CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, WEST ZONAL BENCH : AHMEDABAD

REGIONAL BENCH - COURT NO. 3

EXCISE Appeal No. 10070 of 2014-DB

[Arising out of Order-in-Original/Appeal No RAJ-EXCUS-000-COM-139-13-14 dated 05.12.2013 passed by Commissioner of Central Excise, Customs and Service Tax-SURAT-II]

Ref Cem Industries **.... Appellant**
Station Road, Wankaner
JAMNAGAR, GUJARAT

VERSUS

Commissioner of Central Excise & ST, Rajkot **.... Respondent**
Central Excise Bhawan, 6th Floor, Race Course Ring Road, Rajkot

APPEARANCE :

Shri PV Sheth, Advocate for the Appellant
Shri Rajesh K Agarwal, Superintendent (AR) for the Respondent

CORAM: HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)
HON'BLE MR. C.L. MAHAR, MEMBER (TECHNICAL)

DATE OF HEARING : 31.05.2023
DATE OF DECISION: 29.08.2023

FINAL ORDER NO. 11804/2023

C.L. MAHAR :

The brief facts of the matter are that the appellant are engaged in the manufacture of branded and unbranded fire bricks falling under Central Excise Tariff heading 69029010 and 69029020 of the first schedule of Central Excise Tariff Act, 1985. The appellant have been availing benefit of value based exemption under Notification No. 08/2003-CE dated 01.03.2002, as amended. The appellant have also been availing Cenvat credit under Cenvat Credit Rules, 2002 for the relevant period of the demand.

2. The Revenue entertained a view that since the appellant has been clearing their finished goods under the following two categories:-

(i) On payment of duty on the goods manufactured without brand name by availing exemption under Notification No.8/2003-CE dated 01.03.2003, as amended, and

(ii) Clearing the goods on payment of Central Excise duty on the branded product namely 'ACE' brand fire bricks.

The department is of the view that the appellant has been availing Cenvat credit on inputs namely pet-coke, furnace oil, carbon black and calcined bauxite. These inputs are commonly used in the manufacture of both branded and un-branded fire bricks. The appellant has not maintained separate accounts of input for use in the exempted as well as dutiable final products, as required under Rule 6 of Cenvat Credit Rules, 2004, the appellant thus were asked to pay Central Excise duty at the rate of 8/10% of the value of exempted goods cleared as per the provisions of Rule 6 of the Cenvat Credit Rules, 2004. The matter got adjudicated by impugned order-in-original wherein the Adjudicating Authority has confirmed the demand of Rs. 59,24,415/- under Section 11A(1) of the Central Excise Act, 1944 and penalty of equal amount of duty has also been imposed under Section 11AC of Central Excise Act, 1944. The appellant is before us against the above impugned order-in-original.

3. Learned Advocate appearing on behalf of the appellant contended that a simple issue involved in the matter is that the appellant have availed credit on the common inputs of pet-coke, furnace oil, and Rotary Kiln Bauxite. It has been contended by the learned Advocate that they have submitted Chartered Engineer certificate in this regard and the department without verifying the fact whether all the inputs have been used commonly for both the dutiable and duty free product have issued a show cause notice without verification of goods. The learned Advocate has submitted that Adjudicating

Authority has failed to take into account the Chartered Engineer certificate dated 01.08.2009 issued by Shri P.P. Bhadresa wherein the learned Chartered Engineer, after visiting the factory premises and verifying the manufacturing process had certified the consumption of pet-coke for different types of bricks. The appellant are relying on this certificate for consumption of fuel/ pet-coke, on clearance invoices and analysis of the data of clearances of unbranded and branded goods was submitted with the submissions to show cause notice and has claimed that more than proportionate credit has already been reversed back by the appellant and they have also paid the interest on the same.

4. Learned Advocate has relied upon various judgments in this regard which are given below:-

(a) Tamilnadu News Print and Papers Limited - 2009 (241) ELT 82

(b) Savita Polymers Limited - 2009 (240) ELT 616

(c) Ballarpur Industries Limited - 2006 (199) ELT 433

(d) ESAB India Ltd. 2009 (243) ELT 429

(e) Maize Products 2009 (234) ELT 431

(f) Nicholas Piramal (I) Limited - 2008 (232) ELT 37

(g) Chandrapur Magnet Wires Pvt Limited - 1996 (81) ELT 3

(h) Nestle India Limited -2010 (250) ELT 341

(i) Bombay Minerals Limited - 2019 (29) G.S.T.L. 361

(j) Goyal Proteins Limited - 2017 (355) ELT 72 confirmed by SC 2017(355) ELT A27

(k) Foods, Fats Fertilizers Limited - 2009 (247) ELT 209

(l) Uniworth Textiles Limited - 2013 (288) E.L.T. 161 (S.C.)

