

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, MUMBAI
REGIONAL BENCH**

Excise Appeal No. 79 of 2012

(Arising out of Order-in-Original No. 61/BR-61/Th-I/2011 dated 10.10.2011 passed by Commissioner of Central Excise, Thane-I)

M/s. Saint-Gobain Gyproc India Ltd.

Appellant

Gut No. 348/361/371/300/312/379,
Bhiwandi Wada road, Vill. Nari Wada,
Thane 421 312.

Vs.

Commissioner of Central Excise , Thane-I

Respondent

4th floor, Navprabhat Chambers,
Ranade Road, Dadar (W), Mumbai 400 028.

Appearance:

Shri Gajendra Jain with Ms. Payal Nahar, Advocates, for the Appellant
Shri Anantha Krishnan, Commissioner, Authorised Representative for
the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)
HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

Date of Hearing: 17.03.2022

Date of Decision: 17.03.2022

FINAL ORDER NO. A/85421/2022

PER: SANJIV SRIVASTAVA

This appeal is directed against the order in original No 61/BR-61/Th-I/2011 dated 10.10.10.2011 of Commissioner central Excise, Thane-I. By the impugned order, the Commissioner has held as follows:

"ORDER

(a) I confirm the demand for the wrongful Cenvat credit amounting to Rs. 13,77,42,794/ (Rupees Thirteen crores seventy seven lakh forty two thousand seven hundred ninety four only) i.e.(Basic Rs.13,50,49,534/- and Education Cess amounting to Rs. 26,93,260/-) against M/s Saint Gobain Gyproc India Ltd., and order it's recovery from them under Section 11A of the Central Excise Act, 1944, read with Rule 14 of the Cenvat Credit Rules, 2004.

(b) I order for recovery of interest at appropriate rate from M/s. Saint Gobain Gyproc India Ltd. on the confirmed demand at (a) above under Section 11AB of the Central Excise Act, 1944., read with Rule 14 of the Cenvat Credit Rules, 2004.

(c) I impose a penalty of Rs. 13,77,42,794/- (Rupees Thirteen crore seventy seven lakh forty two thousand seven hundred ninety four only) on M/s. Saint Gobain Gyproc India Ltd., and order its recovery from them under the provisions of Section 11 AC of the Central Excise Act, 1944, read with Rule 15(2) of the Cenvat Credit Rules, 2004, and

(d) I order confiscation of the capital goods valued at Rs. 76,28,11,644/- on which Cenvat credit of Rs.13,05,24,5061- is wrongly availed in contravention of the provisions of the Cenvat Credit Rules, 2004, under Rule 15 (1) of the Cenvat Credit Rules, 2004. However, I impose a fine of Rs.5,00,00,000/- (Rupees Five crore only) in lieu of confiscation and M/s Saint Gobain Gyproc India Ltd shall have the option to redeem the said goods on payment of the said fine.

(e) If M/s. Saint Gobain Gyproc India Ltd., pay the Central Excise duty as confirmed against Sr. No. (a) above along with entire interest as ordered at Sr. No. (b) above, within 30 (thirty) days from the date of communication of this order, the amount of penalty liable to be paid by them shall be 25% (twenty five per cent) of the demand confirmed at Sr. No. (a) above. The benefit of reduced penalty under first proviso to Section 11AC of the Central Excise Act, 1944 shall be available only if the amount of penalty so imposed is also paid within the period of 30(thirty) days from the date of communication of this order.

(f) I do not impose any penalty on Shri Gaganjyot Singh, Vice President, Finance (earlier General Manager) of the assessee under Rule 15 (1) of Cenvat Credit Rules, 2004."

2.1 Appellant is inter alia, engaged in the manufacture of Gypsum Plaster(TI 25059000), Gypsum Plaster Board (TI 68079090) and Jointing Compound (TI 68079090).

2.2 During the period February 2005 to May 2006, they received various capital goods in the factory and availed various input services viz., consultancy service, manpower supply service, security services in connection with erection and

installation of capital goods. These capital goods and input services in dispute were exclusively used in the manufacture of Gypsum Plaster Board and Jointing Compound. In respect of the capital goods received during the period May 2005 to January 2006 for manufacturing Gypsum plaster board and Jointing Compound, the appellants availed cenvat credit of 50% of the duties paid on such capital goods on 2.3.2006 and balance 50% in 6.9.2006. On 31.3.2006, the appellants availed cenvat credit of service tax paid on the aforesaid input services received during the period February 2005 to May 2006 in respect of Gypsum plaster board and Jointing Compound.

2.3 Alleging that at the time of receipt of capital goods and input services, the appellants were engaged in the manufacture of exempt products only, the cenvat credit taken by the appellants is inadmissible in terms of Rule 6(4) or Rule 6(5) of Cenvat Credit Rules, 2004, investigations were initiated against the appellants. A show cause notice dated 21.2.2011 was issued to them proposing to recover cenvat credit of Rs.13,77,42,794/- availed by the appellants on the aforesaid capital goods and input services received during the period January 2005 to February 2006, along with interest and penalty. It was also alleged that the appellants have incorrectly classified Jointing Compound under Tariff Item (TI) 6809 9000, whereas the same is correctly classifiable under TI 2520 2010 and chargeable to nil rate of duty.

2.4 The show cause notice was adjudicated as per the impugned order referred in para 1, above. Aggrieved appellant have filed this appeal.

3.1 We have heard Shri Gajendra Jain with Ms. Payal Nahar, Advocates for the appellant and Shri Anantha Krishnan, Commissioner, Authorized representative for the revenue.

3.2 Arguing for the appellant learned counsel submits:

- The appellants had obtained central excise registration in April 2005 for manufacturing gypsum plaster, gypsum plaster board and Jointing Compound. This shows that the appellants always intended to use the capital goods in the manufacture of dutiable goods. Also, Gypsum Plaster

Board was conditionally exempted and therefore, non fulfillment of condition would lead to charging full duty on Gypsum Plaster Board. The capital goods at the time of receipt were capable of being used in the manufacture dutiable goods. In fact, March 2006 onwards, the appellants indeed used the capital goods in manufacture of dutiable goods i.e., Gypsum Plaster Board and Jointing compound.

- Rule 6(4) of Cenvat Credit Rules, 2004 will not be applicable in cases where capital goods are capable of being used/ intended to be used in manufacturing dutiable goods during their economic lifetime, as have been held in the following cases
 - Rochi Ram & Sons [2003 (155) ELT 96 (T)]
 - Lakshmi Balaji Bottling Pvt. Ltd. [2018 (9) TMI 20 (T)]
 - Brindavan Beverages Pvt. Ltd. [2014 (310) ELT 398 (T)]
 - Arvind Mills Ltd. [2005 (182) ELT 362 (T)]
 - Bhaskar Industries [2003 (54) RLT 301 (T)]
 - Supreme Industries Ltd. [2002 (149) ELT 659 (T)]
 - Gujarat Propack [2009 (234) ELT 409 (Guj.)]
 - S.T. Cottex Exports (P) Ltd. [2010 (261) ELT 807 (T)] Affirmed by Hon'ble High Court at [2011 (268) ELT 318 (P&H)]
 - CCE Vs. S.T. Cottex Exports Pvt. Ltd. - 2018 (2) TMI 1313 (T).
- Rule 6(4) of Cenvat Credit Rules vide Notification No. 13/2016-CE(NT) dated 1.3.2016 to provide that credit in respect of the Capital Goods will be denied only if the said capital goods have been used for two years from the start of commercial production for manufacture/ production of exempted goods.
- Amendment carried out in Rule 6(4) of Cenvat Credit Rules vide Notification No. 13/2016-CE(NT) dated 1.3.2016 has been held to be retrospective in nature as per following decisions and therefore, the time limit provided under amended Rule 6(4) would be applicable in the present case:

