CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI

REGIONAL BENCH

Excise Appeal No. 1946 of 2012

(Arising out of Order-in-Original No. 33-35/AT(33-35)/COMMR/2012 dated28.09.2012 passed by Commissioner of Central Excise, Custom & Service Tax, Raigad)

M/s. Kisan Irrigations Ltd. **Appellant**

3rd Floor 26 A Chandiwali Road, Off. Saki Vihar Road

Andheri (East), Mumbai – 400 072.

Vs.

The Commissioner of Central Excise, Customs &

Service Tax, Raigad **Respondent**

4th Floor, Utpad Shulk Bhavan, Plot No. 1, Sector-17,

Khandeshwar, New Mumbai-410 206.

Excise Appeal No. 85028 & 85029 of 2013

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Khandeshwar, New Mumbai-410 206.

Appearance:

Shri Mehul Jivani, Chartered Accountant, forthe Appellant

Shri S. Anantha Krishnan, Commissioner, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

Date of Hearing: 08.03.2023

Date of Decision:08.03.2023

FINAL ORDER NO. 85739-85741/2023

PER: SANJIV SRIVASTAVA

This appeal is directed against order-in-original No. 33-35/AT(33-35)/COMMR/2012 dated 28.09.2012 of Commissioner Central Excise & Service Tax, Mumbai by the Impugned order commissioner held as follows:

'I determine the amount of Rs. 5,96,79,470.00 (Rupees five crore ninety six lakh seventy nine thousand four hundred seventy only) on the value of the exempted goods cleared during the period from April 2006 to November 2011 under rule 14

along with rule 6(3) of the Cenvat Credit Rules, 2004, and read with proviso to sub-section (i) of section 11A of Central Excise Act, 1944

(ii) I order appropriation of Rs.14,86,580.00 paid by the noticee against the as determined at (i)above.

iii) I order payment of interest on the amount determined as at (i) above by M/s. Kisan Irrigations Ltd forthwith under the provisions of rule 14 of CENVAT Credit Rules, 2004 read with section 11AA/erstwhile 11AB of Central Excise Act, 1944, at the appropriate rate as applicable from time to time.

iv) I impose penalty of Rs. 5,96,79,470.00 (Rupees five crore ninety six lakh seventy nine thousand four hundred seventy only) on M/s. Kisan Irrigations Ltd under the provisions of rule 15(2) of CENVAT Credit Rules, 2004 read with erstwhile section 11AC/section 11AC(b) of Central Excise Act, 1944.'

2.1 Appellants are engaged in manufacture of PVC pipes, fittings, HDPE Pipes, lateral pipes, etc theyare also availing benefit of CENVAT Credit as applicable to them.

2.2 Appellants are clearing the goods on payment of duty and also under exemptions from payment of duty under notification 3/2005-CE. Appellants have maintained separate accounts for input/ input services used in manufacturing of exempted goods and dutiable goods. The SCN dated 20/04/2011 was issued to the appellant alleging that

'(i) Goods valued at Rs 19,14,16,422/ which were manufactured on job work basic and cleared without payment of duty Apparently, the assessee had utilized common inputs, on which they had availed Cenvat Credit, for the manufacture of both job-work goods on which no duty is paid as well as their own goods I, therefore, appears that the assessee was liable to pay an amount calculated at the rate of 5% as substituted vide Govt. of India's Notfn No. 16/2009 C. Ex. (NT) dated 07:07:2009, of the value of the said exempted goods in terms of the provisions of Rule 6(3) (i) of Cenvat Credit Rules, 2004. As per Explanation ill appended to after sub-rule 3D of the Rule 6 of the Cenvat Credit Rules,2004, such amount is recoverable in the manner as provided in Rule 14 of the Cenvat Credit Rules.2004 for recovery of credit wrongly taken.