(m) Polycab Wires Pvt. Limited -2018 (360) ELT 391 (Bom.)

(n) Sterlite Telelink Limited - 2014 (312) ELT 353 (Tri. - Ahmd.)

5. We have also heard the learned DR who has reiterated the findings given in the impugned order-in-original.

6. Having heard both the sides, we take note of the fact of Para 28 of the order-in-original whereunder the details of reversal of Cenvat credit has been provided and the same is reproduced below:-

> "28 I therefore find that the noticee has in clear and blatant violation of Rule 6 Cenvat Credit Rules.2002 which were later on rescinded/superseded by Cenvat Credit Rules, 2004 took
>
> (i) Cenvat credit on common inputs used in both dutiable as well as exempted goods.
> (ii) did not maintain separate records.
> (iii) did not pay amount equal to 8%/10% on the value of exempted goods cleared.
>
> The Central Excise law did not permit the noticee to take Cenvat credit on inputs use in manufacture of exempted goods. If the inputs were used in both dutiable an exempted goods, provision of Rule 6 of Cenvat Credit Rules were there but the noticee did not choose to comply those provisions. When the records of the noticee were audited by the Central Excise auditors, the violation of Rule 6 came to the notice of the department and the noticee paid up the amount as can be seen from the calculation sheet submitted by the noticee under the cover of letter Ref: VBS/C.Ex./General/0114/2012-2013 dated 04.02.2013. The summary of the reversal made by the noticee given in the calculation sheet is as under :-

DETAILS OF DUTY PAYMENT

Particulars of credit reversed/ interest paid	Amount (Rs.)
Basic	20,14,556/-
Interest	16,10,915/-
Service Tax	66,311/-
TOTAL	**36,91,682/-**

From the perusal of the above details, it can be seen that the appellant has already reversed the Cenvat credit availed by them before the matter came to be adjudicated. We also find that appellant have submitted Chartered Accountant certificate dated 30.01.2010 wherein a month wise break-up of common inputs reversed by them has been given. The department has not verified this fact and has simply proceeded in confirming the duty at the rate

8%/ 10% of the value of exempted goods, which we find that as per various legal pronouncements, is not sustainable. Since the Hon'ble Supreme Court in the case of Chandrapur Magnet Wires (P) Limited vs. Collector of C. Excise, Nagpur – 1996 (81) ELT 3 (SC) (supra) has held that once the Cenvat credit availed by the assessee has been reversed, it can be held that assessee has not taken credit of the duty on inputs utilized in exempted final products.

7. We also take note of the decisions of this Tribunal in the following case laws:-

(a) In the case of *Welspun Corp. Limited vs. CCE, Kutch – 2019 (368) ELT 179 (Tri. Ahmd.)* wherein the Tribunal has passed the following order:-

"6. We have carefully considered the submissions made by both the sides and perused the records. The limited issue to be decided by us is that in a case where at the time of receipt of input services, the appellant availed Cenvat credit on the entire service and on pointing out by the audit party they reversed the Cenvat credit in respect of input services attributed to the exempted goods/non-excisable goods along with interest, whether the demand confirmed by the Revenue under Rule 6(3) i.e. 5%/10% on value of exempted goods is legal and proper. The appellant is not disputing that the Cenvat credit in respect of input services attributed to exempted goods namely Steam, Fly-Ash and non-excisable goods i.e. electricity sold outside their factory, is not admissible and they have admittedly reversed the proportionate Cenvat credit and also paid the interest from the date of taking credit till the date of reversal. For ease of reference, we reproduce below the Rule 6(3) of Cenvat Credit Rules, 2004 :

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

(i) the manufacturer of goods shall pay an amount equal to five per cent. of value of the exempted goods and the provider of output service shall pay an amount equal to six per cent. of value of the exempted services; or

(ii) the manufacturer of goods or the provider of output service shall pay 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 subject to the conditions and procedure specified in sub-rule (3A).

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 and input services used exclusively for the manufacture of exempted goods or provision of exempted service.

