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

Excise Appeal No. 85012 of 2018

(Arising out of Order-in-Original No. 13/SP/COMMR/C.EX.AUDIT M-I/2017 dated 16.06.2017 passed by the Commissioner of Central Excise (Audit), Mumbai-I)

M/s. Welspun Corp Ltd. **Appellant**
Welspun House, 5th Floor,
Kamala City, Senapati Bapat Marg,
Lower Parel (W), Mumbai 400 013.

Vs.

Commissioner of Central Excise, Mumbai-I **Respondent**
4th Floor, Navprabhat Chambers,
Ranade Road, Dadar (W),
Mumbai 400 028.

Appearance:

Shri Vishal Agarwal with Shri Abhishek Deodhar, Advocates, for the Appellant
Shri Deepak Bhilegaonkar, Additional 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: 10.11.2022
Date of Decision: 10.11.2022

FINAL ORDER NO. A/86282/2022

PER: SANJIV SRIVASTAVA

This appeal is directed against Order-in-Original No. 13/SP/COMMR/C.EX.AUDIT M-I/2017 dated 16.06.2017 passed by the Commissioner of Central Excise (Audit), Mumbai-I. By the impugned order, following has been held:-

"*ORDER*

33(i) I hereby confirm the demand of Rs.2,53,05,148 (Rupees Two Crores Fifty three lakhs five Thousand One Hundred and Forty Eight Only) for the period 07/2013 to 01/2014, and order recovery of same under Rule 14 of the Cenvat Credit Rules, 2004 read with Section 11A of the Central Excise Act 1944 and Rule 73 of the Finance Act 1994 alongwith interest under Section

11AB of the Central Excise Act, 1944 and Rule 73 of the Finance Act 1994;

(ii) I impose penalty of Rs. 2,53,05,148 (Rupees Two Crores Fifty three lakhs five Thousand One Hundred and Forty Eight Only) on the assessee under Rule 15 of the Cenvat credit Rules, 2004 read with Section 11AC of Central Excise Act, 1944 and Rule 75 of the finance Act 1994.

(iii) M/s Welspun Corpn Ltd. is at liberty to avail of the benefit of reduced penalty imposed as per (it) above in terms of sub section (e) of Section 11AC of Central Excise Act 1944, subject to the condition that the entire amount of duty determined and confirmed hereinabove alongwith Interest at appropriate rate, as ordered and 25 % of duty amount as penalty imposed under section 11AC of Central Excise Act 1944, is paid within 30 days of the date of communication of this order. If the same is not paid within 30 days of receipt of the order, then the benefit of reduced penalty shall not be applicable."

2.1 Appellant is manufacturer of MS pipes falling under Chapter Heading 73053990 of the Central Excise Tariff Act. They are registered as large tax payer unit at Mumbai.

2.2 Divisional Preventive wing of Central Excise division, Patiala, investigated a case regarding wrong availment of inadmissible Cenvat credit on inputs, capital goods and input services used in the manufacture of exempted goods by the appellant during the period from September 2012 to June 2013. A show cause notice dated 04.10.2013 was issued for disallowing and recovery of Cenvat credit amounting to Rs.4,69,42,863/-. This show cause notice was adjudicated as per order-in-original No. 42/CE/CHD-II/2014 dated 25.09.2014 by Commissioner of Central Excise, Chandigarh-II disallowing Cenvat credit. For the subsequent period i.e. from July 2013 to September 2013 it was observed that the appellant cleared exempted goods and did not avail Cenvat credit on inputs/input services. However, during the month of December 2013 appellant claimed credit of duty paid on inputs which were received during the period from July

