
(2023) 12 CESTAT CK 0005

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Excise Appeal No. 85814 Of 2014

Eaton Fluid Power Ltd

APPELLANT

Vs

Commissioner Of Central Excise & Service Tax, Pune-I

RESPONDENT

Date of Decision : 04-12-2023

Acts Referred:

Cenvat Credit Rule, 2004 — Rule 3, 3A(3A), 3(i), 6, 6(3), 6(3)(i), 6(3)(ii), 6(3)(iii), 6(3A), 14
Central Excise Act, 1944 — Section 11A

Citation : (2023) 12 CESTAT CK 0005

Hon'ble Judges : Dr. Suvendu Kumar Pati, Member (J); Anil G. Shakkarwar, Member (T)

Bench : Division Bench

Advocate : Prakash Shah, Mihir Mehta, Mohit Rawal, P. K. Acharya

Final Decision : Allowed

Judgement

Dr. Suvendu Kumar Pati, Member (J)

1. Short issue involved in this appeal relates to conformation of demand under Rule 6(3)(i) of the CENVAT Credit Rule, 2004 solely on the ground that intimation/declaration regarding exercise of option in terms of Rule 6(3A) of the said Rule was not given to the jurisdictional officer.

2. Briefly stated, fact of the case is that Appellant is a manufacturer as well as trader having two separate registration taken for its warehouse located at Chakan where trading activities were undertaken and at Pimpri, located 15 Kms. away from Chakan, where manufacturing activities were undertaken. According to Appellant, it had claimed CENVAT Credit only on the duty paid on capital goods, inputs and Service Tax paid under Rule 3 of the CENVAT Credit Rules, 2004 for inputs used for manufacture of dutiable goods namely Hydraulic Pumps, Cylinders, Valves, Power Units, etc. but it had not availed any credit in respect of goods and services received at warehouse at Chakan. For the purpose of recording sale and purchase transaction in its ERP system in respect of

manufacturing and trading activities undertaken in two different locations, Appellant had used two distinct codes for noting separate transactions for those units and it had also maintained separate records for receipt, consumption and use of goods at the trading warehouse and manufacturing plant separately. It had not availed any credit on inputs services availed for its trading location at Chakan but Audit conducted by the department from the period from September 2009 to February 2011 had raised objection to such activities of the Appellant and proposed for reversal of proportionate credit of Service Tax and cess, which was duly complied by the Appellant that resulted in closure of Audit objection. However, for the subsequent period namely from March 2011 to March 2013, when Audit objection was raised on the same ground, Appellant had made proportionate reversal of its credit. However, show-cause cum demand notice dated 17.06.2013 was issued to the Appellant demanding an amount of Rs.1,56,56,165/- being 5% / 6% of the difference between purchase and sale value of the traded goods, as calculated under Rule 6(3)(i) read with Rule 14 of the CENVAT Credit Rules, 2004 vis. a. vis. Section 11A of the Central Excise Act with proposal for interest and penalty. The said demand was objected and contested by the Appellant but ultimately got conformed through an adjudication order which is assailed herein in this appeal by the unsuccessful assessee.

3. During course of hearing of the appeal, Learned Counsel for the Appellant Shri Prakash Shah, Advocate submitted with reference to case laws of Mercedes Benz India (P) Ltd. Vs. CCE, Pune-I reported in 2015 (40) STR 381 (Tri-Mumbai), Sahar Sahakari Bank Ltd. Vs. CCE & Cus. reported in 2018 (4) TMI 1330-CESTAT, Mumbai, Seth Construction Vs. CCGST, Mumbai (South) reported in 2018 (8) TMI 1399-CESTAT, Mumbai, Godrej & Boyce Manufacturing Co. Ltd. Vs. CCE, Mumbai-II reported in 2020 (9) TMI 503-CESTAT Mumbai, Reliance Life Insurance Co. Ltd. Vs. Commissioner of Service Tax, Mumbai reported in 2018 (363) ELT 1050 (Tri-Mum), Alstom T&D India Ltd. Vs. Commissioner of GST & Cex, Chennai reported in 2019 (370) ELT 625 (Tri-Chennai) that Revenue cannot insist for full payment of duty under Rule 3(i) of the CENVAT Credit Rules, 2004 only because of absence of prior intimation to the concerned Authority when reversal of CENVAT Credit in terms of Rule 6(3)(iii) of the CENVAT Credit Rules, 2004 was already made alongwith applicable interest and penalty for both financial year 2011-12 and 2012-13 respectively, which are the disputed period in this appeal. He further pointed out that adoption of similar procedure has resulted in closure of Audit observation made for the previous period but this time conformation of full amount was made on the ground of suppression etc. by the Adjudicating Authority which is not in conformity to the established rule of parity. While clarifying that Appellant had not taken any credit on trading activities but had only reversed proportionate CENVAT Credit in terms of Rule 6(3)(iii) of the CENVAT Credit Rules, 2004 out of abundant caution but unfortunately has been subjected to harassment in undergoing the entire adjudication and appeal procedure despite the fact that in the case of Tata Technologies Pvt. Ltd. Vs. CCE as reported in 2016 (42) STR-290 (Tri-Mumbai), it has been clearly held that

Rule 6 of CENVAT Credit Rules, 2004 cannot be used as a tool of operation to extract the amount which is much beyond the remedial measure and the amount which cannot be collected directly can never be collected indirectly as well. He also challenged the legality of the findings of the Commissioner in respect of no exercise of option in stating that the requirement to file an option later is applicable only in cases where an assessee is exercising option under Rule 6(3)(ii) of the CENVAT Credit Rules, 2004 and no such requirement for exercising any option for paying an amount in terms of Rule 6(3)(iii) was available in the statute itself, for which the order passed by the Commissioner is required to be set aside.

