CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

EXCISE APPEAL NO: 85646 of 2015

[Arising out of Order-in-Original No: PUN-EXCUS-004-COM-002-14-15 dated 26th November 2014 passed by the Commissioner of Central Excise & Service Tax, Pune – IV.]

Commissioner of Central Excise … ***Appellant***
Pune – IV
41-A, ICE House, Sasoon Road, Opp: Wadia College
Pune – 411 001

versus

LG Electronics India Pvt Ltd ***…Respondent***
Plot No. A-5, MIDC, Ranjangaon, Tal.Shirur
Dist: Pune – 412 220

APPEARANCE:

Shri Bidhan Chandra, Additional Commissioner (AR) for the appellant

Shri V Sridharan, Senior Advocate with Shri Rajesh Ostwal, Advocate for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE DR SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

FINAL ORDER NO: A/86494 / 2019

DATE OF HEARING: 25/04/2019
DATE OF DECISION: 29/08/2019

PER: C J MATHEW

Revenue, aggrieved by the dropping of two demands under rule 6 of CENVAT Credit Rules, 2004 of ₹ 85,01,68,516 on the clearance of 'GSM mobile handset phones' between February 2006 and September 2009 and ₹ 72,26,28,318 for clearance between October 2009 and February 2011, is in appeal against order-in-original no. PUN-EXCUS-004-COM-002-14-15 dated 26th November 2014 of Commissioner of Central Excise & Service Tax, Pune – IV.

2. Briefly, the respondent herein, M/s LG Electronics India Pvt Ltd, cleared the mobile handsets which was exempt from duty of Central Excise with effect from 1st March 2006 *vide* notification no. 6/2006-CE (serial no. 28) with duty liability of 1% reimposed *vide* notification no. 1/2011-CE dated 1st March 2011 (serial no. 100). According to central excise authorities, for the period of exemption from duty, the procurement of common input service for the manufacture and clearance of excisable goods as well as the exempt 'mobile handsets' without maintaining separate accounts mandated the discharge of appropriate liability under rule 6 of CENVAT Credit Rules, 2004, despite the claim of respondent that the goods were subject to National Contingent Calamity Duty after 1st March 2008. Discarding the proposition, the original authority held that the levy of National Contingent Calamity Duty as duty of excise sufficed to exclude the goods from the definition of 'exempted goods' in rule 2(d) of CENVAT Credit Rules, 2004.

3. Drawing attention to the grounds of appeal, Learned Authorised Representative submits that, for qualifying as excisable goods in the

said definition, is limited to the duties prescribed in the First or Second Schedule to Central Excise Tariff Act, 1985 and, the expression 'duty of excise' in rule 2(d) of CENVAT Credit Rules, 2004 being in the singular, is not to be construed as a levy collected under any of the statute. Pointing out the inconsistency of approach on the part of the original authority by dropping of the demand for the period when National Contingent Calamity Duty was also not leviable, Learned Authorised Representative sought reversal thereof. Reliance was placed on the decision of the Tribunal in *Mahindra & Mahindra Ltd v. Commissioner of Central Excise, Mumbai [2007 (211) ELT 481 (Tri.-Mumbai)]* and in *Oil & Natural Gas Corporation Ltd v. Commissioner of Central Excise, Raigad [2013 (31) STR 214 (Tri.-Mumbai)]* which have held that the discharge of any liability other than that of basic excise duty would not exclude it from the ambit of exempted goods. Attention was also drawn to the decision of the Hon'ble High Court of Gujarat in *Hero MotoCorp Ltd v. Commissioner of Central Excise, Dehradun [2018 (14) GSTL 200 (Uttarakhand)]* which held that

> *'41. The other way to look at it is that since the words "duty of excise" are capable of comprehending all duties of excise and since the NCCD and the cesses are surcharges, which are treated as "duties of excise", it would also fall within the expression "duty of excise" within the meaning of Rule 2(d) defining "exempted goods" and Rule 6, and since there is no exemption in respect of these imposts, there is no obstacle in the appellant's claiming the benefit of Cenvat credit.*

