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

REGIONAL BENCH - COURT NO.2

Excise Appeal No.78150 of 2018

(Arising out of Order-in-Appeal No.79/Kol-I/2018 dated 20.04.2018 passed by Commissioner of CGST & CX, (Appeals-I), Kolkata.)

M/s. Castrol India Limited
(Paharpur Plant, P-7, Paharpur Siding Road, Kolkata-700088.)

...Appellant

VERSUS

Commissioner of CGST & CX, Kolkata South Commissionerate
.....Respondent
(GST Bhawan, 180, Shantipally, Rajdanga Main Road, Kolkata-700107.)

APPEARANCE

Shri Sushanth Murthy, Advocate for the Appellant (s)
Shri K.Chowdhury, Authorized Representative for the Respondent (s)

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

FINAL ORDER NO. 75344/2021

DATE OF HEARING : 12 March 2021
DATE OF DECISION : 30 June 2021

P.K.CHOUDHARY :

The facts of the case in brief are that M/s.Castrol India Ltd., Paharpur Plant, located at P-7, Paharpur Siding Road, Kolkata, is one of the manufacturing units of M/s.Castrol India Ltd.. The appellant company has two other manufacturing units which are located at Patalganga in Maharathtra and Silvassa in Dadra & Nagar Haveli. The appellants are engaged in manufacture of lubricating oils which are used extensively by the automobile industry and the industrial grade lubricating oils manufactured are also used in captive power plants, sugar mills, cement factories and other heavy engineering industries. Apart from the manufacturing activity, the appellants also import some lubricating oils from other countries which are directly received at their selling depots at various locations. From there, the goods are sold by the appellant to their customers. Out of the total sales turnover of the company, the proportion of trading goods, sold is around 2% since past several years. The head office of the appellant company is located at Mumbai and was registered as a Input Service Distributor (ISD) under the erstwhile Cenvat Credit Rules, 2004. The credit pertaining to services received at head office, regional offices, etc. of the appellant company was distributed to all the three manufacturing units including Paharpur plant, proportionately in the ratio of value of clearances. The Cenvat credit distributed by the head office and availed by the appellant includes credit availed on various common input services such as Security Agency Services, Clearing & Forwarding Services, Telecommunication Services, Transportation of Goods etc. which were used both towards the manufacturing of excisable goods as well as for the trading activity. The department was of the view that trading being an exempted services, the appellants are not eligible for credit on the common input services used in respect of trading activities. On being pointed out, the appellants reversed the credit along with interest on common input services attributable to trading and informed the same to the department. The appellants reversed credit of Rs.25,17,882/- for the period from 01.04.2006 to 30.06.2011 and also paid interest of Rs.6,25,127/-. However, the department was of the view that the appellants have not complied with the procedure of exercising the option as prescribed in Rule 6(3)/6(3A) of the erstwhile Cenvat Credit Rules to intimate the department regarding the option exercised by the appellant. Show Cause Notice dated 07.05.2013 was issued to deny application of the formula under Rule 6(3A) to compute Cenvat credit reversal on the ground that the appellants have excluded services listed under Rule 6(5) prevailing during the period of dispute. After due process of law, the original authority confirmed the demand alongwith interest and imposed penalties. On appeal, the learned Commissioner(Appeals) passed the Order-in-Appeal dated 20.04.2018 rejecting the appeal and upholding the Order-in-Original. Hence the present appeal before the Tribunal.

2. Shri Sushanth Murthy, learned Advocate appearing on behalf of the appellant argued both on merits as well as on the ground of limitation. He filed a compilation showing list of dates and events and copies of the relied upon case laws.

3. He submitted that Rule 2 (e) of Cenvat Credit Rules, 2004 defines 'exempted services'. The said rule was amended with effect from 1/4/2011, wherein an explanation was added which exempted services including trading. Thus after 1/4/2011, trading is an exempted service. However, prior to the said period, there was much confusion as to whether trading is an exempt service or not. The appellants therefore had availed credit on the common input services used for manufacture of dutiable final products as well as trading activity. On being pointed out by the department, the appellants had immediately reversed the credit attributable to trading activity. The same was intimated to the department. The department has issued show cause notices proposing to recover an amount of 10% / 8% / 6% of the value of traded goods pertaining to turnover of all units of the company for the period from April, 2008 to March, 2010. This itself is highly erroneous. Further, the only allegation is that the appellant having not exercised the option provided under Rule 6 (3A), the appellant has to pay an amount of 10% / 8% / 6% as provided in Rule 6 (3)(b)(i). He argued that the requirement of filing a declaration contemplated in Rule 6 (3A) for exercising the option is only a procedural requirement and the appellant cannot be forced to pay an amount of 10% / 8% / 6% of the value of trading goods when the appellant has voluntarily reversed the proportionate credit . To support his contention, he relied upon the decisions in the case of Mercedes Benz India Pvt Ltd vs Commissioner of Central Excise, Pune 2014 (36) S.T.R.704 (Tri. – Mumbai), Tidel Park Ltd. vs Commissioner of Service Tax, Chennai 2010 (2) TMI 202 – CESTAT, Chennai and Nagar Urban Co-op. Bank Ltd. vs Commissioner of Customs, Central Excise & Service Tax, Aurangabad 2018 (3) TMI 273 – CESTAT, Mumbai. The decision in the case of M/s.Continental Device India Pvt. Ltd. vs CCE and ST, New Delhi vide 4

F.O.No.50674/2018 dt.16/2/2018 as well as the decision in the case of CCE, New Delhi – II vs M/s.Indraprastha Gas Ltd. vide F.O.No.57931/2017 dt.14.11.2017 was also relied upon by the learned Counsel.