From the plain reading of the Rule 6(3), it can be seen that the law provided three options to the assessee (I), (II) accordingly the assessee has option either to pay 5%/10% of value of exempted goods or pay an amount determined under sub-rule (3A) i.e. proportionate credit attributed to the exempted goods. The appellant rightly availed the option of sub-rule (3A) of Rule 6 of CCR, 2004, the only lapse on the part of the appellant is that the payment of Cenvat credit was made belatedly, however the appellant have paid interest for the period right from availing the Cenvat credit till the payment/reversal of proportionate Cenvat credit which create a position as if the appellant have not availed Cenvat credit right from the date when Cenvat credit was availed. Therefore there is no reason for imposing option under Clause (i) of Rule 6(3) i.e. payment of 5%/10% of the value of exempted goods. This issue has been considered by this Tribunal time and again, though the appellant have relied upon almost 20 judgments on this issue which are directly applicable. However, we are referring some of the judgments as under :

- The Hon'ble Tribunal in the case of *Jay Balaji Industries Ltd.* - 2017 (352) E.L.T. 86 (T) held in para 5 that :

"5. The Hon'ble Supreme Court in the case of *Chandrapur Magnet Wires (P) Ltd.* v. *CCE, Nagpur* - 1996 (81) E.L.T. 3 (S.C.) which has been followed in many other decisions of the High Court as well as the Tribunal has held that once Cenvat credit is reversed, it is to be considered *ab initio* not availed. In the light of this judgment of the Hon'ble Supreme Court, the reversal of Cenvat credit already made by the appellant is to be considered as not taken *ab initio*.

The Government has introduced the facility of proportionate reversal w.e.f. 1-4-2008 to mitigate the difficulties faced by manufacturers to maintain separate accounts for inputs/input services as well as when the same are commonly used for dutiable as well as exempted products/services. Though detailed procedure starting with an option to be exercised by manufacturer has been prescribed, in the present case, the appellant has not followed the same. However, it is on record that they have already reversed an amount claimed to be proportionate. It is also pertinent to record that this has been done by the appellant even before the issue of the show cause notice in this case. We are of the considered view that the failure of the appellant to follow the procedure perfectly should not come in the way of extending

the substantial benefit of proportionate reversal. However, we find that in the order passed by the lower authority, he has not given any finding as to whether the reversal already made satisfies the test of proportionate reversal in terms of quantum of reversal. Hence, we are of the considered opinion that the matter is to be remanded to the original adjudicating authority to verify whether the amount of Cenvat credit already reversed along with interest satisfies the requirement of proportionate reversal. We also make it clear that there is no justification for demand of the amount equivalent to 10%/5% of the value of electricity wheeled out. The appellant should be given an opportunity to argue their case before the original adjudicating authority who is directed to pass order expeditiously within a period of three months of the date of receipt of this order."

- The Hon'ble Tribunal in the case of *Swiss Parental Pvt. Ltd.* - 2014 (308) E.L.T. 81 (T) held in para 7.3 that :

"7.3 We find that the ratio of the above case laws is squarely applicable to the appellant's case. We, therefore, hold that if Cenvat credit attributable to inputs used in the manufacture of exempted final products is reversed along with interest subsequent to removal of exempted final products, then the appellant cannot be said to have taken credit of inputs used in or in relation to the manufacture of exempted final products, and they need not pay an amount @ 8% or 10% of the sale price of exempted final products. The adjudicating authority has worked out the demand of Rs. 88,41,543/- on the basis of 8% or 10% of the sale price of exempted final products cleared by the appellant during the material period, while the respondent claims that the input credit attributable to manufacture of exempted final products is only Rs. 7,85,573/-, which they have reversed. In the present case we observed from the case records that the appellant has furnished relevant data/documents available at pages 372 to 396 of the appeal papers filed in Appeal No. E/449/2011 showing Cenvat credit reversed/required to be reversed on inputs used in the manufacture of exempted final products during the material period. The appellant has also placed on record copies of 21 invoices at pages 349 to 370 of the appeal papers of Appeal No. E/449/2011 showing receipt of exempted input (Alpha Beta Arteether) of value of about three crore rupees during the material period, for which no Cenvat credit could be taken. In view of these facts on record, we find that the method adopted by the adjudicating authority for working out of the demand of Rs. 88,41,543/-, on the basis of 8% or 10% of the sale price of dutiable and exempted final products, is not maintainable. We, therefore, remand the matter to the adjudicating authority for proper verification of appellant's claim of reversal of Cenvat credit on inputs attributable to manufacture of exempted final products on the basis of appellant's records after affording opportunity to the appellant to explain their case before deciding the issue of quantum of Cenvat credit in remand proceedings."