2013 to September 2013 and on enquiry they vide their letter dated 03.03.2013 submitted that the Cenvat credit due was kept on hold due to ongoing preventive enquiry from the divisional office. During the period from July 2013 to September 2013 appellant procured 5295.140 MT of inputs sufficient to meet the orders of Greater Mohali Area Development Authority (GMADA), Mohali in respect of the exempted goods. Appellant took credit of entire goods along with input services in December 2013 only on receipt of show cause notice for the period from September 2012 to June 2013. They could arrange the order from M/s. Regency Gangani Energy Pvt. Ltd., Paonta Sahib. They supplied 137.830 mtrs pipes to the said M/s. Regency Gangani Energy Pvt. Ltd. in the month of October 2013 to December 2013 without any purchase of goods in the month of October 2013. No inputs were purchased during the month of October 2013. They procured additional inputs weighing 269.820 MT in November 2013 and 13 MT of copper coated write and welding powder. They again failed to take credit of all inputs and input services in December 2013 after supplying duty paid goods to M/s. Regency Gangani Energy Pvt. Ltd. Further during the period from October 2013 to January 2014 appellant cleared 5009.270 mtrs. pipes to M/s. Welspun Projects Ltd. site office, Mohali by availing exemption under Notification No.12/2012-CE dated 17.03.2012. They also cleared 293.550 mtrs. Pipes to the same party on payment of duty for which exemption notification was available to them to show the clearance of dutiable goods.

2.3 The intention of the appellant to accumulate the inadmissible credit also became clear when they stopped manufacturing activity in the month of January 2014 to their own unit located in Gujarat, under the provisions of Rule 10 of Cenvat Credit Rules, 2004. They also cleared the balance stock to their site office at Mohali in full payment of duty in January 2014.

2.4 The above shows that during the period July 2013 to January 2014 the appellant had manufactured and cleared only exempted goods as per Explanation II below Rule 6 of CCR. No Cenvat credit is available to the appellant on inputs and input services used exclusively for manufacture of the exempted goods. Therefore the wrongly availed credit of Rs.2,53,05,148/- taken by the appellant in December 2013 and January 2014 was liable to be disallowed and recovered from them.

2.5 A show cause notice dated 02.01.2015 was issued by the Commissioner of Central Excise, Chandigarh-II asking the appellant to show cause as to why:-

i) Cenvat Credit of Rs. 2,53,05,148/- (i.e Rs. 2,45,68,102/- as BED + Rs. 4,91,362/- as Edu. Cess + Rs 2,45,684/- as SH Edu. Cess) taken by them for the period from 07/2013 to 01/2014, should not be disallowed and recovered from them under Rule 14 of the Cenvat Credit Rules, 2004 read with Section 11A of the Central Excise Act 1944 and Rule 73 of the Finance Act 1994;

ii) Interest should not be recovered on the above mentioned amount under the provisions of Rule 14 of the Cenvat Credit Rules, 2004 read with Section 11AB of the Central Excise Act, 1944 and Section 75 of the Finance Act, 1994;

iii) Penal action should not be taken against them under Rule 15 of the Cenvat Credit Rules, 2004 read with Section 11AC of Central Excise Act, 1944."

2.6 This show cause notice has been adjudicated as per the impugned order. Aggrieved appellant has filed this appeal.

3.1 We have heard Shri Vishal Agarwal with Shri Abhishek Kapadia, Advocates for the appellant and Shri Dhirendra Kumar, Joint Commissioner, Authorised Representative for the Revenue.

3.2 Arguing for the appellant, learned counsel submits that The issue in respect of the order of the Commissioner, Chandigarh-II has been decided by the Tribunal vide final order No. 61128-61129/2016 dated 10.08.2016 adjudicating the case in favour of the appellant. This order was challenged by Revenue before Hon'ble High Court of Punjab & Haryana and the Hon'ble High Court has upheld the order of the Tribunal. Since the facts in the present proceedings and the proceedings already adjudicated by the Tribunal are exactly the same, the ratio of the said decision should apply in the present proceedings also and the appeal be allowed.

3.3 Learned AR reiterates the findings recorded in the impugned order.

3.4 After completion of the hearing, to clarify certain doubts the matter was again listed for clarification and the appellant submits that the present proceedings are clearly the continuation of the proceedings initiated by the earlier show cause notice without having any changes of facts and allegations and the issue is squarely covered by the previous order passed by this Tribunal and affirmed by Hon'ble High Court.

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

4.2 For confirming the demand against the appellant, Commissioner has observed as follows:-

"17. I find that during the period April 2013 to September 2013, the assessee manufactured only exempted goods Ie pipes of dimension i.e 2274mm ODX12.00mm which were cleared only for GMADA .Thus it is clear that the assessee is engaged in manufacture of exempted goods. I also find that SCN for wrong availment of cenvat being investigated by Dnvl Preventive wing culminated in issue of SCN dtd 04.10.2013 on the ground that all the clearances of assessee to GMADA are in fact exempted clearances. I find that in month Oct 2013 itself, the assessee cleared miniscule quantity of pipes to M/s Regency Gangani Energy Pvt. Ltd. I observe that M/s. Welspun Corporation Ltd. did not procure any fresh Input during Oct 2013 but manufactured 325.81 mtrs of M.S Pipes of dimensions 2724mmX12.00mm THK Pipe for M/s Regency Gangani Energy Pvt. Ltd. without procurement of any fresh additional inputs.