4. On the ground of limitation, the learned Counsel submitted that for the earlier period from April to November 2005, SCN"s were issued on the very same issue, out of which one notice was adjudicated. In the said case, the adjudicating authority had directed the appellant to reverse the proportionate credit. The appellant thereafter was following the said decision and reversing the proportionate credit. The department was completely aware of the facts of availing credit on common input services and had issued SCN for the earlier period and adjudicated the same. This being so, the demand raised invoking the extended period alleging suppression of facts is without any basis.

5. Shri K.Chowdhury, learned Authorized Representative appearing on behalf of the department reiterated the findings in the impugned order. He submitted that the requirement to file a declaration as provided in Rule 6 (3A) is mandatory. The appellant having not filed any such declaration has to then comply with provisions prescribed in Rule 6 (3)(b)(i) and pay 10% / 8% of the value of traded goods. He also relied upon the following decisions in his favour:-

(a) Laly Automobiles Pvt.Ltd. Vs. Commissioner(Adjn.), C.Ex.
[2019 (17) GSTL 422 (Del.)] [Affirmed by Hon'ble Supreme Court as reported in 2019(24)GSTL J115(SC)]

(b) Ruchika Global Interlinks Vs. CESTAT, Chennai
[2017 (5)G.S.T.L. 225 (Mad.)]

6. Heard both sides through video conferencing and perused the appeal records.

7. The allegation is that the appellant had not maintained separate accounts under Rule 6(2) of Cenvat Credit Rules and had not exercised the option to reverse the credit as provided under Rule 6(3). It is observed that as provided in Rule 6 (3A), the appellant on being pointed out, has reversed the proportionate credit along with interest. In the SCN itself, it is noted that the appellant has reversed the credit

in proportion to the credit availed in respect of trading activity / traded goods. The only reason for raising the demand to the extent of 10% / 8% / 6% of traded goods for the disputed period, is that the appellants have not filed declaration as contemplated in Rule 6 (3A). The said issue has been settled by the decisions relied upon by the learned Counsel for appellant. The Tribunal in the case of Dalmia Bharat Sugar & Industries Ltd., vs. CCE-2017-TIOL-113-CESTAT-DEL has followed the decision in the case of Mercedes Benz India Pvt Ltd (supra), wherein it was observed as under :-

> *"8. We find that the coordinate Bench of this Tribunal in the case of Mercedes Benz India Pvt. Ltd. v. C.C.E., Pune I - 2015 (40) STR 381 (Tri-Mum.) = 2015- TIOL-1550-CESTAT-MUM has held that the condition given in Rule 6(3A) to intimate the Department is only procedural matter and the delay of such procedural matter is condonable and therefore, substantive right given in the said Rule cannot be denied for such procedural lapse. The Tribunal has also held that Commissioner cannot insist that assessee should reverse only as per Rule 6(3)(i) but it is the option of the assessee. Tribunal in that case held that as follows:*
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> > *"5.3 As regard the contention of the adjudicating authority that this option should be given in beginning and before exercising such option, we are of the view that though there is no such time limit provided for exercising such option in the rules but it is a common sense that intention of any option should be expressed before exercising the option, however the delay can be taken as procedural lapse. We also note that trading of goods was considered as exempted service from 2011 only, thus it was initial period. We are also of the view that there is no condition provided in the rule that if a particular option, out of three options are not opted, then only option of payment of 5% provided under Rule 6(3)(i) shall be compulsorily made applicable, therefore we are of the view that Revenue could not insist the appellant to avail a particular option. In the present case admittedly it is appellant who have on their own opted for option provided under Rule 6(3)(ii). The meaning of the option as*

argued by the Ld. Sr. Counsel is that "option of right of choosing, something that may be or is chosen, choice, the act of choosing". From the said meaning of the term 'option', it is clear that it is the appellant who have liberty to decide which option to be exercised and not the Revenue to decide the same."

9. In the light of the above decision of the coordinate Bench we find that the Commissioner is not justified in insisting that appellant reverse cenvat credit in terms of Rule 6(3)(i) of Cenvat Credit Rules. The claim of the appellant is that they have already reversed on proportionate basis, the cenvat credit along with interest amount payable in terms of Rule 6(3A). However, the Department is entitled to verify whether reversal of the amount already made by the appellant satisfies the requirement of Rule 6(3)(ii) notwithstanding the fact that the procedural formalities have not been satisfied. For this purpose, we remand the matter to the original authority to carry out verification."

8. Similar view has been taken in all the cases relied by the learned Counsel for appellant. Following the same, I am of the considered opinion that the demand cannot sustain and requires to be set aside which I hereby do. The appeal succeeds on merits.

9. The learned Counsel has also argued on the ground of limitation. The appellants have been issued show cause notices for earlier periods on identical issue. The appellants have disclosed the credit availed in the returns filed by them. They had submitted all the documents called for by the department and I do not find any evidence to saddle the appellants with willful suppression of facts with intention to evade payment of duty. It is also noted that the jurisdictional Commissioner had passed an order holding that the credit was to be reversed based on proportionate value of traded goods. Based on the above order, the appellants had been reversing the credit availed on common input services and informed the department whenever the details were asked for. Thus the department was fully aware that the appellants were conducting trading activity. I therefore find that the demand raised invoking the extended period is without any factual or legal basis. The appeal succeeds on limitation also.

10. In the result, the impugned order is set aside both on merits as well as on limitation. The appeal is allowed with consequential relief, if any

(Order pronounced in the open court on 30 June 2021.)

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

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