CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI

REGIONAL BENCH - COURT NO. I

Excise Appeal No. 1040 of 2012

(Arising out of Order-in-Original No. 8-9/CEX/COMMR/2012 dated 12.04.2012 passed by the Commissioner of Central Excise & Service Tax, Aurangabad)

M/s Harman Finochem Ltd. **.... Appellant**
Plot No. 3-9, MIDC Industrial Area,
Chikalthana, Aurangabad – 431210

Versus

Commissioner of Central Excise & Service Tax, Aurangabad **.... Respondent**
N-5, Town Centre, CIDCO, Aurangabad – 431030

Appearance:

Shri Anil Balani, Advocate for the Appellant

Shri Sanjay Hasija, Supdt., Authorized Representative for the Respondent

CORAM:

HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)
HON'BLE MR. C.J. MATHEW, MEMBER (TECHNICAL)

FINAL ORDER NO. A/87101 / 2021

Date of Hearing: 01.11.2021
Date of Decision: 09 .11.2021

Per: Ramesh Nair

The issue involved is that as to whether the appellant is liable to pay 10% of the value of the exempted goods in terms of Rule 6(3) when they had availed the CENVAT Credit on the common input namely, Furnace Oil for the period May, 2005 to September, 2007 in the fact that the appellant had *suo moto* reversed the proportionate credit before issuance of show-cause notice along with interest @13% and subsequently remaining 11% interest was also paid in terms of retrospective amendment under Section 73 of the Finance Act, 2010.

2. Shri Anil Balani, learned Advocate appearing on behalf of the appellant submits that once the appellant had reversed the proportionate CENVAT Credit along with interest @ 24%, no demand of 10% of the value of the exempted goods can be made. He placed reliance on the following judgments: -

1) CESTAT, Ahmedabad Final Order No.A/12475 /2021 dated 29.10.2021 in Appeal No.10506/2013 of M/s. Sanstar Bio Polymers Ltd.

2) Jai Balaji Industries Ltd. -2017 (352) ELT 86 (Tri-Del.) – maintained by the Hon'ble Chhattisgarh High Court {2017 (356) ELT A48} and Hon'ble Supreme Court [2018 (360) ELT A121(SC)];

3) CCE Vs. Goyal Proteins Ltd. – 2017 (355) ELT 72 (Raj.) maintained by the Hon'ble Supreme Court [2017 (355) ELT A27 (SC);

4) CCE, Chennai-II vs. Mount Mettur Pharmaceuticals Ltd. –2017 (356) ELT 184 (Mad.).

3. Shri Sanjay Hasija, learned Supdt. (AR) appearing on behalf of the Revenue reiterates the findings of the impugned order. He submits that as per retrospective amendment of Rule 6 in terms of Section 73 of the Finance Act, 2010, it is mandatory that the appellant should have paid proportionate CENVAT Credit along with 24% interest within a period of six months from the enactment of the said amendment. In the present case, the appellant had paid remaining 11% interest only after six months prescribed under the Finance Act, 2010. Therefore, the benefit of retrospective amendment is not available to the appellants.

4. We have carefully considered the submissions made by both sides and perused the records.

5. We find that there is no dispute to the fact that the appellant *suo moto* reversed the proportionate CENVAT Credit in respect of furnace oil before issuance of show-cause notice and also paid the interest @ 13%. However, subsequently the appellant also paid the remaining 11% interest in terms of Section 73 of the Finance Act, 2010. We find that even without considering the Finance Act, 2010 for the prior period and even subsequent to the validity of this retrospective amendment provision this issue was considered. In catena of judgments, various Courts and Tribunal has consistently held that if the assessee reversed the proportionate credit even though belatedly and paid the interest for delay in reversal, the demand of 5%/10% in terms of Rule 6(3) will not sustain. Therefore, since the appellant admittedly reversed the proportionate credit in respect of furnace oil used in or in relation to manufacture of exempted goods and also paid the interest @ 24%, the demand of 10% of the value of exempted goods will not sustain. In support of our view, relevant judgments alongwith relevant portions are reproduced below: -

(i) Unimed Technologies Ltd. Vs. Commissioner of Central Excise, Vapi – 2012 (278) ELT 461 (Tri-Ahmd).