42. There can be no doubt that the expression "duty of excise" contained in Rule 3(1)(vii) would be the aggregate of the duties, which are mentioned in various clauses and in the said sense, it could be treated as a case of singular including the plural. When it comes to Rule 3(2) of the Cenvat Credit Rules, 2004, apparently, the intention is that having regard to the principle, which is self-evident in Rule 6 of the Cenvat Credit Rules, namely, the non-availability of Cenvat credit on inputs when final goods are exempted, the rule-maker intended that a manufacturer is entitled to Cenvat credit on the duty paid on the goods, which are lying in stock or in process or inputs contained in the final products lying in stock, when the shadow cast over the claim for the Cenvat credit in the form of an exemption is lifted, inter alia. We are not concerned with the clause, which also likewise applies when the goods become excisable otherwise.

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46. In our view, Rule 6 is intended to cover cases, where the main duty, which is the basic excise duty, is exempted. We are of the view that when Rule-maker made the Cenvat Credit Rules, it had before it the understanding of the phrase "the duty of excise" in terms of the judgment of the Hon'ble Apex Court in Modi Rubber case. Furthermore, the expression "whole of the duty" is appropriately traced to the provisions contained in Section 5A of the Act, which, as we notice, enabled the Authority to grant exemption from the "whole of the duty" or exemption, which is partial in nature. It is this concept, which is seen embedded in Rule 6 read with Rule 2(d) of the Cenvat Credit Rules. The substantial duty invariably will be the basic excise duty. NCCD and other cesses are essentially surcharges, calculated as percentage of the duty. Apparently, the intention was that when the final product is exempted from the payment of the substantial part *of the aggregate of the levies in a case where apart from the excise duty, there are surcharges, as NCCD and cesses in this case, then when the assessee opts for the benefit of the exemption from the duty under Section 3, then it would not also, at the same time, claim further benefit by way of Cenvat credit. It is to be noticed that there is no case for the appellant that the appellant did not exercise his option in the matter of claiming benefit of Notification No. 50 of 2003. We would think that though, no doubt, Modi Rubber was rendered in the context of Excise Rules and it was not rendered in the scenario of the Cenvat credit, having regard to the language used in Rule 6 read with Rule 2(d) in conjunction with the language used in Section 5A of the Act, the conclusion would be that when there is exemption from the whole of the duty under Section 3 of the Act, the goods would be treated as exempted goods within the meaning of Section 2(d) of the Rules. As far as the case based on Rule 19 of the Central Excise Rules and the Circulars, which have been issued with reference to the same, whereunder NCCD, inter alia, has been treated as the duty of excise for the purpose of Rule 19, is concerned, we do not think that the principle on the basis of which, for the purpose of Rule 19, NCCD has been treated as the duty of excise, will assist the appellants when we are called upon to interpret the provisions of Rule 6 read with Rule 2(d) of the Cenvat Rules. We would think that the context and the purport of Rule 19 is different from setting of Rule 2(d) and Rule 6 of the Cenvat Rules, which we have already discussed. This would necessarily result in the appellant becoming disentitled from claiming of Cenvat credit consisting of basic excise duty paid on inputs for payment of NCCD and other cesses.'*

and of the Hon'ble Supreme Court in *Bajaj Auto Ltd v. Union of India & Ors [2019-TIOL-127-SC-CX]* holding that

'18. On the other hand, on behalf of the Department, Ms. Nisha Bagchi, Advocate sought to contend otherwise by seeking to point out the difference in the nature of incidence, since NCCD was to be calculated on the value of the product and not on the value of the excise duty payable.