18. I observe that in the written submission the assessee failed to substantiate the fact that they have not deliberately arranged order from M/s. Regency Gangani Energy (P.) Ltd.

Paonta Sahib for dutiable goods. During the period July 2013 to January 2014, assessee cleared 8896.73 Meters of pipe under exemption and only 325.81 Meters of pipe under payment of duty which indicated that the assessee in connivance with M/s. Regency Gangani Energy (P.) Ltd. Paonta Sahib had manipulated the second purchase order just to claim CENVAT on entire quantity of raw material/input services with an intent to fraudulently avail benefit of Rule 6(3) of the CENVAT Credit Rules, 2004 with intent to accumulate the unutilised CENVAT Credit, whereas no CENVAT Credit was admissible to the assessee as per the provisions of Rule 6(1) of the CENVAT Credit Rules, 2004. I find that since the assessee had manufactured only exempted goods, they were not required to either maintain any separate records or pay amount equal to 6% on such exempted goods. In conclusion, CENVAT Credit was not admissible to the assessee on inputs/Service Tax were used in manufacture of only exempted goods.

19. I find that the assessee was earlier issued with show cause notice vide F.No IV(73)15/CE/43/Commr.Adj/Chd-11/13/3761 dated 4.10.2013 amounting to Rs 4,69,42,853/- on the ground that goods supplied to GMADA were exempted and therefore assessee was not eligible to avail cenvat credit on input, Input Service and capital goods used in the manufacture of such goods.

20. The show cause notice was adjudicated vide Order-in-Original no 42/CE/CHD- 11/2014 dated 25.9.2014 issued vide F.No V(73)15/CE/43/Commr.Adj/ Chd-11/2013 following orders were passed-

5.17 In view of the above discussions and legal position, it is observed that during the impugned period, the Notices manufactured only exempted goods and accordingly they were not required to either maintain any separate records or pay amount equal to 6% of such exempted goods. The noticee deliberately themselves cleared some quantity of the exempted goods on payment of duty and wrongly chose to maintain separate records in order to claim Cenvat Credit on all *inputs/capital goods etc. I hold that cenvat credit was not permissible to the noticee as inputs/capital goods were used in manufacture of only exempted goods and the Noticee No I could not claim such cenvat credit merely by maintaining separate records and paying 6% of value of exempted goods.*

5.19 In view of the above discussed legal position, I hold that Noticee No 1 were not eligible to avail Cenvat Credit of Rs 4,69,42,863/- on Input, Input Services and Capital Goods.

The subject OIO confirmed:-

a) Demand of Cenvat Credit amounting to Rs 4,69,42,863/-

b) Interest on amount confirmed at Sr no (a) herein above.

c) Penalty of Rs 4,69,42,863/- under Rule 15 read with Section 11AC d) Penalty of Rs 50,00,000/- on M/s Welspun Projects Limited.

21. Further, I find that being aggrieved with the order the assessee filed appeal before Hon'ble CESTAT wherein the appeal was allowed vide Final Order No.61128- 61129/2016 dtd 10.08.2016. I find that the appeal has been allowed by CESTAT on the ground that WCL has availed cenvat credit on the inputs before production of exemption certificate by GMADA

22. I find that during the period April 2013 to September 2013, the assessee manufactured only exempted goods le pipes of dimension ie 2274mmODX12.00mm which were cleared only for GMADA Thus it is clear that the assessee is engaged in manufacture of exempted goods. 1 find that during the period July 2013 to November 2013 they have not availed any cenvat credit. However, they took credit in the months of December 2013 and January 2014 after Issuance of Show Cause Notice dtd 4.10.2013. This lend credence to the department assertion that assessee had no intention to manufacture and clear dutiable goods; however after arranging order from M/s Regency Gangani Energy Pvt. Ltd. they took credit of entire quantity purchase.