- The Hon'ble Supreme Court in the case of *Bombay Dyeing & Mfg. Co. Ltd.* - 2007 (215) E.L.T. 3 held in para 8 that :

"8. There is no merit in this civil appeal. Under the notification, mode of payment has not been prescribed. Further, exemption is given to the final product, namely, grey fabric under the Central Excise Act, 1944, levy is on manufacture but payment is at the time of clearance. Under the Act, payment of duty on yarn had to be at the spindle stage. However, when we come to the Exemption Notification No. 14/2002-C.E., the requirement was that exemption on grey fabrics was admissible subject to the assessee paying duty on yarn before claiming exemption and subject to the

assessee not claiming Cenvat credit before claiming exemption. The question of exemption from payment of duty on grey fabrics arose on satisfaction of the said two conditions. In this case, payment of duty on yarn on deferred basis took place before clearance of grey fabrics on which exemption was claimed. Therefore, payment was made before the stage of exemption. Similarly, on payment of duty on the input (yarn) the assessee got the credit which was never utilized. That before utilization, the entry has been reversed which amounts to not taking credit. Hence, in this case, both the conditions are satisfied. Hence item no. 1 of the table to Notification No. 14/2002-C.E. would apply and accordingly the grey fabrics would attract nil rate of duty."

- In the case *of Aster Pvt. Ltd.* - 2016 (43) S.T.R. 411, it was held that :

"The above Rule 6(3A) states that while exercising the option, the manufacturer of goods or the provider of output service shall intimate in writing the department regarding the option exercised. In the present case, admittedly there is no intimation given by the appellant informing his exercise of option. The contention of the department is that when the appellant has not intimated his option in writing then the appellant is bound to pay the duty amount calculated under the first option. I am afraid I cannot endorse this contention. The said rule does not say that on failure to intimate, the manufacturer/service provider would lose his choice to avail second option of reversing the proportionate credit. Rule 6(3A), as seen expressly stated is nothing but a procedure contemplated for application of Rule 6(3). Therefore, the argument of the Revenue that the requirement to intimate the department about the option exercised, is mandatory and that on failure, the appellant has no other option but to accept and comply Rule 6(3)(i) and make payment of 5%/10% of sale price of exempted goods/value of exempted services is not acceptable or convincing. The Rule does not lay down any such restriction. The procedure and conditions laid in Rule 6(3A) is intended to make Rule 6(3) workable and not to take away the option available to the assessee. In any case, at no stretch of imagination can it be said that on failure to intimate the department, Rule 6(3)(i) would automatically come into application."

- The Hon'ble Tribunal in the case of *Cranes & Structural Engineers* - 2017 (347) E.L.T. 112 (T) held in para 4.1 that :

"4.1 On analysis of Rule 6(3A), I find that while exercising the option, the manufacturer of goods or the provider of output service shall intimate in writing to the Department regarding the option exercised. In the present case, admittedly there is no intimation given by the appellant informing the exercise of his option. The argument of the Department is that when the appellant has not intimated his option in writing then the appellant is bound to pay the duty amount calculating under the first option. According to me, this argument is devoid of merit, because the said Rule does not say anywhere that on failure to intimate, the manufacturer/service provider would lose his right to avail second option of reversing the proportionate credit. Sub-rule (3A) of Rule 6 is only a procedure contemplated for application of Rule 6(3). Consequently, the argument of Revenue is that the appellants exercising option is mandatory and on its failure, the appellant has no other option but to accept and apply Rule 6(3)(i) and make payment of 5%/10% of the sale price of the exempted goods or exempted services is not acceptable, because the Rule does not lay down any such restriction and this has been held in the judgments cited supra. It has been held in the judgment cited supra that the condition in Rule 6(3A) to intimate the Department is only a procedural one and that such procedural lapse is condonable and denial of substantive right on such

procedural failure is unjustified. Therefore, keeping in view the facts and evidence on record, the demand raised by the Revenue is not legal and proper. Moreover, the demand raised by the Revenue is also hit by limitation as the appellant reversed the *pro rata* credit with interest on 31-7-2010 itself and communicated to the Department whereas the show cause notice was issued only on 13-3-2012 which is beyond the period of one year and the allegation of the Department regarding suppression of fact is also not tenable because the appellant has disclosed these facts in their periodical ER1 returns filed by them. Therefore, the impugned order is not sustainable on merit as well as on limitation and therefore, I set aside the impugned order by allowing the appeal of the appellant with consequential relief, if any."