(ii) By not doing so it appears that the assessee have contravened the provisions of Rule 612) and Rule 6 (3) of the Cenvat Credit Rules, 2004 by not following the procedures prescribed therein and defaulted in payment of amount due on the value of the exempted goods. Both the Rules i.e. Rule 612) and 6(3) of the Cenvat Credit Rules, 2004 are cumplimentary to each other and assessee is following the self assessment procedure for clearances and payment of duty. Since they did not disclose the procedure/practice to the Department and contravened the said

provisions with an intent to evade payment of duty, the said amount on the value of the exempted goods is recoverable in terms of Rule 14 of the Cenvat Credit Rules, 2004 read with Rule 6 of the Cenvat Credit Rules, 2004 read with proviso to sub-Section (1) of Section 11A of the Central Excise Act, 1944/ Section 11 A (5) of the Central Excise Act 1944 for their failure to maintain separate account of receipt, consumption and inventory of inputs meant for use in the manufacture of dutiable and exempted goods and thereby also made themselves liable to penalty under Rule 15 of the Cenvat Credit Rules, 2004 read with Section 11AC/Section 11 AC (b) of the Central Excise Act, 1944.

(iii)Apparently the assessee appears to have contravened the provisions of Rule 6(2) and Rule 6 (3) of the Cenvat Credit Rules, 2004 in as much as they have not paid the amount of Rs.98,57,946 - (Rupees Ninety Eight Lakhs Fifty Seven Thousand Nine Hundred forty Six Only) i.e. 5% of the value of the job work goods, totally valued at Rs.19,14,16,422/- cleared, during the period January, 2011 to October, 2011, as detailed in Annexure 'A' of this show Cause Notice, as required under the said Rules.'

2.3 Appellant were issued show cause notice asking them to show cause as to why:-

i. *'The amount of Rs. 98,57,946 /- (Rupees Ninety Eight Lakhs Fifty Seven Thousand Nine Hundred Forty Six Only), on the value of the exempted goods for clearance affected during the period January-2011 to October-2011, as detailed in Annexure 'A' of this show Cause Notice, should not be demanded and recovered from them in terms of Rule 14 of the Cenvat Credit Rules, 2004 read with Rule 6(3) of the Cenvat Credit Rules, 2004 read with the first proviso to sub-section (1) of Section 11A of the Central Excise Act, 1944 and Section 11 A(5) of the Central Excise Act, 1944 for the period 01.01.2011 to 07.04.2011 and 08.04.2011 to 31.10.2011 respectively.*

ii. *Interest should not be charged and recovered on the disputed amount under the provision of Section 11 AB/11AA of Central Excise Act 1944 read with Rule 14 of the Cenvat Credit Rules, 2004.*

iii. *Penalty should not be imposed under the provisions contained in Rule 15 of the Cenvat Credit Rules, 2004 read with of Section 11AC of the Central Excise Act, 1944 and Section 11AC (b) of the Central Excise Act 1944 for the period 01.01.2011 to 07.04.2011 and 08.04.2011 to 31.10.2011 respectively.'*

2.4 Show cause notice was adjudicated by impugned order. Aggrieved appellants have filed this appeal.

3.1 We have heard Shri. Mehul Jivani, Chartered Accountant for the appellant and Shri S. Anantha Krishnan, Commissioner(AR) for the revenue.

