the Cenvat Credit Rules prior to 01.03.2011 provided for maintenance of separate accounts of inputs and input service *"meant for use"*/"*intended for use*" in manufacture of dutiable goods and exempted goods. On the other hand, w.e.f. 01.03.2011 the said Rule 6(2) provides for maintenance of separate accounts of "*inputs used"/*receipt and *"use"* of input services. Thus, as per the said Rule 6(2) in force during the relevant period (July 2012 to March 2016), maintenance of separate account of physical stock of inputs meant for use/intended for use for manufacture of dutiable/exempted goods is not required. However, separate account of such common inputs/input services is required to be maintained after the common inputs/input services are used and particularly in the context of the facts and circumstances of the instant case, it can only be achieved by back calculation method, as undisputedly adopted by the appellant.

(b) Both the show cause notice and the impugned order unequivocally confirms that it is not possible to keep a separate account of the inputs/input services "meant for use/intended for use" for manufacture of exempted DI Pipes inasmuch as the exemption from duty is determined only at the time of clearance of the DI Pipes under Notification No. 12/2012-CE dated 17.03.2012. Therefore, adopting back calculation method to determine the quantum of inputs/input services used for manufacture of exempted DI Pipes was the only practical alternative available to the appellant and it fully complies with the mandate of Rule 6(2) of the Cenvat Credit Rules.

(c) It is expressly admitted in the impugned order that the appellant has duly reversed on proportionate basis the duty/tax paid on inputs and input services attributable to the manufacture of exempted DI Pipes. The alleged discrepancies in the quantum of the reversals have also been made good by way of further reversal with interest. Consequently, the demand confirmed in the impugned order under Rule 6(3)(i) of the Cenvat Credit Rules is not sustainable for the reason that the appellant has not availed the cenvat credit of duty/tax paid on inputs and input services used for manufacture of exempted DI Pipes, inasmuch as reversal of duty/tax paid on inputs and input services attributable to the manufacture of DI Pipes, tantamount to having not taken such credit at all. Further, it is settled law that in case of common inputs and input services used in or in relation to the manufacture of dutiable and exempted final products, proportionate to use of input and input services in exempted products, if reversed, the assessee is not required to make payment in terms of Rule 6(3)(i) of the Cenvat Credit

Rules. In support, the appellant relied upon the following decisions:

(i) Commissioner of Central GST and CX Vs. Himmat Glazed Tiles, 2018 (15) GSTL 486 (Guj)

(ii) Commissioner of C.Ex. Vs. Maan Pharmaceuticals Ltd., 2011 (263) ELT 661 (Guj)

(iii) Rukmani Power and Steel Limited Vs. Commissioner of C.Ex.& ST, 2017 (354) ELT 144 (T)

- Affirmed by the Chhattisgarh High Court in Commissioner of C.Ex.&ST Vs. Rukmani Power and Steel Limited, 2017 (354) ELT A24 (Chhattisgarh)

(iv) Commissioner of C.Ex. Vs. Himalaya Drug Company, 2011 (271) ELT 350 (Kar)

(iv) Commissioner of C.Ex. & ST Vs. Secure Meters Limited, 2017 (354) ELT 146 (T)

- Affirmed by the Rajasthan High Court in Union of India Vs. Secure Meters Limited, 2017 (354) ELT A32 (Raj)

(v) Commissioner of Central Excise and Customs Vs. Precot Meridian Limited, 2015 (325) ELT 234 (SC)

(vii) Welspun Corp. Ltd. Vs. Commissioner of Central Excise, 2019 (368) ELT 179 (T)

(viii) Cranes & Structural Engineers Vs. Commissioner of C.Ex. 2017 (347) ELT 112 (T)

(ix) Etrans Solutions Pvt. Ltd. Vs. Commissioner of CGST & C.Ex., 2020 (372) ELT 867 (T-Kol)

(x) Bombay Minerals Limited Vs. Commissioner of C.Ex. & ST, 2019 (29) GSTL 361 (T)

(xi) Commissioner of Central Excise Vs. IVP Ltd., 2017 (349) ELT 18 (Bom).

