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

Excise Appeal No. 1523 of 2012

(Arising out of Order-in-Appeal No. BR/116/Th-I/2012 dated 17.08.2012 passed by the Commissioner of Central Excise (Appeals), Mumbai Zone-I)

M/s. Ethypharm LL Pvt. Ltd. **Appellant**
A-3, 486, MIDC, Chemical Zone,
Additional Ambernath, Ambernath,
Dist. Thane 421 501.

Vs.

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

Appearance:

Shri Aditya Srinivasan, Chartered Accountant, for the Appellant
Shri Amrendra Kumar Jha, Deputy 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: 24.02.2023
Date of Decision: 24.02.2023

FINAL ORDER NO. 85761/2023

PER: SANJIV SRIVASTAVA

This appeal is directed against Order in appeal no BR/ 116 /Th-1/2012 dated 17.08.2012 of the Commissioner (Appeals), Central Excise, Mumbai Zone I. By the impugned order Commissioner (Appeals) has upheld the order in original No 57/MM-06/TH-I/2009, dated 31.07.2012 of the Additional Commissioner holding as follow:

"ORDER

42.01 I confirm the demand of the amount to the extent of Rs.21,54,565/- (Rupees twenty one lakhs fifty four thousand five hundred and sixty five only), (as detailed in the Annexure-A to the said show cause notice) on the exempted finished goods *removed during the period from April 2008 to June 2009, and order its recovery with interest from M/s Ethypharm LL Pvt. Ltd., under proviso to Section 11A(1) of the Central Excise Act, 1944, read with Rule 14 of the Cenvat Credit Rules, 2004.*

42.02- I drop the demand amounting-to Rs.--24,25,251/- (Rupees twenty four lakhs twenty five thousand two hundred and fifty one only) on the exempted finished goods removed during the period from January 2007 to March 2008 for the reason of the input credit attributable to it being already reversed and the same is ordered to be appropriated however an interest of 24% would be applicable on it for the period of delay till the date of payment in terms of the amendment carried out by Section 73 of the Finance Act, 2010 to Rule 6 of the CENVAT Credit Rules, 2004.

42.03 I impose a penalty of Rs.21,54,565/- (Rupees twenty one lakhs fifty four thousand five hundred and sixty five only) on M/s Ethypharm LL Pvt. Ltd. under the provisions of Section 11AC of the Central Excise Act, 1944, read with Rule 15 of the Cenvat Credit Rules, 2004.

42.04 If M/s Ethypharm LL Pvt. Ltd., pay the amount as confirmed against Sr. No.42.01 above along with entire interest as ordered at Sr. No. 42.01 above, within 30 (thirty) days from the date of communication of this order, the amount of penalty liable to be paid, as per Sr. No. 42.03 above by them under Section 11AC of the Central Excise Act, 1944 shall be 25% of the demand confirmed at Sr. No. 42.01 above. The benefit of reduced penalty shall be available only if the amount of penalty so imposed is paid within the period of 30 (thirty) days from the date of communication of this order."

2.1 The Appellant is engaged in the business of manufacturing drugs and medicaments falling under Chapter 29 & 30. In the course of their business, they manufacture and clear both dutiable and exempted goods. They are availing the of CENVAT Credit as available to them in terms of CENVAT Credit Rules, 2002.

2.1 Admittedly they were not maintaining separate account in respect of inputs/ input services used in manufacture of dutiable and exempted goods. During the period April 2008 to June 2009, while they had reversed the CENVAT Credit availed on inputs attributable to manufacture of exempted goods as per Rule 6 of the CENVAT Credit Rules, 2004, they inadvertently missed to reverse the credit availed on Input Services.

2.3 On the basis of CERA audit, show cause notice dated 03.01.2011 was issued to them asking them to show cause as to why:

(i) The amount of Rs 45,79,816 should not be demanded and recovered from them under proviso to Section 11A (1) of the central excise Act, 1944 read with Rule 14 of Cenvat Credit Rules, 2004.

