

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
MUMBAI**

WEST ZONAL BENCH

EXCISE APPEAL NO: 88197 OF 2013

[Arising out of Order-in-Original No: 06/RKS/CEX/P-I/2013 dated 21st May 2013 passed by the Commissioner of Central Excise, Pune – I.]

Alfa Laval (India) Limited

Mumbai-Pune Road, Dapodi, Pune - 411012

... Appellant

versus

Commissioner of Central Excise

Pune – I

41-A ICE House, Sassoon Road, Pune - 411001

...Respondent

APPEARANCE:

Shri Jitendra Motwani, Advocate for the appellant

Shri Bhilegaonkar Deepak, Additional Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)

HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: A / 87025/2023

DATE OF HEARING:

26/06/2023

DATE OF DECISION:

18/10/2023

PER: C J MATHEW

This appeal, though having every outward appearance of
disputing recovery of ₹ 11,56,09,971 under rule 14 of CENVAT

Credit Rules, 2004, along with applicable interest thereon, and imposition of penalty of like amount under rule 15 of CENVAT Credit Rules, 2004 while appropriating ₹ 95,77,184 already remitted by M/s Alfa Laval (India) Ltd before issue of show cause notice culminating in the impugned order¹ of Commissioner of Central Excise, Pune-I, is all about the manner in which neutralisation of such credit as was rendered ineligible by operation of rule 6 of CENVAT Credit Rules, 2014 is to be undertaken by an assessee and the extent of mandate available for the authority competent to order recovery under section 11A of Central Excise Act, 1944. Admittedly, the appellant had reversed credit of 95,77,184, in two tranches on 31st May 2012 and 1st June 2012, that, according to them, was obligated, in terms of rule 6 of CENVAT Credit Rules, 2004, on ineligible activity for 2011-12 which, however, was held as not having been performed when due and, thus, warranting application of ‘default option’ – coincidentally, the most detrimental – by the adjudicating authority.

2. The root of the controversy lies in the contribution of ‘trading’ to the topline of the appellant for the disputed period which, not being either ‘manufacture’ or ‘service’, disentitled them to offset of credit of tax paid on ‘input service’ used in common to the extent attributable to ineligible activity towards duties and taxes leviable on ‘excisable

¹ [order-in-original no. 06/RKS/CEX/P-I/2013 dated 21st May 2013]

goods' manufactured by them or 'taxable services' rendered by them. While the taking of credit, in terms of rule 3 of CENVAT Credit Rules, 2004, was in order, and indeed not disputed, a bar on retention of such credit in the pool available for offset of duty liability has been incorporated as rule 6 of CENVAT Credit Rules, 2004. Acknowledging the botheration in disaggregating 'input services' subsequent to procurement for erasure of credit that, in course of time and to the extent not attributable to eligible activity, was not permitted for retention, machinery provision was incorporated as sub-rule (3) therein.

3. The stand of the appellant is that fulfillment, even belatedly and as set out *supra*, of the admitted obligation to neutralise ineligible credit, along with interest thereon, relieved them of higher detriment entailed to the other options in rule 6(3) of CENVAT Credit Rules, 2004 which the adjudicating authority held to be nothing but advance remittance towards the default option therein. The impugned options find place as

'Rule 6. Obligation of a manufacturer or producer of final products and a provider of taxable service –

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(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 any one of the following options, as applicable to him, namely :-

- (i) pay an amount equal to five 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 sub-rule (2), take CENVAT credit only on inputs under sub-clauses (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 five per cent of the value so exempted.*

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.'*

of CENVAT Credit Rules, 2004.

