IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH : KOLKATA

REGIONAL BENCH - COURT NO.2

Excise Appeal No.76721 of 2018

(Arising out of Order-in-Appeal No.55/BOL/CT(Audit-II)/2017-18 dated 28.02.2018 passed by Commissioner of Central Tax(Appeal), Audit-II Commissionerate, Kolkata.)

M/s. Steel Authority of India Limited
(Durgapur Steel Plant, Durgapur-713203, West Bengal.)

...Appellant

VERSUS

Commissioner of CGST & CX, Bolpur Commissionerate

.....Respondent
(Nanoor Chandidas Road, Sian, Bolpur, Dist: Birbhum, West Bengal-731204.)

WITH

Excise Appeal No.77040 of 2018

(Arising out of Order-in-Appeal No.60/BOL/CT(Audit-II)/2017-18 dated 05.03.2018 passed by Commissioner of Central Tax(Appeal), Audit-II Commissionerate, Kolkata.)

M/s. Steel Authority of India Limited
(Durgapur Steel Plant, Durgapur-713203, West Bengal.)

...Appellant

VERSUS

Commissioner of CGST & CX, Bolpur Commissionerate

.....Respondent
(Nanoor Chandidas Road, Sian, Bolpur, Dist: Birbhum, West Bengal-731204.)

APPEARANCE

Dr.Samir Chakraborty, Senior Advocate & Shri Abhijit Biswas, Advocate for the Appellant (s)
Shri A.Roy, Authorized Representative for the Respondent (s)

CORAM: HON'BLE SHRI P.K.CHOUDHARY, MEMBER(JUDICIAL)

FINAL ORDER NO. 75244-75245/2021

DATE OF HEARING : 22 March 2021
DATE OF DECISION : 12 May 2021

P.K.CHOUDHARY :

The two appeals are against the orders dated February 28, 2018 and March 5, 2018 both passed by the Commissioner of Central Tax (Appeals), Kolkata whereby the appeals filed by the appellant against the adjudication orders dated November 8, 2012 and December 18, 2012 both passed by the Additional Commissioner, Central Excise & Service Tax Commissionerate, Bolpur confirming demands of Rs. 11,79,415/- and Rs. 26,94,800/- respectively against the appellant, under Rule 14 of the Cenvat Credit Rules, 2004 (hereinafter referred to as the "Cenvat Credit Rules") and *Explanation II* of Rule 6(3)(b) of the Cenvat Credit Rules, along with interest thereon under Rule 14 of the Cenvat Credit Rules read with Section 11AB of the Central Excise Act, 1944 (hereinafter referred to as "the Act") and imposing equivalent amount of penalties upon the appellant under Rule 15(2) of the Cenvat Credit Rules, have been rejected. The periods involved in the instant appeals are from August 2010 to February 2011 and August 2010 to March 2011.

2. The facts in brief of the cases, involving common issues, are:

(a) The appellant, an integrated steel plant manufactures various iron, steel and allied products falling under various Chapter Headings of the First Schedule to the Central Excise Tariff Act, 1985 at its said steel plant in Durgapur, West Bengal. The appellant has five coke oven batteries, each having 78 ovens and one coke oven having battery of 39 ovens which are used to convert coal into coke. During the process of conversion of coal into coke, at very high temperatures, Coke Oven Gas ("CO gas"), a very poisonous and harmful gas is generated. Hence it is not permitted to be let out in the air as per environmental law.

(b) The Raw CO gas contains various contaminants, such as Tar Vapour, Light Oil Vapour (consisting mainly of Benzene), Toluene and Xylene, Naphthalene Vapour, Ammonia Gas. The Raw CO gas generated is sucked by the exhauster from the Coke oven battery and is sent to the Coal Chemical Plant to extract high value by-products like Napthelene, Benzene, Toluene and Xylene, Tar, Heavy Creosote Oil, Light Oil, etc. In order to make raw CO gas suitable for use as a fuel the removal of Ammonia gas is essential because of its corrosive nature. Ammonia in the presence of oxygen and moisture causes severe erosion in the Coke Oven Gas lines. Hence, reduction in CO gas is a technical necessity. Wash oil is used to remove the Naphthalene and Benzol vapour from the raw CO gas, Benzol is then converted into Benzene, Toloune and Xylene and cleared from the factory upon payment of duty.