23. I observe that the earlier SCN pertaining to period Sept. 2012 to June 2013 was issued on ground that entire quantity of exempted goods manufactured was cleared to GMADA except for a small quantity which was cleared on payment of duty to GMADA. I find that the assessee defence then was that they could not arrange exemption certificate from GMADA, hence the goods were cleared on payment of duty and cenvat availed under CCR, 2004. I observe that after receipt of Show Cause Notice for period September 2012 to June 2013, they arranged for supply of dutiable goods to M/s Regency Gangani Energy Pvt. Ltd.

24. From the above sequence, it is evident that the assessee deliberately cleared some quantity of the goods on payment of duty, in order to claim / avail CENVAT on all inputs/capital goods.

25. I find that the aforesaid CESTAT order is not relevant in this case as both the cases are different. I observe that in the earlier case WCL had availed cenvat credit at the time of purchase of the inputs and before production of exemption certificate by GMADA whereas in the present case cenvat has been availed after exempted goods were manufactured and cleared out of inputs/ input services procured for manufacture of exempted goods.

26. I find that assessee relied upon the decision of the Hon'ble CESTAT in the case of HMM Coaches Ltd us. CCE [2008 (231)ELT 506] wherein the Hon'ble CESTAT held that an assessee is entitled to forego a conditional exemption notification and that it is not open to the Revenue to thrust upon an assessee a conditional exemption notification. The CESTAT judgment mentioned by assessee is not related to present issue as department have not alleged that exemption availed by assessee is inadmissible.

27. I find that the assessee has argued that at the time of receipt of the inputs and input services, they had no idea that the said inputs or input services would be used in the *manufacture of exempted goods. If this was the case assessee would have immediately availed cenvat credit as it was done for earlier period. However, they stopped availing Cenvat credit from the month of July 2013 and availed credit only after arranging dutiable goods order and after issuance of Show Cause Notice dated 04.10.2013. This clearly indicates that the assessee were having orders to clear exempted goods only. If the Cenvat credit on the inputs received during the said period had been legally available to the assessee, they would have availed the same instantly. The fact that the assessee failed to take credit on time when they allegedly had separate orders for supply of goods on payment of duty strengthens the belief that dutiable clearances were arranged by the assessee with an intention to show the manufacture and clearance of the dutiable goods, in addition to exempted goods to be supplied to GMADA Mohali, with sole motive to avail credit on the entire quantity of inputs used for the manufacture of such exempted goods.*

28. I observe that the assessee procured inputs during the period from July 2013 to Sep 2013 weighing 5295.140 M.T., and utilized it for the production of 2274mmOD x12.00 mm THK pipe which were supplied to GMADA Mohali without payment of duty. However, assessee availed the entire Cenvat Credit on the said inputs which were exclusively utilized for the production of exempted goods. Therefore, as per the explanation II below Rule 6 of the Cenvat Credit Rules, 2004, no Cenvat Credit is allowable to the Assessee on inputs and Input services used exclusively for the manufacture of exempted goods

Explanation to Rule 6 of the Cenvat Credit Rules, 2004 which is reproduced as below

-For removal of doubt, it is hereby clarified that the credit shall not be allowed on inputs and Input services used exclusively for the manufacture of exempted goods or provision of exempted service.

29. In view of forgoing, I am of the view that the assessee was manufacturing only exempted goods, therefore, they were not *required to maintain separate records or to pay amount equal to 6% of the value of exempted goods and that they were not eligible to avail. ENVAT Credit on Inputs, input services or capital goods used in the manufacture of exempted goods. It is a settled a legal position that eligibility of CENVAT Credit on goods received in the factory is to be determined with reference to the dutiability of the final product being manufactured by the assessee on-that date. The reliance was placed on the following case laws-*

a. M/s. Surya Roshni Ltd. (2003(155)E.L.T.481(Tri-Del.)] wherein it has been held that "Cenvat/Modvat - Capital goods - Eligibility to be determined at the time when goods received by the manufacturer -Subsequent becoming of the goods as dutiable or the manufacturer puts the capital goods to other use would not revive the question of admissibility of Modvat credit not admissible. The Civil Appeal No. 8512 of 2003 filed by M/s. Surya Roshni Ltd. against the said Tribunal order was dismissed as not maintainable by the Hon'ble Supreme Court on 10.11.2003 (2003(158)E.L.T.A273(S.C.)]

b. M/s. Spenta International Ltd. [2007(216)E.L.T.133(Tri.-LB)] wherein it has been held that "credit eligibility is to be determined with reference to the dutiability of the final product on the date of receipt of capital goods -Rules 4(2), 6(4) of CENVAT Credit Rules, 2002/2004."