(ii) Interest at appropriate rate should not be recovered from them under Section 11AB of the Central Excise Act, 1944 read with Rule 14 of Cenvat Credit Rules, 2004.

(iii) A penalty should not be imposed on them under Section 11AC of the Central Excise Act, 1944 read with Rule 15 of Cenvat Credit Rules, 2004.

(iv) *The goods valued at Rs 4,57,98,166/- should not be held as liable for confiscation under Rule 25 of the Central Excise Rules, 2002 read with Rule 15 of Cenvat Credit Rules, 2004.*

2.4 After issuance of show cause notice, the appellants realised their mistake and calculated & paid the proportionate CENVAT Credit of Input Services attributable to such exempted products as per Rule 6(3A).

2.5 The show cause notice was adjudicated by the Additional Commissioner as per the order in original referred in para 1 above. The appeal filed by the appellant against the same has been dismissed by the Commissioner (Appeal) as per the impugned order. Hence this appeal.

3.1 We have heard Shri Aditya Srinivasan, Chartered Accountant, for the appellant and Shri Amrendra Kumar Jha, Deputy Commissioner, Authorized representative for the revenue.

3.2 arguing for the appellant learned Chartered Accountant submits

- The appellant admits that they missed to reverse the input service credit inadvertently. However after issuance of SCN, the appellant has calculated & reversed proportionate credit as per Rule 6(3A) thereby complying with the provisions of the law. The rule does not provide that the right to choose the options provided therein is extinguished the moment the procedure laid down under Rule 6(3A) is not followed. Reliance placed on Welspun Corp. Ltd. [2019 (368) ELT 179 (Tri. - Ahmd.)]
- Not following the procedure prescribed under Rule 6 is only a technical breach The procedure laid down under Rule 6(3A) of prior intimation and monthly reversal of credit based on previous period values is not a substantive provision of the law. While the appellant has missed to follow this procedure inadvertently, the intent of the legislation of reversing proportionate credit as per the formula provided therein has been satisfied. Hence not following the procedure provided therein may be considered as a technical breach only and the entire demand needs to be dropped on this ground alone. Reliance placed on
    - Aster Pvt. Ltd. [2016 (43) STR 411 (Tri. - Hyd)]
    - Cranes & Structural Engineers [2017 (347) ELT 112 (Tri.Bang)]
- Reversal of Credit demanded is in absolute disproportion to the exempted goods supplied by the appellants The total turnover of the exempted goods supplied by the appellants is only 2.5% of the total turnover of the appellant. Whereas the Credit Sought for reversal is around 78% of the total credit availed by the appellant which is subject to Rule 6 of the CENVAT Credit Rules, 2004. The purpose of

Rule 6 is to ensure that the appellant does not avail credit of input / input services used for manufacture of exempted goods / provision of exempted service. To place such exorbitant demand on the appellant is unjustified. Reliance on

- Foods, Fats & Fertilisers Ltd. [2011(22) STR 484 (Tri. - Bang)]
- Bombay Minerals Ltd. [2019 (29(GSTL 361 (Tri-Ahmd)]

- Without prejudice to all the arguments made above, even assuming that the appellant is required to reverse credit as per Rule 6(3)(i) of the CENVAT Credit Rules, 2004, the 10% provided therein is both for Inputs & Input Services. The fact that the appellant has reversed the credit pertaining to inputs is admitted in findings part of the OIO in Para 27.Hence even in the worst case scenario, the demand needs to be further reduced by deducting the amount already reversed in respect of inputs.
- Demand is hit by limitation. Reliance placed on:
  - Jakap Metind Pvt. Ltd. [2015 (320) ELT 485 (Tri.-Mumbai)]
  - Sarabhai Chemicals [2005 (179) ELT 3 (SC)]

3.3 Learned authorized representative reiterates the findings recorded in the impugned order.

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

4.2 The only issue for consideration in the present appeal as per the impugned order is "Whether the option of reversing proportionate CENVAT Credit of Input Services attributable to manufacture of exempted goods provided under Rule 6(3)(ii) read with Rule 6(3A) is available to the appellant since they have not followed the procedure laid down in Rule 6(3A)."

