2020-TIOL-1713-CESTAT-KOL

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
EASTERN ZONAL BENCH, KOLKATA
REGIONAL BENCH
COURT NO. II

Service Tax Appeal No.75460 of 2018

Arising out of Order-in-Appeal No.260/HWH/ST/2017-18, Dated: 31.10.2017
Passed by Commissioner of CGST & Central Excise (Appeals), Kolkata-II

Date of Hearing: 10.11.2020
Date of Decision: 10.11.2020

M/s MOULD EQUIPMENT LTD
(162/A, JANAGAR ROAD, P.O. PRABHASHNAGAR
SERAMPORE-712249, WEST BENGAL)

Vs

COMMISSIONER OF CGST AND CENTRAL EXCISE
HOWRAH COMMISSIONERATE, (15/1, STRAND ROAD
M.S.BUILDING, KOLKATA-700001)

Appellant Rep by: Shri Ankit Kanodia, CA
Respondent Rep by: Shri Joydip Chattopadhyay, AR

CORAM: P K Choudhary, Member (J)

ST - The issue arises for consideration is, whether assessee is required to pay 5%/6% of exempted services provided by them in terms of Rule 6(3)(i) when the assessee paid the actual credit attributed to exempted services in terms of Rule 6(3A) along with interest - The assessee did not maintain separate accounts for input services used in or in relation to provision of taxable service as well as exempt service - Therefore, two options were available to them, i.e., either to pay 6% of value of exempted service or pay an amount equal to the credit attributable to the input services used in or in relation to exempt services subject to the provisions of Sub-rule (3A) - When the mistake was pointed, assessee reversed the proportionate common credit taken on input services used in provision of exempted services - Therefore, Rule 6(3) (i) will not have any application, when a credit is taken wrongly and the same is reversed as it tantamount to nonavailment of the credit - In view of the decision in case of *M/s MERCEDES BENZ INDIA (P) LIMITED* **2015-TIOL-1550-CESTAT-MUM**

, the impugned order cannot be sustained and the same is set aside: CESTAT

Appeal allowed

Case laws cited:

MERCEDES BENZ INDIA (P) LIMITED VS COMMISSIONER OF CENTRAL EXCISE, PUNE-I - 2015-TIOL-1550-CESTAT-MUM... Para 9

ETRANS SOLUTIONS PVT LTD Vs COMMISSIONER OF CGST AND CENTRAL EXCISE, KOLKATA - 2019-TIOL-3327-CESTAT-KOL... Para 9

ROCKEY MARKETING CHENNAI PVT LTDVs THE COMMISSIONER OF SERVICE TAX, II, CHENNAI - 2020-TIOL-1585-CESTAT-MAD... Para 9

FINAL ORDER NO. 75653/2020

Per: P K Choudhary:

The appellant assessee is in appeal against the Order-in-Appeal dated 31/10/2017 wherein demand of CENVAT credit reversal amounting to Rs.32,40,001/- under Rule 6(3) of the Cenvat Credit Rules, 2004 on account of provision of exempted services and provision of taxable service was confirmed by the Commissioner(Appeals) for the period from 2010-11 to 2013-2014.

2. Briefly stated, the facts of the case are that the appellant, M/s.Mould Equipment Limited, is engaged in the business of manufacture of moulds as well as repair and maintenance and job work services and is registered with the Service Tax as well as the Central Excise department. They are also engaged as job worker by M/s. Hindustan National Glass and Industries Limited (hereinafter referred to as M/s. HNGIL) wherein raw materials received from M/s. HNGIL, after carrying out the process of proof machining and other activities which was classified under Central Excise Tariff i.e. other than raw cast articles of iron, are retuned back to M/s. HNGIL for use in further manufacture of glass bottles by HNGIL.