(d) The appellant exercised for the first time its option in July, 2012 to effect reversal of cenvat credit in respect of duty/tax paid in or in relation to the manufacture of exempted DI Pipes. Thereafter, there has been no withdrawal of such option exercised either in the financial year 2012-13 or in the subsequent years. Thus, there is no violation of the provisions of '*Explanation I*' to Rule 6(3) of the Cenvat Credit Rules. In support, the appellant relied upon the decision of this Bench, in the case of Tata Steel Limited Vs. CCEX & S.Tax, Jamshedpur (Final Order No. 75367/2020 dated 28.07.2020, passed in Excise Appeal No. 1 of 2011). In addition, the appellant relied upon the following case laws:

(i) Mercedes Benz India (P) Ltd. Vs. Commissioner of C. Ex., 2015 (40) STR 381 (T)

(ii) Aster Private Limited Vs. Commissioner of Customs & C.Ex., 2016 (43) STR 411 (T)

(iii) Alstom T&D India Ltd. Vs. Commissioner of GST & C.Ex., 2019 (370) ELT 625 (T).

(e) From the documents on record it is evident that at all material point of time the jurisdictional Central Excise authorities were fully aware of the manner of maintenance of account and reversal of cenvat credit on input and input services used in or in relation to the manufacture of exempted products. Further, not only that maintenance of separate accounts and reversal of taxes/duties attributable to inputs/input services used in manufacture of exempted DI Pipes were reflected in the appellant's ER-1 returns since July 2012, but also the same was confirmed during the EA-2000/CERA audits during 2012-13 to 2014-15. Thus the Department was fully aware of all relevant facts, including the manner of compliance of Cenvat Credit Rules by the appellant. Therefore, none of the ingredients of Rule 15(2) of the Cenvat Credit rules/Section 11AC of the Act are satisfied to invoke the extended period of limitation. In support of this contention the appellant relied upon the following decisions:

(i) Commissioner of C.Ex. Vs. Pragathi Concrete Products (P) Ltd., 2015 (322) ELT 819 (SC)

(ii) Continental Foundation Jt. Venture Vs. Commr. of C.Ex., 2007 (216) ELT 177 (SC)

(iii) Uniworth Textiles Ltd. Vs. CCE, 2013 (288) ELT 161 (SC)

(iv) Pushpam Pharmaceuticals Company Vs. CCE, 1995 (78) ELT 401 (SC)

(v) Cranes and Structural Engineers Vs. CCE, 2017 (347) ELT 112 (T).

(f) On the same ground not only that the demand confirmed in the impugned order is barred by limitation, but also the penalty imposed under Rule 15(2) of the Cenvat Credit Rules read with Section 11AC of the Act is not sustainable, the condition precedent for invoking the said provisions being the same.

5. The Ld. A.R. supported the findings of the Commissioner and reiterated the same. He drew the attention of the Bench to the discrepancies in figures submitted by the appellant with regard to input/input service credit not taken during the relevant period in support of the finding in the impugned order that the method of back calculation and approximation as adopted by the appellant is beyond the provisions of the Cenvat Credit Rules.

6. Heard both sides and perused the appeal records.

7. The following issues arise for determination in the instant case:

(i) Whether for the purposes of Rule 6(2) and Rule 6(3) of the Cenvat Credit Rules it was obligatory on the part of the appellant to maintain separate accountal of input and input services used in or in relation to manufacture of exempted and dutiable final products prior to manufacture of the final products or reversal of the cenvat credit of the duty and tax involved in respect of exempted inputs and input services on proportionate basis after manufacture of the final products also satisfies the requirement of Rule 6(2) of the Cenvat Credit Rules?

(ii) Whether, in the facts and circumstances of the instant case, the appellant is required to make payment of an amount equal to 6% of the value of the exempted goods and 7% of the value of the exempted services in terms of Rule 6(3)(i) of the Cenvat Credit Rules?

(iii) Whether the appellant had altered the option exercised under Rule 6(3) of the Cenvat Credit Rules in mid 2012-13 and whether the same was not permissible as per "*Explanation I*" of Rule 6(3)?

