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

REGIONAL BENCH - COURT NO.2

Excise Appeal No.762 of 2010

(Arising out of Order-in-Original No.20/Commissioner/CE/Haldia/Adjn/2010 dated 24.09.2010 passed by Commissioner of Central Excise, Haldia Commissionerate, Kolkata.)

M/s. Haldia Petrochemicals Limited
(Regd. Office No.1, Auckland Place, Kolkata-700017.)

...Appellant

VERSUS

Commissioner of Central Excise, Haldia

.....Respondent
(15/1, Strand Road, Custom House, M.S. Building, Kolkata-700001.)

APPEARANCE

Shri Arvind Baheti, Chartered Accountant for the Appellant (s)
Shri S.S.Chattopadhyay, Authorized Representative for the Revenue

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

FINAL ORDER NO. 75825/2023

DATE OF HEARING : 26 April 2023
DATE OF DECISION : 26 June 2023

Per : P.K. CHOUDHARY :

Excise Appeal No. 762/2010 is directed against 'Order-in-Original' ('O-I-O') dated 24 September 2010 passed by the Ld. Commissioner confirming duty demand of Rs. 10,67,40,103/- under the proviso to Section 11A along with interest and penalty.

2. Briefly stated the facts of the case are that the Appellant is engaged in the manufacture of dutiable final products falling under Chapter 27 and Chapter 39 of the Central Excise Tariff Act at its petrochemical complex at Haldia, with Naphtha being its principal inputs. In order to meet the electricity and steam requirements of the Petrochemical Complex, the Appellant has set up a 116 MW Co-generation Power Plant as a Joint Venture titled, HPL Co-generation Limited ('HPLCL'), within the factory complex.

During November 2000 to January 2004, the Appellant had removed Residual Fuel Gas ('RFG') generated out of cracking Naphtha to M/s. HPLCL for generation of electricity and steam following the procedure laid down under Rule 4(5)(a) of the Cenvat Credit Rules ('CCR'),as was in force during the said period. The electricity and steam generated out of the supplied 'RFG' was returned to the Appellant for use in manufacture of dutiable final products.

3. It is the case of the Revenue that since the RFG was an intermediate excisable product, manufactured out of cracking Naphtha, and being classifiable under chapter sub-heading No. 2711.90 of C.E.T.A., 1985, hence, the same could not be removed from the factory without payment of duty under Rule 4(5)(a) of the CCR or under Notification No. 214/86. Accordingly, a show-cause cum demand Notice was issued to them for the said period on 16 April 2004 demanding duty of Rs. 10,67,40,103/- alleging suppression of facts. The Ld. Commissioner adjudicated the Notice vide 'O-I-O' confirming the demand and imposed equivalent penalty.

4. The Ld. Counsel appearing for the Appellant has assailed the 'O-I-O' dated 24 September 2010 on merits as well as on the following grounds:

(a) Intermediate product such as 'RFG' could be cleared for job work under Rule 4(5)(a) of the CCR being covered by expression *"partially processed inputs"* and the said issue stands settled in favour of the Appellant in its own case reported in 2006 (197) ELT 97 in the context of another partially processed inputs, namely 'CLS'. Reliance was also placed upon the decision of the Tribunal in the case of Maharashtra Aldehydes & Chemicals Ltd. Vs. CCE, Raigad reported in 2017 (348) ELT 713.

(b) Notification No. 214/86 confers exemption to dutiable goods manufactured by job worker and since electricity and steam generated by the job worker were generally exempted, no benefit was claimed under Notification No. 214/86.

(c) Even otherwise, 'RFG' could not be construed as excisable since the same was not capable of being taken to the market and also disputed its classification under Tariff Heading 2711.90 being a non-existent tariff entry thereby revenue failing to discharge the burden of proving marketability and dutiability. Reliance in this regard was placed upon the following decisions:

(i) Collector of Central Excise, Baroda Vs. United Phosphorus Ltd. [2000 (117) ELT 529]

(ii) Board of Trustees Vs. Collector of Central Excise, A.P. [2007 (216) ELT 513]

(d) Extended period of limitation could not be invoked as the department was kept in the know about the entire operations at the petrochemical complex including the clearance of partially processed naphtha in the form of 'CLS', 'RFG' through communications dated 16 November 1999 and 15 December 2000 for job work. Moreover, the revenue failed to discharge the burden of proving mala fide on the part of the Appellant which is a pre-requisite for invoking the extended period of limitation as held by Hon'ble Supreme Court in the case of Uniworth Textiles Ltd. Vs. Commissioner of Central Excise [2013 (288) ELT 161].

