(2021) 09 CESTAT CK 0063

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Excise Appeal No. 30588 Of 2019

M/s Inox Air Products Pvt Ltd APPELLANT

Vs

Commissioner Of Customs Central Excise And Service Tax RESPONDENT

Date of Decision : 14-09-2021

Acts Referred:

Cenvat Credit Rules, 2004 — Rule 2(d), 6, 6(3), 6(3)(b), 57CC
Central Excise Act, 1944 — Chapter X, Section 5A(1)

Citation : (2021) 09 CESTAT CK 0063

Hon'ble Judges : Rachna Gupta, J

Bench : Single Bench

Final Decision : Allowed

Judgement

1. The present appeal has been filed to assail the order of Commissioner (Appeals) bearing No. 12/2018 dated 10/04/2019. The facts in brief relevant for present adjudication are as follows:

The appellants are manufacturers of acetylene gas who clears the same on payment of duty and avails CENVAT credit on inputs, input services and capital goods to that effect. The department on verification of appellant's records also observed that the appellants are clearing the acetylene gas to various customers on payment of duty and are also availing CENVAT credit on inputs like calcium carbide, acetone etc and input services like inward freight security services etc. However, department also observed that the acetylene gas has been cleared by appellants also to M/s Hindustan Shipyards Ltd (M/s HSL) Visakhapatnam without payment of duty under Notification No. 82/84-CE dated 31/03/1984 and as such duty on this clearance was not paid by the appellants but the appellant is availing CENVAT credit in respect of inputs used in manufacturing final products which are chargeable to duty as well as exempted goods. As such the duty liability of Rs 3,10,060/- for clearing dissolved acetylene gas valued at Rs 51,67,664/- to M/s HSL during the period from January 2016 to March 2017 was proposed to be recovered vide Show-cause notice bearing No. 34/2017 dated

22/08/2017 while invoking Rule 6(3) of CENVAT Credit Rules 2004. The said proposal was initially confirmed vide order-in-original bearing No. 01/2018 dated 21/02/2018. The appeal thereof has been rejected vide the aforesaid mentioned order under challenge.

2. I have heard learned counsel Shri A. Sarveswar Rao for the appellant and Shri N. Bhanu Kiran learned A.R. for the Revenue. It is submitted on behalf of the appellant that dissolved acetylene gas is excisable good which attracts central excise duty @ 14% as per central excise tariff under sub-heading 2091-2910. Accordingly, the appellant has discharged the duty liability on the goods removed from its factory except on the goods removed based on Form-I furnished by M/s HSL by furnishing information under Central Excise (Removal of Goods at Concessional Rate of Duty for Manufacture of Excisable goods) Rules 2001. In view of Notification No. 82/84-CE dated 31/03/1984. It is mentioned that the demand of the authorities pursuant to Rule 6(3)(b) of Cenvat Credit Rules against the value of goods cleared without payment of duty to M/s HSL is absolutely wrong. The orders of the adjudicating authority below calling for reversal of the CENVAT credit availed is not sustainable and hence is liable to be set aside.

3. Learned counsel has also brought to the notice that this Tribunal has already allowed the appeals of the appellants inasmuch as ten other similar appeals for the preceding periods. It is also brought to the notice that this Tribunal vide another order dated 03/06/2019 has rejected the appellant's contentions upholding the confirmation of reversal of CENVAT credit as done by the departmental authorities. However, the appeal against that order is pending consideration before Hon'ble High Court of Andhra Pradesh. Finally, impressing upon that Rule 6(3)(b) of CENVAT Credit Rules is not applicable to the facts of the present case and thus has been wrongly invoked by the authorities below, the order under challenge is prayed to be set aside and appeal is prayed to be allowed.

