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

REGIONAL BENCH – COURT NO.2

Excise Appeal No. 78860 of 2018

Arising out of Order-in-Appeal No.56/SLG-CGST/2018 dated 23.07.2018 passed by Commissioner of CGST & Central Excise, Siliguri.

M/s. Chryso India Pvt. Ltd.
(38/1, Block-GN, Sector-V, Salt Lake City, Kolkata-700091, W. B)

Appellant (s)

VERSUS

Commr. of CGST & Central Excise, Kolkata North Commissionerate
(180, Rajdanga Main Road, Kolkata, West Bengal-700107)

Respondent (s)

APPERANCE :

Mr. Tapan Kumar Ray & Kumar Sundar Ray both Consultant for the Appellant
Mr. P. K. Ghosh, Authorized Representative for the Respondent

CORAM:
HON'BLE MR. R. MURALIDHAR, MEMBER (JUDICIAL)

FINAL ORDER NO.75369/2023

Date of Hearing : 3 April 2023
Date of Decision : 3 April 2023

PER R. MURALIDHAR

The Appellant was engaged in the manufacture of excisable goods falling under Chapter 38 of the First Schedule to the Central Excise Tariff Act, 1985. Apart from their manufacturing activities, some trading activities were also undertaken by them during the material time. Before budgetary changes in 2011, there was no specific provision about traded goods as traded goods were neither exempt goods nor exempt service. By budget-2011 changes made in Cenvat Credit rules, 2004. Trading had been cleared as 'exempted service' with effect from 01.04.2011 vide Notification No.3/2011-Central Excise (N.T.) dated 01.03.2011.

2. Consequent upon the above changes made in Cenvat Credit Rules, 2004, the Appellant exercised option with effect from 01.04.2011 for proportionate reversal of credit in respect of common input service in terms of Rule 6(3A)(a) of Cenvat Credit Rules, 2004 and duly filed

with the jurisdictional Range Superintendent on 04.09.2012 vide letter dated 01.09.2012.

3. By alleging late submission of their option in this regard the Department issued a demand for Rs.2,52,853/- being 5% or 6% of value of exempted service in terms of Rule 6(3A) of the Cenvat Credit Rules, 2004. After due process, the Lower authorities confirmed the demand. Aggrieved by the same the Appellant is before the Tribunal.

4. The Learned Counsel submits that a mere late filing of their willingness to avail such an option which is suitable to them cannot create a hindrance to their choice. They made proportionate reversal amounting to Rs.14,847.00 and paid interest calculating @ 24% per annum amount to Rs.1,796.00 before issue of SCN in compliance of Rule 6(3A)(g) of Cenvat Credit Rules, 2004 and intimated the jurisdictional Range Superintendent along with calculation sheet and proof of payment. But still the demand was confirmed along with interest and penalty by following the method as laid down under Rule 6(3A)(i) of Cenvat Credit Rules, 2004. He further submits that the submission of option cannot be an inpediment to choose the option of proportionate reversal and relies on the following case laws:-

(i) Cranes & Structural Engineers Vs. CCE, Bangalore-I-2017 (347) ELT 112 (Tri.-Bang.)

(ii) Aster Pvt. Ltd. Vs. CCE, Hyderabad-III-2016 (43) STR 411 (Tri.-Hyd.)

5. The Learned AR reiterates the findings of the Lower Authorities and justifies the confirmed demand, interest and penalty.

6. Heard both sides and perused the documents.

7. Admittedly the Appellant has filed the option letter belated by opting to reverse proportionate Cenvat on common inputs used. During the period under consideration, the Tribunals have been taking a liberal view that on account of the mistake of non-filing of the option letter which is only a procedural condition, the assessee should not be made to suffer by making huge payments in terms of 5%/6% of the value of the exempted services. In the case of Mercedes Benz India (P) Ltd. Vs. CCE-Pune, 2015 (40) STR 381 (Tri.-Mum.), Mumbai Tribunal has held as under:-

> *5.4 <u>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. [emphasis supplied]</u>*

8. The CESTAT, Hyderabad in the case of Aster Pvt. Ltd. Vs. CCE-Hyd-III, 2016 (43) STR 411 (Tri.-Hyd.) has held as under:-

> *5.xxxxxxxx*
>
> *The above Rule 6(3A) states that while exercising the option, the manufacturer of goods or the provider of output service shall intimate in writing the department regarding the option exercised. <u>In the present case, admittedly there is no intimation given by the appellant informing his exercise of option. The contention 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 calculated under the first option. I am afraid I cannot endorse this contention. The said rule does not say that on failure to intimate, the manufacturer/service provider would lose his choice to avail second option of reversing the proportionate credit. Rule 6(3A), as seen expressly stated is nothing but a procedure contemplated for application of Rule 6(3). Therefore, the argument of the Revenue that the requirement to intimate the department about the option exercised, is mandatory and that on failure, the appellant has no other option but to accept and comply Rule 6(3)(i) and make payment of 5%/10% of sale price of exempted goods/value of exempted services is not acceptable or convincing.</u> The Rule does not lay down any such restriction. The procedure and conditions laid in Rule 6(3A) is intended to make Rule 6(3) workable and not to take away the option available to the assessee. <u>In any case, at no stretch of imagination can it be said that on failure to intimate the department, Rule 6(3)(i) would automatically come into application. [emphasis supplied]</u>*

9. In the case of Cranes & Structural Engineers, V. CCE-Bangalore-I, 2017 (347) E. L. T. 112 (Tri.-Bang.), Bangalore Tribunal has held as under:-

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. [emphasis supplied]

10. From the above decisions of the Tribunals, it is seen that even prior to Rule 6 (3AA) coming into effect from 01/4/2016, they have been taking the view that mere non filing of the option letter should not be used to deprive the assesssee from reversing the proportionate Cenvat Credit. The very fact that the Rule 6 (3AA) has been brought into effect from 1/04/2016 wherein the Adjudicating Authority is empowered to allow the assesse to reverse the Cenvat on proportionate basis on being pointed out, shows the legislative intent to allow the assessee to pay proportionate Cenvat Credit as the first option.

11. Relying on the cited case law, I hold that the demand confirmed for Rs.2,52,853/- in terms of Rule 6(3)(i), i.e. on 5%/6% of value of exempted goods is not sustainable and the same is set aside.

12. The Appellant has correctly reversed Rs.14,847/- along with interest of Rs.1796/- on proportionate reversal basis, in terms of Rule 6(3A). The interest paid by them is not disputed by the Revenue. These two amounts are allowed to be appropriated by the Revenue.

13. The balance demand of Rs.2,38,006 /- along with interest thereon and entire penalty of Rs.2,52,853 /- is set aside.

14. In respect of Rs.14,847/- paid along with interest, as same has been paid immediately on being pointed out, the penalty of Rs. 14,847/- is set aside.

12. The Appeal is disposed of thus.

(Operative part of the order was pronounced in the open Court.)

Sd/-

(R. Muralidhar)
Member (Judicial)

Pooja