Though the decision pertains to credit of Capital Goods I am of the opinion that same is applicable for availment of credit on input and input service also.”

4.3 The issue involved in the present case is very simple as a case for consideration under Rule 6 of Cenvat Credit Rules. It is the claim of the appellant that they are manufacturing both dutiable and exempted products and claiming Cenvat credit of duty paid on inputs and input services received by them for manufacture of the finished goods. They reversed the Cenvat credit as provided by Rule 6(3) of Cenvat Credit Rules for clearance of the exempted goods. There is no denial of the said fact. In their order Hon'ble Punjab & Haryana High Court after taking note of Rule 6(1) to (3) of Cenvat Credit Rules has observed as follows:-

"For reference, Rule 6(1) to (3) of the Rules is reproduced as under:

"(1) The CENVAT credit shall not be allowed on such quantity of input used in or in relation to the manufacture of exempted goods or for provision of exempted services, or input service used in or in relation to the manufacture of exempted goods and their clearance upto the place of removal or for provision of exempted services, except in the circumstances mentioned in sub-rule (2):

Provided that the CENVAT credit on inputs shall not be denied to the job worker referred to in rule 12AA of the Central Excise Rules, 2002, on the ground that the said inputs are used in the manufacture of goods cleared without payment of duty under the provisions of that rule.

(2) Where a manufacturer or provided 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 -

(a) the receipt, consumption and inventory of inputs used--

(i) in or in relation to the manufacture of exempted goods;

(ii) in or in relation to the manufacture of dutiable final products excluding exempted goods;

(iii) for the provision of exempted services;

(iv) for the provision of output services excluding exempted services; and

(b) the receipt and use of input services--

(i) in or in relation to the manufacture of exempted goods and their clearance upto the place of removal;

(ii) in or in relation to the manufacture of dutiable final products, excluding exempted goods, and their clearance upto the place of removal;

(iii) for the provision of exempted services; and

(iv) for the provision of output services excluding exempted services,

and shall take CENVAT credit only on inputs under subclause (ii) and (iv) of clause (a) and input services under subclauses (ii) and (iv) of clause (b).

(3) Notwithstanding anything contained in sub-rules (1) and (2), the manufacture of goods or the provider of output service, opting not to maintain separate accounts, shall follow any of the following options, as applicable to him, namely:-

(i) pay an amount equal to six per cent of value of the exempted goods and exempted services; or

(ii) pay an amount as determined under sub-rule (3A); or

(iii) maintain separate accounts for the receipt, consumption and inventory of inputs as provided for in clause (a) of subrule (2), take CENVAT credit only on inputs under subclauses (ii) and (iv) of said clause (a) and pay an amount as determined under sub-rule (3A) in respect of input services. The provisions of sub-clauses (i) and (ii) of clause (b) and sub-clauses (i) and (ii) of clause(c) of sub-rule (3A) shall not apply for such payment.

***Provided** that if any duty of excise is paid on the exempted goods, the same shall be reduced from the amount payable under clause (i):*

***Provided** further that if any part of the value of a taxable service has been exempted on the condition that no CENVAT credit of inputs and input services, used for providing such taxable service, shall be taken then the amount specified in clause (i) shall be six per cent of the value so exempted:*

***Provided** also that in case of transportation of goods or passengers by rail the amount required to be paid under clause (i) shall be an amount equal to 2 per cent of value of the exempted services.*

Explanation I.- If the manufacturer of goods or the provider of output service, avails any of the option under this sub-rule, he shall exercise such option for all exempted goods manufactured by him or, as the case may be, all exempted services provided by him, and such option shall not be withdrawn during the remaining part of the financial year.

Explanation II.-- For removal of doubt, it is hereby clarified that the credit shall not be allowed on inputs used exclusively in or in relation to the manufacture of exempted goods or for provision of exempted services and on input services used exclusively in or in relation to the manufacture of exempted goods and their clearance upto the place of removal or for provision of exempted services.