(c) In the Coal Chemical Plant, CO gas is passed through an absorber, where it is sprayed counter currently by low concentrated ammonia liquor containing sulphuric acid in two stages. Concentrated ammonical liquor from absorber is stored in feed tank and from there it is pumped to evaporator. Creating vacuum through surface condenser vaporizes concentrated liquor in evaporator and thereby formation of crystals of ammonium sulphate takes place, which crystals from centrifuge are taken to dryer through conveyor belt where the crystals are dried and fed to salt bunker from where it is loaded in bags as ammonium sulphate, a fertilizer.

(d) Although according to the appellant the provisions of Rule 6(2) & (3) of the Cenvat Credit Rules are not applicable in respect of ammonium sulphate, since it is a byproduct though exempted, in order to avoid any future dispute, the appellant, after coming into force of the provisions of substituted Rule 6(3) and the newly inserted Rule 6(3A) in the Cenvat Credit Rules

with effect from April 1, 2008, exercised option in terms of Rule 6(3)(ii) of the Cenvat Credit Rules and reversed cenvat credits on all common inputs used in or in relation to the manufacture of dutiable products and exempted goods, including ammonium sulphate, and paid, by way of reversal, cenvat credit attributable to inputs in or in relation to the manufacture of exempted goods, including ammonium sulphate and CO gas, in terms of Rule 6(3A) of the Cenvat Credit Rules, from the financial year 2008-09 onwards. Cenvat credit attributable to inputs used in or in relation to the production of the exempted goods were paid by way of reversal. The appellant continued to exercise the said option under Rule 6(3)(ii) for subsequent financial years also. From the year 2009-10, the appellant also included common input services for reversal. There was no common input service used during the earlier years.

(e) On 17.08.2011 a show cause notice was issued by the Additional Commissioner, alleging that the appellant had manufactured and cleared an exempted product, Coke Oven Gas, falling under Tariff Item 27050000 of the Central Excise Tariff which had been manufactured using different common cenvatable inputs and input services but without maintaining separate accounts as required under Rule 6(2) of the Cenvat Credit Rules and without payment of amounts as required under Rule 6(3)(i) of the Cenvat Credit Rules and called upon the appellant to show cause as to why a sum of Rs. 11,79,415/-, being 5% of the value of the said goods, should not be demanded and recovered from the appellant, along with interest, for the period August 2010 to March 2011 in respect of ammonium sulphate cleared during the said period and why penalty should not be imposed upon the appellant.

(f) A similar show cause notice was issued on November 8, 2011 by the Additional Commissioner, alleging that during the

period August 2010 to February 2011 the appellant had manufactured and cleared exempted product, Ammonium Sulphate, falling under Tariff Item 31022100 of the Central Excise Tariff which had been manufactured using different common cenvatable inputs and input services and without maintenance of separate accounts as required under Rule 6(2) of the Cenvat Credit Rules and without payment of the amount as required under Rule 6(3)(i) of the Cenvat Credit Rules, as a consequence whereof the appellant had contravened the provisions of Rule 6(2) and Rule 6(3)(i) of the Cenvat Credit Rules and was required to make payment of an amount equal to 5% of the value of the said goods cleared during the aforesaid period, along with interest thereon, amounting to Rs. 26,94,800/-, along with interest and was liable to penalty.

(g) On the appellant filing its replies dated August 28, 2012 and October 10, 2010, the two adjudication orders were passed by the Additional Commissioner rejecting the appellant's contentions and proceeding to confirm the demands contained in the two show cause notices, along with interest and by imposing equivalent amounts of penalties upon the appellant. The appeals preferred by the appellant against the adjudication orders were rejected by the impugned orders of the Commissioner (Appeals) and the adjudication orders upheld. Aggrieved thereby the instant appeals have been preferred.

3. Dr. Samir Chakraborty, learned Senior Advocate, appearing on behalf of the appellant, along with Shri Abhijit Biswas, learned Advocate, submits as under:

(i) From the process of production detailed, it is evident that wash oil is not used in the generation of CO gas. This fact was duly intimated to the jurisdictional Central Excise authorities by a letter dated 05.09.2007.