5. The Ld. Authorized Representative for the department reiterated and justified the findings of the Commissioner.

6. Heard both sides and perused the appeal records.

7. The issue before us for determination is whether RFG, an intermediate excisable good, could be cleared without payment of duty for job work under Rule 4(5)(a) of the CCR for conversion into electricity/steam and return thereof for use in the manufacture of dutiable final products. We find that this Tribunal in the Appellant's own case vide Final Order No. 433-434/05

dated 28 January 2005 reported in 2006 (197) ELT 97 had dropped the demand of duty on the removal of another intermediate product i.e. 'CLS' cleared to M/s. HPLCL during the period November 2000 to October 2002 under Rule 4(5)(a) of the CCR for generation of steam and electricity which were received back by the Appellant and used in the manufacture of final products. Relevant para's of the said decision are set out below:

> ***"19.****The Commissioner has denied the benefit of Rule 4(5)(a) of the Cenvat Credit Rules on the ground that "the said rule emphasises return of the inputs or partially processed inputs from the job worker premises after further processing such as testing, repairing, re-conditioning or any other purposes and not for complete conversion of input or partially processed input into a different entity altogether. When partially processed inputs get converted into an energy in the form of electricity, the original character of the goods known as CLS consisting of different constituents such as NRS/Py, Gas, C/4 Raffinate, C/6 Raffinate etc., are totally lost and the provisions of Rule 4(5)(a) of Cenvat Credit Rules is not applicable in such cases". <u>This finding is not borne out from the rules</u>.*
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> ***24.****We, therefore, hold that the Appellant was entitled to take Cenvat credit on the duty paid on Naphtha, sent as such, or after being partially processed ('CLS') to the power plant for generation of steam or electricity, which was sent to the petrochemical complex of the Appellant for use or in relation to the manufacture of final products under Rule 57AC or Rule 4(5)(a) of the Central Excise Rules or Cenvat Credit Rules. We are also of the view that no relevant facts were suppressed by the Appellant as is evident from various letters and discussions with the Departmental*

Officers, and, therefore, the extended period of limitation cannot be invoked under the proviso to Section 11A(1) of the Central Excise Act, 1944. There is also no case for imposition of penalty first for the reason that the demand of duty is unsustainable and secondly for the reason that the case involves a question of interpretation of law.

25.*We, therefore, set aside the order passed by the Commissioner of Central Excise and allow Appeal No. E/4001/04-A and grant consequential relief, if any. In view of the decision that we have taken in Appeal No. E/4001/04 A, it is not necessary to decide the issues involved in Appeal No. E/4210/04-A and accordingly* this appeal is dismissed as infructuous."

We find that the issue involved in the present case is on the same lines and the only difference is that in the said case the partially processed goods was 'CLS' whereas in the instant case we are concerned with 'RFG' but both 'RFG' and 'CLS' were generated on cracking of Naphtha and were sent to M/s. HPLCL for generation of electricity and steam with an intention to bring back electricity and steam for use in the manufacture of final products.The Ld. Commissioner misdirected himself in observing that this Tribunal's Order dated 28 January 2005 was not concerning dutiability of an intermediate good as Excise Appeal No. E/4001/04-A therein was concerning dutiability of an intermediate product (CLS). To the same effect is the decision of the Tribunal in Maharashtra Aldehydes & Chemicalscase (supra) wherein the duty demand on the intermediate product cleared under Rule 4(5)(a) of the CCR was dropped. Since the issue is squarely covered in favour of the Appellant by the decision of the Tribunal in the Appellant's own case,we are inclined to allow the appeal of the Appellant on merits.

9. In so far as the invocation of the extended period is concerned, the same also does not survive in view of the communications dated 16 November 1999 &15 December 2000 intimating the Jurisdictional Superintendent about clearance, inter alia, of 'RFG' to M/s. HPLCL for job work.

10. Having allowed the appeal on both merits and limitation, we refrain from examining the other alternate contentions advanced by the Appellant with respect to marketability and dutiability of 'RFG'.

(Order pronounced in the open court on 26 June 2023.)

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

Sd/
(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

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