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

REGIONAL BENCH – COURT NO.2

Excise Appeal No. 516 of 2010

(Arising out of Order-in-Original No. 23/COMMR/DENOVO/CE/KOL-V/ADJN/10 dated 31.03.2010 passed by Commissioner of Central Excise, Kolkata.)

M/s BOC India Limited,
(48/1, Diamond Harbour Road, Kolkata-700027.)

...Appellant

VERSUS

Commissioner of Central Excise, Kolkata-V,
(180, Shantipally, Rajdanga Main Road, Kolkata-700107)

.. ...**Respondent**

APPERANCE :

Shri Ankit Kanodia & Ms. Megha Agarwal, Advocates for the Appellant
Shri S. K. Jha, Authorized Representative for the Respondent

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

FINAL ORDER No...76655/2025

DATE OF HEARING : 17.06.2025
DATE OF DECISION : 17.06.2025

Per R. Muralidhar :

The appellant was issued a Show Cause Notice on 2.11.2007 demanding the duty for the period October 2002 to March 2007. The Revenue raised the issue that the appellant was not maintaining separate accounts for the CENVAT Credit taken for the dutiable and exempted goods. Accordingly, the demand was made, asking the appellant to pay the duty to the extent of 6% / 8% percent of the exempted goods.

2. After due process, the adjudicating authority confirmed the demand and the matter was agitated by the appellant before the Tribunal. During the first round of appeal before the Tribunal, the

appellant argued that they should be allowed to reverse the CENVAT Credit on proportionate basis and the same has not been considered by the adjudicating authority. Considering the same, the Tribunal remanded the matter for denovo adjudication by the adjudicating authority.

3. In the denovo adjudication by the impugned order, the adjudicating authority has confirmed the entire demand. Being agitated, the appellant is before the Tribunal.

4. The Learned counsel appearing on behalf of the appellant submits that in case of the same appellant, one earlier proceeding had come up before the CESTAT for the period April, 1997 to March, 2002. In the earlier proceedings, the extended period provisions were invoked and the matter had reached the Tribunal. This Bench vide Final Order No. A-298/KOL/2008, dated 25.02.2008 held that the appellant was not required to pay 6% / 8% of the value of the exempted goods. The reversal of CENVAT Credit on a proportionate basis would be sufficient. The Learned counsel submits that no further appeal was filed by the Revenue against this order and hence the same has reached finality. He submits that this being so, the Revenue was in error in invoking the extended period provisions once again in the present proceedings. Therefore, he takes the stand that the confirmed demand for the extended period is required to be set aside on account of the time bar.

5. In the present case, on an earlier occasion, that Bench had directed the appellant to approach the Commissioner and reconcile the cenvat payable to get the correct quantification of the amount to be reversed. The Appellant has filed an Affidavit today to the effect that they are not in position to get hold of ER-1 for the period 2002 to 2007. They submit that they are agreeable to reverse the CENVAT Credit on proportionate basis for the period 2006-07, as per the quantification shown in Para 20 of the denovo Order-in-Original.

6. The Learned AR submits that as per the directions given earlier the Commissioner is awaiting the response of the appellant for verification and quantification. The appellants were not in a position to get hold of the same.

7. Heard both sides perused the appeal papers and the submissions made by both the sides and the Affidavit filed by the appellant.

8. We find that in respect of the appellant, on identical issue for the earlier period 1997 to 2002, the same stands decided by the Tribunal vide **Final Order No. A-298/KOL/2008 dated 25.02.2008,** wherein it is held as under:

> "The Appellant states that in its own case this Hon'ble CESTAT in Final Order No. A-298/KOL/2008, dated 25-2-2008 in Appeal No. E/EDM-462/2004 and C.O. No. 136/2004 has held as-
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> "Heard both sides. The appellants manufactured liquid oxygen. They also procured oxygen in case of shortage from the sister unit on payment of duty and they took credit thereof. Both manufactured'

and 'procured' oxygen, are stored in a common tank from which the same is supplied duty free to M/s. IISCO and to hospitals and are also cleared to industrial consumers on payment of duty. There is no dispute that in respect of the duty free supply, the appellants were required to reverse credit in case the supplies are relatable to procured oxygen in respect of which credit has been taken. The appellants have adopted a calculation under which the entire supplies to the steel plant and the hospitals are shown to be from their own production and only for the supply in excess of such production, they have reversed the credit. The demand confirmed under the impugned order goes to the other extreme and holds that the entire procured quantity has been supplied duty free and hence the demand has been made for reversal of the entire credit taken.

2. In view of the fact that the appellants have been permitted to keep oxygen obtained from both the sources in common tank as a measure of facilitation, removal from the common tank has to be considered applying any acceptable accounting principle applicable to inventory management. Shri Sudip Bhattacharyay, Manager of the appellant-Companies, appearing for the appellants, states that the Company applies the principle of first-in first-out in respect of common inventories. As first-in first-out is an acceptable accounting principle, we are of the view that the same should be applied for the purposes of quantification of the credit to be reversed by the appellants. As such, we set aside the impugned order and remand the matter to the original authority for redetermining the duty amount which would be required to be reversed applying the principle of first-in first-out for the relevant period. The original authority shall give an adequate opportunity of hearing to the appellants before passing a fresh order and it will be open to the appellants to raise the grounds of time-bar before him."

9. There is nothing to indicate that the order has been overturned at the higher forum. Therefore, we also hold that even in the present case 6% / 8% duty demand on the exempted goods turnover does not

legally sustain. On this ground we set aside the confirmed demand on merits.

10. On account of the earlier proceedings against the appellant, we find force in the argument of the appellant that the Revenue could not have issued the present show-cause notice by invoking the extended period provisions. In the case of **Nizam Sugar Factory Vs. Collector of Central Excise, A. P.-(2006(197) E.L.T. 465 (S.C.)**, the Apex Court held as under:

> *"9. Allegation of suppression of facts against the appellant cannot be sustained. When the first SCN was issued all the relevant facts were in the knowledge of the authorities. Later on, while issuing the second and third show cause notices the same/similar facts could not be taken as suppression of facts on the part of the assessee as these facts were already in the knowledge of the authorities. We agree with the view taken in the aforesaid judgments and respectfully following the same, hold that there was no suppression of facts on the part of the assessee/appellant.*
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> *10. For the reasons stated above, Civil Appeal Nos. 2747 of 2001 and Civil Appeal No. 6261 of 2003 filed by the assessees are accepted and the impugned orders are set aside on the question of limitation only. The demands raised against them as well as the penalty, if any, are dropped. Civil Appeals Special Leave Petition (C) Nos. 9271-9278 of 2003 filed by the department are dismissed. Questions of classification and marketability are left open. Parties shall bear their own costs."*

11. Accordingly, we hold that the confirmed demand for the extended period cannot be legally sustained. Accordingly, we set aside the same.

12. The Learned counsel has submitted that in the present case, only six months would form part of the normal period. On going through the impugned OIO, we find that the appellant was required to pay Rs.2,89,499/- for the period 2006-07 as per the quantification on proportionate basis shown at para 20 of the OIO.

13. It would be very difficult at this juncture to arrive at the exact amount to be reversed for the six-month's period. We have directed the appellant to pay the entire amount of Rs.2,89,499/- (which is on proportionate reversal basis) along with interest so as to close the issue in this case. The Ld. Counsel has agreed to do so.

14. Considering the factual details, the statutory provisions and the appellant's willingness to pay the entire amount of Rs.2,89,499/- for 2006-07, we set aside the penalty imposed on the appellant.

15. The appeal stands disposed of thus.

(Dictated and pronounced in the open court)

Sd/-
(R. Muralidhar)
Member (Judicial)

Sd/-
(Rajeev Tandon)
Member (Technical)

Tushar Kr.