19. We may note that in terms of the impugned judgment, one principle which clearly emerges, and over which there is no dispute before us, also, is that exemption notifications, like the one in question must be read in a manner that give them a liberal interpretation, provided that no violence is done to the language employed. The rationale for the same is well enunciated in Novopan India Ltd., Hyderabad v. CCE and Customs, Hyderabad,5 apart from in other judicial pronouncements.

In such cases, it is not as if the principle of strict interpretation of tax law has been given a complete go by, but that rule of interpretation would apply at a different stage, i.e., to determine whether the exemption is applicable to the assessee or not. Once such exemption is indeed found to be applicable to the assessee in question, a liberal approach is to be adopted by the Court in construing the language, such as to allow the benefit to be reaped by the beneficiary in question (Union of India v. Wood Papers Ltd.6).

20. We may notice that the primary reasoning contained in the impugned order is common for the three cesses, i.e., NCCD; Education Cess and Secondary & Higher Education Cess. These were in the nature of surcharges levied in other Acts, which have not been specifically excluded under the Notification in question. That reasoning does not prevail, more so because of the judgment in SRD Nutrients Pvt. Ltd.7 The question, thus, is whether, even though the NCCD is in the nature of an excise duty, its incidence being on the *product, rather than on the value of the excise duty, that itself would make any difference to the applicability of the NCCD to excise exempt units.*

21. On a proper appreciation of the judicial pronouncement in SRD Nutrients Pvt. Ltd.,8 we are not inclined to take a different view from the one taken for Education Cess and Secondary & Higher Education Cess, even while considering the issue of NCCD.

22. We may notice that this Court, in SRD Nutrients Pvt. Ltd.9 gave its imprimatur to the view expressed by the Rajasthan High Court in Banswara Syntex Ltd.10 The rationale is that while there may be surcharges under different financial enactments to provide the Government with revenue for specified purposes, the same have been notified as leviable in the nature of a particular kind of duty. In the case of NCCD, it is in the nature of an excise duty. It has to bear the same character as those respective taxes to which the surcharge is appended. NCCD will not cease to be an excise duty, but is the same as an excise duty, even if it is levied on the product.

Thus, when NCCD, at the time of collection, takes the character of a duty on the product, whatever may be the rationale behind it, it is also subject to the provisions relating to excise duty, applicable to it in the manner of collection as well as the obligation of the taxpayer to discharge the duty. Once the excise duty is exempted, NCCD, levied as an excise duty cannot partake a different character and, thus, would be entitled to the benefit of the exemption notification. The exemption notification also states that the exemption is from the "whole of the duty of excise or additional duty of excise." We may also note that the exemption itself is for a period of ten years from the date of commercial production of the unit.'

4. Learned Counsel for the respondent contends that even if the impugned goods are construed as exempted, the alternate plea of proportionate reversal of credit erasing the applicability of rule 6 of CENVAT Credit Rules, 2004 should stultify the appeal. Reliance has been placed on the decision of the Tribunal in *Hindustan Antibiotics Ltd v. Commissioner of Central Excise, Pune [2016 (42) STR 387 (T)* and *DBC Port Logistics Ltd v. Commissioner of Central Excise, Raigad [2017 (48) STR 494 (T)]* besides the decision of the Hon'ble High Court of Gujarat in *Commissioner of Central Excise v. Maan Pharmaceuticals Ltd [2011 (263) ELT 661 (Guj.)]*, of the Hon'ble High Court of Karnataka in *Commissioner of Central Excise, Bangalore v. Himalaya Drug Company [2011-TIOL-245-HC-KAR-CX]* and of the Hon'ble Supreme Court in *Chandrapur Magnet Wires (P) Ltd v. Collector of Central Excise, Nagpur [1996 (81) ELT 3 (SC)]*. In addition, the show cause notice dated 2nd November 2012 for demand beyond the normal period of limitation is alleged to be bereft of any evidence of the ingredients that would justify the invoking of the extended period and hence requires setting aside. It was also contended that the plea for leviability under rule 6(3) of CENVAT Credit Rules, 2004, for period prior to the imposition of National Calamity Contingent Duty has ignored rule 6(7) therein which is intended to operate retrospectively. It was also contended that rule 6(2) of CENVAT Credit Rules, 2004 prescribes the maintenance of separate account only for 'inputs' and not for 'input

