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

REGIONAL BENCH - COURT NO.2

Excise Appeal No.76305 of 2018

(Arising out of Order-in-Appeal No.61/DGP-III/CT(Audit-II)/2017-18 dated 06.03.2018 passed by Commissioner of Central Tax(Appeal), Audit-II Commissionerate, Kolkata.)

M/s. Steel Authority of India Limited
(Durgapur Steel Plant, Durgapur-713203, West Bengal.)

...Appellant

VERSUS

Commissioner of Central Excise & Service Tax, Durgapur
.....Respondent
(Presently Commissioner of CGST & CX, Bolpur Commissionerate,
Nanoor Chandidas Road, Sian, Bolpur, Dist: Birbhum, West Bengal-731204.)

<u>APPEARANCE</u>

Dr.Samir Chakraborty, Senior Advocate & Shri Abhijit Biswas, Advocate for the Appellant (s)
Shri A.Roy, Authorized Representative for the Respondent (s)

CORAM: HON'BLE SHRI P.K.CHOUDHARY, MEMBER(JUDICIAL)

<u>FINAL ORDER NO. 75247/2021</u>

DATE OF HEARING : 22 March 2021
DATE OF DECISION : 12 May 2021

P.K.CHOUDHARY :

The present appeal is against the order dated 06.03.2018 passed by the Commissioner of Central Tax (Appeals), Kolkata rejecting the appeal filed by the appellant against the adjudication order dated 19.10.2012 passed by the Deputy Commissioner, Central Excise & Service Tax, Durgapur-III Division and affirming the demand of an amount of Rs. 2,92,309/- against the appellant confirmed against the appellant, along with interest and imposing equal amount of penalty upon the appellant.

2. The facts in brief are:

2.1 At its integrated steel plant at Durgapur the appellant manufactures various dutiable iron, steel and allied products, falling under various Chapter Headings of the First Schedule to the Central Excise Tariff Act, 1985. For such manufacture a large number of capital goods and input materials are required. The appellant availed cenvat credit on such capital goods and input materials.

2.2 Since long the appellant has been reversing the cenvat credit availed in respect of common inputs and input services attributable to exempted goods and goods having nil rate of duty, in terms of Rule 6 of the Cenvat Credit Rules and has been reflecting the same in the monthly ER-1 returns. Every month, in the ER-1 returns, the details of cenvat credit balance were furnished and provisional payments on monthly basis were made. Such payments were finalised every year, prior to June 30 of the next financial year and the balance amount required to be reversed, if any, was done.

2.3 By a letter the appellant submitted before the Range Superintendent its option under Rule 6(3)(ii) for payment of an amount equivalent to the cenvat credit attributable to inputs and input services used in or in relation to the manufacture of exempted goods or for provision of exempted services, following the procedure specified in Rule 6(3A). Accordingly the appellant reversed cenvat credit on common inputs as per the option exercised under Rule 6(3)(ii) of the Cenvat Credit Rules, attributable to the manufacture of exempted goods, including coke, for the year 2010-11. A calculation sheet was also submitted to the Range Office thereafter, on 13.07.2011.

2.4 A show cause notice dated 14.07.2011 however was issued by the Assistant Commissioner, Central Excise, Durgapur-III Division alleging that the appellant had availed cenvat credit of the specified duty paid on inputs and input services which were used in or in relation to manufacture of hard coke and mixed coke, which were chargeable to nil rate of duty, of quantities of 534.554 MT of mixed coke and hard coke, valued at Rs. 58,43,180/-, during the period July 2010 to February 2011, without maintenance of separate inventory and accounts of inputs and input services and that though the appellant had opted to follow the option of sub-rule 3(ii) and exercised option as per sub-rule (3A), on scrutiny it was found that several specified provisions of Rule 6(3A) had not been followed. Therefore, the option exercised being incomplete, improper and not as per prescribed provisions, was unacceptable and the appellant was liable to pay the amount equal to 5% of the price/value of coke cleared, amounting to Rs. 2,92,309/-, in terms of Rule 6(3)(i) of the Cenvat Credit Rules along with interest under Rule 14 of the Cenvat Credit Rules, read with Sections 11A and 11AB respectively of the Central Excise Act and the appellant was liable to penalty under Rule 15 of the Cenvat Credit Rules read with Section 11AC of the said Act.

2.5 On reply being filed to the show cause notice on 13.01.2012, the adjudication order dated 19.10.2012 was passed, appeal filed against which by the appellant was rejected and the adjudication order was upheld by the impugned order of the Commissioner (Appeals).

