

**IN THE CUSTOMS, EXCISE AND SERVICE TAX
APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI**

**APPEAL NO: E/579/2009
CROSS-OBJECTION NO: E/CO-48/2009**

[Arising out of Order-in-Original Appeal No: 43-49/SLM (43 to 49)
COMMR/RGD/08-09 dated 30th January 2009 passed by the
Commissioner of Central Excise, Customs & Service Tax, Raigad.]

For approval and signature:

**Hon'ble Shri C J Mathew, Member (Technical)
Hon'ble Shri Ajay Sharma, Member (Judicial)**

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| 1. Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982? | : Yes |
| 2. Whether it should be released under Rule 27 of CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not? | : Yes |
| 3. Whether Their Lordships wish to see the fair copy of the Order? | : Seen |
| 4. Whether Order is to be circulated to the Departmental authorities? | : Yes |
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Commissioner of Central Excise, Customs & Service Tax
Raigad *... Appellant*

versus

Gas Authority of India Ltd *...Respondent*

Appearance:

Shri Hitesh Shah, Commissioner (AR) for appellant

Shri Sanjay Dwivedi, Advocate for respondent

CORAM:

Hon'ble Shri C J Mathew, Member (Technical)
Hon'ble Shri Ajay Sharma, Member (Judicial)

Date of hearing: 29/08/2018
Date of decision: 20/12/2018

ORDER NO: A/88159 / 2018

Per: C J Mathew

Revenue is aggrieved by what it perceives to be the lack of legality and propriety in order-in-original no. 43-49/SLM (43 to 49) COMMR/RGD/08-09 dated 30th January 2009 of Commissioner of Central Excise, Customs & Service Tax, Raigad in dropping of demands in seven show cause notices by erroneously placing reliance on the decision of the Hon'ble Supreme Court in civil appeal no. 1822-1823 of 2002 dated 13th November 2007 in their own matter and the entitlement to the entirety of CENVAT credit on inputs that were used in manufacturing even though waste or by-product emerged in the production process.

2. The seven show cause notices for September 1998 and covering the period from October 2001 to August 2004 invoked rule 6 of CENVAT Credit Rules, 2002 (and the erstwhile rule 57CC of Central Excise Rules, 1944) to enforce remittance of ₹ 55,44,35,386 on the value of clearances of 'lean gas' manufactured by M/s Gas Authority of India Ltd along with 'liquefied petroleum gas', extracted from 'rich

natural gas' and exempted from duty in terms of notification no. 3/2001-CE dated 1st March 2001 (at serial no. 27), by using common inputs, such as molecular sieves, methanol oil etc., on which CENVAT credit had been availed. The entire demand was based on the emergence of exempted output as one of the two final products of the process.

3. According to Learned Authorised Representative, the grounds of appeal make it abundantly clear that the impugned proceedings, based on the emergence of the exempted product cleared by the respondent, should have succeeded as the obligation of the respondent to maintain separate accounts of the utilisation of inputs in the exempted product was not fulfilled. It is his contention that, instead of doing so, the adjudicating authority accorded credence to the claim of the assessee that the issue had been settled by the decision of the Hon'ble Supreme Court in *Commissioner of Central Excise v. Gas Authority of India Ltd* [2008 (232) ELT 7 (SC)] without ascertaining whether 'lean gas' was a final product. It was pointed out that, in the said decision, the appeal of Revenue was dismissed on the ground that the show cause notice failed to designate the disputed goods as final product which, in the event of exemption of duties and availment of CENVAT credit on inputs, was liable to the amount specified in rule 57CC of Central Excise Rules, 1944 or rule 6 of CENVAT Credit Rules, 2002; he asserts that such *lacuna* as pointed out by the Hon'ble Supreme Court is not attracted in the present notices except for the

demand pertaining to September 1998. Relying upon the decision of the Tribunal in *ONGC v. Commissioner of Central Excise [1989 (42) ELT 420 (T)]*, he submits that 'lean gas' was held to be manufactured exciseable goods. Referring to the memorandum of cross-objections filed by the assessee, he asserted the right of Revenue to take a contrarian position *vis-à-vis* the decision of the first appellate authority that had not been appealed against for any reason whatsoever.

4. Learned Counsel for respondent questioned the propriety of this challenge by Revenue despite approval of the Hon'ble Supreme Court to the setting aside of demands for an earlier period and acceptance of their contention by the same adjudicating authority for subsequent period.

5. It is apparent from the impugned order that the original authority has not applied its mind to ascertain if the 'lean gas' was to be treated as final product and from which the consequences proposed in the show cause notice would follow. He was satisfied that the decision of the Hon'ble Supreme Court was so entirely in favour of the respondent that there was no cause to examine the applicability of circular no. B-4/7/2000-TRU dated 3 April 2000 in which Central Board of Excise & Customs has negated the scope for invoking exclusion from eligibility for CENVAT credit merely because the inputs had been utilised in waste or by-products. As a consequence,

the nature of the exempted 'lean gas' has not been dealt with even though covered by the show cause notices. In *re Gas Authority of India Ltd*, the Hon'ble Supreme Court had affirmed the decision of the Tribunal thus

'5. Therefore, the short question which arises for determination before this Court is whether Lean Gas was a by-product or a final product. If it is a by-product then the assessee would be entitled to the benefit of Rule 57D. On the other hand, if Lean Gas is a final product, then the assessee would not be entitled to the benefit of Rule 57D in view of the provisions of Rule 57CC as it refers to set off/adjustment of duty payable.

6. We are not required to examine the above issue for the simple reason that on the facts of the present case, as can be seen from the extract quoted from the show cause notice, which is the foundation of the Demand made by the Department, Lean Gas is a by-product which emerges when LPG is extracted from natural gas. If the case of the Department itself in the show cause notice was that Lean Gas is a by-product, then we fail to understand as to the basis for denying the benefit of Modvat credit to the assessee during the relevant period (October 1998 to January 1999) under Rule 57D.

7. As repeatedly held by this Court, show cause notice is the foundation of the Demand under Central Excise Act and if the show cause notice in the present case itself proceeds on the basis that the product in question is a by-product and not a final product, then, in that event, we need not answer the larger question of law framed hereinabove. On this short point, we are in agreement with the view expressed by the Tribunal that nowhere in the show cause notice it has been

alleged by the Department that Lean Gas is a final product. Ultimately, an assessee is required to reply to the show cause notice and if the allegation proceeds on the basis that Lean Gas is a by-product, then there is no question of the assessee disputing that statement made in the show cause notice.

8. We express no opinion on the merits of the question framed hereinabove. We are dismissing these appeals only on the facts of the present case and only on the ground that there is no allegation made in the show cause notice that Lean Gas is the final product.'

6. As the show cause notices in the impugned proceedings, except for the one pertaining to September 1998, had sought to invoke the demands by disputing the claim of the assessee that 'lean gas' is a by-product, it was incumbent upon the original authority to examine that as a prerequisite for determination of liability. Having failed to do so, we are not in a position to examine the validity of the claim of central excise authorities that liability should be confirmed. To rectify that lack, the matter would need to be decided afresh.

7. Accordingly, we set aside the impugned order and direct the original authority to examine the scope of the applicability of the exclusion from rule 6 of CENVAT Credit Rules, 2002 on the 'lean gas' claimed to be a by-product in the manufacturing process of the respondent. Cross objection is also disposed off.

(Pronounced in Court on 20/12/2018)

(Ajay Sharma)
Member (Judicial)

**/as22101212*

(C J Mathew)
Member (Technical)