- Welspun India Limited [2019 (9) TMI 885 - CESTAT AHMEDABAD]
 - Mohit Industries Ltd. [2019 (11) TMI 292 - CESTAT AHMEDABAD}
 - Orient Syntex [2020 (12) TMI 634 - CESTAT NEW DELHI}
- The appellants used the aforesaid capital goods and input services in the manufacture of final products. Some of the final products were cleared to SEZ developers without payment of central excise duty during the period June 2007 to November 2008. It is settled legal position that clearances made to SEZ developers are covered under Rule 6(6)(i) & 6(6)(v) of Cenvat Credit Rules, 2004 and the provisions of Rule 6(1), (2), (3) & (4) cannot be made applicable to the same, as have held in the case of Sujana Metal Products Ltd. [2011 (273) ELT 112 (T)] affirmed in [2016 (342) ELT A115 (AP)].
- Input services received by them are specified under Rule 6(5) of Cenvat Credit Rules, 2004. These services were received in connection with erection and installation the capital goods. Such input services do not pertain exclusively to the gypsum plaster (exempted) division but also pertained to the gypsum plaster board and jointing compound division. Therefore, the said input services cannot be said to be exclusively used in the manufacture of exempted goods and credit cannot be denied in terms of Rule 6(5) of CCR, 2004.
- Decision of Surya Roshni Ltd. - 2003 (155) ELT 481 (T) is not applicable in the present case.
- Without prejudice to the above submissions, the payment of excise duty at the time of clearance of Jointing Compound by the appellants should be treated as the reversal of disputed credit. Excise duty already paid has to be adjusted against the cenvat credit demand.
- The entire demand raised in the show cause notice is for the period beyond the normal period of limitation of one year prior to the date of show cause notice. They entertained bonafide belief that they have correctly taken cenvat credit on the capital goods and input services in

dispute, since jointing compound was always chargeable to duty and the capital goods and input services in question were also used in relation to manufacture of jointing compound and were not exclusively used in manufacture of exempted goods. It is settled legal position that extended period of limitation can be invoked only when suppression of facts with intent to evade duty is established without doubt. Hence, extended period of limitation is not invokable in the present case as have been held in Shree Ramanuj Dyeing & Printing Mills [2019 (5) TMI 506 - Cestat Ahmedabad].

➤ The appeal filed be allowed

3.3 Arguing for the revenue learned authorized representative reiterates the findings recorded in the impugned order, and prays for the dismissal of appeal.

4.1 We have considered the impugned order along with the submissions made in appeal and during the course of arguments.

4.2 Commissioner has in the impugned order for disallowing the CENVAT credit taken in respect of the Capital Goods and input services observed as follows:

"(47) Findings: I have carefully gone through the entire records of the case, written submissions made by the noticees, oral submissions made by them during the hearing, and the relevant provisions of law on the subject matter. There are mainly two issues involved that is, to be decided in the present case, first, whether the Cenvat credit availed by the assessee on the capital goods which were used by them for manufacture of a product which was exempt at the time of taking such credit, is correct and second, whether another product manufactured by them and classified under a particular heading with applicable rate of duty has been misclassified, and upon proposed revised classification will be exempt from duty.

(48) In this case, M/s. Saint Gobain Gyproc India Ltd., the assessee holders of a Central Excise registration are interalia engaged in the manufacture, of three products i) Gypsum plaster ii) Gypsum plaster board and ii) Jointing compound, which they

have classified under Chapter Sub-heading Nos. 2520 20 10 , 6809 11 00 & 6809 90 00 respectively, of the Central Excise Tariff Act, 1985. An intelligence was gathered that the assessee had wrongly availed and utilised the Cenvat credit of duty paid on capital goods, received in their factory from January 2005 to February 2006, for manufacturing finished goods, i.e. "Gypsum plaster board" and "Gypsum plaster", which were exempted from payment of Central Excise duty at the time of receipt of the capital goods and their other product "Jointing compound" was not being manufactured at all at the relevant time. It indicated that the assessee had availed said Cenvat credit on 2nd March, 2006, when "Gypsum plaster board" became chargeable to Central Excise duty @ 8%. As per intelligence the assessee has also availed the Cenvat credit of Service Tax paid on various input services like Consultancy services, Labour/ Manpower supply services, Security services etc., which were received and utilized by them for erection and installation of capital goods plant, which in turn were used in the manufacture of their finished goods i.e. "Gypsum plaster board" and "Gypsum plaster", which were exempted from payment of Central Excise duty at the relevant time of availment of such services.

(49) In order to work out the intelligence, visits to the assessee's factory were undertaken, relevant records and statements of concerned persons were recorded mainly to examine whether the intelligence was correct, and whether the credit availed by the assessee was in order or otherwise.

(50) From the first of the statements of Shri. Raut, Manager, Indirect Taxes, of the assessee's factory the facts that have come to fore which are most relevant to the issue are as follows:

A. in relation to 'Gypsum Board' and 'Jointing Compound' plant the capital goods were received inside the plant from Jan 2005 onwards" and "Regarding the 'Plaster plant' the capital goods were received in 2004 & 2005.

B. 50% Cenvat credit was taken on the Capital goods by them on 2nd March 2006 (.e. after about one year after receipt of the capital goods) for the first time. Since then they have been taking Cenvat credit on all Capital goods received in relation to the manufacture as 'Gypsum Board' and 'Jointing

Compound' plant. No Cenvat credit has been availed on "Gypsum plaster plant".

C. The manufacture of the products namely 'Gypsum Plaster' commenced from Sept 2009, "Gypsum Plaster Board' commenced from Jan 2006. Jointing Compound from March 2000.

D. Dutiability of each of the product during the period of receipts of impugned Capital goods i.e. Jan 05 to Feb 06 is as under: 1) Gypsum Plaster - Tariff rate Nil. II) Gypsum Board - Exempted under Sr. No 158 of Notification No. 6/ 2002 dated 1-3-2002.as amended by III) Jointing Compound - claimed as dutiable but not manufactured during the said period.

(51) The records indicate that the assessee has cleared "Gypsum Plaster Board" for the first time in the month of January 2006 and February 2006 at 'Nil' rate of duty as per Sr. No 158 of Notification No 6 / 2002 dated 1-3-2002as amended. This Notification was rescinded / superseded by Notification No. 21/2006-C.E., dated 1-3-2006 and a new Notification No 05 / 2006 dated 1-3-2006 was issued as per which, subject to conditions laid down therein, the product "Gypsum Plaster Board" became chargeable to duty @ 8% as against the earlier "Nil" rate of duty, as existed under Notification No 6/2002 dated 1-3-2002.

(52) The moment "Gypsum Plaster Board" became chargeable to duty @ 8%, by virtue of Notification No 5 /2006 dated 1-3-2006 as amended, the assessee, on the 2nd of March 2006, availed 50% Cenvat credit of the duty paid on capital goods, received in the factory from January 2005 to February 2006, for the manufacturing of "Gypsum plaster board" and "Gypsum Plaster", which were exempted from payment of Central Excise duty/chargeable to nil rate at the time of receipt of such capital goods. Similarly, on the 31st of March 2006, they have also availed Cenvat credit of Service Tax paid on input services, which were utilized by them at the time of erection and installation of the said capital goods plants, received in the factory from January 2005 to February 2006 and used in the manufacture of their finished goods i.e. "Gypsum Plaster" and "Gypsum Plaster Board" which were chargeable to nil rate of

duty/exempted from payment of duty at the relevant time of availment of such services.