7. In view of the above, the issue is no longer *res integra*, therefore, the demand confirmed equal to 5%/10% of value of the exempted goods is not sustainable. As regard the submission of Ld. Counsel regarding the limitation, we find that firstly, the appellant had not utilized the Cenvat credit attributed to the exempted goods, secondly the fact regarding the availment of credit and manufacture and clearance of exempted and non-excisable goods are very much on record, therefore, the suppression of fact cannot be attributed on the part of the appellant. We also find that since the issue regarding reversal of Cenvat credit under Rule 6(3) is contentious and various cases on the same issue have been made out which can be seen from such of judgment given above, therefore, on the issue related to Rule 6(3) particularly in the facts of the present case it cannot be said that the appellant had *mala fide* intention to evade payment of duty. Therefore, demand for the extended period is also hit by limitation for the same reason the penalties imposed are also unsustainable.

8. As per our above discussion, we hold that proportionate credit paid by the appellant along with interest is sufficient compliance under Rule 6(3), accordingly the same is maintained. The demand under Rule 6(3)(i) i.e. 5%/10% of value of the exempted goods and all the penalties are set aside. The appeal is allowed in the above terms.

(b) In the case of Mercedes Benz India (P) Limited vs. CCE, Pune – 2015 (40) STR 381, the Mumbai Bench of this Tribunal has passed the following decision:-

"5. We have considered the submissions made by both sides. From the facts and circumstances of the case and arguments put forth by rivals, we find that the issue to be decided by us is whether appellant is required to pay 5% of total sale value of the goods traded by them in terms of Rule 6(3)(i) when the appellant paid the actual credit attributed to the quantum trading sale in terms of Rule 6(3A) along with interest following the option available under Rule 6(3)(ii). Provisions for payment of 5% of the sale value of exempted goods is provided as one of the option given in Rule 6(3) of Cenvat credit Rules which is reproduced below :-

RULE 6. Obligation of a manufacturer or 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.

Explanation 1. - For the purposes of this rule, exempted goods or final products as defined in clauses (d) and (h) of Rule 2 shall include non-excisable goods cleared for a consideration from the factory.

Explanation 2. - Value of non-excisable goods for the purposes of this rule, shall be the invoice value and where such invoice value is not available, such value shall be determined by using reasonable means consistent with the principles of valuation contained in the Excise Act and the rules made thereunder.

(2) Where a manufacturer or provider of 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).

(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 percent 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.

Ld. Adjudicating Authority demanded 5% of the total sale of the trading turnover of goods on the ground that option provided under Rule 6(3)(i) is applicable on the ground that claim of the appellant on the option provided under Rule 6(3)(ii) is not available for the reason that appellant has not complied with condition provided under sub Rule (3A) of Rule 6 which provides that manufacturers of the goods shall follow certain procedure and conditions as provided under sub-rule (3A)(a)(i) to (iv) inasmuch as the appellant have not given said information in writing to the Jurisdictional Superintendent of Central Excise. Secondly the appellant, as provided under Claus (b) of sub-rule (3A) have not paid the amount of Cenvat on monthly basis and paid after almost 11 months.

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.

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 sub-rule (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 services; can be recovered from the assessee.

5.6 We have gone through judgments relied upon by the Ld. A.R. In the arguments, we found that as regards the judgments on the issue of availment of Cenvat credit on the input or input services used in dutiable and exempted goods, the provision involved in the present case i.e. Rule 6(3) (i) (ii) (3A) has not been considered in the relied upon judgments, therefore the same are not applicable. As regard the other judgments, all these judgments having different facts and dealing with other provisions such as SSI exemption, exemption notification, etc., which are not identical to the fact of the present case, Moreover, in the present case the substantive provisions under Rule 6(3)(ii) and sub rule (3A) i.e. payment of equivalent to the Cenvat credit, which the

appellant have complied with and if at all there is delay, the required interest has also been paid, therefore in the present case, there is no case of noncompliance of procedure and condition. Therefore the judgments cited by the ld. A.R. are not applicable.

6.1 In view of these observations, we are of the considered view that demand confirmed by the adjudicating authority has no legs and therefore the same cannot be sustained. The impugned order is set aside and Appeal is allowed.**"**

8. In view the above decisions, we hold that impugned order-in-original is without any merit and hence the same is set-aside. The appeal is allowed.

(Pronounced in the open court on 29.08.2023*)*

(Ramesh Nair)
Member (Judicial)

(C L Mahar)
Member (Technical)

KL