(iv) Whether the demand confirmed is barred by limitation?

(v) Whether in the facts and circumstances of the case penalty equivalent is imposable upon the appellant under Rule 15(2) of the Cenvat Credit Rules read with Section 11AC of the Act?

8. *Re: Issue No. (i) & (ii)*

8.1 Rule 6(2) w.e.f. 01.03.2011 provides for maintenance of separate accounts of "*inputs used"/*receipt and *"use"* of input services. In other words, as per Rule 6(2), w.e.f. 01.03.2011, provides that separate account can be maintained even after the common inputs/input services are '*used*' for manufacture of dutiable goods/services and exempted goods/services. Such separate account of common inputs / input services can only be done by back calculation method, which has been undisputedly adopted by the appellant in the instant case.

8.2 From both the show cause notice and the impugned order we find that it is an undisputed fact that it is not possible to differentiate the DI Pipes between those exempted and dutiable at the point of or prior to its production and thus it is not possible to keep a separate account of the inputs/input services meant for use or intended for use for manufacture of exempted D.I Pipes inasmuch as the exemption from duty is determined at the time of clearance of the D.I Pipes under Notification No.

12/2012-CE dated 17.03.2012. In the show cause notice this fact is acknowledged as follows:

> "*it was simply impossible to maintain separate account for inputs where there is only one blast furnace where basic raw material is fed for production of Pig Iron which is then transferred to DI plant as well as Billet plant, M S wire Rod plant and Sinter plant*".

In the impugned order also in paragraph 12.3 it is observed as under:

> "*In the entire process it is obviously not possible to differentiate the DI Pipes being exempted or dutiable at the point of its production. And it is also not possible to keep a separate account for pig iron which is produced from such inputs on which cenvat credit has not been availed. Furthermore no excisable goods at the time of its production can be differentiated as exempted goods. The DI Pipes after being manufactured is entered into the statutory records like RG-1 register as common final product*."

This has been reiterated also in paragraphs 12.7, 12.9 and 16.1 of the impugned order. Hence, separate account of inputs/input services used for manufacture of exempted D.I Pipes, by adopting the back calculation method is the only alternative, which fully complies with the mandate of Rule 6(2) of the Cenvat Credit Rules.

8.3 It is acknowledged both in the impugned order and the show cause notice that the appellant had reversed on proportionate basis the duty/tax paid on inputs and input services which were used, to the extent they related to exempted final products. There is no denial of this fact although issues have been raised regarding alleged discrepancies in the quantum of the reversals made, which we find had been duly attended to by the appellant by way of reversal with interest. It is also acknowledged in the impugned order that in all such cases of reversal, wherever required, the same has been effected along with payment of interest.

8.4 It is now a settled proposition that reversal of cenvat credit even after manufacture of the goods and/or clearance thereof amounts to not taking of the credit on the exempted goods and that in case of common inputs and input services used in or in relation to the manufacture of dutiable and exempted final products, credit proportionate to use of inputs and input services in exempted products, if reversed, the assessee is not required to make payment of an amount in terms of Rule 6(3)(i) of the Cenvat Credit Rules.

8.4.1 In the case of Commissioner of Central GST & CX. Vs. Himmat Glazed Tiles, 2018 (15) GSTL 486 (Guj), where a similar issue arose, the Hon'ble Gujarat High Court, dismissing the appeals filed by the Revenue, observed and held as follows:

> "*2. Briefly stated the facts are that the assessee is a manufacturer of ceramic products. These are by-products and is called body clay powder which envisages nil rate of duty. The assessee did not maintain separate accounts and initially availed cenvat credit on the exempt product also. However, subsequently, it appears that such credit so availed was reversed with interest. The department however still objected to such procedure.*
>
> *3. The appellate authority and the Tribunal held that since the assessee had reversed the cenvat credit with interest, no further adverse consequence should follow. We notice that this Court in case of Commissioner Vs. Ashima Dyecot Ltd. reported in 2008 (232) ELT 580 has observed that reversal of credit amounts to non-availment.*

> *4. We do not find any error in the view of the Tribunal. Tax appeals are dismissed*."