(53) This factual position about the receipt of the capital goods, dutiability of their three products and date of availment of Cenvat credit has not been disputed by the assessee, but the availment of the Cenvat credit has been claimed to be in consonance with the provisions of law. The notice has disputed this credit as wrongly taken and has alleged that the entitlement of Cenvat credit of duty paid on capital goods is subject to the dutiability of the finished goods manufactured by using the said capital goods, at the time of receipt of the said capital goods in the factory, on the basis of Rule 6(4) of the Cenvat Credit Rules, 2004, hence it is essential to firstly see what is the exact provision under the said Rule.

(54) Rule 6 of the Cenvat Credit Rules, 2004 pertains to obligation of manufacturer of dutiable and exempted goods and provider of taxable and exempted services and Rule 6(4) reads as follows:

"No CENVAT credit shall be allowed on capital goods which are used exclusively the manufacture of exempted goods or in providing exempted services, other than the final products which are exempt from the whole of the duty of excise leviable thereon under any notification where exemption is granted based upon the value or quantity of clearances made in a financial year."

The rule is a prohibitory provision and clearly prohibits Cenvat credit on those capital goods which are exclusively used in the manufacture of exempted goods. It however clarifies that the term exempted used in it does not cover value or quantity based exemptions. Also since the Rule relates to allowing credit, which in turn means taking credit from the other side, it has to be specifically read with other Rules of the Cenvat Credit Rules, 2004. Rule 4(2a) of the Cenvat Credit Rules, 2004 stipulates that the Cenvat credit in respect of capital goods received in a factory at any point of time in a given financial year shall be taken only for an amount not exceeding fifty percent of the duty paid on capital goods. The use of the word 'shall' amply demonstrates that it is mandatory to take Cenvat credit not exceeding fifty percent of the duty paid on capital goods in the financial year in

which they are received in the factory and the same cannot be deferred.

(55) From the detailed position about the dutiability, production/clearance and credit taken on capital goods and services in respect of the three final products, discussed in foregoing paragraphs, four things are clear in this case

i. The capital goods on which credit was availed were used exclusively in the manufacture of goods i.e. "Gypsum Plaster Board" and "Gypsum Plaster" by the assessee. The manufacture of Jointing Compound was started after March, 2006.

ii. The product "Gypsum Plaster Board" was conditionally exempted at the time of receipt of the said capital goods by virtue of Notification No 6 / 2002 dated 1-3-2002 as amended and the first clearance of "Gypsum plaster board" in the months of January 2006 and February 2006, were effected by the assessee under "Nil" rate of duty as per the notification.

iii. The assessee had decided to clear the "Gypsum plaster board" at "Nil" rate of duty only availing the benefit of the notification.

iv. The moment "Gypsum Plaster Board" became chargeable to duty @ 8%, by virtue of Notification No 5 /2006 dated 1-3-2006 as amended, the assessee, on 2nd of March 2006, availed 50% Cenvat credit of the duty paid on capital goods, which were received in the factory from January 2005 to February 2006, for the manufacturing of "Gypsum plaster board" and 'Gypsum Plaster', which were exempted from payment of Central Excise duty/chargeable to nil rate of duty at the time of receipt of capital goods and similarly, on 31st of March 2006, they have also availed Cenvat credit of Service Tax paid on input services utilized by them at the time of erection and installation of the said capital goods plant.

*(56) Since the exemption granted by the said notification is not based upon the value or quantity of clearances made in any financial year, hence at the time of receipt of goods in question the assessee was not complying with the substantial requirement of the Rule 6 (4) *ibid* discussed above and therefore not eligible to avail the Cenvat credit. Accordingly, they did not take the*

credit also. However as soon as the product, which was conditionally exempted earlier became dutiable, they have taken credit on 02-03-2006,

(57) Similarly, Rule 6(1) of the Cenvat Credit Rules, 2004, which pertains to obligation of manufacturer of dutiable and exempted goods and provider of taxable and exempted services, reads as follows:

"(1) The Cenvat credit shall not be allowed on such quantity of input or input service which is - used in the manufacture of exempted goods or exempted services, except in the circumstances mentioned in sub-rule (2)"

"(2) Where a manufacturer or provider of output service avails of CENVAT credit in respect of any inputs or input services, and manufactures such final products or provides such output service which are chargeable to duty or tax as well as exempted goods or services, then , the manufacturer or provider of output service shall maintain separate accounts for receipt, consumption and inventory of input and input service meant for use in the manufacture of dutiable final products or in providing output service and the quantity of input meant for use in the manufacture of exempted goods or services and take CENVAT credit only on that quantity of input or input service which is intended for use in the manufacture of dutiable goods or in providing output service on which service tax is payable."

(58) The availment of the Cenvat credit of Service Tax paid on input services paid by the assessee is also wrong in the light of above rule as the input service were used by the assessee for erection and installation of capital goods plant, which in turn were used in the manufacture of their finished goods which at time of availing the services was exempted. Here too the assessee first availed services in relation to capital goods to be used in exempted final products and later when the exemption to one final product stood withdrawn, quickly took credit of the Service Tax paid thereon.

(59) In the light of these findings, the Cenvat credit of the duty paid on capital goods amounting to Rs. 13,77,42,794- and of Service Tax paid on services used in erection/commissioning of

the said capital goods, is wrong and so, is recoverable from the assessee. The view is substantiated by the decision of the Hon'ble Tribunal in the case of CCE Versus M/s Surya Roshani Ltd. reported in 2003(155) E.L.T. 481 (Tri.Del.), where facts were exactly identical to the present case, and wherein it is clearly held by Hon'ble Tribunal that:

(a) "Eligibility to be determined at the time when goods received by the manufacturer - Subsequent becoming of the goods as dutiable or the manufacturer putting the capital goods to other use would not revive the question of admissibility of Modvat credit - Machine, when received, used in manufacture of exempted products - Credit not admissible - Rules 57Q, 57R(1) and 57T(2) of the erstwhile Central Excise Rules, 1944. The classification list may contain details of goods which are liable to pay duty. But it cannot be claimed therefrom that the machine was also meant to be used in the production of final goods chargeable to duty. The declaration mentioned in Rule 57T(2) ibid to the effect that the capital goods in question shall not be used exclusively for production of an exempted final product has not been brought on record."

(b) "When the impugned machine was received, it has been used in the manufacture of bulbs which were exempted from the payment of whole of the duty of excise leviable on them."

If the capital goods are exclusively used in the manufacture of exempted products, modvat credit will not be available to the manufacturer. Subsequently, the exempted product becomes dutiable on account of withdrawal of exemption or the manufacturer puts the capital goods to other use would not revive the question of Modvat credit which stands determined at the time the capital goods was received the decision of the single Bench of the Tribunal in Kailash Auto Builders case is not applicable to the facts of the present matter as the Appellants therein "have made their intention clear that they would be using the said capital goods in the manufacture of excisable final products once the factory starts working to its full capacity in view of this, the Respondents are not entitled to Modvat credit. Accordingly, we set aside the impugned Order and allow the Appeal filed by the Revenue" .