> **4.** The relevant facts in brief that arise for consideration are the appellant herein are engaged in the manufacture of excisable as well as exempted goods. The appellants have availed Cenvat credit on inputs and packing materials which are common inputs and are used in both dutiable and exempted goods. In the absence of non maintenance of separate accounts in respect of duty and exempted goods as per the provisions of Rule 6 of the Cenvat Credit Rules, 2002 lower authorities have held that the appellant is required to pay an amount equal to 8%/10% of the

total value of the exempted goods cleared during the period May 2004 September 2004. Coming to such a conclusion, both the lower authorities have held that removal of impugned goods by the appellant only by reversal of proportionate Cenvat credit availed as inputs was legally incorrect and were required to pay 8%/10% of the value of the exempted goods.

5. On perusal of the entire records, we find that it is not disputed that as to during the relevant period in this case, the appellant had availed the Cenvat credit on the common inputs which are used for dutiable as well as exempted goods. It is also seen from the records that there is no dispute as to the facts that the appellant herein reversed the proportionate cenvat attributable to the inputs which are used in the manufacturing of the exempted goods in the factory premises.

6. If the fact of reversal of Cenvat credit attributable to the inputs which are used in the manufacturing of exempted goods is undisputed, we find that the issue is now squarely covered by the retrospective amendment of the Cenvat Credit Rules by the Finance Act, 2010 which contemplates for reversal of Cenvat credit attributable to the inputs which are used in the manufacturing of exempted goods.

7. In our considered opinion, the appellant was following the procedure even before the retrospective amendment came into picture.

8. In light of the foregoing, we find that the impugned order confirming the demands of an amount equivalent to 8%/10% of the value of the exempted goods is incorrect and unsustainable and hence liable to be set aside.

9. Impugned order is set aside and the appeal is allowed with consequential relief, if any.

(ii) Tata Chemicals Ltd. – 2008 (232) ELT 737 (Tri-Ahmd)

6. After hearing both the sides and considering the arguments advanced, we find that the offer made by the ld. Advocate that they have already reversed the amount payable if steam or electricity is taken as exempted product in respect of the final products viz. Iodized salt/vacuum salt has to be accepted. Even though the amount payable on electricity is higher than what is payable on steam, we feel that it would be appropriate if the amount is calculated on the cost of steam and not electricity since electricity comes after the steam but before the final product viz. Iodized salt vacuum salt. Further once the amount is paid on steam, the requirement of Rule 6(3)(b) is fulfilled and therefore we do not find any need to consider the arguments advanced in support of their claim that reversal of credit would amount to not taking the credit at all. Further other judgments cited by the party also need not have to be discussed since the requirements of Rule 6(3)(b) would get fulfilled. More over as far as the pet coke and furnace oil are concerned, steam has to be taken as a final product because electricity and other products are produced only subsequently. It is not the case of the Department or the appellant that steam or electricity are by-products and not final products as far as pet coke/furnace oil are concerned. In fact there is no other product which arises in this process.

7. The next issue to be considered is the demand for Rs. 2,77,15,038/- for the periods from 2001-02 to 2005-06. The appellants have contested the demand on the ground of limitation. It has been said that all the facts were in the knowledge of the Department and separate proceedings had been initiated to recover Cenvat credit on the fuel used in the generation of electricity used in the manufacture of salt. Commissioner (Appeals) had allowed their appeal on merits as well as limitation. As regards the merits of the demand, the appellants state that they have paid excise duty on the soda ash used for purification of brine for the entire period. Since, full excise duty has been paid on the intermediate product, question of demanding 8% or 10% on the price of excise salt does not arise. Further, they have also reversed the credit of duty paid on the inputs that went into the manufacture of soda ash used in the manufacture of brine used for exempted product. The Commissioner has discussed the issue of limitation in his order and observed that the appellants had never brought it to the notice of the Department that a portion of soda ash has been used in the exempted product. We find force in the argument of the Department that while it can be said that use of electricity in the excise product as well as dutiable product was known to the Department, the same thing cannot be said about soda ash. It is quite possible that appellants may be accounting the soda ash separately and using the same for exempted products. Only on verification, it has been found that the soda ash used for manufacture of brine, which was in turn used for exempted product was not duty paid. Therefore, we feel that extended period has been rightly invoked. Further the fact that appellants on their own paid the duty on soda ash used for producing exempted goods on 5-9-2006 voluntarily also supports view. They have also claimed that they have reversed the credit also even though duty is paid on soda ash used for manufacture of exempted products, credit need not be reversed. However, the Commissioner has observed that this payment has been made without authority and without proper calculation. Therefore, the case will have to be remanded to the original Adjudicating Authority, who can get the correctness of the duty paid on the soda ash for the 5 year period by the appellants verified. Needless to say once duty is paid on the soda ash used in exempted goods, the reversal of the credit of duty paid on the inputs will not be required. Since, the duty has been paid in the soda ash used in the exempted product, the demand of amount of Rs. 2,77,15,038/- on salt has to be set aside.