4. In response to such submissions, Learned Authorised Representative for the Respondent-Department, Shri P. K. Acharya, argued that the very fact of availing CENVAT Credit on common services is evident from the fact of reversal of CENVAT Credit attributable to exempt services by the Appellant after the same was pointed out by the Audit but after reversal since it had not exercised the option of proportionate reversal by intimating the Departmental Authority, the entire amount of exempted service has to be taken into consideration for assessment of liability of the Appellant, for which the order passed by the Commissioner need not be interfered with. In citing judgment of Hon'ble Supreme Court passed in the case of Indian Aluminum Company Vs. Thane Municipal Corporation Ltd. as reported in 1991 (55) ELT 454 (SC) way back in 1991 namely before CENVAT Credit Rules, 2004 was brought into existence and judgment of Nicholas Piramal (I) Ltd. Vs. Commissioner of Central Excise passed by this Tribunal as reported in 2009 (244) ELT 321 (Bom.), he advanced his argument in saying that since provision of sub-Rule of 3A is to be followed, the procedure prescribed under Rule 3A is to be adhered too. Further, trading being defined as on exempted service w.e.f. 01.04.2011, with reference to the Hon'ble Supreme Court's judgment of Lally Automobiles Pvt. Ltd. Vs. Commissioner of ST-Delhi reported in 2017 (12) TMI 27 CESTAT- New Delhi, he further argued that trading being not at all covered under the Credit scheme, Appellant should not have availed credit for common input services which are used for taxable output service as well as for trading activities and therefore, interference by the Tribunal in the order passed by the Commissioner is uncalled for.

5. We have gone through the case record and written note of submissions made by the adversaries. At the outset we must draw attention of all concern to the repeated pleading of the Appellant made in response to the Show-cause in the form of a reply dated 19.08.2013 and at subsequent stages wherein Appellant had clearly demonstrated that only in respect of purchase of services and goods for the manufacturing plant, CENVAT Credit was taken on inputs and input services and not in respect of trading operations at Pimpri, which is separately recorded in the respective sites in the Oracle software (para 2.5 & 2.6 at appeal memo page number 97). Further at page 99 of the appeal memo under para 3 Appellant has clearly noted that they are not going into the legality of the objection pointed out by the Audit Party during EA 2000 Audit and as an abundant precaution Appellant Company has reversed the Credit under Rule 6(3)

to settle the issue concerning availment of inputs in respect of common services, if any was in existence. Giving a pause at the Appellant's contention and going by the Common man's knowledge and perception, we are unable to find a tenable reason as to which common service is referred by the Respondent-Department when in two separate premises located at a distance of nearly 15 Kms., if electricity, water supply, telephone connection, cleaning and housekeeping services etc. are to be taken as input services, then there exist two different places in which common service cannot be extended and in the present case, it is clearly stipulated by the Appellant that they are recording the services availed by the warehouse, in which trading was being carried out, separately against which they were not availing any CENVAT Credit. Interestingly enough, while acknowledging separate location of both the premises and separate maintainance of account for both manufacturing and trading activities, the Commissioner has apparently reached at a finding that common input services were being used by the Appellant for both trading and manufacturing activities as Appellant had been maintaining common Balance Sheet for its manufacturing as well as trading activities, despite the fact that Balance Sheet of the Company records the financial transactions including Profit & Loss, Assets & Liability of the entire Company and it has got nothing to do with availment of services which are recorded in the accounting package, as such, separately.

6. At this point we intend to record that the issue is no more res integra in view of consistent decisions of this Tribunal that has attained finality with the approval of various Appellate Courts that Rule 6(3)(i) *ibid* cannot be made automatically applicable on failure to intimate in writing about options to be availed by the assessee but here the facts are completely different in the sense that Appellant disputed the demand saying that it had not availed any common input services for its trading activity, but accepted the observation of Audit without challenging the legality of the issue only to set the dispute at rest. Therefore, proportionate reversal, when made in compliance to Audit report, is well within the knowledge of the Respondent-Department. Such a paper work in putting a written intimation would have added no additional advantages to the Appellant. Be that as it may, in view of the settled principle of law that in the absence of such intimation in writing Rule 6(3)(i) cannot be applied to confirm the demand by taking 5%/6% of the entire credit amount. Hence the order.

THE ORDER

8. The appeal is allowed and the order passed by the Commissioner of Central Excise, Pune-I vide Order-in-Original No. PUN-EXCUS-001-COM-038-13-14 dated 16.12.2013 is hereby set aside with consequential relief, if any.