3.2 Arguing for the appellant Learned Counsel submits:

- *From 2006-07 the appellants have estimated thepercentage of clearance of exempted goods (lateral pipes) compared to the total value of clearance and have reduced the said percentage of credit from the service tax credit shown in the invoice of service provider. Thus, the appellants had at the initial stage did not avail the credit of service tax of the entire service received but have availed the reduced amount of credit by reducing the credit amount which is attributable to use of input service in the manufacture of exempted goods.*
  - *MIRC EKECTRONICS LTD 2012-TIOL-1832-CESTAT-MUM[2015 (38) S.T.R. 199 (Tri.-Mumbai)]*
- *Without prejudice to the above, the option to pay 6% of the value of exempt goods cannot be thrust upon the appellant even if intimation not filed under Rule 6(3A) for proportionate reversal:*
  - *J.B. Mangharam Foods Pvt. Ltd. versus Commissioner of C. Ex., Indore 2010 (258) E.L.T. 575 (Tri.-Del.)*
  - *Sahyadri Starch order No. A/85556/16/EB dtd. 25/01/2016.*
  - *Mercedes Benz India (P) Ltd.[2015(40) S.T.R. 381 (Tri.-Mumbai)]*
  - *Nagar Urban Co-op Bank Ltd 2018(3) TMI273-CESTAT Mumbai.*
  - *Aster Pvt. Ltd. 2016 (43) S.T.R.. 411 (Tri-Hyd)*
  - *Tata Technologies Ltd. 2016 (42) S.T.R. 290 (Tri.-Mumbai)*
  - *Commissioner of C. Ex., Puducherry versus CESTAT, Chennai 2015 (323) E.L.T. 323 (Mad.)*
- The intention is to recover only proportionate amount of credit, Finance Act, 2010 has retrospectively from 1-9-96 has amended the rules and proportionate reversal of credit on the Input/Input services attributable to the use in manufacture of exempted goods. Such retrospective amendment from 1-9-96 clearly establish the fact that the authorities has intention to recover only Cenvat credit which is attributable to use of input/input services in manufacture of exempted goods. This view is supported by the following decision:
- The decision of Hon'ble Bombay High Court in case of **Nicholas Piramal(India) Ltd. 2009 ELT 321 (Bom)** is distinguishable and would not be applicable in the present case.
- Demand has extended period of limitation should not be involved in the present case.
- Penalty on issues were the interpretation of the law is not warranted as held in the follows decisions:
  - Uniflex Cables Ltd. 2011 (271) ELT161 (SC)
  - Sonar Wires Pvt. Ltd. Vs. CCEx. 1996 (87) ELT 349 (T)

- Synthetics &Chemicals Ltd. 1997 (89) ELT 793(T)
- ManIndustries Corporation1996 (88) ELT 178 (T)
- Sports & Leisure Apparel Ltd. CCE., Noida 2005 (180) ELT490
- AquamallWater SolutionsLtd. 2003 (153) ELT 428.

3.4 Arguing for the revenue Learned AR submits that issue involved in the present case vis-à-vis non-reversal of service tax credit involved in the manufacture of exempted goods during the period November,2005 to October,2011. Inevitably appellants are manufacturing dutiable as well as exempted goods and also taking the benefit of Cenvat credit. For the period prior to 01.03.2008 it was mandated that the person manufacturing dutiable and exempted goods should maintain separate accounts for the inputs of the input services used in manufacture of dutiable and exempted goods and check credit only of that portion used in the manufacture of dutiable goods. Having failed to do so appellants were required to pay an amount of 10% or 5% for the value of exempted goods cleared. He relies upon following decisions:

- NAGAR URBAN CO-OP. BANK LTD 2018 (3) TMI 273 – CESTAT MUMBAI
- Ciron Drugs & Pharma Pvt. Ltd. 2016-TOIL-1415-CESTAT MUMBAI
- Colgate Palmolive (I) Ltd. 2012 (25) STR 268 (Tri – Mum)
- Maan Phamacuticals Ltd. 2011 (263) ELT 661 (Guj)
- Maize Products 2009 (234) ELT 431 (Guj)
- Himalaya Drug Company 2012 (27) STR 95 (Kar)

3.5 Since appellants have not maintained separate accounts, the appeals filed by the appellants do not merit and needs to be dismissed. He reiterates the findings recorded in the Impugned order.

4.1 We have considered the Impugned order along with the submissions in appeal and during the course of arguments. Commissioner has recorded following findings:

'*In their letter dated 14.09.2012, the noticee has provided elaborate details of proportionate credit needed to be reversed. Their claims can be abridged as under:*

i) during the period 2005-06, they have not availed the CENVAT credit on input services andtherefore for the period 2005-06 the provisions of rule 6 do not apply.
ii) they have at the time of availing the credit reduced 30%; they have worked out the actual percentage of exempted goods compared to total turnover of goods manufactured at Roha factory which works out to 23%; that thus as against 30% margin kept at the time of availing the credit, the company was required to reduce 23% of the credit. Thus for the year 2010-11 for input services received at Roha factory the company is not required to reverse any credit.

iii) at Head Office they have reduced 30% of the total credit and availed the rest of the credit; that they have now worked out the actual percentage of sales of exempted goods.