3. I have heard Dr. Samir Chakraborty, Senior Advocate, on behalf of the appellant and Shri A. Roy, learned Authorized Representative for the Department and have perused carefully the documents on record.

4. It has been contended by Dr. Chakraborty on behalf of the appellant as follows:

(a) The option under Rule 6(3) is required to be exercised under either Rule 6(3)(i) or Rule 6(3)(ii) of the Cenvat Credit Rules. In the event the option is exercised under Rule 6(3)(ii), an assessee becomes obliged to comply with the condition and procedure specified in Rule 6(3A), including the various sub-clauses thereof. Rule 6(3A) prescribes the procedure for exercising the option and the conditions which have to be satisfied on such option being exercised in terms of Rule 6(3)(ii) of the Cenvat Credit Rules. There is no provision in any of the clauses or sub-clauses of Rule 6(3A) for exercising any option, contrary to the erroneous finding in the adjudication order and approved by the Commissioner (Appeals) in the impugned order.

(b) There is no provision in the Cenvat Credit Rules, including in Rule 6(2) or Rule 6(3), which provides that in the event the option exercised under Rule 6(3)(ii) is found to be suffering from some error or inaccuracy or there is alleged non-compliance with certain prescribed procedure required to be followed thereunder or under Rule 6(3A), the option under Rule 6(3)(i) becomes applicable and the assessee is bound to make payment in terms of Rule 6(3)(i) the amount specified therein.

(c) Rule 6(3A) of the Cenvat Credit Rules provides for, under clauses (a) and (b) thereof, provisional payments per month of the amount equivalent to cenvat credit attributable to inputs and input services used in or in relation to the manufacture of exempted goods, in the manner stipulated therein. The payments under these sub-clauses are provisional. The amount involved is to be finally determined and the differential amount paid thereafter by June 30 of the following year, in the manner prescribed under sub-clauses (c) and (d) of Rule 6(3A) of the Cenvat Credit Rule. In the instant case the relevant records clearly demonstrate that there was final determination of the amount payable in the manner prescribed under Rule 6(3A)(c) and payment of the amount required to be paid by the due date, viz., before June 30 of the succeeding financial year by the appellant, in the manner prescribed under Rule 6(3A)(d) of the Cenvat Credit Rules.

(d) The only procedural error committed by the appellant was that instead of making monthly payment as per sub-clauses (a) and (b) of Rule 6(3A) on and from the date of exercise of option, i.e., July 20, 2010, the provisional payments were made in four instalments between August 2010 and March 2011. Such procedural error in making payment of provisional amounts, when the amount payable was to be finally determined at the end of the financial year and differential amount paid by the end of June of the succeeding financial year as per statutory provision itself, which was undisputedly done in the instant case, cannot and does not lead to the conclusion that the option exercised under Rule 6(3)(ii) becomes non-est in the eye of law or is not effective or cannot be considered as a valid option exercised by the assessee. There is also no such provision in Rule 6 of the Cenvat Credit Rules, including sub-rules (3) and (3A) thereof. The contrary findings are therefore without any statutory support and devoid of merit. Reliance has been placed in support upon the following decisions:

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

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

(iii) *Aster Pvt. Ltd. Vs. Commissioner of Customs & C.Ex., 2016 (43) STR 411 (T).*

(e) The Commissioner (Appeals) has erred in holding that the provision of Rule 6(3)(i) of the Cenvat Credit Rules was applicable in the instant case or that the appellant was liable for payment of an amount equal to 5% of the price/value of the coke cleared during the said period or that any such amount was recoverable from the appellant along with interest in terms of Rule 14 of the Cenvat Credit Rules read with Section 11A and Section 11AB respectively of the Act. No provision of the Cenvat Credit Rules, including Rule 6 thereof, enables or empowers either the adjudicating or the appellate authority to hold that the provision of Rule 6(3)(i) of the Cenvat Credit Rules is applicable in a case even if the credit involved has been taken or utilised wrongly or the amount of credit availed is incorrect. In support reliance has been placed on the following decisions:

(i) Tiara Advertising Vs. Union of India, 2019 (30) GSTL 474 (Telengana)

(ii) Reliance Life Insurance Co. Ltd. Vs. Commissioner of Service Tax, 2018 (363) ELT 1050 (T)

(iii) Tata Steel Ltd. Vs. CCE&ST, Final Order No. 75367/2020 dated 28.07.2020 passed by the Kolkata Bench of the Tribunal in Appeal No. E/1/2011.