8.4.2 The Hon'ble Bombay High Court also in the case of Commissioner of Central Excise Vs. IVP Ltd., 2017 (349) ELT 18 (Bom) upheld reversal of proportionate credit as compliance with requirement of Rule 6 of the Cenvat Credit Rules even if an assessee had failed to maintain separate account. In paragraph 5 of the judgment it was held as follows:

"*5. The findings essentially are of fact. However, only one question which was projected as a substantial question of law, now appears to be concluded against the Revenue on account of the retrospective amendment and which is incorporated in the Finance Act, 2010. The Finance Act, 2010 makes an amendment of Rule 6 of Cenvat Credit Rules, 2002. The Central Government, in exercise of powers conferred by Section 37 of the Central Excise Act, published a Notification in the Official Gazette dated 1st March, 2002. Rule 6 was amended and is deemed to have been amended retrospectively, in the manner provided in column (3) of the Seventh Schedule, on and from and up to the corresponding date specified in column (4) of that Schedule, against the rule specified in column (2) of that Schedule. The amendment, therefore, enables the dealer to make these adjustments. The respondent assessee, even if it had failed to maintain a separate account in view of the retrospective amendment, it was entitled to reverse proportionate cenvat credit. The option of paying an amount equal to 10% sale value of exempted goods, therefore, could not have been enforced on the assessee. That is how consistently even the Tribunals and the High Courts namely, the High Court of Karnataka at Bangalore, the High Court of Judicature at Madras and the High Court of Gujarat at Ahmedabad, have all understand and interpreted this provision. In such circumstances and even while these matters were brought to our notice, a Division Bench in* *the case of Central Excise Appeal No. 138 of 2005, decided on 17th October, 2016 [2017 (349) ELT 33 (Bom)] took up the same issue and held that these substantial questions of law would not survive. They would not have to be answered against the Revenue and in favour of the assessee. That is how they stand answered even in this matter. The Revenue's appeal is accordingly dismissed."*

8.4.3 Coordinate Benches of the Tribunal have also held so. In the case of Commissioner of C.Ex. & S.T. Vs. Secure Meters Ltd., 2017 (354) ELT 146 (T), in a similar case as in the instant case, has observed and held as under:

"*2. After hearing both sides we find that the respondents were engaged in the manufacture of exempted as also dutiable final product. They were availing cenvat credit on duty paid on inputs, being used by them in both types of products and were maintaining a common cenvatable account.*

3. Revenue by entertaining a view that inasmuch as the appellants are using the common inputs in the manufacture of exempted final product, they are required to pay 10% of the value of final exempted product, in terms of provisions of Rule 6(3)(b) of the Cenvat Credit Rules, initiated proceedings against them for recovery of amount of Rs. 26,29,898/-. The same was confirmed by the original adjudicating authority.

4. However, on appeal Commissioner (Appeals) took note of the fact that the assessee has already reversed the cenvat credit attributable to inputs and input service used in the manufacture of exempted final product and as such, applicability of Rule 6(3)(b) is ruled out. Accordingly, he set aside the impugned order of the lower authorities and allowed the appeal.

5. Hence, the present appeal by the Revenue.

6. We find that Revenue is not disputing the fact of reversal of proportionate credit. However, the only grievance of the

Revenue is that such reversal has taken place subsequent to the clearance of goods.

7. We find that the issue is no more res integra. Commissioner (Appeals) has granted relief to the assessee by following the Larger Bench decision of the Tribunal in the case of Franco Italion Co. Pvt. Ltd. [2000 (120) ELT 792] as also the Hon'ble Supreme Court decision in the case of Chandrapur Magnet [1996 (81) ELT 3 (SC)]. He has also relied upon the decision of Hon'ble Allahabad High Court in the case of Hello Minerals Water (P) Ltd. [2004 (174) ELT 422 (All)]. We have also taken note of the list of decisions supplied to us by the learned advocate for the respondents, laying down that such reversal, even if subsequent to clearance of final product, is appropriate and result in a situation as if no credit was even availed by the assessee. One such reference can be made to Gujarat High Court decision in the case of CCE Vs. Ashima Dyecot Ltd. [2008 (232) ELT 580 (Guj)] = 2008 (12) STR 701 (Guj)] affirmed by the Hon'ble Supreme Court as reported at [2009 (240) ELT A41 (SC)]. Inasmuch as the issue is decided, we find no reason to interfere in the impugned order of Commissioner (Appeals). Accordingly, Revenue's appeal is rejected."