iv) regarding trading sales, the noticee submitted that as per rule 6 the value of exempted goods shallbe considered as 10% of the cost of sales;

v) the actual percentage of sales of exempted goods and traded products (exempted service) for the year 2010-11 is 14.41% (i.e; 13.62 +0.79); that the total credit as shown in the invoice service provider for the year 2010-11 is Rs.12,64,286.00; that if 14.4% is reduced there from the eligible credit remains at Rs.10,82,093.00 which is more than the credit of Rs.8,85,000.00 that is availed at Roha factory; that thus the credit availed is less than the credit eligible and hence for the year 2010-11 no credit is required to be reversed.

vi) giving details of calculation as at para 21 and 22 supra, the noticee claimed that they reversed Rs.3,20,845.00 vide entry no 13/128 and 13/129 dated 164-2009 in RG 23 register of and paid interest of Rs.23,452.00 vide challan no 50328 dated 3-7-2009, that this should be considered as sufficient discharge of liability towards proportionate reversal of credit on input services which have been used for manufacture of exempted goods that since they have already reversed the credit no further credit is required to be reversed, that for the year 2009-10 and 2010-11, the credit taken after reducing the estimated amount of percentage of reversal is less than the credit eligible to the company, that since they have taken less credit compared to eligible credit amount no further credit is required to be reversed.

In nutshell, I observe, the claim of the noticee is that they need to reverse Rs. 12,480, Rs 19,011 and Rs. 25,451 for the period 2006-07, 2007-08 and 2008-09 respectively and the proportionate credit for the rest of the period has already been made good. In this regard the jurisdictional Range Superintendent has been directed to verify the veracity of their claims. In his letter E.NO-CEX/RR-II/KISAN/12-13/ dated 28.09 2012 Superintendent, Roha Range II of Alibag Division submitted the verification report. In his verification report, the jurisdictional Range Superintendent has asserted that during the period of 2005-2006 the noticed has not availed the CENVAT credit on input service as seen from ER-1 returns for the month of November 2005 to March 2006 and RG 23 A 11 and thus no service tax credit appears to be used in the manufacture of exempted goods. He has also informed that the noticee has reversed/paid Rs.14,86,580.00.

Coming back to the allegations, I find that the basic issue raised in the notices stands resolved as the noticee agrees with the allegations. However, the only dispute now remains is payment of 50/10% of the value of exempted goods as alleged in the notices. I find that the noticee relying upon various judicial and quasi-judicial decisions claims that even if not exercised initially can be exercised subsequently and hence they shall be permitted to reverse the credit proportionately as under *sub-rule 3A. Their claim attracts concern especially when the noticee had been issued show cause notices challenging the classification of lateral pipes and exemption availed thereon thereby making application of the provisions of rule 6 of the CENVAT Credit Rules, 2004, quite doubtful in the case of the noticee which has been now resolved and the classification of lateral pipes has been decided under tariff item No 84249000 and the eligibility of exemption under notification No. 3/2005-CE dated 24.02.2005 has been permitted as per Order in Original No. 30-32/AT(30-32)COMMR/RGD/12-13 dated 27.09.2012 issued under F. No.V/Adj(SCN)15-182/Rg4/09-10 thereby making the issue under discussion quite live rather than hypothetical. However, the requirement of non-filing of option is a stringent hindrance. I find the noticee putting their reliance on various decisions by the higher authorities in support of proportionate reversal of credit in lieu of payment of 'amount'.*

I find that the facility of reversal of proportionate credit in the circumstances where the assessces are unable to maintain separate accounts as required under rule 6 ibid has been introduced vide notification No. 10/2008-CE(NT) dated 01.03.2008. However, the amendment made to rule 6 providing the facility of reversal of proportionate credit, comes with a valley of procedures to be followed by an assessee. The notices also based upon these failures of compliance of these procedures. Statutory provisions are meant for strict follow up find that the noticee has not followed procedures laid down under rule 6(3) and rule 6(3A) ibid. In absence of such strict compliance, expecting benefits from these fraction of statute I also find that the notice in their concentrated effort relied upon various decisions by the higher authorities to say that proportionate credit attributable to the exempted goods can be reversed even prior to the issue of. However, Hon'ble Bombay High Court has settled this issue in CCE vs Nicholas Piramal (India) Lid-2009(244)ELT 321(Bom HCDB) holding that "Court cannot read in rule something different. Rule 6(2) is mandatory and not directory. Hardship in following rule cannot result in giving goby to language of the rule and make the rule superfluous". Hence, reversal of proportionate credit cannot be allowed prior to the introduction of this very amendment. Again, going by the provisions of rule 63AXc) ibid, such proportionate reversal has to be determined finally for the whole year. In view of these statutory provisions concreted by the judicial pronouncements the claim of reversal of proportionate credit for the period under discussion cannot be allowed. The noticee is, therefore, liable to pay 10%/5% of the value of exempted goods as proposed in the notices.