(ii) The water used in the boiler for steam generation is required to be demineralized for which Caustic Soda, Ferric Alum, HCL and Ion exchanger are used as Water Treatment chemicals. Steam is not used for generation of CO gas but for extraction of costly byproducts like Napthelene, Benzene, Toluene and Xylene, Tar, Heavy Creosote Oil, Light Oil, etc. Steam is used as a fuel to run the exhauster resulting into high pressure steam to intermediary pressure steam by which CO gas is sent to benzol plant for extraction of the said byproducts. Therefore, steam is not an input for generation of CO gas but is used as fuel for running the exhauster.

(iii) Thus both Wash Oil as well as Ferric Alum, Caustic Soda, HCL and Ion Exchanger, used as a water treatment chemicals and contained in the steam used as a fuel for running exhauster, are not used in or in relation to generation of CO gas. Hence these are not inputs covered by Rule 6 of the Cenvat Credit Rules.

(iv) Ammonium sulphate in Coal Chemicals Plant is manufactured in two plants. In 1.0 MT stage coke oven gas containing ammonia is passed through Saturator Acidic Bath (3% to 4% sulphuric acid) and salt crystals are lifted by compressed air. In 0.6 MT stage, ammonia from coke oven gas is recovered by spraying acidic liquor of varying concentration (1.5% to 10.0% H_2SO_4). Mother Liquor is fed to evaporator crystallizer for making ammonium sulphate. No other chemicals or fuel is used.

(v) In an integrated steel plant the final product is iron and steel. Ammonium sulphate gets produced only because of the fact that CO gas cannot be let into air as it contains ammonia, an hazardous product and hence cannot be discharged as per prevailing environmental laws. The CO gas recovered in the form of ammonia gas is highly corrosive in nature. Without extracting

ammonia from the coke oven gas the said gas cannot be used in the manufacture of iron and steel products. Hence the appellant is compelled to produce ammonium sulphate by way of pollution control requirement. This byproduct ammonium sulphate is produced during the manufacture of the final product, viz., coke, which is used to manufacture dutiable iron and steel products.

(vi) In the premises, the provisions of Rule 6(2) and Rule 6(3) of the Cenvat Credit Rules are inapplicable in respect of Coke Oven Gas and ammonium sulphate, both by-products.

(vii) This issue stand settled in favour of the appellant by decisions of the Supreme Court and the Tribunal, one of which was also affirmed by the Bombay High Court and the Supreme Court. The following decisions were relied upon:

(a) Union of India Vs. Hindustan Zinc Ltd., 2014 (303) ELT 321 (SC)

(b) Aarti Drugs Ltd. Vs. CCE, 2001 (133) ELT 385 (T), affirmed by the Bombay High Court in Commissioner Vs. Aarti Drugs Ltd., 2009 (240) ELT A-40 (Bom), further affirmed by the Supreme Court in Commissioner Vs. Aarti Drugs Ltd., 2015 (320) ELT A-109 (SC).

(c) Tata Steel Ltd. Vs. Commissioner of Central Excise & Service Tax - Order No. FO/A/76193/2019 dated 26.06.2019 passed in EA No. 66 of 2010-DB by the Kolkata Bench of the Tribunal.

(viii) As such, on this ground alone, the impugned proceedings, including the adjudication orders and the impugned orders of the Commissioner (Appeals) are ex-facie untenable and unsustainable.

(ix) In so far as whether the demand under Rule 6(3)(i) of the Cenvat Credit Rules is sustainable, the appellant having exercised option to follow Rule 6(3)(ii) of the Cenvat Credit Rules

in terms of Rule 6(3A) and whether the Department had wrongly refused to accept payments made in terms thereof, it is submitted that the documents on record conclusively establish that the appellant had undisputedly exercised option in terms of Rule 6(3)(ii) of the Cenvat Credit Rules and had complied with the requirements as laid down in Rule 6(3A) thereof. In the premises, the Additional Commissioner had no right, authority or jurisdiction to initiate and/or continue with proceedings for alleged non-compliance with the requirements of Rule 6(3) of the Cenvat Credit Rules read with Rule 6(2) thereof. There is no provision in the Act or the Cenvat Credit Rules, including Rule 6 thereof, which authorises or empowers the Additional Commissioner to, inspite of an assessee exercising option in terms of Rule 6(3)(ii) during a financial year, ignore the same and proceed to initiate proceedings and/or confirm a demand of an amount in terms of Rule 6(3)(i) of the Cenvat Credit Rules. The Additional Commissioner has, therefore, acted patently without jurisdiction and contrary to the powers conferred upon him under the Act in passing the adjudication order. Consequently, both the adjudication order and the impugned order are contrary to law and untenable.

