TaxGuru®
Complete tax solution

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

Excise Appeal No. 86235 of 2019

(Arising out of Order-in-Appeal No. NSK/EXCUS/000/APPL/567/18-19 dated 31.12.2018 passed by the Commissioner of GST & CE (Appeals), Nashik)

M/s. Morganite Crucible (India) Ltd. .....**Appellant**
Plot no. B-11, MIDC, Waluj
Aurangabad

VERSUS

Commissioner of Central Excise & Service Tax, Aurangabad .....**Respondent**
N-5, Town Centre, CIDCO
Aurangabad

APPEARANCE:

Ms. Shrayshree T., Advocate for the appellant
Shri P.K. Acharya, Superintendent (AR) for the respondent

CORAM:
HON'BLE MR. AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER No: A/85932/2023

DATE OF HEARING : 19.12.2022
DATE OF DECISION : 13.06.2023

Per: AJAY SHARMA

This appeal has been filed from the impugned Order dated 31.12.2018 passed by the Commissioner of GST & Central Excise (Appeals), Nashik rejecting the appeal filed by the appellant.

2. The issue involved herein is whether the Appellant is entitled to the Cenvat Credit attributable to common input

service utilized in its *Die Lube Unit* as per the provision of Rule 7 of Cenvat Credit Rules, 2004?

3. The appellant is engaged in manufacturing of excisable goods viz. Silicon Carbide Crucibles, Clay Graphite Crucibles and spout cement etc. at their factory at Plot No. B-11, MIDC, Walgunj, Aurangabad. They started manufacturing a new product *Die Lube* at their another unit at different premises with separate Central Excise registration for this product and during the period 2012-13 upto August, 2014 they had availed Cenvat credit of common services such as Management, Software, Accounting, Auditing, Banking, Trade mark, Security, SAP software system used for manufacture and clearance of their final product of *Die Lube* at that separate premises at Plot No. K-256, MIDC, Walgunj, Aurangabad, which according to the department the appellant has wrongly availed to the extent of turnover of their *Die Lube Unit* in violation of Rule 7 ibid. As per the department *common input services* shall be distributed to all units pro rata on the basis of turnover of such units during the relevant period as prescribed in Rule 7 ibid and accordingly after invoking the extended period a demand cum show cause notice dated 27.2.2017 was issued to the appellant, which culminated into Adjudication order dated 14.12.2017 disallowing the credit taken and recovery of the amount of Rs.3,46,039/- alongwith interest and penalty. On Appeal preferred by the Appellant, the learned Commissioner (Appeals) vide impugned order dated

31.12.2018 upheld the order of the lower authority and rejected the appeal filed by the appellant.

4. According to learned counsel at their *Die Lube unit* only excisable goods were manufactured and not exempted goods and the invoices pertaining to the input service consumed in the said unit were also in the name of the appellant and therefore the availment of Cenvat credit on the said invoices cannot be faulted. He also submits that the appellant is the head office of the company, which is not an I*nput Service Distributor (ISD)* registrant and is availing and utilizing the Cenvat credit of services availed at other units and not distributing the same. According to learned counsel even if they did not have a registration as an ISD, the availment of Cenvat credit cannot be denied. As an alternative submission learned counsel submits that the present case is governed by revenue neutrality inasmuch the *Die Lube* unit would otherwise be eligible for the credit that was availed by the appellant and therefore there was no loss to the revenue. Per contra learned authorised representative on behalf of revenue reiterated the findings recorded in the impugned order and prayed for rejection of appeal.

5. I have heard learned counsel for the appellant and learned Authorised Representative for the revenue and perused the case records including the synopsis/written submission and case laws placed on record. Somewhat similar issue came up for

consideration before the Hon'ble High Court of Judicature at Bombay in the matter of *The Commr. Central Tax, Pune-I Commissionerate vs. M/s. Oerlikon Balzers Coating India P. Ltd.; 2018(12)TMI 1300- Bombay High Court* in an appeal filed by the department and in that matter the assessee having units at various places viz. Pune, Gurgaon, Chennai, Jamshedpur etc. took the Cenvat credit in its books during the period October, 2009 to March, 2014 at the Pune Unit only which was objected to by the department and it was the specific case of the department that the assessee should have distributed the tax credit to the various units situated across the country and should not have availed Cenvat Credit at Pune Unit only. In that decision the Hon'ble High Court after considering Rule 7 ibid as it was existing both pre and post amendment in 2012 held that the assessee was entitled to utilize the Cenvat credit at its one unit only i.e. Pune unit. The Hon'ble High Court also gone into the issue of revenue neutrality in that matter. The relevant paragraphs of the said decision are extracted as under:-