4. The appellant is a manufacturer of 'equipment for heating, cooling and separation' and, having procured certain 'taxable services' during 2011-12, proceeded to take credit of tax in the said invoices as permissible under rule 3 of CENVAT Credit Rules, 2004. Trading volumes for the period was reported as ₹ 2,32,21,99,414 and the impugned recovery of 5% thereof, as provided in

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

of rule 6(3) of CENVAT Credit Rules, 2004 of is cause of dispute herein. The show cause notice of 17th December 2012 also proposed appropriation of ₹ 1,08,83,928 (inclusive of interest and penalty, as applicable) paid by appellant by resort to the computation prescribed in rule 6(3A) of CENVAT Credit Rules, 2004 well before the issue of

show cause notices and intimated to jurisdictional central excise authorities in communication dated 24th August 2012 for desisting from initiating proceedings for recovery under rule 14 of CENVAT Credit Rules, 2004. Thus, with the incorporation of

‘Explanation .- For the removal of doubts, it is hereby clarified that “exempted services” includes trading;’

below

‘(e) ““exempted services” means taxable services which are exempt from the whole of the service tax leviable thereon, and includes services on which no service tax is leviable under section 66 of the Finance Act, and taxable services whose pat of value is exempted on the condition that no credit of inputs and input services, used for providing such taxable service, shall be taken.’

of rule 2 of CENVAT Credit Rules, 2004 with effect from 1st April 2011, by notification no. 3/2011-CE(NT) dated 1st March 2011 rendering ‘trading’ to be ineligible for absorption of credit of tax paid on ‘input service’, and indeed there is no dispute on ineligibility of appellant, the obligation to reverse such credit crystallised.

5. Learned Counsel for appellant submits that the machinery provision for disaggregation of credit did not require exercise of option at the beginning of the year and that the self-contained scheme, for neutralization under rule 6(3A) of CENVAT Credit Rules, 2004, did not envisage any time-lines therein. It was further submitted that

the scheme of determining the reversal provisionally, pending finalisation at the end of the year, enabled discharge of obligation in the following financial year. It was also argued that the options were not contingent upon one another but mutually exclusive.

6. According to Learned Counsel, the discharge of obligation before issue of notice, by reversal, sufficed, in terms of the decision of the Hon'ble Supreme Court in *Chandrapur Magnet Wires (P) Ltd v. Commissioner of Central Excise, Nagpur* [1996 (81) ELT 3 (SC)] and of the Hon'ble High Court of Allahabad in *Hello Minerals Water (P) Ltd v. Union of India* [(2004) 174 ELT 422 (ALL)], as discharge of tax liability. That, as well as the finding therein that this was a permitted option even if not intimated to jurisdictional authorities, was claimed to have been set out in the order of the Tribunal in *Mercedes Benz India (P) Ltd v. Commissioner of Central Excise, Pune-I* [(2015) 40 STR 381 (Tri-Mum)] and in *New Bharat Ventures Limited v. Commissioner of Central Excise Customs and Service Tax* [(2021) SCC Online CESTAT 2700 (Tri-Hyd)] besides a *catena* of other rulings. Insisting that they had taken recourse to the correct manner of computation for reversal of ₹ 2,02,37,716, comprising ₹ 1,06,60,532 at 5% of value of 'exempted service' and disaggregation of ₹ 95,77,184, it was contended that 'trading' value was ₹ 73,43,01,782 and credit of ₹ 4,23,62,663 pertaining to 'input services' having been availed in entirety for 2011-12, owing to which Learned Counsel

submitted there was no short-payment at all.

7. Learned Authorized Representative drew attention to rule 6 of CENVAT Credit Rules, 2004 to point out that the option exercised was to prevail for the entire year and that it was held by the Hon'ble Supreme Court in *Mangalore Chemicals & Fertilizers Ltd v. Deputy Commissioner [191 (55) ELT 437 (SC)]* that express provisions of law did not warrant any interpretation.

8. Having considered the facts and circumstances, as well as the several decisions placed before us, it would appear that the scheme of neutralisation is to be exercised only by the assessee. Furthermore, it is also abundantly clear that rule 6 of CENVAT Credit Rules, 2004 merely sets out the scheme of neutralisation and entirely for the assessee to comply with; any failure thereto was to be set right under the authority of rule 14 of CENVAT Credit Rules, 2004. In *re Mercedes Benz India (P) Ltd*, it was held that

'5.1 We have observed that in Rule 6(3) prevalent at the relevant time, two options have been provided :-

- (i) Payment of 5% on value of exempted services.*
- (ii) Payment of an amount equal to the Cenvat Credit amount attributed to input services used in or in relation to manufacture of exempted goods or provision of exempted services as provided under sub rule (3A)(b).*