3. During the period, the Appellant has treated the above process as amounting to manufacture as the excise duty was paid on the finished goods by M/s, HNGIL and thus the appellant was taking the benefit of Notification No. 214/86-CE and no excise duty was paid by the Appellant. Also, the job charges received by the Appellant from M/S HNGIL was exempt from Service Tax vide notification No. 08/2005-ST dated 1st March, 2005 for the period up to 30/06/2012 and under clause (f) of section 66D of the Finance Act, 1994 w.e.f. 1st day of July'2012. The appellant availed Cenvat credit under Cenvat Credit Rules, 2004 on input and input services used in relation to the manufacture of finished goods as well as provision of job work services. In this background, a Show cause notice (SCN) dated 10.09.2015 was issued by the Service tax audit team of the revenue department and the Appellant was asked to pay an amount of Rs. 32,40,001/-being 5%/6% of the exempted turnover under Rule 6(3)(i) of the Cenvat Credit Rules, 2004 for availing common input services used for both provision of taxable service/ manufacture of taxable goods and provision of exempted services of job work.

4. The said SCN culminated into Order-in-Original dated 16/12/2016 wherein the learned Adjudicating authority

confirmed the total demand along with imposition of equivalent amount of penalty and interest as applicable. On Appeal filed before the learned Commissioner(Appeals), the Adjudication Order was upheld. Hence, the present appeal before the Tribunal .

5. Shri Ankit Kanodia, learned Chartered Accountant, appeared on behalf of the appellant and Shri Joydip Chattopadhyay, learned Authorized Representative appeared on behalf of the respondent department.

6. The learned Chartered Accountant appearing for the appellant submitted that the appellant has already reversed the total common Cenvat credit of input services by applying proportionate ratio method as per Rule 6(3)(ii) of the CCR, 2004 and has thus reversed an amount of Rs.3,25,737/- as per calculations below and thus there is no question of demanding 5%/6% of exempted turnover for reversal of Cenvat credit.

MOULD EQUIPMENT PRIVATE LIMITED

1,[illegible]	1,[illegible]	1,[illegible]	[illegible]
-2012	2012-2013	2013-2014	Total
[illegible]	2,85,[illegible]	[illegible]	[illegible]
91,47,135	93,93,032	1,23,16,935	3,76,79,205

7. He also submitted copies of statements showing year-wise calculations of the common Cenvat credit on input services and proportionate reversal done in this regard along with a Chartered Accountant's certificate certifying the submitted calculations. It is his contention that without considering the ratio of the turnover of taxable and exempted services, the lower authority has merely confirmed the demand at 5%/6% of the total exempted turnover which cannot be sustained and being completely perverse, the impugned order is liable to be set aside.

8. The learned Chartered Accountant also submits that it is not provided under the law that if there is any procedure infraction in availing the option of Rule 6(3)(ii), the option provided under Rule 6(3) (i) shall automatically apply. Two options have been provided under the law to the assessee. It is a choice available to the assessee to exercise the option to be availed. In the present case, the appellant admittedly availed option available under rule 6(3)(ii) read with rule 6(3A), therefore Revenue cannot insist to avail the option of Rule 6(3)(i) and demand huge amount of money which is otherwise not payable by the appellant, nor it is part of Cenvat Credit availed by the Appellant. He submits that when the options have been provided, the department has no say for choice of the assessee, the assessee has liberty to choose any of the option and therefore in the appellant's case, the appellant has opted for option available under rule 6(3)(ii) of Cenvat Credit Rules, therefore the department has no role to decide regarding any other option available in these rules.

9. In support of his submissions, the Learned. Chartered Accountant has referred to the following judgments:

a. M/s MERCEDES BENZ INDIA (P) LIMITED VS COMMISSIONER OF CENTRAL EXCISE, PUNE-I - **2015-TIOL-1550-CESTAT-MUM**

b. M/s Philips Carbon Black Ltd. VERSUS C C Ex & Service Tax, Durgapur Excise Appeal No.76122 of 2016- FINAL ORDER NO.76973-76975/2019 dated 17/12/2019