services' during the relevant period of time. It is, therefore, contended that for the period prior to March 2008, respondent had been compliant with rule 6 of the CENVAT Credit Rules, 2004. For the period thereafter, reference was invited to section 136 of Finance Act, 2001 to evince clear linkage with duty of central excise and, therefore, not open for contention by Revenue that goods continue to be exempted. It is submitted that circular no. 641/32/2002-CX dated 26th June 2002 of Central Board of Excise & Customs accords parity to the duty discharged by them with duties of excise in dealing with exports. Reliance was also placed on the decision of the Hon'ble High Court of Supreme Court in *Barnagore Jute Factory Co v. Inspector of Central Excise [1992 (57) ELT 3 (SC)]* and of the Larger Bench of the Tribunal in *TTK-LIG Ltd v. Commissioner of Customs, Chennai/New Delhi [2006 (193) ELT 169 (T-LB)]* to support the contention that levy of any cess or other duties is not different from levy of duties of central excise.

5. Having heard both sides and perused the records, the first issue to be decided is whether the discharge of National Calamity Contingent Duty with cess thereon suffices for the purpose of exclusion from the ambit of rule 2(d) of CENVAT Credit Rules, 2004 which defines

> *'2(d) "exempted goods" means excisable goods which are exempt from the whole of the duty of excise leviable thereon,*

and includes goods which are chargeable to "Nil" rate of duty;'

It is pertinent to note that 'GSM mobile handsets' are excisable and, therefore, discharge of any liability of duty of excise would suffice for eligibility to CENVAT credit of duty paid on inputs used in the manufacture thereof. The expression 'duty of excise' deployed therein has not been defined in rule 2 of CENVAT Credit Rules, 2004 and, as per rule 2(t),

'words and expressions used in these rules and not defined but defined in the Excise Act or the Finance Act shall have the meanings respectively assigned to them in those Acts. '

There is no definition of duty in Central Excise Act, 1944 but the entire objective of Central Excise Act, 1944 is embodied in

'Section 3. Duties specified in First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985 to be levied. -

(1) There shall be levied and collected in such manner as may be prescribed a duty of excise to be called the Central Value Added Tax (CENVAT) on all excisable goods (excluding goods produced or manufactured in special economic zones) which are produced or manufactured in India as, and at the rates, set forth in the Fourth Schedule : .....'

The absence of levy of any duty other than CENVAT in Central Excise Act, 1944 is unambiguous and it is only the empowerment of section 136 of Finance Act of 2001 that imposes this levy. It would, therefore, appear that the duty of excise referred to rule 2(t) is limited to the duty leviable under Central Excise Act, 1944 except where the CENVAT Credit Rules, 2004 prescribes otherwise.

6. This is made further apparent in rule 3 of CENVAT Credit Rules, 2004 which, while allowing availment of credit of National Calamity Contingent Duty, restricts its utilization in accordance with fifth *proviso* in rule 3(4) of CENVAT Credit Rules, 2004. In view of this clear segregation of National Calamity Contingent Duty from the general pool of CENVAT credit, the discharge of duty liability under National Calamity Contingent Duty would not qualify the goods to be other than ‘exempted goods’. This would also be consistent with the scheme of CENVAT credit which is intended to ensure that the burden of any indirect tax is borne by the ultimate consumer; the ultimate consumer is the one who is not enjoined to pay tax or duty directly into the exchequer. On any manufactured goods, it is the addition to value is subject to tax and effect is given to his charge through the mechanism CENVAT credit. To permit the availment of credit of duties/tax paid on inputs/input services utilized in the manufacture of ‘GSM mobile sets’ would be tantamount to grant of refund of tax that were collected, under authority of law and in accordance with the provisions of law, at the immediately preceding stage. Hence the decision of the Tribunal in *re Mahindra & Mahindra Ltd* that