"xxx xxx xxx

8. It would be appropriate that we reproduce Rule 7 as existing prior to 2012 and post 2012 which is as under:-

Rule 7 as Existing Prior to 2012 :-

RULE 7. Manner of distribution of credit by input service distributor *- The input service distributor may distribute the Cenvat credit in respect of the service tax paid on the input service to its manufacturing units or units providing output service, subject to the following condition, namely :*

(a)The credit distributed against a document referred to in Rule 9 does not exceed the amount of service tax paid thereon; or

(b)credit of service tax attributable to service used in a unit exclusively engaged in manufacture of exempted goods or providing of exempted services shall not be distributed.

Rule 7 Post 2012 - amendment

RULE 7. Manner of distribution of credit by input service distributor *- The input service distributor may distribute the Cenvat credit in respect of the service tax paid on the input service to its manufacturing units or units providing output service, subject to the following condition, namely :-*

(a) The credit distributed against a document referred to in Rule 9 does not exceed the amount of service tax paid thereon; or

(b) credit of service tax attributable to service used in a unit exclusively engaged in manufacture of exempted goods or providing of exempted services shall not be distributed;

(c) credit of service tax attributable to service used wholly in a unit shall be distributed to the unit; and

(d) credit of service tax attributable to service used in more than one unit shall be distributed pro rate on the basis of the turnover during the relevant period of the concerned unit to the sum total of the turnover of all the units to which the service relates during the same period.

9. From reading of the above Rules both pre and post amendment, it would be noticed that both provisions give an option to the assessee concerned whether to distribute input services tax available to it amongst its other manufacturing units which are providing output services. This is evident from the use of word "may distribute the Cenvat credit" is found in Rule 7 both prior and also post 2012. Thus, from the reading of the Rules, the option was available to the assessee whether to distribute the Cenvat credit or not. In fact, our attention is invited to Rule 7 of the Cenvat Credit Rules, 2004 as substituted w.e.f. 1-4-2016 which has made it mandatory for distribution of input services to the various units providing output services. This is evidence by the use of words "shall distribute the Cenvat credit" in the substituted Rule 7 as Cenvat Credit Rules 2004 w.e.f. 1-4-2016. Therefore, on plain reading of Rule 7 as existing both pre and post amendment 2012 covering period involved in these proceedings, the respondent - assessee was entitled to utilize the Cenvat credit available at its Pune unit.

> *10. In any event, the Tribunal, on facts found that the entire exercise would be revenue neutral. This is so as the distribution of Cenvat credit to the various units would result lesser service tax being paid by cash on their activity of coating as they would have utilized the Cenvat credit available for distribution.*
>
> *11. In this view of the matter, the question of law as proposed does not give rise to any substantial question of law as the entire exercise would be revenue neutral. Thus, making the entire exercise academic. Therefore, the question is not entertained.*
>
> *12. Accordingly, the Appeal is dismissed.*"

6. The opening words of Rule 7 is '*may distribute*' and therefore the assessee is not under any obligation to distribute. The word '*shall*' which has been used later in the clauses/ sub-clauses to rule 7 will come into operation only if the assessee chooses to distribute among its units. Meaning thereby if the appellant chooses to distribute then only he has to follow all the conditions laid down in Rule 7 therein including clause (d) which mandates that such distribution be done on pro rate basis. During the period in issue the distribution was optional only was further strengthen from the fact that in the year 2016 Rule 7 was further amended and the word '*may*' was substituted with the word '*shall*' which makes it mandatory for the assessee to distribute the credits between the units. My aforesaid view finds support from the decision of a co-ordinate Bench of the Tribunal in the matter of *Gloster Cables Ltd. Unit I vs. Commr. Central Tax, Medchal Commissionarte; 2018 (5) TMI 660- CESTAT Hyderabad*. Otherwise also it is no doubt true that the entire excise would be revenue neutral as the utilization by any unit of

the same entity would not make any loss to the exchequer as the credit disallowed from one unit in proportion to second unit will be eligible as credit to such other unit and the net credit availment and utilization form a company's perspective will remain unchanged and also that the appellant is not going to gain anything extra to its entitlement. In such a scenario there is no question of any suppression on the part of the appellant and therefore extended period is also not invokable in the facts of the case and on this count also the demand fails.

7. In view of the discussions made hereinabove, the impugned order is set aside and the appeal filed by the appellant is allowed with consequential relief, if any, in accordance with law.

(Pronounced in open Court on 13.06.2023)

(Ajay Sharma)
Member (Judicial)

//SR