(x) In support of this contention reliance has been placed on the following decisions:

(i) Tiara Advertising Vs. Union of India, 2019 (30) GSTL 474 (Telengana)

(ii) Reliance Life Insurance Co. Ltd. Vs. Commissioner of Service Tax, 2018 (363) ELT 1050 (T)

(iii) Etrans Solutions Pvt. Ltd. Vs. Commr. of CGST & C.Ex., 2020 (372) ELT 867 (T).

(xi) For this reason also the impugned orders are liable to be set aside.

4. Mr. A. Roy, the learned AR, appearing for the Department, while reiterating the findings in the adjudication and appellate orders, referred to two Order-in-Appeals, both dated 24.08.2018, passed by the Appellate Authority on the self same issue as to the applicability of Rule 6(2) & (3) of the Cenvat Credit Rules for the earlier periods of February 2009 to September 2009 and October 2009 to July 2010 in the appellant's own case, by which the impugned adjudication orders were set aside following the decision in *Aarti Drug Ltd.,'s case (supra)* and the matters remanded for de novo adjudication, and submitted that instant appeals should also be remanded to the adjudicating authority.

5. Heard both the parties through video conferencing and have carefully perused the documents on record.

6. In the instant case the following issues are to be decided:

(i) Whether wash oil, sulphuric acid, caustic soda, alum, hydrochloric acid, ion exchanger are inputs in or in relation to generation of ammonium sulphate and CO gas?

(ii) Whether demand in terms of Rule 6(3)(i) of the Cenvat Credit Rules is appropriate as the appellant availed cenvat credit on common inputs which were used in or in relation to, either directly or indirectly in the manufacture and clearance of dutiable final products as well as exempted final products, namely ammonium sulphate and CO gas, where the appellant had exercised option to follow Rule 6(3)(ii) of the Cenvat Credit Rules in terms of Rule 6(3A) and whether non-acceptance thereof by the Department was correct?

7. ***Issue (i)***

7.1 I find that this issue stands settled by the decision of the Apex Court in the case of ***Union of India*** *Vs.* ***Hindustan Zinc Ltd****.,* ***2014 (303) ELT 321 (SC)***. In this case sulphur dioxide, emerging as inevitable technological necessity during calcinations of ore concentrates for production of zinc and copper (like coke oven gas in the instant case), was converted to sulphuric acid as a non-polluting measure and sold to fertilizer manufacturers. Given quantity of zinc concentrate resulted in emergence of zinc sulphate and sulphur dioxide, according to chemical formula on which the assessee had no control. Though sulphuric acid as end product (ammonium sulphate in the instant case) was liable to ad valorem duty, but under exemption notification it was liable to nil duty for use in manufacture of fertilizers. It was held that sulphuric acid was only a by-product and conversion of sulphur dioxide (in the instant case ammonium sulphate) to sulphuric acid (mother ammonia liquor in the instant case) could not elevate sulphuric acid to status of final product. In paras 21 to 26 of the judgment it has been held by the Hon'ble Supreme Court as under:

> "*21. As already pointed out, argument of the learned Solicitor General was that Rule 57CC and Rule 6 of the Modvat/ Cenvat Rules respectively require the literal rule of interpretation which needs to be applied, as the language of these was unambiguous in this behalf. We may record that as per the learned Solicitor General, the provisions of Rule 57CC or Rule 6 envisage common use of inputs in two final products i.e. one dutiable and other exempted from the applicability of the same. He submitted that when two final products emerge out of use of common inputs, one excisable and the other exempt, the provisions will apply. The question of intention of the assessee to manufacture the exempted product is not relevant. It may be intended or unintended but if what results in the course of a manufacturing process is a "final product" falling within the meaning of the said provisions, the provisions will apply in full with the attendant consequences. He also argued that Rule 57D uses the words 'waste*

and refuse' alongwith "by-products". The word 'by-product' will necessarily have to take its colour and meaning from the accompanying words "waste and refuse". "By-products" cannot, in any event, mean "final products". This Rule only means that Modvat Credit cannot be denied on the ground that in the course of manufacture, non-excisable goods also arise.