4.3 The issue under consideration is no longer res-integra. In case of Welspun Corporation, tribunal has held as follows:

"6. We have carefully considered the submissions made by both the sides and perused the records. The limited issue to be decided by us is that in a case where at the time of receipt of input services, the appellant availed Cenvat credit on the entire service and on pointing out by the audit party they reversed the Cenvat credit in respect of input services attributed to the exempted goods/non-excisable goods along with interest, whether the demand confirmed by the Revenue under Rule 6(3) i.e. 5%/10% on value of exempted goods is legal and proper. The appellant is not disputing that the Cenvat credit in respect of input services attributed to exempted goods namely Steam, Fly-Ash and non-excisable goods i.e. electricity sold outside their factory, is not admissible and they have admittedly reversed the proportionate Cenvat credit and also paid the interest from the date of taking credit till the date of reversal. For ease of reference, we reproduce below the Rule 6(3) of Cenvat Credit Rules, 2004 :

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

(i) the manufacturer of goods shall pay an amount equal to five per cent. of value of the exempted goods and the provider of output service shall pay an amount equal to six per cent. of value of the exempted services; or

(ii) the manufacturer of goods or the provider of output service shall pay an amount equivalent to the Cenvat credit attributable to inputs and input services used in, or in relation to, the manufacture of exempted goods or for provision of exempted services subject to the conditions and procedure specified in sub-rule (3A).

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 and input services used exclusively for the manufacture of exempted goods or provision of exempted service.

From the plain reading of the Rule 6(3), it can be seen that the law provided three options to the assessee (I), (II) accordingly the assessee has option either to pay 5%/10% of value of exempted goods or pay an amount determined under sub-rule (3A) i.e. proportionate credit attributed to the exempted goods. The appellant rightly availed the option of sub-rule (3A) of Rule 6 of CCR, 2004, the only lapse on the part of the appellant is that the payment of Cenvat credit was made belatedly, however the appellant have paid interest for the period right from availing the Cenvat credit till the payment/reversal of proportionate Cenvat credit which create a position as if the appellant have not availed Cenvat credit right from the date when Cenvat credit was availed. Therefore there is no reason for imposing option under Clause (i) of Rule 6(3) i.e. payment of 5%/10% of the value of exempted goods. This issue has been considered by this Tribunal time and again, though the appellant have relied upon almost 20 judgments on this issue which are directly applicable. However, we are referring some of the judgments as under :

- *The Hon'ble Tribunal in the case of Jay Balaji Industries Ltd. - 2017 (352) E.L.T. 86 (T) held in para 5 that :*

"5. The Hon'ble Supreme Court in the case of Chandrapur Magnet Wires (P) Ltd. v. CCE, Nagpur - 1996 (81) E.L.T. 3 (S.C.) which has been followed in many other decisions of the High Court as well as the Tribunal has held that once Cenvat credit is reversed, it is to be considered ab initio not availed. In the light of this judgment of the Hon'ble Supreme Court, the reversal of Cenvat credit already made by the appellant is to be considered as not taken ab initio.

The Government has introduced the facility of proportionate reversal w.e.f. 1-4-2008 to mitigate the difficulties faced by manufacturers to maintain separate accounts for inputs/input services as well as when the same are commonly used for dutiable as well as exempted products/services. Though detailed procedure starting with an option to be exercised by manufacturer has been prescribed, in the present case, the appellant has not followed the same. However, it is on record that they have already reversed an amount claimed to be proportionate. It is also pertinent to record that this has been done by the appellant even before the issue of the show cause notice in this case. We are of the considered view that the failure of the appellant to follow the procedure perfectly should not come in the way of extending the substantial benefit of proportionate reversal. However, we find that in the order passed by the lower authority, he has not given any finding as to whether the reversal already made satisfies the test of proportionate reversal in terms of quantum of reversal. Hence, we are of the considered opinion that the matter is to be remanded to the original adjudicating authority to verify whether the amount of Cenvat credit already reversed along with interest satisfies the requirement of proportionate reversal. We also make it clear that there is no justification for demand of the amount equivalent to 10%/5% of the value of electricity wheeled out. The appellant should be given an opportunity to argue their case before the original adjudicating authority who is directed to pass order expeditiously within a period of three months of the date of receipt of this order."