It is observed that the appellant has availed the option provided under sub-rule (3)(ii) of Rule 6 and paid an amount as per sub-rule (3A) along with interest and intimated the same to the jurisdictional superintendent in writing vide letter dated 14-3-2012. From the perusal of the said letter, we observed that the appellant categorically stated in the said letter that payment of Cenvat Credit, which they have made alongwith interest is in accordance with Rule 6 (3A) of Cenvat Credit Rules. With this act of the appellant, it is clear that the appellant opted for the option as provided under Rule 6(3)(ii) of the Cenvat Credit Rules, 2004, in accordance to which, the appellant are supposed to an amount equivalent to Cenvat Credit on input service attributed to the exempted service in terms of Rue 6(3A). In the present case, the appellant has availed Cenvat credit in respect of common input services, which has been used in relation to the manufacture of the final product as well as for trading of bought out cars. Therefore they are supposed to pay an amount equivalent to Cenvat credit which is attributed to the input service used for exempted service i.e. sale of car. In our view, three options have been provided under Rule 6(3) and it is up to the assessee that which option has to be availed. Revenue could not insist the appellant to avail a particular option. In the present case the appellant have admittedly availed option as provided under Rule 6(3)(ii) and paid an amount as required under sub-rule (3A) of Rule 6. As regard the compliance of the procedure and conditions as laid down for availing option as provided under sub-rule (3)(ii), we find that foremost condition is that the appellant is required to pay an amount as per the formula provided under sub-rule (3A) on monthly basis. However, we find that as per the provision, payment on monthly basis is provisional basis, therefore it is not mandatory that whole amount or part of the amount was required to be paid on every month. The appellant though

belatedly calculated the amount required to be paid in terms provided under sub-rule (3A) of Rule 6, therefore to fulfill the condition, assessee should pay the said amount, which has been complied by the appellant.

5.2 As regard the delay in payment, if any, the appellant have discharged the interest liability on such delay. Regarding the compliance as provided under Clause (a) of sub-rule (3A) of Rule 6 the appellant while exercising this option is required to intimate in writing to the Jurisdictional Superintendent, Central Excise, the following particulars namely :

- (i) Name, address and registration No. of the manufacturer of goods or provider of output service;*
- (ii) Date from which the option under this clause is exercised or proposed to be exercised;*
- (iii) Description of dutiable goods or taxable services;*
- (iv) Description of exempted goods or exempted services;*
- (v) Cenvat credit of inputs and input services lying in balance as on the date of exercising the option under this condition.*

As per the submission of the appellant and perusal of their letter along with enclosed details, it is found that more or less all these particulars were intimated to the Jurisdictional Superintendent. The appellant has been filing their returns regularly on monthly basis to the department. On perusal of the copies of the such return submitted along with appeal papers, it is observed that the particulars, as required under clause (a) of sub-rule (3A) of Rule 6 has been produced to the range superintendent. Therefore all the particulars which are required to be intimated to the Jurisdictional superintendent

while exercising option stand produced. Though these particulars have not been submitted specifically under a particular letter, but since these particulars otherwise by way of return and some of the information under their letters has admittedly been submitted, we are of the view, as regard this compliance of Rule 6(3A), it stood made.

5.3 As regard the contention of the adjudicating authority that this option should be given in beginning and before exercising such option, we are of the view that though there is no such time limit provided for exercising such option in the rules but it is a common sense that intention of any option should be expressed before exercising the option, however the delay can be taken as procedural lapse. We also note that trading of goods was considered as exempted service from 2011 only, thus it was initial period. We are also of the view that there is no condition provided in the rule that if a particular option, out of three options are not opted, then only option of payment of 5% provided under Rule 6(3)(i) shall be compulsorily made applicable, therefore we are of the view that Revenue could not insist the appellant to avail a particular option. In the present case admittedly it is appellant who have on their own opted for option provided under Rule 6(3)(ii). The meaning of the option as argued by the Ld. Sr. Counsel is that “option of right of choosing, something that may be or is chosen, choice, the act of choosing”. From the said meaning of the term ‘option’, it is clear that it is the appellant who have liberty to decide which option to be exercised and not the Revenue to decide the same.’