c. M/s ETRANS SOLUTIONS PVT LTD Vs COMMISSIONER OF CGST AND CENTRAL EXCISE, KOLKATA - **2019-TIOL-3327-CESTAT-KOL**

d. M/s ROCKEY MARKETING CHENNAI PVT LTDVs THE COMMISSIONER OF SERVICE TAX, II, CHENNAI - **2020-TIOL-1585-CESTAT-MAD**

10. The learned Authorized Representative for the Revenue justifies the impugned orders.

11. Heard both sides through video conferencing and perused the appeal records.

12. The short issue that arise for consideration in the instant appeal is whether appellant is required to pay 5%/6% of exempted services provided by them in terms of Rule 6(3)(i) when the appellant paid the actual credit attributed to the exempted services in terms of Rule 6(3A) along with interest following the option available under Rule 6(3)(ii). The relevant rule is reproduced below:

[Obligation of a manufacturer or "RULE 6. producer of final products and a [provider of output service]]. — (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 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.]

Where a manufacturer or provider of [(2) 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 sub-clauses (ii) and (iv) of clause (a) and input services under sub-clauses (ii) and (iv) of clause (b).]

Notwithstanding anything contained in [(3) 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 [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 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 [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."

13. In the present case, it is an admitted fact that the appellant did not maintain separate accounts for the input services used in or in relation to the provision of taxable service as well as exempt service. Therefore, two options were available to them, i.e., either to pay 6% of value of the exempted service or pay an amount equal to the credit attributable to the input services used in or in relation to exempt services subject to the provisions of Sub-rule (3A). When the mistake was pointed, the appellant reversed the proportionate common credit taken on input services used in the provision of exempt services. Therefore, Rule 6(3) (i) will not have any application, when a credit is taken wrongly and the same is reversed as it tantamount to nonavailment of the credit.

14. I find that the Tribunal in the case of *M/s MERCEDES BENZ INDIA (P) LIMITED VS COMMISSIONER OF CENTRAL EXCISE, PUNE-I* - **2015-TIOL-1550-CESTAT-MUM** while dealing with a similar situation has held – *"5.4 We find that the appellant admittedly paid an amount of Rs.4 ,06,785 /plus interest, this is not under dispute. Therefore in our view, the appellant have complied with the condition prescribed under Rule 6(3)(ii) read with sub rule (3A) of Rule 6 of Cenvat Credit Rules, therefore demand of huge amount of Rs.24,71,93,529/of the total value of the vehicle amounting to Rs.494,38,70,577/sold in the market cannot be demanded. We are also of the view that Rule 6 of the Cenvat Credit Rules is not enacted to extract illegal amount from the assessee. The main objective of the Rule 6 is to ensure that the assessee should not avail the Cenvat Credit in respect of input or input services which are used in or in relation to the manufacture of the exempted goods or for exempted services. If this is the objective then at the most amount which is to be recovered shall not be in any case more than Cenvat Credit attributed to the input or input services used in the exempted goods. It is also observed that in either of the three options given in sub rule (3) of Rule 6, there is no provisions that if the assessee does not opt any of the option at a particular time, then option of payment of 5% will automatically be applied. Therefore we do not understand that when the appellant have categorically by way of their intimation opted for option provided under subrule (3)(ii), how Revenue can insist that option (3)(i) under Rule 6 should be followed by the assessee. 5.5 As discussed above and in the facts of the case that actual Cenvat credit attributed to the exempted services used towards sale of the bought out cars in terms of Rule 6(3A) comes to Rs.4,06,785/where as adjudicating authority demanded an amount of Rs.24,71,93,529/. In our view, any amount, over and above Rs.4 ,06,785 /is not the part of the Cenvat Credit, which required to be reversed. The legislator has not enacted any provision by which Cenvat credit which is other than the credit attributed to input services used in exempted goods or servicesÍ¾ can be recovered from the assessee."*

15. In view of the above discussions, it is my considered view that the impugned order cannot be sustained and the same is set aside. The Appeal is allowed with consequential benefits, if any.

(Operative part of the order was pronounced in the open Court)