4. While rebutting these submissions, learned A.R. has mentioned that the order of this Tribunal dated 03/06/2019 is later in time and thus has to prevail. It is also impressed upon that the order has elaborated the reasons for non-applicability of the decision in the case of SRF Ltd reported as 2008(223) ELT 508. It has been clearly established that all the decisions as relied upon by the appellant pertain to the period when Chapter X of Central Excise Rules 1944 was in existence. However, after the year 2001, since when Central Excise (Removal of Goods at Concessional Rate of Duty for Manufacture of Excisable goods) Rules 2001, have taken over the said Chapter X, remission of duty is no more the concept but that of exemption of duty due to which Rule 6(3)(b) of CENVAT Credit Rules is invokable. Impressing upon no infirmity in the order under challenge, the appeal is prayed to be dismissed.

5. After hearing the rival contentions and perusing the appeal record as well as the decisions relied upon by the respective parties, I hold as follows:-

The issue involved in the case is regarding reversal of an amount equivalent to 8% or 10% of the value of goods cleared under Notification No. 82/84 to M/s HSL claiming exemption. The said Notification mandates for compliance of procedures laid down in Central Excise (Removal of Goods at Concessional Rate of Duty for Manufacture of Excisable goods) Rules 2001. It is not in dispute that the said procedure has been complied with and the appellant has cleared the non-dissolved acetylene gas to M/s HSL after receiving the certificates. In the given circumstance it has to be adjudicated as to whether provisions of Rule 6 (3) of Cenvat Credit Rules shall be applicable to the present transactions. For that purpose the rule has to be looked into, which is as follows:-

"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 six percent of value of the exempted goods and services; or

ii) Pay an amount as determined under sub-rule (3A); or

iii) Maintain separate accounts for 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."

A perusal of the Rule makes it clear that it applies in cases where manufacturer is engaged in manufacture of any final product which is chargeable to duty as well as the manufacturers another final product which is exempted from payment of duty or chargeable to 'Nil' rate of duty and the manufacturer takes credit of the specified duty on any inputs, which is used in manufacture of both the above kind of final products. The facts of the present case are that there is one final product of the appellant herein i.e. is dissolved acetylene gas which is cleared by the appellant on payment of requisite excise duty except for M/s HSL being entitled for exemption under Notification No. 82/84 provided it fulfills the procedure mentioned therein. It is not in dispute that the procedure for availing benefit of the notification was fulfilled and it is after requisite certificate that the one and only product of appellant i.e. dissolved acetylene gas was cleared by the appellant to M/s HSL without payment of duty. Since there are no two different products being manufactured by the appellant from the same inputs, question of applicability of Rule 6 does not at arise. The issue was initially dealt with by Hon'ble Apex Court in the case of Ballarpur Industries reported in 2007 (215) ELT 489(SC). The relevant para is reproduced below:

"8. Value is the function of price. In every case in which there is an allegation of evasion, a show cause notice constitutes the foundation on which the demand made by the Department could stand or fall. Rule 57CC deals with adjustment of credit on inputs used in the manufacture of exempted final products. It applies in cases where a manufacturer is engaged in the manufacture of any final product which is chargeable to duty as well as any other final product which is exempted from payment of duty or chargeable to nil rate of duty and the manufacturer takes credit of the specified duty on any inputs, which is used in manufacture of both the above categories of final products. In such a case, the manufacturer is required to pay a presumptive amount equal to eight per cent of the price of the exempted final product charged by the manufacturer for the sale of such goods at the time of their clearance from the factory."

Delhi Bench of this Tribunal also in the case of Auriola Chemicals Ltd Vs CCE Indore (2004(175) ELT 148 (Tri-Del)] has held that the goods cleared by the then appellant i.e. spent sulphuric acid was cleared against CT-3 bond to the fertilizer manufacturer. The sulphuric acid was denied to be called as exempted product or the product chargeable to 'NIL' rate of duty. Provisions of erstwhile Rule 57CC/Rule 6 of CENVAT Credit Rules were not held applicable. The appellant therein was held not required to reverse 10% of the value of the goods cleared. The similar decision has been followed by the Mumbai Bench of the Tribunal in the case of Dharmsi Morarji Chemical Co. Ltd reported at [2010(255)ELT 314(Tri-Mum)]. Ten other final orders of this Tribunal as have been tabled in the written submissions of the appellant i.e.

Sl.No.

Period

Appeal No.

Order date

1.

2/2005 to 7/2008

E/1047/2009

07/09/2017

2.