Further, the Civil Appeal filed by M/s Surya Roshni Ltd against the above CEGAT order No AI 279/2003-NB dated 30-05-2003 was dismissed by the Hon'ble Supreme Court holding that "The appeal is not maintainable. Hence it is dismissed" [M/s Surya Roshni Ltd Vs Commissioner - 2003 (158) E.L.T. A273 (S.C)]. The matter has thus attained finality and under judicial discipline, the judgment is binding on lower adjudicating authority when facts are identical.

(60) The assessee in this case, identical to the above case, claimed the benefit of exemption i.e. "Nil" rate of duty, at the time of the first clearances of "Gypsum plaster board", in the months of January 2006 and February 2006, under Notification No. 6/2002 dated 01.03.2002 instead of paying duty and exercising the right to avail the benefit of Cenvat credit of duty paid on the capital goods, and expressing intention to use the capital goods in manufacture of such exempt goods. Thus they have conferred a status of "exempted goods" to their product "Gypsum plaster board". The other product Jointing Compound was not manufactured. In view of these facts which place the case in purview of above decision of Hon'ble Tribunal and Supreme Court, the assessee are not entitled to Cenvat credit so availed by them on 02-03-2006 (50%) and October 2006 (50%).

(61) In the light of Hon'ble S.C. upholding the position as above it is not open for the assessee to claim benefit contrary to the decision. Yet the assessee has cited a number of case laws, mainly, of M/s Bhaskar Industries and M/s Arvind Mills supra to support their case. However, the two case laws can be distinguished from the present case inasmuch as in the two cases, either in the second/third phase of the installation thereof or indirectly, the capital goods in question were used in manufacture of dutiable final goods, whereas in present case, when the goods were received, their products "Gypsum Plaster" was chargeable to nil tariff rate, "Gypsum Plaster Board" was fully exempted under a exemption notification and the other product "Jointing Compound" was not being manufactured at the relevant time and as such the assessee were not satisfying the requirements of eligibility to the Cenvat credit thereon. .

(62) The other contest regarding variation of the facts from the case decided by Hon'ble S.C. supra is also attempted by the assessee on mainly two grounds. First, that their plant was capable of manufacturing both exempt and dutiable final products, since exempt goods merely required use of particular raw materials in prescribed proportion and were not anything else than dutiable goods. Second that they always had intention to manufacture dutiable final products and not that they were always going to manufacture exempt goods. Both these arguments are contrary to the condition laid down/upheld by Hon'ble S.C. in the case supra, as capability to manufacture dutiable goods or intention to manufacture it, is not a criteria for availing Cenvat credit. The criteria in the prohibitory rule discussed above and finely elucidated by the Apex Court is that if the capital goods are used in the exempt goods, credit is not available under the Claim that later on the goods manufactured on it became dutiable or the machine was later on employed for manufacture of different but dutiable goods. Thus, there being no variation in the - facts also, the Hon'ble S.C. decision supra covers the case, overrides all the case laws Cited, demean all contra arguments taken at length in this regard, and so the demand in question has to be upheld."

4.3 Undoubtedly the Commissioner have based on strict interpretation of Rule 6 (4) of CENVAT Credit Rules, 2004 concluded that the appellant at the time of receipt of the Capital Goods and input services were not eligible to the CENVAT Credit of the same as they were not manufacturing or clearing any dutiable goods. Further they did not had any intention to manufacture and clear the dutiable goods. However, he also admits that subsequently these capital goods were used for the manufacture and clearance of the dutiable goods. Thus there is no denial of the fact that these capital goods were used for the manufacture of dutiable goods. *The sole ground for proceeding against the appellants is the decision rendered in the case of Surya Roshni [2003 (155) ELT 481 (Tri Del)].* The appeal against this order of the tribunal was dismissed by the Hon'ble Apex Court as reported at [2003 (158) E.L.T. A273 (S.C.)] stating as follows:

"The appeal is not maintainable. Hence, it is dismissed."

After the dismissal of the appeal by the Hon'ble Apex Court, M/s Surya Roshni approached the jurisdictional High Court, and filed MCC No 2 of 2004. This application was disposed of by the Hon'ble High Court of Madhya Pradesh by the order dated 21.09.2012, [2013 (298) E.L.T. A24 (M.P.)] stating as follows:

"1. This application under Section 35H(1) of the Central Excise Act, 1944 (for short "the Act") has been filed by the applicant Industry for directing the Customs, Excise and Gold (Control) Appellate Tribunal to refer the question of law stated in the application arising from the order of the Tribunal for answer by this Court.

2. In brief, the case of the applicant is that the applicant is engaged in the manufacture of various lamps of different wattages and sizes falling under Chapter 85 of the Central Excise Tariff Act, 1985 and is operating under the Modvat credit scheme. The applicant had imported a machine in March 1996 for the manufacture of lamps of different types including GLS glass lamps. The machine being a sophisticated machine, the engineers had set up the machine for a particular operation and after initial trial, advised the applicant for long production runs to monitor the performance before the second type could be taken up. The applicant had used the machine for manufacture of both dutiable and exempted final products. At the time of receipt in March 1996 the machine was originally used for manufacture of exempted final products for the reason mentioned above. The applicant had taken Modvat credit of duty paid on the aforesaid machine on 20-6-1997. However at the time of receipt of machine in 1996 itself the applicant had filed the statutory declaration under Rule 57T stating that the machine would not be exclusively used for manufacture of exempted final products.

3. The Central Excise Department had issued show-cause notice dated 12-12-1997 for disallowing the Modvat credit and recovering the said amount and also to levy the penalty inter alia on the ground that at the time of receipt of the machine, it was exclusively used for manufacture of exempted final product. The applicant had submitted reply to the said notice and the

Assistant Commissioner of Central Excise, vide order-in-original dated 30-6-1998, held that the applicant had correctly taken the credit of the duty paid on the said machine. The Department's appeal was dismissed by Commissioner of Central Excise (Appeals), against which an appeal was preferred by the Department before the Tribunal and cross-objection was filed by the applicant. The Tribunal by the order dated 30-5-2003 has allowed the Department's appeal and has held that the applicant is not entitled to Modvat credit.

4. We have heard the learned counsel for the parties and minutely perused the record of the case as well as the order dated 30-5-2003 passed by the Tribunal. In our considered opinion following question of law arises from the order of the Tribunal :-

"Whether in the facts and circumstances of the present case, the Appellate Tribunal was correct in holding that the capital goods in question were exclusively used in the manufacture of exempted final products so as to attract the mischief of Rule 57R of the Central Excise Rules, 1944?"

5. Accordingly, we allow the application filed under Section 35H(1) of the Act and direct the Tribunal to refer the aforesaid question to this Court in terms of Section 35H of the Act.

6. The MCC is accordingly disposed of."

Thus the decision of the Tribunal relied upon by the Commissioner cannot be said to have attained finality, as was observed by the Hon'ble high Court of Madras in the case of Kaleesuwari Refinery Pvt. Ltd [2016 (340) E.L.T. 632 (Mad.)], while interpreting the provisions of Rule 6 (4) of the CENVAT credit Rules. Hon'ble High Court stated as follows:

"24. Mr. A.P. Srinivas, learned Senior Panel Counsel relies upon a decision of a Larger Bench of a Tribunal in Spenta International Ltd. v. CCE [2007 (216) E.L.T. 133]. In that case, the issue that was referred to the Full Bench was whether Cenvat credit eligibility has to be determined with reference to the dutiability of the final product on the date of receipt of the goods from the date of utilisation eligibility of 50% credit. For arriving at a decision on the said issue, the Larger Bench followed Surya

Roshini, without even taking note of the fact that the decision in Surya Roshini is still at large before the Madhya Pradesh High Court. In any case, the interpretation to be given to Rule 6, was not even considered by the Larger Bench in Spenta International. Hence, it has no application.