I find in view of the above that the submissions of the notice with regard to their claim of reversal of proportionate credit cannot be accepted. I find that the allegations made in the show cause notices sustain and the noticee is liable to pay the amount at 5%/10% as provided under rule 6 of CENVAT Credit Rules, 200.

However, the proposal for appropriation of amount shown in the notices has apparently been merged with the entire amount of Rs.14,86,580.00 paid by the noticee which needs to be appropriated.

I find that the noticee was reversing certain amount of proportionate credit attributable to competed goods on their own; hence, it cannot be said that they were unaware of their responsibilities thrust upon them with regard to the provisions of rule 6of Cenvat Credit Rules, 2004. By their commission of reversal of proportionate credit they were avoiding the statutory responsibility of payment of 1065% as proposed in the notices. Similarly, they were quite aware that the facility for reversal of credit facility came into effect from 01.03.2008 but they conveniently extended the facility of reversal of proportionate credit for the prior period too even while the noticee has totally failed to comply with statutory procedures with intent to illegal gain by way of lesser payment to government. Hence, the notice is liable for penal action as contemplated and they are liable to pay interest also, I find that they are claiming that they are not liable to penalty as the amount to be paid on exempted goods does not attract any of the provisions as proposed in the notices. However, I find that it is their claim that they are eligible to reverse proportionate credit and they need not pay the amount of 5%/10% as provided under rule 6. Therefore, the notice is liable for penal action for non-reversal of credit. As for the proposal in the show case notice dated 06.12.2010 for appropriation of interest that is paid by the noticee, I find that this interest pertains to an the credit reversed by them on their own prior to issue of show cause notice. As no such demand is being considered for reversal once again, the appropriation of interest is also out of purview of these findings.'

4.2 Finance Act, 2010 amended the Central Excise Rules, 1944. From 1997 onwards, CENVAT Credit Rules, 2001, 2002 and 2004 to provide for proportionate reversal of the common input/ input services credit used for manufacture of dutiable and exempted goods. That being so undisputedly even if separate accounts were not being maintained proportionate reversal needs to be allowed instead of asking for the reversal of 5%/10% of the value of the exempted goods.

4.3 Further tribunal has in following decisions held that proportionate reversal of the credit is sufficient compliance with the provisions of Rule 6.

- IPCA LABORATORIES LTD. 2015(40) S.T.R 771 (Tri. Del.)
- IVP LTD. 2017 (349) E.L.T. 18 (Bom.)
- ICMC CORPORATION LTD. 2015 (315) E.L.T. 388 (Mad.)

4.4 Appellants proportionately had been taking credit only of 70% that was due. It is 30% as the exempted turnover. On finalization of accounts it is observed that the exempted turnover was only 23% which is less than 30% assumed by them for taking the credit. Accordingly they have short taken during the disputed period as shown in the table:

Sr No	Description	Years				
		2006-07	2007-08	2008-09	2009-10	2010-11
1	Total credit taken	350316	1361911	2590066	3390047	1165529
2	Total credit eligible	352429	1510920	2653714	3549043	1390673
3	Short credit taken	2,113	1,49,009	63,648	1,58,996	2,25,114

As appellant themselves have not taken the credit which is attributable to the exempted good cleared by them there cannot be any demand made for the said credit. Tribunal and various courts have consistently held that proportionate reversal of Cenvat credit is sufficient compliance of provisions of Rule 6 of CENVAT Credit Rules, 2004.

4.5 All the facts were in the knowledge of the revenue throughout, thus it cannot be said that appellants were suppressing anything for availment of inadmissible credit. Accordingly, extended period of limitation provided Section 11A(1) will not be available for making the demand for extended period.

4.4 Since we do not find any merits in the demand made a penalty imposed also cannot be sustained.

5.1 Order set aside. Appeal is allowed.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

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