(f) Hence the impugned order, being based on incorrect premises of law and erroneous interpretation of the relevant statutory provisions of the Cenvat Credit Rules, is unsustainable. The demands of amount and interest and imposition of penalty are illegal, invalid and untenable.

5. Shri A. Roy, learned Authorized Representative for the department reiterates the findings in the impugned order and the adjudication order.

6. I find that the issue involved in the present case is no longer *res integra*. The Hon'ble Telengana High Court, in *Tiara Advertising Vs. Union of India (supra)*, has held that in the event the assessee is found to have availed Cenvat credit wrongly, Rule 14 of the Cenvat Credit Rules empowers the Authority to recover such credit which had been taken or utilized wrongly, along with interest and that the statutory scheme does not vest the Revenue authorities with the power of choice under, *inter alia*, Rule 6(3)(i) of the Cenvat Credit Rules. This decision has been followed by the Division Bench of this Tribunal in the case of *Tata Steel Ltd. Vs. CCE&S.Tax (supra)*. It has been held therein that the demand confirmed under Rule 6(3)(i) of the Cenvat Credit Rules by the Adjudicating Authority/Commissioner (Appeals) by choosing such option in the show cause notice cannot be sustained.

6.1 Further, in the case of *Etrans Solutions Pvt. Ltd. Vs. Commr. of CGST & C.Ex. (supra)*, this Bench of the Tribunal, in a similar case, held as under:

"10. In the present case, it is an admitted fact that the appellant did not maintain separate accounts for the input services used in or in relation to the provision of taxable service as well as exempt service i.e. trading of goods. Therefore, two options were available to them, i.e., either to pay 6% of value of the exempted service or pay an amount equal to the credit attributable to the input services used in or in relation to exempt services subject to the provisions of Sub-rule (3A). When the mistake was pointed out, the appellant reversed the proportionate common credit taken on input services used in the provision of exempt services (trading of goods) along with interest thereon. Therefore, Rule 6(3) (i) will not have any application, when a credit is taken wrongly and the same is reversed along with interest as it tantamounts to not taking of the credit at all.

I find that the Tribunal in the case of M/s Mercedes Benz India (P) Limited Vs. Commissioner of Central Excise, Pune-I (supra) while dealing with a similar situation has held as under:-

"5.4 We find that the appellant admittedly paid an amount of Rs.4,06,785/- plus interest, this is not under dispute. Therefore in our view, the appellant have complied with the condition prescribed under Rule 6(3)(ii) read with sub-rule (3A) of Rule 6 of Cenvat Credit Rules, therefore demand of huge amount of Rs.24,71,93,529/of the total value of the vehicle amounting to Rs.494,38,70,577/- sold in the market cannot be demanded. We are also of the view that Rule 6 of the Cenvat Credit Rules is not enacted to extract illegal amount from the assessee. The main objective of the Rule 6 is to ensure that the assessee should not avail the cenvat credit in respect of input or input services which are used in or in relation to the manufacture of the exempted goods or for exempted services. If this is the objective then at the most amount which is to be recovered shall not be in any case more than cenvat credit attributed to the input or input services used in the exempted goods. It is also observed that in either of the three

options given in sub-rule (3) of Rule 6, there is no provisions that if the assessee does not opt any of the option at a particular time, then option of payment of 5% will automatically be applied. Therefore we do not understand that when the appellant have categorically by way of their intimation opted for option provided under sub-rule (3)(ii), how Revenue can insist that option (3)(i) under Rule 6 should be followed by the assessee.

5.5 As discussed above and in the facts of the case that actual cenvat credit attributed to the exempted services used towards sale of the bought out cars in terms of Rule 6(3A) comes to Rs.4,06,785/- whereas adjudicating authority demanded an amount of Rs.24,71,93,529/-. In our view, any amount, over and above Rs.4,06,785/- is not the part of the cenvat Credit, which required to be reversed. The legislator has not enacted any provision by which cenvat credit which is other than the credit attributed to input services used in exempted goods or services can be recovered from the assessee."

6.2 In the instant case also it is an undisputed fact that the appellant had reversed the entire amount of Cenvat credit as required under Rule 6(3)(ii) read with Rule 6(3A)(c) of the Cenvat Credit Rules.

6.3 As such, following the above decisions of the High Court and the Tribunal, I hold that the demand confirmed by the lower appellate authority is unsustainable.

7. The impugned order of the Commissioner (Appeals) is therefore set aside and the appeal filed by the appellant is allowed, with consequential relief.

(Order pronounced in the open court on 12 May 2021.)

SD/
(P.K.CHOUDHARY)
MEMBER (JUDICIAL)

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