25. Yet another decision relied upon by Mr. A.P. Srinivas, learned Standing Counsel is the one in *Commissioner of Central Excise v. Samsung India Electronics Ltd.* [2014 (309) E.L.T. 593]. In that case, the Allahabad High Court was concerned with a question whether the Cenvat credit of capital goods taken by the respondents, which are exclusively used in the manufacture of exempted goods, was admissible or not. As seen from the facts out of which the said case arose, there were actually two companies in question. One was Samsung Electronics India Information and Telecommunication Ltd. It was engaged in the manufacture of colour monitors and CTV Chassis on job works. This company later amalgamated with Samsung Electronics India Ltd. The former was undertaking job work for the latter. Therefore, the question that arises for consideration in this appeal did not even arise for consideration in the case before the Allahabad Division Bench.

26. Coming to the core issue on hand, as we have pointed out earlier, the expression "financial year" appearing in Rule 4(2)(a) cannot be rendered redundant or nugatory. The capital goods were received admittedly during the financial year 2002-03. The main final product, namely refined edible oil was exempt from payment of duty only up to 28-2-2003 during the financial year 2002-03. The goods became dutiable with effect from 1-3-2003. Additionally, all the three by-products were not exempt from payment of duty during any part of the financial year 2002-03. Rule 4(2)(a) is not worded as follows :

"Cenvat credit shall be availed with reference to the date of receipt of the capital goods."

The Rule simply states that Cenvat credit shall be availed in respect of capital goods received in a factory at any point of time in a given financial year. In other words, if a factory is

manufacturing goods which are dutiable, the date on which a person receiving capital goods is entitled to claim Cenvat credit, is left to his choice. He is entitled to take any date within the financial year subject only to the first condition imposed under Rule 6(4), namely that on the date on which he avails credit, the goods to be manufactured out of them should not be exempted goods. This is the proper manner of construction of Rules 4(2)(a) and 6(4).

27. The consequences of giving a different interpretation to the Rule is too obvious. Take for instance a case where the factory receives capital goods on a particular day, say for instance 1-10-2003. If the goods are dutiable goods on the date of receipt, namely 1-10-2003, the Department agrees that the factory will be entitled to Cenvat credit. Suppose an exemption notification is issued on the date following the date of receipt of capital goods, he will still be entitled to the benefit of Cenvat credit. Therefore, to interpret Rule 4(2)(a) in a manner that will benefit a person, who receives the capital goods on the date, on which, the goods to be manufactured were dutiable, despite the same goods becoming exempted goods on the next day, but to deprive the benefit to a person, who manufactures dutiable goods on the basis of the capital goods received in a particular financial year, would not be a proper interpretation to the Rules."

4.4 In view of the decision of the Hon'ble madras High Court, we do not find much merits in the reliance placed by the Commissioner on the decision of tribunal in case of Surya Roshni. Tribunal has in series of decisions referred to by the appellant's counsel held that once the capital goods have been used for manufacture of the dutiable goods the bar of rule 6 (4) will no longer be there and the CENVAT Credit will be admissible to appellant. In the Lakshmi Balaji Bottling Plant [2018-TIOL-2916-CESTAT-HYD] tribunal has observed as follows:

"7. We have examined the arguments on both sides. The facts are not in dispute that plant is capable for manufacture of both dutiable and exempted products. The appellant had intimated his intention to use the machinery (at the time of receipt of the capital goods) to manufacture both exempted and dutiable goods but had used the plant exclusively for manufacture of exempted

goods for the first two years. Thereafter, he used a plant for manufacture of dutiable products for a short period of 19 days and thereafter never used a plant for manufacture of dutiable products. The question to be decided is whether under these circumstances the assessee is entitled to the benefit of capital goods CENVAT credit on the disputed Line 3 of the plant. A plain reading of the Rule 6(4) of CENVAT Credit Rules, 2004 shows that no credit is admissible on capital goods used exclusively in manufacture of exempted goods or in providing exempted services. There is no requirement of the capital goods to be used any specified extent in manufacture of dutiable goods. The Rule, as it is framed, entitles an assessee to claim credit on capital goods even if the machinery is used to manufacture a single unit of dutiable goods. This appears unfair but equity has no place in matters of taxation and we have to follow the law as it is drafted. The next question to be decided is whether the entitlement of capital goods should be decided based on how they are used at the time of receipt of capital goods. In the case of Surya Roshni Ltd., (supra) at the time of receipt of the capital goods the initial products were exempted from the payment of duty. Thereafter, they became dutiable and the assessee wanted to claim credit of MODVAT on these goods. The Tribunal did not allow the capital goods credit and this decision was upheld by the Supreme Court. In this case, the plant was capable of manufacturing both exempted and dutiable products and the appellants declared their intention to manufacture both using Line 3. They, however, never used machinery for the first time of two years to manufacture dutiable goods at all. Thereafter, the appellants used machinery to manufacture of dutiable goods for 19 days. Thus, it cannot be said that the goods are used exclusively for manufacture of exempted products. This case is similar to the case of Brindavan Beverages Pvt. Ltd., [2014 (310) ELT 398 (Del.)] = 2014-TIOL-2136-CESTAT-DEL in which, the Tribunal held as follows in paragraphs 6, 7:

"6. The undisputed facts are that the capital goods, in question, had been received by the appellant in their Bareilly unit during September 2004 to August 2005 period. There is also no dispute about the fact that during the period till September 2006, the

machinery, in question, had been used only for manufacture of fruit pulp based soft drink called MAAZA which is fully exempt from duty. However the appellant had still availed Cenvat credit amounting to Rs. 1,64,08,716/- in respect of these capital goods. According to the appellant, from October 2006 onwards they have started using these machines for manufacture of aerated waters which are dutiable final product and this fact is not disputed by the Department. According to the appellant, they are eligible for capital goods Cenvat credit, as in terms of the provisions of Rule 6(4) of the Cenvat Credit Rules, 2004, the capital goods Cenvat credit is to be denied only when the capital goods have been used exclusively for manufacture of exempted final product, not when the capital goods are used for dutiable as well as exempted final products and in this case the Cenvat credit cannot be denied as from the very beginning, the appellant's intention was to use the capital goods, in question, for manufacture of both, dutiable as well as exempted final product and that notwithstanding the fact that till September 2006, the machinery was used only for manufacture of fruit pulp based soft drinks (exempted final product), since they started using the machinery since October 2006 for manufacture of aerated waters (dutiable final product), they would be eligible for Cenvat credit. According to the appellant, the judgment of the Tribunal in the case of CCE, Indore v. Surya Roshni Ltd. (supra) is not applicable to this case, as in this case, from the very beginning their intention was to use the machinery for manufacture of dutiable as well as exempted final product and that for this purpose, it is not necessary both dutiable and exempted final products have to be manufactured simultaneously.