9. Thus, it is clear that exercise of option vests entirely with assessee at any stage and proceedings under rule 14 of CENVAT

Credit Rules, 2004 would have to be restricted to that which is least detrimental to the assessee.

10. The appellant, even if belatedly, has discharged obligation claiming that to be that contemplated in rule 6 of CENVAT Credit Rules, 2004. In terms of the decision of the Hon'ble Supreme Court in *re Chandrapur Magnet Wires (P) Ltd* holding that

'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.'

and of the Hon'ble High Court of Allahabad in *re Hello Minerals Water (P) Ltd* holding that

'16. The appellate Tribunal has disallowed the benefit of Notification No. 15/1994-CE, dated 1-3-1994 (supra) holding that the credit was not reversed by the petitioner prior to clearance/removal of the goods.'

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18. *In view of the above decision we are of the opinion that reversal of Modvat credit amounts to non-taking of credit on the inputs. Hence the benefit has to be given of the notification granting exemption/rate of duty on the final product since the reversal of the credit on the input was done at the Tribunal's stage.*

19. *The Tribunal while passing the impugned order dated 1-10-2003 [2004 (163) E.L.T. 55 (Tri. - Del.)] has not referred to the larger Bench decision of the Tribunal and other binding decisions. In Chandrapur Magnet Wire Limited v. Collector Central Excise, 1996 (81) E.L.T. 3 the Supreme Court has held :-*

"If debit entry is permissible to be made, the credit entry for duties paid on the inputs utilised in manufacture of final exempted product will stand deleted in the account 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 final exempted product under Rule 57-A. In other words the claim of exemption of duty on the disputed goods cannot be denied on the plea that the assessee has taken credit of duty paid on the inputs used in manufacture of these goods."

20. *The Tribunal while passing the impugned order dated 1-10-2003 instead of following the principles of law and the ratio of the decision of the Supreme Court in Chandrapur Magnet Wires Ltd. (supra) and also the decision of the larger five Members Bench of the Tribunal in the case of Franco Italian Company (P) Limited (supra) and other larger bench decision in the case of ICON Pharma and Surgical (P) Ltd. - 2000 (40) RLT 918 has held that reversal on inputs credit should have been done before removal of the bottles. In our opinion the Tribunal has completely misunderstood the decision in the case of Chandrapur Magnet Wires Ltd. (supra) in which the Supreme Court has quoted the Circular issued by the Ministry of Finance, being Circular No. 22/8/86, dated 10-4-1986. In Para 5 of the said Circular it was mentioned that the duty paid in the inputs used should be*

debited, before removal of such exempted final products. Since the Circular in that case required reversal of the credit before removal of the final product, hence the Supreme Court interpreting the said circular has mentioned that they see no reason why the assessee cannot make debit entry before removal of exempted final products.

21. In the present case for the purposes of claiming the benefit of the Notification No. 15/94-C.E., dated 1-3-1994 neither any circular has been issued nor the said circular of 1986 has been made applicable in the notification, which has been issued in 1994.

22. Hence in our opinion the Tribunal was not justified in taking a view that reversal of the credit having been made by the petitioner after removal of the final products the petitioner was not entitled to the benefit of Notification No. 15/94-C.E., dated 1-3-1994.

23. This view of the Tribunal is in our opinion patently erroneous and contrary to the decision of the five Member Larger Bench of the Tribunal as well as three member bench of the Tribunal, and is also contrary to the ratio of the decision of the Supreme Court in the case of Chandrapur Magnet Wire (supra).'

leaving no doubt that even post-clearance compliance of stipulations precluded denial of an entitlement available otherwise.

11. In these circumstances, the demand based on the harshest of the options as ordered by the original authority does not sustain. However, in having taken that extreme step, the claim of the appellant that obligation contemplated in the scheme has been duly complied

with was not ascertained. The discharge of the obligation must be in consonance with the computation envisaged in rule 6 of CENVAT Credit Rules, 2004. To enable such ascertainment, we set aside the impugned order and remand the matter back to the original authority who shall limit proceedings under rule 14 and rule 15 of CENVAT Credit Rules, 2004, if any, only to deficit, if any, in compliance as set out *supra*.

(Order pronounced in the open court on 18/10/2023)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*