8/2008 to 1/2009

E/2093/2012

3.

2/2009 to 1/2010

E/291/2012

4.

2/2010 to 1/2011

E/2092/2012

5.

2/2011 to 1/2012

E/27926/2010

6.

1/2013 to 03/2013

E/22067/2015

7.

2/2012 to 12/2012

E/21732/2015

17/08/2017

8.

4/2013 to 12/2013

E/31202/2017

08/02/2018

9.

1/2014 to 09/2014

E/30361/2018

21/05/2018

10.

10/2014 to 03/2015

E/30363/2018

are also sufficient for me to hold that the issue involved in present appeal is no more resintegra.

6. Learned A.R. has laid emphasis upon the decision of Hon'ble High Court of Mumbai in the case of Atlas Automotive Components Pvt Ltd Vs UOI reported at 2017(350)ELT 42(Bom)] impressing upon that Rule 57 C has been held not applicable to clearances under Chapter X. It has been observed that the Hon'ble Court in that case has held as follows:-

"The buyer of castings, therefore, has a choice to either purchase the castings against the duty paying document and then in turn avail MODVAT credit or instead of following the procedure of MODVAT credit, obtain remission of duty under Chapter X and purchase the castings without payment of duty. This choice of the buyer of the castings does not make the castings per se chargeable to nil rate of duty or wholly exempt from payment of duty"

It was further held that since there is no explanation provided, much less reasonable and plausible by the petitioners for the decision to initially reverse the MODVAT credit, but later on shifting their stand and refusing to reverse it. It becomes clear that the contention of this petitioner was rejected not on the ground of the option taken under Chapter X but on the ground of different action at the time of different clearances of the same final product which is not the fact for the present case.

7. The appellant herein while clearing dissolved acytelene gas to M/s HSL has always claimed exemption from payment of duty. Another case relied upon by the department i.e. Micro Melt Pvt Ltd Vs CCE [2014(300)ELT 232(Guj)] is also observed to be not applicable to the facts of the present case. The goods used in the manufacture of the final product in that case were already granted exemption from payment of duty under Notification No 6/2000 due to which it was held in that case that once the product is exempted from payment of duty, question of remission of duty under chapter X of Central Excise Rules may not arise. Apparently this is also not the fact of the present case. Dissolved acetylene gas is not provided any exemption from duty. Apparently and admitted the appellant is clearing the said product on payment of duty @14% except for M/s HSL. Hence the peculiar and distinguished fact of the present case is that it was not the manufactured gas which was subject to exemption but M/s HSL was entitled to exemption while buying said excisable product.

8. Finally coming to the recent decision of this Tribunal dated 03/06/2019 wherein the contentions of the department have been considered and applicability of Rule-6 upon the appellant clearing the dissolved acetylene gas without payment of duty to M/s HSL has been allowed. I have perused the decision and it is observed that the findings have been arrived at on the ground that Chapter X Central Excise Rules 1944 stands superseded by Notification No 9/2001 dated 01/03/2001 and hence it was prior to 2001 only that the remission of duty on goods for special industrial purposes was allowed. The Rules of 2001 since do not provide for remission of duty but only prescribe for procedure to be followed by a manufacturer who intends to avail the benefit of notification and Rule 6 of CENVAT Credit Rules will be applicable. I have looked into the provisions of Chapter X as well as the Central Excise Rules of 2001 which is reproduced herein below:

"Chapter X

REMISSION OF DUTY ON GOODS USED FOR SPECIAL INDUSTRIAL PRUPOSES 192. Application for concession - Where the Central Government has, by notification under rule 8 or section 5A of the Act, as the case may be, sanctioned the remission of duty on excisable goods, other than salt, used in a specified industrial process, any person wishing to obtain remission of duty on such goods, shall make application to the Commissioner in the proper form stating the estimated annual quantity of the excisable goods required and the purpose for and the manner in which it is intended to use them and declaring that the goods will be used for such purpose and in such manner. If the Commissioner is satisfied that the applicant is a person to whom the concession can be granted without danger to the revenue, and if he is satisfied, either by personal inspection or by that of an officer subordinate to him that the premises are suitable and contain a secure store-room suitable for the storage of the goods, and if the applicant agrees to bear the cost of such establishment as the Commissioner may consider necessary for supervising operation in his premises for the purposes of this Chapter, the Commissioner may grant the application and the applicant shall then enter into a bond in the proper form with such surety or sufficient security, in such amount and under such conditions as the Commissioner approves. Where, for this purpose, it is necessary for the applicant to obtain an Excise registration certificate, he shall submit the requisite application along with the proof for payment of registration certificate fee and shall then be granted registration certificate in the proper form. The concession shall, unless renewed by the Commissioner, cease on the expiry of the registration certificate:

Provided that, in the event of death, insolvency or insufficiency of the surety or where the amount of the bond is inadequate, the Commissioner may, in his discretion, demand a fresh bond; and may, if the security furnished for a bond is not adequate, demand additional security."

Sections 1 & 2 of the Central Excise (Removal of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules 2001 read as follows:

"1) These rules may be called the Central Excise (Removal of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules 2001.

2) They extend to the whole of India

3) They shall come into force on and from the 1st day of July 2001.

2. Application:-

These rules shall apply to a manufacturer who intends to avail of the benefit of a notification issued under sub-section (1) of Section 5A of the Central Excise Act, 1944 (1 of 1944)

(hereinafter referred to as the Act) granting exemption of duty to excisable goods (hereinafter referred to as subject goods) when used for the purpose specified in that notification.

3. Application by the manufacturer to obtain the benefit-

(1) A manufacturer who intends to receive subject goods for specified use at

concessional rate of duty, shall make an application in quadruplicate in the Form at Annexure-I to the jurisdictional Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be (hereinafter referred to as the said Assistant Commissioner or Deputy Commissioner)"

A bare perusal of these provisions gives me the reason to differ from the observations of Hon'ble Member in the said decision dated 03.06.2019 that remission of duty has been done away in the year 2001. Both the provisions are intended for extending the benefit to a specified industrial process. As per both the provisions anyone who wants to seek benefit of the provisions has to make an application in a proper form. On being satisfied, the Commissioner may extend the benefit of provision to the said specified industry. Thus the object of both the provisions is clear and the only difference is that Chapter X uses the word "remission" of duty on excisable goods" and Central Excise Rules 2001 used the word "exemption of duty to excisable goods". None of these words have been defined in the Central Excise Act.

9. Rule 2(d) of Central Excise Rules 2004 defined exempted goods as excisable goods which are exempt from whole of the duty of excise leviable thereon and include goods which are chargeable to "NIL" rate of duty. However, for the meaning of word "remission" and "exemption" we have to look for the dictionary meaning. Remission stands defined as an act of reducing or cancelling the amount of money that somebody has to pay. Exemption amounts to an act of giving immunity from payment which is as good as either cancellation or remission. These dictionary meanings are sufficient to hold that remission and exemption are the overlapping terms and can yet be assigned the same meaning. From the above definition of exempted goods also it is clear that good may either be exempted from payment of any duty or was not charged to duty. In the present case, admittedly, dissolved acetylene gas as per tariff, is being charged to duty @ 14%. Notification 82/84 apparently does not extend exemption to dissolved acetylene gas as such it does extend the benefit to the specified industry buying this product. Hence the product cannot be held to have been covered under the definition of Rule 2(d) of CENVAT Credit Rules. Accordingly, applicability of Rules 6(3)(b) of CENVAT Credit Rules is not at all sustainable.

10. In view of the discussion above, I hold that the adjudicating authority has failed to appreciate that Rule 6(3)(b) is applicable where the manufacturer is manufacturing two separate products one being charged to duty and another being exempt from payment of duty or is charged with 'NIL' rate of duty. Apparently, the same is not the fact for the present case. The product in question is one and only one i.e. dissolved acetylene gas which is charged to duty @ 14%. The findings of the order under challenge are, therefore, wrong. The order accordingly is set aside. Resultant thereto, Appeal stands allowed.

(Order pronounced in open court on 14/09/2021)