7. In terms of the provisions of sub-Rule (4) of Rule 6 of the Cenvat Credit Rules, 2004 Cenvat credit shall not be admissible on capital goods which are used exclusively in the manufacture of exempted goods or in providing exempted services, other than the final products which are exempt from the whole of the duty of excise leviable thereon under any notification, where the exemption is granted based on the value or quantity or clearances made in a financial year. From a perusal of this sub-

Rule, it is clear that capital goods Cenvat credit would be admissible when the capital goods are used either only for dutiable final product or for dutiable as well as exempted final product. The capital goods Cenvat credit is also admissible when a manufacturer is availing full duty exemption based on the value or quantity of the goods cleared in a financial year, in which case, while initially the manufacturer will be availing full duty exemption (for some months or for several financial years at a stretch) but subsequently at some point of time when he crosses the threshold limit for exemption, his final product becomes dutiable and in such a case, even during the period of full exemption, the manufacture can take capital goods Cenvat credit which he can utilize when this final product becomes dutiable. A question arises as to when capital goods are used for manufacture of dutiable as well as exempted final product, whether for availing capital goods credit, the dutiable as well as exempted final product have to be manufactured simultaneously. In our view this is not necessary, and Cenvat credit would be admissible even if the capital goods are used for manufacture of dutiable goods and exempted goods at different points of time. However, if at the time of receipt of the capital goods, the manufacturer was using the capital goods only for manufacture of fully exempted final product and had no plan or intention to use them for dutiable final products and later on, either the final product becomes dutiable or he changes his plans and starts using the capital goods for manufacture of dutiable final products, the judgment of the Tribunal in the case of CCE, Indore v. Surya Roshni Ltd. (supra) and Spenta International Ltd. v. CCE, Thane (supra) would become applicable. But, if at the time of receipt, the manufacturer had clear intention to use the capital goods for manufacture of dutiable as well as exempted final products, in such a situation just because at the time of receipt, he uses the capital goods for manufacture of exempted final product and subsequently he switches over to the manufacture of dutiable final product, the capital goods Cenvat credit cannot be denied. When at the time of receipt of capital goods, capable of use in manufacture of dutiable as well as exempted final products, there is evidence to show that the manufacturer had intention to use them for manufacture of

dutiable as well as exempted final product, the eligibility of the capital goods for Cenvat credit cannot depend upon the order in which the same are used - whether first for the manufacture of exempted final products or for the manufacture of dutiable final product. We are supported in this view by the judgment of Hon'ble Gujarat High Court in case of CCE, Vadodara II v. Gujarat Propack reported in [2009 (234) ELT 409 (Guj.) = 2008-TIOL-717-HC-AHM-CX wherein the Hon'ble High Court has held that when the capital goods installed in the year 2000 were used for manufacture of exempted goods on trial basis and subsequently were used for manufacture of dutiable goods when regular production was started, the Cenvat credit in respect of capital goods cannot be denied and the Tribunal's judgment in case of M/s. Surya Roshni Ltd. (supra) would not be applicable.

In a similar case, in the case of Pepsico India Holdings Limited [2015 (324) ELT 175 (Tri. - Mumbai)] it was held as follows:

"5. Having considered the rival contentions, I hold that the expression exclusively used "also includes intention to use" as provided under Rule 6(4) of the Cenvat Credit Rules. As the appellant had admittedly informed the Revenue at the time of commencement of production that it will utilize the said machinery installed for manufacture of both dutiable and no dutiable products, it cannot be said that the said machinery is exclusively used for manufacture of the exempted goods. Capital goods in question have a life over several accounting years and as such the intention at the time of installation is also the relevant factor. For the temporary use for few months in manufacture of only exempted goods will not disable the assessee in availing the Cenvat credit and utilizing the same for manufacture of dutiable goods. It is also an admitted fact that the Cenvat credit so availed have been utilized only after Nov. 2005 whereas the production of dutiable goods started admittedly in June, 2005. Thus, I hold that the respondent assessee is entitled to Cenvat credit on the capital goods in question. The appeal of the Revenue is dismissed. The respondent-assessee will be entitled to consequential relief, if any."

8. We respectfully follow the ratio of the above two orders and hold that the assessee is entitled to the benefit of CENVAT credit on capital goods on the Line 3 of their plant as it was:

a) Declared to be meant for manufacture of both dutiable and exempted products;

b) Used for manufacture of dutiable products although for a mere 19 days.

Consequently, the demand, interest, penalty and personal penalty are liable to be set aside and we do so."

4.5 Similarly in case of S T Cottex Export P Ltd [2010 (261) ELT 807 (T)] affirmed by the Hon'ble High Court as reported at [2011 (268) ELT 318 (P&H)], tribunal held:

"4. I have carefully considered the submissions from both sides and perused the records. Capital goods, in question, had been received during January, 2005 to March, 2005 and at that time the goods manufactured by using those capital goods - cotton yarn had been cleared by a duty exemption under Notification No. 30/2004-C.E. However, from June, 2005 onward the appellants started availing benefit of Notification No. 29/04-C.E. in respect of their clearances for export where there is optional rate of duty of 4% and there is no dispute about the fact that Notification No. 29/04-C.E. and 30/04-C.E. were being availed during the same period simultaneously. In view of this position, it cannot be said that the capital goods in question had been used exclusively for the manufacture of fully exempted finished products. Under sub-rule (4) of Rule 6 of Cenvat Credit Rules, 2004, capital goods Cenvat credit is inadmissible only in respect of those capital goods which are exclusively used in the manufacture of exempted goods. But it is not so in this case. In the case of Surya Roshni Ltd. (supra) relied upon by the Commissioner (Appeals), the finished products at the time of receipt of capital goods were fully and unconditionally exempt from duty while it is not so in this case as in this case while Notification No. 30/04-C.E. provides full duty exemption subject to the condition that no input duty credit has been taken, Notification No. 29/04-C.E. issued on the same date provides optional rate of duty of 4% adv. without any condition.

Therefore, the ratio of Tribunal's judgment in the case of Surya Roshni Ltd. (supra) is not applicable to the facts of this case. In view of the above discussion, impugned order is not sustainable and the same is set aside. Appeal is allowed."

4.6 Rule 6(4) was subsequently amended vide Notification No. 13/2016-CE (NT) dated 1.3.2016 to read as under:

"(4) No CENVAT credit shall be allowed on capital goods used exclusively in the manufacture of exempted goods or in providing exempted services for a period of two years from the date of commencement of the commercial production or provision of services, as the case may be, other than the final products or output services which are exempt from the whole of the duty of excise leviable thereon under any notification where exemption is granted based upon the value or quantity of clearances made or services provided in a financial year: Provided that where capital goods are received after the date of commencement of commercial production or provision of services, as the case may be, the period of two years shall be computed from the date of installation of such capital goods."