Appeal against this decision preferred by the Revenue was rejected by the Hon'ble Rajasthan High Court – Union of India Vs. Secure Meters Ltd., 2017 (354) ELT A32 (Raj).

8.4.4 To same effect are the decisions of the Tribunal in Cranes & Structural Engineers Vs. Commr. of C.Ex., 2017 (347) ELT 112 (T) and Bombay Minerals Ltd. Vs. Commr. of CE&ST, 2019 (29) GSTL 361 (T).

8.4.5 In this respect it is also relevant to refer to the decision of the Hon'ble Supreme Court in Commissioner of Central Excise & Customs Vs. Precot Meridian Ltd., 2015 (325) ELT 234 (SC). In this case, dealing with an issue of exemption under a notification subject to non-availment of Modvat Credit, reversal of credit after availment on inputs and contention of Revenue that subsequent reversal did not satisfy the requirement of the exemption notification, the Hon'ble Supreme Court observed as follows:

"*3. We note that five-Member Bench of the Tribunal in the case of Franco Italian Co. Pvt. Ltd. Vs. commissioner [2000 (120) ELT 792 (T-LB)] had taken the view that even if the MODVAT credit was utilised but, thereafter, refunded, it would amount to not utilising the said MODVAT credit. Same view has been taken by the High Court of Allahabad in Hello Minerals Water (P) Ltd. Vs. Union of India [2004 (174) ELT 422 (All)].*

4. On a specific query put by the Court, we were informed that as far as the aforesaid two judgments are concerned, they were accepted by the Department and no appeal was filed there against. In the impugned judgment the Tribunal has decided the issue in favour of the assessee relying upon the aforesaid two decisions.

5. We, thus, do not find any reason to interfere with this order. The appeal is dismissed accordingly."

This principle would also apply to the instant case.

8.4.6 The facts of the present case being similar to the abovementioned decisions, the principle laid down therein is squarely applicable. Respectfully following the same we therefore hold that the demand of Rs. 58,96,13,230/- confirmed by the impugned order is unsustainable since the appellant has reversed the cenvat credit on input and input services attributable to the exempted product, including in some cases with interest if applicable.

9. <u>*Re: Issue No. (iii)*</u>

9.1 The relevant records show that till early 2012 the appellant was not maintaining separate accounts nor was it reversing the credit or paying any amount in terms of Rule 6(3)(i) of the Cenvat Credit Rules. Only when the jurisdictional Range Superintendent drew the appellant's attention to this fact by a letter dated June

19, 2012 and requiring the appellant to make payment of amount as per Rule 6(3)(i),the appellant paid Rs. 2,96,31,387/-, an amount equal to 6% of the value of the exempted DI pipes cleared during April 2011 to June 2012, along with interest. Thereafter the appellant, from July 2012 started reversal of cenvat credit in respect of duty/ tax paid in or in relation to the manufacture of exempted products, which was continued in the subsequent years covering the entire of the relevant period. It is the appellant's contention that in such circumstances there is no violation of the provisions of *Explanation I* to Rule 6(3) of the Cenvat Credit Rules, since the said rule, including the *Explanation-I* thereof, does not mandate that the option cannot be exercised at the middle of the year or has to be exercised only at the beginning of a financial year.