Explanation III.-- No CENVAT credit shall be taken on the duty or tax paid on any goods and services that are not inputs or input services."
Rule 6(1) states that no cenvat credit shall be allowed on the inputs used in relation to manufacture of exempted goods. Sub-rule (2) provides exception to sub-rule (1), it deals where the manufacturer or a provider of output service is involved in both dutiable as well as exempted goods or services. For availing the CENVAT credit, separate accounts are to be maintained as envisaged in clauses (a) and (b) to the sub-rule. Sub-rule (3) starts with a non-obstantate clause and contemplates the situation where separate accounts are not maintained and provides for options. As per clause (i), 6% duty is to be paid of the value of exempted goods and services; or as per clause (ii), to pay an amount as determined under subrule (3A); or sub-clause (iii) provides that a separate account is to be maintained for receipt, consumption and inventory of input as per clause (a) to sub-rule (2) and CENVAT credit can only be taken on input under subclauses (ii) and (iv) of clause (a) and also pay to the amount determined under sub-rule (3A) on the input service.

There is no dispute raised on the fact that till 20.8.2012, the nature of pipes manufactured was not determined as exempt because GMADA was not granted exemption certificate. The respondents were not maintaining separate books of account. The goods cleared were on payment/adjustment of duty under

Rule 6(3) and also dutiable goods albeit in small ratio. The finding recorded by the Tribunal that dutiable goods were cleared on 5.11.2012 has not been challenged.

The contentions raised by learned counsel for the appellant are not well founded. Rule 6(2) provides no minimum ratio for the manufacture of exempted and dutiable goods. It deals with manufacturing of exempted and duty chargeable goods and in case of non-maintaining of separate accounts, then Rule 6(3) comes into operation and as per first option the manufacturer is liable to pay 6% of the value of exempted goods.

The submission that from September to 4.11.2012, WCL was only manufacturing exempted goods is merely on presumptions and the argument falls flat in view of the finding recorded by the Tribunal that on 5.11.2012 the goods were cleared on payment of duty. Without there being any manufacturing of dutiable goods prior to 4.11.2012, the goods could not have been cleared on 5.11.2012 on payment of duty. More-so, when clearance and supply of dutiable goods is accepted and there is no denial to the fact that a purchase order existed for supply of dutiable goods, on mere assumptions the intention cannot be determined or it can be concluded that the conduct was fraudulent. The authorities have also not appreciated the difference in manufacture and clearance of goods.

In view of the findings of fact recorded by the Tribunal, it cannot be concluded that WCL till 04.11.2012 was indulging only in manufacture of exempted goods. No perversity has been pointed out in the order."

4.4 We find that the issue is squarely covered by the above decision of the Hon'ble High Court in respect of interpretation relating to Rule 6(1)(to (3) of Cenvat Credit Rules, 2004. Rule 6 does not provide for accountal of inputs contract-wise for the purpose of admissibility of Cenvat credit as has been sought to be done in the present proceedings. Rule 6(1) to (3) only provide that if exempted goods are cleared, then the amount as determined as per Rule 6(3) needs to be reversed. Having done so, the requirement of Cenvat Credit Rules is fulfilled. Cenvat credit cannot be denied in toto on the inputs received during a particular month when exempted goods were being manufactured or cleared.

4.5 There is no one-to-one correlation between the inputs and the output goods manufactured and cleared by the appellant, a fact which was also stated by Hon'ble Supreme Court in the case of Chandrapur Magnet Wires (P) Ltd. [1996 (81) ELT 3 (SC) wherein it has been held as follows:-

*"**3.** The case of the appellants is that if a manufacturer clears various final products utilising duty paid inputs, according to Central Excise Rules, he was entitled to the benefit of MODVAT scheme and was entitled to get credit for the duty of excise paid on the inputs which were utilised for manufacture of final product. The credit amounts were adjusted against the duty leviable on the final product. As soon as the inputs were purchased, the duty paid on the inputs were entered in a register which had to be maintained statutorily recording the amount of credit allowable to the manufacturer.*

***4.** The problem in this case arose because, some of the goods manufactured by the appellants were exempted from duty by Notification No. 69/86-C.E., dated 10th February, 1986. This notification was amended by a further notification No. 106/88, dated 1st March, 1988 by which copper winding wires were exempted from payment of the whole of the duty subject to the condition that the final products were manufactured from copper wire bars of over 6 mm and also subject to the stipulation that -*

"(b) No credit of the duty paid on goods (a) (ii) above, used in their manufacture, has been taken under Rule 57A of the said Rules."