4.7 The amended rule clearly stipulated that the credit will be denied only if the Capital Goods were used for two years from the start of commercial production to manufacture exempted goods. This rule has been held to be retrospective as per the following decisions:

- Welspun India Limited [**2019-TIOL-3031-CESTAT-AHM**]
- Mohit Industries Ltd. [**2019-TIOL-3182-CESTAT-AHM**]
- Orient Syntex [2020 (12) TMI 634 - CESTAT NEW DELHI]

4.8 In case of Welspun and also in case of Mohit Industries after referring to Rule 6(4) tribunal observed as follows:

"As per the above substituted Rule, it is clear that the bar on availing the credit in respect of capital goods used in manufacture of exempted goods shall apply only if the capital goods are used for two years from the date of installation/commencement of production. As per the facts of the

present case, though the appellant received and installed the capital good in their running unit in August, 2015 but before completion of two years, in August, 2017 the capital good was used for manufacture of goods which were cleared on payment of duty, availing the exemption notification 29/2004-CE. Therefore, the capital goods were not used continuously for two years for manufacture of exclusively exempted goods. Since the amendment is by way of substitution, it will be applicable from the retrospective effect. This view is supported by decisions as follows:

(a) Zile Singh vs. State of Haryana & Ors.- 2004 (10) TMI 553 (SC)

*(b) Govt. of India vs. Indian Tobacco Co.- 2005 (8) TMI 113 (SC) = **2005-TIOL-109-SC-CUS***

4.9 Thus it is quite evident that even if at the time of the receipt of the capital goods, the finished goods manufactured and cleared by the appellant were exempt from payment of duty or attracted duty at "nil" rate, but subsequently the capital goods were utilized for manufacture and clearance of the goods on payment of duty, then the CENVAT credit in respect of such capital goods could not be denied subject to the restrictions as per the Notification No. 13/2016-CE (NT) dated 1.3.2016. In the terms of amendment made the capital goods should have been utilized for manufacture and clearance of goods on payment of duty within two years of the commercial operation of the capital goods. The facts as have been recorded by the Commissioner, admit that indeed these capital goods were utilized within the period of two years from the start of their commercial operations for manufacture and clearance of the finished goods on payment of duty. It is not even the case of revenue that throughout these capital goods were exclusively used for manufacture and clearance of finished goods exempt from payment of duty.

4.10 As there is no denial of the fact that appellants have utilized theses capital goods for manufacture and clearance of the finished goods on payment of duty, in the manner as prescribed by the amended rule 6 (4) the CENVAT Credit could not have been denied. In view of this we do not intend to dwell

on the issue of classification/ misclassification of the finished goods, which have been raised by the impugned order.

4.11 Appellants have challenged the demand made by invoking the extended period of limitation. They have also challenged the penalties imposed upon them. Commissioner has vide the impugned order held as follows:

"(73) However, the assessee have also contested the demand on limitation in respect of Section 11A ibid and arguing in this regard that there was no suppression of fact, in the case as they had not wilfully suppressed the fact of availment of credit on capital goods and input services and had not wilfully mis-stated the classification of jointing compound under Tariff Item 6809 9000. They have argued that the departmental authorities possessed full information with regard to the facts involved in the present case, the final products being manufactured by them was known, they were filing monthly returns along with Cenvat credit details from time to time in showing item-wise availment of credit on various items as well as of the classification adopted by them for jointing compound. Further, that their factory was audited by the Central Excise department in January & March, 2008, and so the facts relevant for the present SCN were known to the department from January, 2008 onwards. Moreover, that their records were always available for departmental scrutiny.

As seen from the detailed findings recorded above it is clear that the assessee had themselves obtained the registration for manufacture showing particular classifications of their three products, received the capital goods cleared on payment of duty and opted for exemption for their main product under a conditional notification. They have themselves classified the other product under a suitable Heading and when the conditionally exempt product became dutiable, chosen to avail credit on capital goods which were already received much earlier and put to use in manufacture of non-dutiable/exempt products as is clear from the investigation and their own submissions now. They either presumed the provisions of the Cenvat credit wrongly and principles of classification also wrongly or projected their acts as unintentional and went ahead took the credit with an intent to utilize the huge Cenvat credit of the capital goods.

They have, thereon, submitted incorrect periodical Returns in Form ER-1 by mis-declaring the wrongful credit with intent to avail and utilize it in contravention of the Rules as discussed aforesaid. The Cenvat credit availed and utilized by them, which is available only to the manufacturer of dutiable goods was therefore ab initio wrong. Now, as regards their intention for the two main contraventions, there was clear intention to avail the credit not due to them when they have admittedly after almost one year of receipt of the capital goods availed after the exempt goods became dutiable without specifically making any correspondence in this regard or declaring in the returns. As regards the second contravention of misclassification, there is a sharp contradiction in the claim of assessee so far as the classification of "Gypsum Plaster Board" and "Jointing Compound" is concerned. On the one hand, they have correctly classified "Gypsum Plaster Board" as an "article of compositions based on plaster" in which besides "Calcined Gypsum" or "Calcined plaster" as the main component, ingredients like Boric acid powder, HRA, Maize Starch, Adhesive, Foaming Agent are added. On the other hand they have wrongly classified an "admixture of various chemicals i.e. the "Jointing Compound" as an article, which in itself is a "composition based on plaster", in which, besides "Calcined Gypsum" or "Calcined plaster", ingredients like Mica, Binder, Calcite, Plast Retard PE, Benequa 4000, Cellulose PVA and Unigel are added. It is therefore clear that they have purposefully misclassified the product "Jointing Compound" under S.H. No. 6809 90 00 as "other articles of plaster or of composition based on plaster", with a malafide intent to demonstrate that the said product is dutiable and to avail the Cenvat credit of duty paid on those capital goods which are used in the manufacture of "Plasterboard" and partly for "Jointing Compound", as claimed by them. Also now they have come up with another classification for the product Jointing Compound which is correctly classifiable under Chapter 25 claiming new composition of the product and departing from the earlier facts which is already discussed earlier. Their claim now to classify their compound under Chapter 38, there are two specific observations flowing from it, firstly that they are inclined to accept their initial mis-classification of the jointing compound,

and secondly, that they are desperately seeking a classification which will fetch a rate of duty instead of 'nil duty to the product, so that their claim to the credit on the capital goods in question is pedestalled. Hence, their volte face now to call that the product is based on calcium carbonate and not on gypsum is a clear afterthought and an attempt to somehow show that the product was all the time dutiable. The attempt also clearly indicates the intention to somehow project the goods as dutiable so that the Cenvat credit on capital goods is substantiated. Thus, when they were not manufacturer of dutiable goods at material time in terms of Central Excise law, yet they availed the credit on capital goods and services in relation to it, and utilized it, it shows further that the credit was wrong and intentionally taken. In fact for this very reason of utilizing the credit which otherwise would have remained idle, they did the act and to substantiate it carried out misclassification also. Thus, it is clear that the assessee has deliberately made a conscious attempt to mis-declare the credit as correct and the product as dutiable activities carried out by them as 'manufacture' and to suppress the basic fact that the credit availed on capital goods was availed after a lapse of a long time, after utilizing the machinery for manufacture of goods attracting no duty and one of the product was in fact carrying nil duty when placed under proper heading. Therefore, their acts and omissions were deliberate, intentional, unlawful and done with the sole intent to avail a credit not available at the beginning itself. Therefore, the extended period under proviso to Section 11 A (1) of the Central Excise Act, 1944, read with Rule 14 of the Cenvat Credit Rules, 2004, for demand and recovery of such Cenvat credit wrongly availed is rightly invoked and their contentions in this regard are not sustainable.