- *The Hon'ble Tribunal in the case of Swiss Parental Pvt. Ltd. - 2014 (308) E.L.T. 81 (T) held in para 7.3 that :*

"7.3 We find that the ratio of the above case laws is squarely applicable to the appellant's case. We, therefore, hold that if Cenvat credit attributable to inputs used in the manufacture of exempted final products is reversed along with interest subsequent to removal of exempted final products, then the

appellant cannot be said to have taken credit of inputs used in or in relation to the manufacture of exempted final products, and they need not pay an amount @ 8% or 10% of the sale price of exempted final products. The adjudicating authority has worked out the demand of Rs. 88,41,543/- on the basis of 8% or 10% of the sale price of exempted final products cleared by the appellant during the material period, while the respondent claims that the input credit attributable to manufacture of exempted final products is only Rs. 7,85,573/-, which they have reversed. In the present case we observed from the case records that the appellant has furnished relevant data/documents available at pages 372 to 396 of the appeal papers filed in Appeal No. E/449/2011 showing Cenvat credit reversed/required to be reversed on inputs used in the manufacture of exempted final products during the material period. The appellant has also placed on record copies of 21 invoices at pages 349 to 370 of the appeal papers of Appeal No. E/449/2011 showing receipt of exempted input (Alpha Beta Arteether) of value of about three crore rupees during the material period, for which no Cenvat credit could be taken. In view of these facts on record, we find that the method adopted by the adjudicating authority for working out of the demand of Rs. 88,41,543/-, on the basis of 8% or 10% of the sale price of dutiable and exempted final products, is not maintainable. We, therefore, remand the matter to the adjudicating authority for proper verification of appellant's claim of reversal of Cenvat credit on inputs attributable to manufacture of exempted final products on the basis of appellant's records after affording opportunity to the appellant to explain their case before deciding the issue of quantum of Cenvat credit in remand proceedings."

- *The Hon'ble Supreme Court in the case of Bombay Dyeing & Mfg. Co. Ltd. - 2007 (215) E.L.T. 3 held in para 8 that :*

"8. There is no merit in this civil appeal. Under the notification, mode of payment has not been prescribed. Further, exemption is given to the final product, namely, grey fabric under the Central

Excise Act, 1944, levy is on manufacture but payment is at the time of clearance. Under the Act, payment of duty on yarn had to be at the spindle stage. However, when we come to the Exemption Notification No. 14/2002-C.E., the requirement was that exemption on grey fabrics was admissible subject to the assessee paying duty on yarn before claiming exemption and subject to the assessee not claiming Cenvat credit before claiming exemption. The question of exemption from payment of duty on grey fabrics arose on satisfaction of the said two conditions. In this case, payment of duty on yarn on deferred basis took place before clearance of grey fabrics on which exemption was claimed. Therefore, payment was made before the stage of exemption. Similarly, on payment of duty on the input (yarn) the assessee got the credit which was never utilized. That before utilization, the entry has been reversed which amounts to not taking credit. Hence, in this case, both the conditions are satisfied. Hence item no. 1 of the table to Notification No. 14/2002-C.E. would apply and accordingly the grey fabrics would attract nil rate of duty."