'31. The next question arises is whether tractors on which automobile cess and education cess is payable can be considered as exempted from the whole of duty of excise thereon or chargeable to nil rate of duty as required under Rule 2(d) of Cenvat Credit Rules. Here we find that the terms exempted goods has been defined under Section 2(d) of the Cenvat Credit Rules, 2002/2004 as under :-

> *"Exempted goods" means goods which are exempt from whole of duty of excise leviable thereon and includes goods which are chargeable to nil rate of duty."*

It is pertinent to note that the word used is 'duty of excise' and not 'duties of excise'. The expression 'whole of duty of excise' and 'chargeable to nil rate of duty' is 'singular expression referring to one duty of excise' and not all duties of excise. Section 2A of the Central Excise Act, 1944 uses four terms:- 'duty', 'duties', 'duty of excise' and 'duties of excise' which means that there is a difference between them, If the intention of the legislature was that it should be exempted from all duties of excise then the words used should have been 'from whole of duties of excise and not duty of excise'. We further note that Rule 3 of the Cenvat Credit Rules, 2002/2004 allows a manufacturer credit of all duty of excise and also of education cess national calamity contingent duty etc. but duty of excise has been referred to in Rule 3(1)(i) and Rule 3(1)(ii) and no where else and in fact education cess has been separately referred to. In this context the duty of excise has to be considered as referring to duty of excise as referred to in Rule 3(1)(i) & (ii) and not others. The decision in the case of Malwa Industries - 2004 (171) E.L.T. 67 cited by the learned Advocate for the appellants is not relevant as in that case the provision of Rule 57AB(1)(b) were interpreted which used the term that the Cenvat credit can be utilized for payment of any duty of excise and therefore any duty of excise cannot be restricted to basic duty of excise only. In the

> *present case the term used is not 'any duty of excise' but 'duty of excise' only. Similarly the decision in the case of Silvasa Industries Pvt. Ltd. v. C.C.E. - 2006 (196) E.L.T. 213 (T) is also not relevant as in that case, finished goods were exempted only from NCCD and were otherwise chargeable to other duties which may include excise duty also. The Tribunal was no where required to interpret the term 'exempted goods' as defined under Rule 2(d) of the Cenvat Credit Rules and the issue as to whether the final product which is exempted from excise duty but chargeable to cess can be considered as exempted goods or not. Since the tractors are exempted from duty of excise specified both in First Schedule of the Tariff Act and Second Schedule to the Tariff Act, it has to be considered as exempted and not dutiable as is being contended by the appellants. In view of the same the appellants are required to follow the provision of Rule 6(2) and (3) of the Cenvat Credit Rules.'*

7. We are, therefore, led to conclude that the respondent herein is within the ambit of rule 6 of CENVAT Credit Rules, 2004. In the light of this finding, their liability cannot but be enforceable.

8. The next question; in the context of ineligibility to CENVAT credit of tax paid on services used in common, is the legality of recovery in the face of reversal claimed by respondent.

9. It is seen that the impugned order has not examined the submissions that the obligation under rule 6 of CENVAT Credit Rules, 2004 has been duly discharged by reversal of proportionate credit and that the bar of limitation impedes recovery. The

adjudicating authority should have ascertained the correctness of the claim of the respondent that the proportionate of amount of CENVAT credit had been reversed and that interest thereon had been paid before issue of show cause notice.

10. In the light of the lack thereof in the impugned order which precludes us from rendering a decision on the submissions now made by respondent before us, we find it appropriate to set aside the impugned order and remand the matter to the original authority to take a decision afresh on these two aspects.

11. The appeal is disposed off on the above terms.

(Order pronounced in the open court on 29/08/2019)

(C J Mathew)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

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