There is no dispute that the inputs which were utilised in the manufacture of the copper wires were duty paid and that the amount of duty paid on the inputs had been entered by the appellants to their credit in the ledger which has to be maintained under the Excise Rules. The credit *amount can be utilised by the manufacturer towards payment of duty of excise leviable on the final products. Since the copper wires manufactured by the appellants had become duty free, there was no question of any adjustment of the credit amount against the duty payable on these copper wires. Moreover, Rule 57C specifically provides that credit of duty cannot be allowed if final products were exempt from payment of excise duty. Faced with this situation, the appellants reversed the credit entries of duty paid on inputs which were utilised for manufacture of the duty free copper wires.*

5. *The case of the Excise Department is that the reversal of credit entries are not permitted by the rules. The assessee is not entitled to remove the copper wires without payment of duty since credit of the duty paid on the inputs used in the manufacture of copper wire had already been taken in accordance with Rule 57A. Once appropriate entries have been made in the register, there is no rule under which the process could be reversed. Since the credit has been taken for the duty paid on the inputs in the ledger maintained by the assessees, the assessee cannot be heard to say that no credit of the duty has been taken by it under Rule 57A.*

6. *It is true that the assessee has not maintained separate accounts or segregated the inputs utilised for manufacture of dutiable goods and duty free goods, as should have been done. The contention of the Department that in this situation, the assessee is not entitled to reverse the entries and get the benefit of the tax exemption is a question which merits serious consideration. There is no doubt that the assessee should have maintained separate accounts for duty free goods and the goods on which duty has to be paid. But our attention was drawn to a departmental circular letter on this problem in which it has been clarified by the Ministry of Finance as under :-*

"3. The credit account under MODVAT rules may be maintained chapterwise, MODVAT credit is not available if the final products are exempt or are chargeable to nil rate of duty. However, where a manufacturer produces along with dutiable final products, final products which would be exempt from duty by a notification (e.g. an end use notification) and in respect of which it is not reasonably possible to segregate the inputs, the manufacturer may be allowed to take credit of duty paid on all inputs used in the manufacture of the final products, provided that credit of duty paid on the inputs used in such exempted products is debited in the credit account before the removal of such exempted final products."

This circular deals with a case where the manufacturer produces dutiable final products and also final products which are exempt from duty and it is not reasonably possible to segregate inputs utilised in manufacture of the dutiable final products from the final products which are exempt from duty. In such a case, the manufacturer may take credit of duty paid on all the inputs used in the manufacture of final products on which duty will have to be paid. This can be done only if the credit of duty paid on the inputs used in the exempted products is debited in the credit account before the removal of the exempted final products.

7. *In view of the aforesaid clarification by the Department, we see no reason why the assessee cannot make a debit entry in the credit account before removal of the exempted final product. If this debit entry is permissible to be made, credit entry for the duties paid on the inputs utilised in manufacture of the final exempted product will stand deleted in the accounts of the assessee. In such a situation, it cannot be said that the assessee has taken credit for the duty paid on the inputs utilised in the manufacture of the final exempted product under Rule 57A. In other words, the claim for exemption of duty on the disputed goods cannot be denied on the plea that the assessee has taken credit of* *the duty paid on the inputs used in manufacture of these goods."*

4.6 The distinction sought to be made by the Commissioner in the order from the earlier proceedings is contrary to the facts on record as the show cause notice itself records the earlier show cause notice issued by Chandigarh Commissionerate and adjudicated by the Commissioner vide order-in-original No. 42/CE/CHD-II/2014 dated 25.09.2014. Commissioner has in the impugned order sought to distinguish the said order by pointing to the time of taking credit. Said distinction is not justifiable subject to fulfillment of conditions of Rule 6(1), 6(2) & 6(3) of Cenvat Credit Rules, 2004. Appellant's submission that they have reversed the credit as per Rule 6(3) has not been countered by the impugned order. Once that order has been set aside which is the basis of the present proceedings, we are not in agreement with the findings recorded by the Commissioner in the impugned order for non-applicability of the decision of the Tribunal in the present case.

5.1 Appeal is allowed. Impugned order is set aside.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

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