9.2 We find that this issue is also settled by the decision of this Bench in the case of Tata Steel Ltd. Vs. CCEx.&ST, Jamshedpur, being Final Order No. 75367/2020 dated July 28, 2020, passed in Excise Appeal No. 1 of 2011. Relying upon the decisions of Coordinate Benches of the Tribunal in Mercedes Benz India (P) Ltd. Vs. Commissioner of C. Ex., 2015 (40) STR 381 (T) and Aster Private Limited Vs. Commissioner of Customs & C.Ex., 2016 (43) STR 411 (T) it has been held as follows:

"*14. Both the above decisions are applicable on all fours to the instant case. There is no requirement under Rule 6(3)(i) and Rule 6(3A) of the Cenvat Credit Rules that the option had to be exercised on the first day of the financial year or the first month thereof. On the contrary, the said provisions clearly indicate that such option could be exercised at any point of time during a financial year by a manufacturer. The only restriction under Explanation-I of Rule 6(3) is that once such option is exercised, the same has to be continued with during the remaining part of the financial year. In this respect reference may also be made to the Larger Bench decision of the Tribunal in Ankit Packaging Ltd.*

Vs. CCE (supra). This case involved the issue as to whether an assessee who paid duty at the normal rate at the commencement of the financial year under the provisions of Notification 1/93 and thereafter was eligible to avail the benefit of the said notification during the same financial year if he satisfies other conditions. In <u>*paragraph 5*</u> *of the order it was observed, inter alia, as follows:*

"……………………………………………………………………………………

The only question is whether payment of duty on some goods cleared in the beginning of the financial year could be considered as de facto opting out of the benefit of the exemption notification. We find no warrant for such a view. The notification calls for specific opting out by a manufacturer. There was no requirement to opt in. In the present case, the assessee has also written to the department informing that it was wanting to avail the exemption notification. In the face of such opting in, there was no justification for interpreting the payment of duty on some goods as opting out. Moreover, the assessee has also explained his reason for clearing some goods on payment of duty at the beginning of the financial year; it required some time to compute the aggregate value of the clearances made during the preceding financial year, so as to be sure that it had not exceeded the qualifying value limit during the preceding financial year. Thus, paying duty on the goods cleared during the opening days of the Financial Year was only erring in favour of the revenue and not foregoing an exemption. Such caution in an assessee cannot be turned against him……………………………"

15. The correspondence on record of the appellant with Range Superintendent exchanged during the period May 2008 to June 2008, clearly establishes that the appellant had never exercised at any point of time during the period 2008-09 the option in terms of Rule 6(3)(i) of the Cenvat Credit Rules prior to May 2008. The Commissioner has therefore erred in holding that it is on record that the appellant had exercised the option under Rule

6(3)(i) of the Cenvat Credit Rules in the instant case. There is no document disclosed either in the show cause notice or in the impugned order which evidences exercising of such option by the appellant. Exercising an option is a positive act and cannot be inferred as has been sought to be done by the Commissioner and submitted by the Ld. Special Counsel.

16. Hence, following the principle laid down in the abovestated orders of the Tribunal it is conclusive that there has been due compliance by the appellant of the requirements under rule 6(3) and (3A), including the procedure laid down therein and the appellant has legally and validly availed the option in terms of Rule 6(3)(ii). The Commissioner has therefore erred in holding that the appellant had not fulfilled the conditions of procedure laid down in Rule 6(3) and Rule 6(3A) of the Cenvat Credit Rules and that the appellant was not entitled to avail option under Rule 6(3)(ii) of the Cenvat Credit Rules."

9.3 The materials on record clearly establishes that in this case the appellant had not exercised at any point of time during the period 2012-13 the option in terms of Rule 6(3)(i) of the Cenvat Credit Rules prior to July, 2020. No document to the contrary has been disclosed either in the show cause notice SCN or in the impugned order. In the impugned order it has been acknowledged by the Commissioner also that Explanation I to Rule 6(3) of the Cenvat Credit Rules does not bar exercising option in the middle of a financial year. However, according to him such option has to be exercised by physically writing to the Range Officer with assessee particulars and Cenvat Account Balance, which has not been done in the instant case. This contention has been considered and rejected by a Coordinate Bench of the Tribunal in the case of Cranes & Structural Engineers Vs. Commr. of C. Ex. (supra). It has been observed and held therein as follows:

"*4.1 On analysis of Rule 6(3A), I find that while exercising the option, the manufacturer of goods or the provider of output service shall intimate in writing to the Department regarding the option exercised. In the present case, admittedly there is no intimation given by the appellant informing the exercise of his option. The argument of the Department is that when the appellant has not intimated his option in writing then the appellant is bound to pay the duty amount calculating under the first option. According to me, this argument is devoid of merit, because the said Rule does not say anywhere that on failure to intimate, the manufacturer/service provider would lose his right to avail second option of reversing the proportionate credit. Sub-rule (3A) of Rule 6 is only a procedure contemplated for application of Rule 6(3). Consequently, the argument of Revenue is that the appellants exercising option is mandatory and on its failure, the appellant has no other option but to accept and apply Rule 6(3)(i) and make payment of 5%/10% of the sale price of the exempted goods or exempted services is not acceptable, because the Rule does not lay down any such restriction and this has been held in the judgments cited supra. It has been held in the judgment cited supra that the condition in Rule 6(3A) to intimate the Department is only a procedural one and that such procedural lapse is condonable and denial of substantive right on such procedural failure is unjustified. Therefore, keeping in view the facts and evidence on record, the demand raised by the Revenue is not legal and proper*."

We are in agreement with the said finding.

9.4 Hence, there has been no violation of the provisions of *Explanation I* to Rule 6(3) of the Cenvat Credit Rules.

10. <u>*Re: Issue No. (iv)*</u>

10.1 From the records of the instant proceedings the following facts emerge, which are not disputed in the impugned order:

(a) In 2012 the jurisdictional Range Officer pointed out to the appellant regarding non-maintenance of separate accounts of inputs/input services used in manufacture of exempted DI Pipes;

(b) In response, the appellant paid an amount of Rs.2,96,31,387/-, with interest amounting to Rs.8,72,535/-, being equivalent to 5%/6% of the value of the exempted DI Pipes removed by the appellant without payment of duty during the period April 2011 to June 2012;

(c) Through its ER-1 for July 2012, the appellant declared to the jurisdictional Range Officer of having started maintaining separate accounts of inputs used in manufacture of exempted DI Pipes by way of proportionate reversal post-manufacture of the goods;

(d) the fact of availment of proportionate credit only in respect of inputs/input services used in manufacture of dutiable goods were reflected in the appellant's ER-1 for all months starting from July 2012;

(e) Appellant's maintenance of separate accounts of inputs/input services used in manufacture of exempted DI Pipes, was confirmed during the subsequent audits conducted during the financial years 2012-13 to 2014-15 under EA 2000/CERA.

10.2. As such at all material point of time the Department was fully aware of and/or was made aware of by the appellant of all relevant facts, including the manner of compliance by the appellant with the requirements in terms of Rule 6(2) of the Cenvat Credit Rules. In these circumstances, as per principles laid down by the Apex Court consistently, there can be no case of suppression of any material fact or wilful misstatement or contravention by an assessee of any provision of the Act or the rules made thereunder with intent to evade duty/tax and hence there can be no invocation of the extended period of limitation in terms of the Proviso to Section 11A(1) or Section 11A(4) of the Act. The demand in such cases can only be for the normal period under Section 11A(1) of the Act. For the same reasons no penalty can be imposed upon an assessee in such cases in terms of Rule 15(2) of the Cenvat Credit Rules or Section 11AC of the Act.

10.3 In the present case the show cause notice was issued on August 2, 2017, beyond the normal period of 2 years prescribed under Section 11A(1) of the Act. Consequently, on respectful application of the principle abovestated laid down by the Hon'ble Supreme Court, the demand confirmed by the impugned order is also barred by limitation.

11. *Re: Issue No. (v)*:

11.1 For the reasons abovestated, the demand of interest in terms of Section 11AA of the Act and penalty imposed under Rule 15(2) of the Cenvat Credit Rules read with Section 11AC of the Act are also unsustainable.

12. In view of the aforesaid, the impugned order dated 19.06.2018 passed by the Commissioner is set aside and the appeal is allowed, with consequential relief.

(Pronounced in the open court on 19.11.2020)

Sd/

(P. K. Choudhary)
Member (Judicial)

Sd/

(P. Anjani Kumar)
Member (Technical)

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