(74) It is also worthwhile to note that as mentioned in the notice at the beginning itself the assessee classified the disputed item under a different heading and it is, therefore, most difficult for the Department to identify what processes were carried out by them for obtaining the final products, what were raw materials and why resultant classification was claimed and so the Department has to depend on the submission of the assessee. On the other hand the SCN alleges that after receiving an

intelligence the entire processes, raw materials, forms of the final products, dutiability from the beginning, stages of receiving the capital goods and taking credit etc. was delved into in detail and after recording of statements of various officials vis-à-vis records the true position could be made out. It is also surprising that why the assessee, as claimed by them did not revert to the Audit with "correct" position of their disputed credit and classification of the product instead of substantiating their credit. In any case, a reply to audit or correspondence with them or a Return filed can not bring out the exact position of Cenvat credit or classification done by the assessee and it is for the assessee to correctly analyze their activities against various decisions and act as per the law in liberalized system of operation of law. It is also for the record that the Departmental Audits, are mainly on selective basis, on the assessee's statutory/ financial records sans any study of the processes or visits to the factory and so it is wrong to say that as audits were conducted the Department was aware of their activity. The jurisdictional authority's control in liberalized form is also through records and returns filed by the assessee and so their knowledge about the credits availed, classification of the products claimed by the assessee is also incorrect.

The case laws cited by them to support their defense in this regard are those where the appellants have been able to establish that the entire facts were known to the Department. However, it is clear from the foregoing discussion that there is sufficient ground to invoke extended period and so the case laws do not cater to their case

(75) As regards their contention of genuine bona fide belief that the credit was available to them, there is no suppression, and so they are not liable to any penalty proposed, it is seen that they themselves availed the credit on capital goods used in manufacture of exempt goods, and services, after a huge gap of time and as soon as the exemption was withdrawn and it was decided by them to start paying duty accordingly, presented classification of their particular goods under a heading suited to their credit and now, have made a volte face claiming a different chemical base of their product. There is no record to show that

they had made any reference seeking to know whether their intention to take credit was correct or why they were classifying the goods under a particular head. As regards the returns filed from time to time and the Cenvat credit record or mention of the fact about use of capital goods can not clearly indicate that the capital goods are used in exempt product, after lapse of time and after decision to pay duty. As regards the scrutiny of the records conducted on their records, it is seen that nothing is placed on record to substantiate that their entire activity from the beginning was subjected to any study. Therefore, the case is correctly covered by extended period of Section 11A *ibid* and so attracts statutory penalty. The case laws cited by them **therefore, do not cater to their case.**

(76) The other proposal in the notice is to confiscate the capital goods valued at Rs. 76,28,11,644/- on which the wrongful Cenvat credit of Rs. 13,05,24,506/- is wrongly availed by the assessee in contravention of the provisions of the Cenvat Credit Rules, 2004, under Rule 15 (1) of the Cenvat Credit Rules, 2004. In terms of the said Rule 15, the capital goods on which wrongful credit is availed are the contravening goods which are liable to confiscation and as per the provisions of Section 34 of the Central Excise Act, 1944, an option needs to be given to redeem the same by imposition of fine in lieu of confiscation. For the purpose of imposing fine in lieu of confiscation, the fact that the capital goods in question were received in 2005 which are now old and depreciated substantially is also to be considered. Hence, while imposing fine in lieu of confiscation, such reduced value has to be considered.

(77) Also, penalty has been; proposed on Shri Gaganjyot Singh, Vice President, Finance (earlier General Manager) of the assessee has been proposed for penalty under Rule 15 of the Cenvat Credit Rules, 2004 read with Section 11AC of the Central Excise Act, 1944. As alleged in the notice, being responsible person of the Company he was expected to know the Central Excise law, to take the provisions of law seriously for implementation has overlooked this aspect. On questioning about the decision to take credit after the goods became dutiable, which were initially cleared as exempted goods, he has

been unable to substantiate the decision legally but has ducked the queries by talking about modernity of the capital goods and other irrelevant facts more related to marketing than compliance with the law. The assessee have contested this proposal on the grounds that he has not personally suppressed any facts. and the credit was taken by the company. The submission is correct. Though, this wrongful credit, as observed in the notice, has resulted into revenue-loss to the Government, he can not be held to have actually effected taking of wrongful credit, in a company which notice itself concedes as a multi-national entity, whose decisions are not concentrated in any one hand but are consciously planned by entire management. In any case in the form of statutory penalty the assessee company is penalised and the main purpose of discouraging infractions is sufficiently met by the penalty, I do not consider Shri. Gaganjyot Singh, Vice President, Finance (earlier General Manager Finance) of the assessee liable to proposed penalty under Rule 15 (1) of the Cenvat Credit Rules, 2004."

4.12 From the above it is quite evident that all the facts in respect of availment of CENVAT Credit on the capital goods, input services and the clearance of the finished goods were in the knowledge of the department throughout. Even if there were some interpretational issues the same cannot be said to be the reason for invoking the extended period. Hon'ble Supreme Court has in case of L.M.P. Precision Eng. Co. Ltd. [2004 (163) E.L.T. 290 (S.C.)]

"18.*The next issue is whether the extended period of limitation could be invoked by the appellant for the purpose of raising the impugned demand against the respondent. Rule 173B of the Rules requires inter alia that every assessee shall file with the proper officer for approval a list in such form as the Collector may direct showing the "full description" of the goods manufactured. The form in which the application is required to be submitted has been prescribed as the C.L.I Form. The Form requires "a full description of each item of the goods produced, manufactured with warehouse together with the description as would appear from the invoice". Admittedly, the description of the goods given in the C.L.I. Form by the appellant for the*

*period in question did not tally with the description in the invoices for the same period. The content of the C.L.I. Form has been excerpted in the Tribunal's order and it is clear therefrom that no attempt was made to describe the goods at all, let alone fully or truly. The requirement for disclosure was clear, unambiguous and categorical. **There was no scope for misunderstanding or misinterpretation. The respondent's reliance on diverse decisions of this Court in which it was held that there could be said to be no suppression or wilful misstatement related to cases where it was necessary to interpret a particular provision of law. Where the assessee had proceeded on a misinterpretation of a legal provision, this Court appears to have held that the bona fides could not be called into question. Those decisions are distinguishable since in this case there was no question of the assessee failing to comply with the requirement of the Rule by reason of any alleged misinterpretation of the Rule. Had the assessee given a full description of the excisable goods but claimed classification under a wrong Tariff heading, the principle enunciated by this Court and as relied upon by the respondent may have been applied but that has not happened here.***

4.13 In the case of *Shree Ramanuj Dyeing and Printing Mills* [Final Order No. A/ 10787 /2019 dated 06.05.2019], Ahmedabad bench has in similar circumstances held as follows:

"4. We have heard both the sides and perused the records. We find that as regard the submission made by Ld. Counsel on limitation the fact is not under dispute that the appellant in their ER-1 return have been clearly declaring the claim of exemption Notification No. 29/2004-CE as well as 30/2004-CE at the same time they were availing the cenvat credit on the capital goods. It is also observed in the ER-1 return that though the appellant was showing the availment of cenvat credit but were not paying excise duty for the reason that the goods were cleared under exemption notification No. 30/04-CE, therefore, relevant fact that the appellant in one hand availing the exemption notification 30/04-CE and on other hand availing the cenvat

credit on capital goods were very much declared in the ER-1 return, therefore, there is no intention coming out from the ER-1 return that the appellant intend to evade any payment of duty, therefore, the entire demand raised for extended period will not sustain on the ground of limitation as the SCN for the period April 2004 to December 2004 was issued much after one year i.e. 01.01.2009. Since the demand is hit by limitation, we need not to address the merit of the case. Accordingly, the impugned order is set aside only on the ground of limitation. Appeal is allowed."

4.14 In view of the discussions as above we are not in position to sustain the impugned order on merits or on limitation. Since we do not sustain the demand, on merits and also on limitation, the confiscation and penalties imposed too cannot be sustained.

5.1 The appeal is allowed.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

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