22. Elaborating this contention, the learned Solicitor General submitted that the words "final products" in the context of Modvat and Cenvat Credit have to be understood giving the meaning as assigned to it in the Modvat/Cenvat Rules. Rule 57A inter alia states that the provisions of this Section shall apply to such finalised excisable goods (referred to in that section as final products). Again, Rule 2(c) of the Cenvat Credit Rules, 2002 defines "final products" as meaning excisable goods manufactured or produced from inputs except matches. Rule 2(h) of the Cenvat Credit Rules, 2004 defines "final products" as meaning excisable goods manufactured or produced from input, or using in input service. Thus, final products referred to in the aforesaid provisions can only mean to be excisable goods produced or manufactured. In the present set of cases, sulphuric acid, caustic soda flakes, trichloro ethylene and Phosphoryl A and Phosphoryl B are excisable goods manufactured and produced in India falling under different headings of the Central Excise Tariff Act. The submission was that if these products are exempt or subject to NIL rate of duty, then the inputs on which Modvat/Cenvat credit are claimed used in the manufacture of the aforesaid final products will attract the rigor of Rule 57CC/Rule 6 of the Modvat/Cenvat Credit Rules.

23. In this very direction, his further submission was that the term "by-products" is not defined either in the Act or in the Rules. Dictionary meanings cannot be resorted to in this case as it would then mean that final products would be treated as by-products defeating the plain language of Rule 57CC and Rule 6 which are applicable to final products. The only test is "excisability of goods manufactured or produced" and only if the requirements of this test are satisfied, the goods can be 'final products' and never 'by-products'. On this basis, the learned Solicitor General submitted that even an admission made

before the Tribunal in the Birla Copper case of the goods being a 'by-product', cannot be relied on by the respondent.

24. While pleading that the aforesaid interpretation to these Rules be accepted by this Court, submission of Mr. Parasaran was that in such an eventuality the judgment in the case of Swadeshi Polytex Ltd. v. CCE; 1989 (44) ELT 794 was not applicable, nor was the judgment in CCE v. Gas Authority of India Ltd.; 2008 (232) ELT 7 relied upon the by the respondent. Likewise his submission was that judgment of the Bombay High Court in the case of Rallis India Ltd. v. Union of India; 2009 (233) ELT 301 was erroneous wherein view taken is contrary to the aforesaid submission.

25. These arguments may seem to be attractive. However, having regard to the processes involved, which is already explained above and the reasons afforded by us, we express our inability to be persuaded by these submissions. We have already noticed above that in the case of Birla Copper (C.A. No. 2337 of 2011) the Tribunal has decided the matter following the judgment in the case of Swadeshi Limited (supra). In that case, Ethylene Glycol was reacted with DMT to produce polyester and ethanol. Methanol was not excisable while Polyester Fibre was liable to excise duty. Credit was taken of duty paid on ethylene glycol wholly for the payment of duty on polyester. The department took a position that Ethylene Glycol was used in the production of Methanol and proportionate credit taken on ethylene glycol was to be reversed. This Court ruled that the emergence of Methanol was a technological necessity and no part of ethylene glycol could be said to have been used in production of Methanol and indeed it was held that the total quantity of ethylene glycol was used for the production of polyester. The fact in all these three appeals appear to be identical to the facts and the law laid down in Swadeshi Polytex (supra). Therefore, this judgment is squarely applicable.

26. Furthermore, the provisions of Rule 57CC cannot be read in isolation. In order to understand the scheme of Modvat Credit contained in this Rule, a combined reading of Rule 57A, 57B and 57D alongwith Rule 57CC becomes inevitable. We have already reproduced

Rule 57D above. It can be easily discerned from a combined reading of the aforesaid provisions that the terms used are 'inputs', 'final products', 'by-product', 'waste products' etc. We are of the opinion that these terms have been used taking into account commercial reality in trade. In that context when we scan through Rule 57 CC, reference to final product being manufactured with the same common inputs becomes understandable. This Rule did not talk about emergence of final product and a by-product and still said that Rule 57 CC will apply. The appellant seeks to apply Rule 57CC when Rule 57D does not talk about application of Rule 57CC to final product and by-product when the by-product emerged as a technological necessity. Accepting the argument of the appellant would amount to equating by-product and final product thereby obliterating the difference though recognised by the legislation itself. Significantly this interpretation by the Tribunal in Sterlite (supra) was not appealed against by the department."