(iii) Goyal Proteins – 2008 (232) ELT 156 (Tri-Del)

5. We find that the appellants are engaged in the manufacture of excisable and exempted goods and were taking credit in respect of common inputs. Two show cause notices were issued to the appellants for demand of duty on the ground that as per provisions of Central Excise Rules in respect of exempted goods manufactured out of common inputs, manufacturer has to pay 8% or 10% of the value of the exempted goods.

6. Demand is for the period 30-4-2003 to 28-2-2005. Two show cause notices were issued, one for the period 30-4-2003 to 30-11-2004 on 21-9-2005 by invoking extended period of limitation and, second for the period 1-12-2004 to 28-2-2005 on 9-11-2005. The appellants were regularly filing monthly return showing clearance of goods on payment of duty as well as without payment of duty. On examining the returns the Revenue vide letter dated 26-6-2003 directed the appellants to pay 8% of the value of exempted goods. As the Revenue was aware on 26-6-2003 that the appellants were taking credit in respect of common inputs and clearing products without payment of duty as well on payment of duty, therefore, charge of suppression of facts with intent to evade payment of duty is not sustainable, hence, the demands beyond the normal period of limitation are time-barred, hence liable to be set aside.

7. In respect of demand of remaining period, we find that now the appellants are ready to reverse whole of the credit availed on common inputs. Revenue has relied upon the decision of the Hon'ble Supreme Court in the case of *Amrit Paper* (supra) wherein the manufacturer was availing credit in respect of duty paid on inputs and clearing the goods on payment of duty and, thereafter, *suo moto* reversed the credit and filed refund claim in respect of duty paid on the ground that the goods are exempted from payment of duty under Notification No. 6/2006. In such a situation Hon'ble Supreme Court held that when the condition of notification was that exemption is available only in case when credit has not been taken in respect of duty paid on inputs the benefit of notification is not available. In the present case facts are different. In the present case the appellants submitted that they want to reverse whole of the credit availed on common inputs used in the manufacture of excisable as well as exempted goods. This situation is covered by the Tribunal judgment in the case of *Maize Products* (supra). The Tribunal after considering the earlier decision of the Tribunal has held as under :-

> "We have carefully considered the submissions. We are convinced that the demand is highly dis-apportionate to the credit availed on the common inputs which could be attributed to goods which have been cleared without payment of duty. We are not going to the merits of the decision of the Commissioner in so far as the same relates to dropping of the demand in the four show cause notices as the Department is not in appeal before us. We are inclined to accept the offer of the appellant-company to reverse the entire credit attributable to the exempted product covered in the nine show cause notices and accordingly we set aside the order of the Commissioner confirming the demand in respect of the nine show cause notices with the direction to consider and accept their offer to reverse the entire credit on the common inputs i.e., caustic soda lye and hydrochloric acid. The department shall redetermine the credit taken on the common inputs i.e., caustic soda lye and hydrochloric acid in so far as they relate to demand proposed in the 9 show cause notices. The assessee shall produce the necessary evidence in the form of chartered accountant's certificate for the relevant period. If any further credit is to be reversed, the same shall be reversed within four weeks from the date of receipt of the communication from the department."

> In view of the above decision of the Tribunal the demand for the normal period is set aside and the matter is remanded to the adjudicating authority with the direction to accept the offer of the appellants to reverse the entire credit on the common inputs and the Revenue shall redetermine the credit taken on common inputs and the appellants will produce necessary evidence in respect of credit availed on common inputs. Impugned order is set aside and the appeal is disposed of as indicated above.

6. In view of the above judgments and many more judgments on the same issue, it was consistently held that once the proportionate credit in respect of the inputs used in the manufacture of exempted goods has been reversed and interest thereupon was paid in case of any delay in reversal, the demand of 10% of the value of exempted goods under Rule 6(3) will not sustain. Accordingly, we are of the view that since the appellants have reversed the proportionate credit along with payment of 24% interest, the demand of 10% of value of the exempted goods in terms of Rule 6(3) is not sustainable. Hence, the impugned order is set aside and appeal is allowed.

(Pronounced in court on 09.11.2021)

(C.J. Mathew)	**(Ramesh Nair)**
Member (Technical)	**Member (Judicial)**

Sinha