- *In the case of Aster Pvt. Ltd. - 2016 (43) S.T.R. 411, it was held that :*

"The above Rule 6(3A) states that while exercising the option, the manufacturer of goods or the provider of output service shall intimate in writing the department regarding the option exercised. In the present case, admittedly there is no intimation given by the appellant informing his exercise of option. The contention of the department is that when the appellant has not intimated his option in writing then the appellant is bound to pay the duty amount calculated under the first option. I am afraid I cannot endorse this contention. The said rule does not say that on failure to intimate, the manufacturer/service provider would lose his choice to avail second option of reversing the proportionate credit. Rule 6(3A), as seen expressly stated is nothing but a procedure contemplated for application of Rule 6(3). Therefore, the argument of the Revenue that the

requirement to intimate the department about the option exercised, is mandatory and that on failure, the appellant has no other option but to accept and comply Rule 6(3)(i) and make payment of 5%/10% of sale price of exempted goods/value of exempted services is not acceptable or convincing. The Rule does not lay down any such restriction. The procedure and conditions laid in Rule 6(3A) is intended to make Rule 6(3) workable and not to take away the option available to the assessee. In any case, at no stretch of imagination can it be said that on failure to intimate the department, Rule 6(3)(i) would automatically come into application."

- *The Hon'ble Tribunal in the case of Cranes & Structural Engineers - 2017 (347) E.L.T. 112 (T) held in para 4.1 that :*

"4.1 On analysis of Rule 6(3A), I find that while exercising the option, the manufacturer of goods or the provider of output service shall intimate in writing to the Department regarding the option exercised. In the present case, admittedly there is no intimation given by the appellant informing the exercise of his option. The argument of the Department is that when the appellant has not intimated his option in writing then the appellant is bound to pay the duty amount calculating under the first option. According to me, this argument is devoid of merit, because the said Rule does not say anywhere that on failure to intimate, the manufacturer/service provider would lose his right to avail second option of reversing the proportionate credit. Sub-rule (3A) of Rule 6 is only a procedure contemplated for application of Rule 6(3). Consequently, the argument of Revenue is that the appellants exercising option is mandatory and on its failure, the appellant has no other option but to accept and apply Rule 6(3)(i) and make payment of 5%/10% of the sale price of the exempted goods or exempted services is not acceptable, because the Rule does not lay down any such restriction and this has been held in the judgments cited supra. It has been held in the judgment cited supra that the condition in Rule 6(3A) to intimate the Department is only a procedural one and that such

procedural lapse is condonable and denial of substantive right on such procedural failure is unjustified. Therefore, keeping in view the facts and evidence on record, the demand raised by the Revenue is not legal and proper. Moreover, the demand raised by the Revenue is also hit by limitation as the appellant reversed the pro rata credit with interest on 31-7-2010 itself and communicated to the Department whereas the show cause notice was issued only on 13-3-2012 which is beyond the period of one year and the allegation of the Department regarding suppression of fact is also not tenable because the appellant has disclosed these facts in their periodical ER1 returns filed by them. Therefore, the impugned order is not sustainable on merit as well as on limitation and therefore, I set aside the impugned order by allowing the appeal of the appellant with consequential relief, if any."

7. In view of the above, the issue is no longer res integra, therefore, the demand confirmed equal to 5%/10% of value of the exempted goods is not sustainable. As regard the submission of Ld. Counsel regarding the limitation, we find that firstly, the appellant had not utilized the Cenvat credit attributed to the exempted goods, secondly the fact regarding the availment of credit and manufacture and clearance of exempted and non-excisable goods are very much on record, therefore, the suppression of fact cannot be attributed on the part of the appellant. We also find that since the issue regarding reversal of Cenvat credit under Rule 6(3) is contentious and various cases on the same issue have been made out which can be seen from such of judgment given above, therefore, on the issue related to Rule 6(3) particularly in the facts of the present case it cannot be said that the appellant had mala fide intention to evade payment of duty. Therefore, demand for the extended period is also hit by limitation for the same reason the penalties imposed are also unsustainable.

8. As per our above discussion, we hold that proportionate credit paid by the appellant along with interest is sufficient *compliance under Rule 6(3), accordingly the same is maintained. The demand under Rule 6(3)(i) i.e. 5%/10% of value of the exempted goods and all the penalties are set aside. The appeal is allowed in the above terms."*

4.4 In view of the above decision we do not find any merits in the impugned order.

5.1 Appeal is allowed.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

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