7.2 In the case of ***Aarti Drugs Ltd***. *Vs.* ***Commissioner of Central Excise***, ***2001 (133) ELT 385 (T-Mum)***, which was affirmed by the Hon'ble Bombay High Court in ***Commissioner*** *Vs.* ***Aarti Drugs Ltd.***, ***2009 (240) ELT A-40 (Bom)*** and further affirmed by the Hon'ble Supreme Court in ***Commissioner*** *Vs.* ***Aarti Drugs Ltd.***, ***2015 (320) ELT A-109 (SC)***, a Division Bench of the Tribunal has held that ammonium sulphate obtained from mother liquor is a by-product and the provisions of Rule 57CC(1) of the erstwhile Central Excise Rules, 1944, equivalent to Rules 6(2) and 6(3) of the Cenvat Credit Rules, 2004, is inapplicable and cenvat credit of inputs contained in such by-product was permissible.

7.3 The CO gas issue is settled by the decision of this Bench of the Hon'ble Tribunal in the case of ***Tata Steel Ltd***. *Vs.* ***Commissioner of Central Excise & Service Tax***, being Order No. FO/A/76193/2019 dated June 26, 2019 passed in Excise Appeal No. 66 of 2010-DB. The Division Bench of the Tribunal, following the decision of the Hon'ble

Supreme Court in the case of ***Union of India*** *Vs.* ***Hindustan Zinc Limited (supra)***, held as under :-

> *"9.2.1 On application of the afore quoted observation of the Hon'ble Supreme Court to the instant case, we find that herein also it is an undisputed fact that the entire quantity of coal is completely utilized for production of coke and no part thereof forms a part of the coal gas or coal tar, which inevitably comes into existence as a technological necessity. Here also the appellant cannot use lesser quantity of coal only to produce coke and not produce coal gas or coal tar. Hence, it has to be concluded that the appellant has consumed the entire quantity of coal in the production of coke. Further, merely because coal tar is recovered by a recovery process in the coke plant, from the mixtures of the several by products which arise in the course of production of coke from coal, as and by way of technological necessity, the same cannot and does not become a final product. It would be not out of place to mention that not every coke oven plant is capable of recovering coal tar/ coal gas in the process.*
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> *10. Respectfully following the above decision of the Hon'ble Supreme Court, which as discussed above, fully applies to the instant case, we are of the view that the provisions of Rule 6(3)(b) of the Cenvat Credit Rules are inapplicable to the instant case and, consequently, the appellant is not required to make payment of any amount contrary to what has been held in the impugned order."*

7.4 The facts and the issues contained the above decisions of the Apex Court and the Tribunal are, on perusal of the impugned orders, the adjudication orders and the documents on record of the present proceedings are found to be the same and hence the said decisions are fully applicable to the instant cases. Respectfully following the said decisions I hold that findings of the Commissioner (Appeals) and the Adjudicating Authority on this issue are unsustainable.

8. ***Issue (ii)***

8.1 Rule 6(3A) of the Cenvat Credit Rules contains a comprehensive scheme for reversing/payment of 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, including payment of interest @ 24% from the due date prescribed therein and empowering and authorising recovery in the manner provided in Rule 14 in the event of failure on the part of the assessee to make payments as per the laid down procedure contained in the said provision, once an assessee exercises the option provided under Rule 6(3)(ii) of the Cenvat Credit Rules. Such option made available to an assessee by a statutory provision, viz., Rule 6(3) of the Cenvat Credit Rules, with effect from March 1, 2008, has not been made the subject of approval or permission of any Central Excise authority. The only condition is that the assessee has to comply with conditions and procedure under Rule 6(3A). Hence, the adjudicating authority has no right or authority to require the appellant to make payment in terms of Rule 6(3)(i), inspite of the fact that the relevant materials on records clearly evidencing not only the appellant intimating the prescribed jurisdictional Central Excise authority, as per Rule 6(3A)(a), the fact of exercising of option under Rule 6(3)(ii) and providing the particulars as required in the said sub-clause (a), and complying with the requirement laid down in Rule 6(3A)(c), (d) and (g) of the Cenvat Credit Rules.

