CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

WEST ZONAL BENCH, MUMBAI

Service Tax Appeal No. E/87890 of 2018.

(Arising out of Order-in-Appeal No. SK/GST (Audit-II)MUM/55/Appeals/Raigad/2018 dated 05-03-2018 passed by Commissioner (Appeals) of CGST &CX (Audit-II), Centre-1, Mumbai-400005.)

CHEMBOND CHEMICALS LTD. ....Appellant
EL-71 Mahape MIDC,
Navi Mumbai
Maharashtra-400710.

VERSUS

Commissioner of C.G.ST.-BELAPUR ....Respondent
CGO Complex, 10, CBD Belapur,
Navi Mumbai-400614.

APPERANCE:

Shri R.M. Patkar, Consultant for the Appellant

Shri Anil Choudhary, Dy. Commissioner, Authorised Representatives for the Respondent

CORAM: HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

FINAL ORDER NO. A/86139/2019

Date of Hearing: 21-02-2019
Date of Decision: 20-06-2019

PER: DR. SUVENDU KUMAR PATI

Confirmation of duty demand in part along with applicable interest and equipment penalty for non-reversal of proportionate cenvat credit taken against Baddi factory at Himachal Pradesh, enjoying area based exemption is assailed by the Appellant as an Input Service Distributer (ISD).

2. Facts of the case, in a nutshell, is that Appellant is a manufacturer and service provider having units at different locations including factory at Baddi where area based exemption on manufacturing was applicable during the relevant period 2009-10 and 2010-11. CERA Audit Reported that Rule 6(3) of the Cenvat Credit Rules 2004 was not followed as exempted goods were manufactured in Baddi factory. It also found that Appellant as Input Service Distributor (ISD) had availed and Distributed Service Tax of ₹ 108.24 lacs in 2009 and basing on its calculation for 2010-11, CERA Auditor had observed that cenvat credit of ₹ 11.69 lacs calculated on pro-rata basis was recoverable from the Appellant for non-maintenance of separate accounts for input service and for exempted product manufactured at Baddi plant. Appellant was put to show cause, matter was adjudicated upon and duty demand along with interest, equivalent penalty were confirmed against which Appellant preferred appeal

before the Commissioner who re-quantified the duty demand as ₹ 26.32 lacs and confirmed interest as well as penalty of 6.32 lakhs u/s 78 and also confirmed penalty of ₹ 5000/- u/s 77. Appellant is before this Tribunal challenging legality of the said order.

3. In the Memo of appeal and during course of hearing of appeal, Learned Counsel Shri R.M. Patkar for the Appellant submitted that Appellant had not provided any exempted service and reversed Cenvat Credit in proportion to turnover of their dutiable goods and exempted goods manufactured at their Baddi factory. Placing the calculation sheet found the show cause notice, referred by the adjudicating authority and also re-calculated by the Commissioner (Appeals), he calculated pro-rata cenvat credit at ₹ 4.70 lakhs which was liable to be reversed, out of which ₹ 1,69,157/- along with interest was paid before issue of show cause and ₹ 3,00,843/- was paid before passing the Order-In-Original and fact of such payment is referred in the OIA. He further submitted that despite the fact that Rule 6(5) of CCR 2004 begins with non-obstante clause where credit in respect of 17 services which were admissible for both dutiable goods and exempted goods were not taken into consideration by the lower authorities while confirming the duty demand etc. for which he pray to set aside the order passed by the Commissioner (Appeals). He placed his reliance on the case laws of the *Commissioner of Central Excise, Belapur (Appeal Nos. e/86863 and 88794/13) v. Elder Pharmaceuticals Ltd., Dabur India Ltd. = 2017-TIOL-3082-CESTAT-DEL, ITC LTD = 2018-TIOL-2218-CESTAT-MAD*. to substantiate his stand.

4. In response to such submissions, Learned Authorised Representative for Respondent department Shri Anil Choudhary, Dy. Commissioner argued with reference to the reasoning and rationality found in the order of the Commissioner (Appeals) and submitted that after duty calculation made in tabular form in Order-In-Appeal itself, the Commissioner had reduced the amount to ₹ 6.32 lakhs and justified inapplicability of Rule 6(5) CCR 2004 to ISD, as the same is meant for manufacturer/service provider for which he sought for no interference by the Tribunal in the order passed by the Commissioner (Appeals).

5. Heard from both sides at length on the other day and perused case record as well as relevant provision contained in Rule 6(5) and judicial decisions referred by the Appellant. Admittedly erstwhile Rule 6(5) started with notwithstanding the provision contained in sub rule (1), (2) & (3). So, while allowing credit of whole service tax paid on sub-clause (g), (p), (q), (r), (v), (w), (za), (zm), (zp), (zy), (zzd), (zzh), (zzi), (zza), (zzq) & (zzr) of clause 105 of section 65 of the Finance Act, unless such services were used exclusively in or any relation to the manufacture of exempted goods or providing exempted services, sub rule (1) to (3) were not tobe applied. The Commissioner (Appeals) also referred the said provision and given his finding that service tax paid on those services could be fully allowed irrespective of facts that no separate records were maintained for manufacturing exempted goods or providing exempted services. There was only one

condition that such services should not be used exclusively for manufacturing of exempted goods or providing exempted services. However, the Commissioner Appeals found applicability of Rule 6(5) to the appellant's case on the ground that same provision was meant formanufacturer or provider of output service and not for an ISD, on the ground that ISD is covered by Rule-7 of CCR 2004 for which Rule 6(5) is not applicable to it. But a cursory reading of Rule 6 would reveal that it deals with admissibility and non-admissibility of cenvat credit on input used <u>in or in relation to the manufacture of exempted goods or for provision of exempted service or input service</u> and it does not deal with manufacturer or service provider. As has been interpreted in several decisions "in or in relation to" is a broader concept which encompasses the entire manufacturing process or provision of services and it has not excluded input service provider (ISD) from its purview since Rule 7 also states that ISD would distribute cenvat credit in respect of service tax paid on the input service to its manufacturing units or units providing output service or outsource manufacturing units. This being the dictate of statute and ISD arrangement being designed to distribute cenvat credit to manufacturing and service providing units, I am of the considered view that Rule 6(5), as was existing during the relevant period, is applicable to the appellant and the benefit of the same was not extended to the appellant. Further there are three contradictory calculation sheets given in the show cause and by the lower authorities which is required to be reassessed on the basis of available records. Therefore, I find it a fit case which requires re-adjudication in terms of the above findings.

Moreover, when assessment varies in the Auditor Report and in the findings of the adjudication authority as well as the Commissioner (Appeals) vis a vis applicability and non-applicability of erstwhile Rule 6(5) of CCR 2004, penalty for such wrong interpretation of statute would not sustain. Hence the order.

ORDER

6. The appeal is allowed by way of remand to the Commissioner (Appeals) for re-assessment of duty liability only, in terms of the observation made above. The appellant is duty bound to appear and participate in the re-quantification of duty demand process.

(Order pronounced in the Court on 20-06-2019)

(DR. SUVENDU KUMAR PATI)
MEMBER (JUDICIAL)

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