8.2 Rule 6(3A) is a complete provision which not only provides for steps that can be taken in the event of non-compliance or incomplete compliance with the requirements laid down thereunder including the payments to be made in terms thereof but also the penal consequence that an assessee would be liable to. It also specifically provides that in the event of the reversal/payments not being effected by the assessee as per the said provision, the differential amount is to be recovered in the manner as provided for in Rule 14 of the Cenvat Credit Rules. There is no provision therein or in any other provision of the Cenvat Credit Rules which provides that in such a case the assessee would be liable to make payment of an amount in terms of Rule 6(3A)(i) of the Cenvat Credit Rules. Hence the question of whether or not the

appellant was required to make payment of any higher amount as per Rule 6(3)((i) in a given case than that payable and paid in terms of Rule 6(A)(ii) thereof is irrelevant and cannot form the subject matter of a proceeding for recovery of an alleged amount under Rules 6(3)(i), in terms of Rule 14 of the Cenvat Credit Rules or under any other provision of the Central Excise Act or Cenvat Credit Rules.

8.3 The Hon'ble Telengana High Court in the case of ***Tiara Advertising*** *Vs.* ***Union of India***, ***2019 (30) GSTL 474 (Telengana)*** has held that in the event the assessee is found to have availed cenvat credit wrongly, Rule 14 of the Cenvat Credit Rules empowers the Authority to recover such credit which had been taken or utilized wrongly, along with interest and that the statutory scheme did not vest the Revenue authorities with the power of choice under, inter alia, Rule 6(3)(i) of the Cenvat Credit Rules. In paragraphs 14 and 15 of the judgment it has been held as under:

> "*14. Further, we may reiterate that Rule 6(3) of the Cenvat Credit Rules, 2004, merely offers options to an output service provider who does not maintain separate accounts in relation to receipt, consumption and inventory of inputs/input services used for provision of output services which are chargeable to duty/tax as well as exempted services. If such options are not exercised by the service provider, the provision does not contemplate that the Service Tax authorities can choose one of the options on behalf of the service provider. As rightly pointed out by Sri S. Ravi, Learned Senior Counsel, if the petitioner did not abide by the provisions of Rule 6(3) of the Cenvat Credit Rules, 2004, it was open to the authorities to reject its claim as regards the disputed Cenvat Credit of Rs.17,15,489/-.*
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> *15. We may also note that in the event the petitioner was found to have availed Cenvat Credit wrongly, Rule 14 of the Cenvat Credit Rules, 2004 empowered the authorities to recover such credit which had been taken or utilised wrongly along with interest. However, the second respondent did not choose to exercise power under this Rule*

> *but relied upon Rule 6(3)(i) and made the choice of the option thereunder for the petitioner, viz., to pay 5%/6% of the value of the exempted services. The statutory scheme did not vest the second respondent with the power of making such a choice on behalf of the petitioner. The Order-in-Original, to the extent that it proceeded on these lines, therefore cannot be countenanced.*"

8.4 There is no dispute nor denial in either the show cause notices or in the adjudication orders that the appellant had exercised option in terms of Rule 6(3)(ii) of the Cenvat Credit Rules. Once this fact, established from the materials on record, is not disputed, there can be no demand in terms of Rule 6(3)(i) of the Cenvat Credit Rules.

8.5 The finding that the appellant was required to pay much higher amount in terms of Rule 6(3) of the Cenvat Credit Rules other than that actual reversed is also without any merit. On plain reading of Rules 6(3) and (3A) it is seen that nowhere it is mentioned that an assessee should pay any amount higher than that of the actual amount calculated under the procedure prescribed under Rule 6(3A) of the Cenvat Credit Rules. The finding that the reversal of credit attributable to the inputs used in the manufacture of exempted products was insufficient in accordance to the demanded amount as calculated in the show cause notices is misconceived. The relevant provisions and procedure nowhere requires that an assessee should pay an amount higher than that of the actual amount calculated under the procedure prescribed under Rule 6(3A) of the Cenvat Credit Rules.

8.6 Hence the findings of this issue of both the Commissioner (Appeals) and the Adjudicating Authority are also unsustainable.

9. In view of the abovestated, since the issues involved are settled by decisions of the Hon'ble Supreme Court and High Court, which decisions were not before the Appellate Authority in the appeals for the earlier periods and there being no disputed facts involved, it is not necessary to remand the matters to the adjudicating authority as submitted by the Learned AR.

10. The impugned orders dated 28.02.2018 and 05.03.2018 passed by the Commissioner (Appeals) are therefore set aside and both the appeals of the appellant are allowed, with consequential relief.

(Order pronounced in the open court on 12 May 2021.)

SD/
(P.K.CHOUDHARY)
MEMBER (JUDICIAL)

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