

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
CENTRAL EXCISE APPEAL NO.14 OF 2017

Jubilant Life Sciences Ltd.,
(formerly known as Jubilant Organosys
Limited), a company incorporated
under the Companies Act, 1956
having its registered office at
Nimbut Nira, Baramati,
Pune – 412 102.

.... Appellants

- Versus -

The Commissioner of Central Excise,
Pune-III, having office at ICE House,
41-A, Sassoon Road, Opp. Wadia
College, Pune – 411 001.

.... Respondent

Mr. Prakash Shah with Mr. Jas Sanghvi i/by PDS
Legal for the Appellants.
Ms P.S. Cardozo with Ms Ruju R. Thakker for the
Respondent.

CORAM: S.C. DHARMADHIKARI &
PRAKASH D. NAIK, JJ.

DATE : APRIL 16, 2018

ORAL JUDGMENT (Per Shri S.C. DHARMADHIKARI, J.):

1. By this appeal, the assessee challenges an order

passed by the Customs, Excise & Service Tax Appellate Tribunal, West Zonal Bench, Mumbai, dated 9-3-2016.

2. After hearing both sides and perusing this order, we are of the opinion that the appeal raises the following two substantial questions of law:-

- “(a) Whether in the facts and circumstances of the case, the Appellate Tribunal is justified in rejecting the refund claim on the ground that the Appellants have correctly reversed cenvat credit in terms of Rule 6(3)(ii) of Cenvat Credit Rules, 2004 inspite of the fact that the Appellants had never opted for any option provided in the rule and followed the procedure prescribed under Rule 6(3)(ii) read with Rule 6(3)(A) of Cenvat Credit Rules, 2004?”*
- “(b) Whether in the facts and circumstances of the case, the Appellate Tribunal is justified in holding that there is no excess reversal of cenvat credit in terms of Rule 6(3)(ii) even after noting the fact that the Appellants reversed the entire cenvat credit @ Rs.750/- pmt. on the molasses used in the manufacture of RS & ENA which is not proportionate reversal of cenvat credit as required under Rule 6(3)(ii) of Cenvat Credit Rules, 2004?”*

Hence, **admit**. The respondent waives service.

3. In the light of the fact that the matter must go back to the Tribunal for determination afresh, we only refer to brief

facts.

4. The appellants before us, *inter alia*, manufacture organic chemicals like Glacial Acetic Acid, Ethyl Acetate, Acetic Anhydride, Piperidine falling under Chapter 29 of the First Schedule to the Central Excise Tariff Act, 1985 and clear these final products on payment of central excise duty at the applicable rate. The appellants claim that they take CENVAT credit of excise duty paid on capital goods, inputs and service tax paid on input services used in or in relation to manufacture of their final products.

5. Apart from the manufacture of organic chemicals, the appellants also manufacture Rectified Spirit and Extra Neutral Alcohol. The molasses are used as input in the manufacture of Rectified Spirit. The assessee purchases molasses on payment of excise duty at specific rate on per tonne basis. The Rectified Spirit so manufactured is either captively consumed in the manufacture of Extra Neutral Alcohol or sold as such in the domestic market.

6. The Extra Neutral Alcohol manufactured is either captively consumed in the manufacture of dutiable goods or sold as such in the domestic market. This is classifiable under CSH 2207 of the Central Excise Tariff Act, 1985 and is exempted from payment of excise duty.

7. The appellants have specifically urged that they followed the procedure laid down under the erstwhile Rule 6(3)(a) of the CENVAT Credit Rules, 2004. As per this Rule, a manufacturer engaged in the manufacture of goods falling under Chapter Heading 2207 of the Central Excise Tariff Act, 1985 was required to pay an amount equivalent to the CENVAT credit attributable to inputs used in the manufacture of exempted final products. Bearing in mind the nature of the operation and the manufacturing process, the appellants stated that it was not feasible to maintain separate accounts for receipt, consumption and inventory of molasses for manufacture of dutiable and exempted goods in accordance with the erstwhile Rule 6 of the CENVAT Credit Rules.

8. That is how they reversed the CENVAT credit equivalent to the duty paid on molasses used in the manufacture of exempted goods. They relied upon a Notification dated 1-3-2008, pursuant to which an amendment was brought to Rule 6(3) of the CENVAT Credit Rules. After setting out as to how this amendment has impacted the availment of CENVAT credit, what the appellants allege is that during the course of internal audit they realised that from April, 2008 to September, 2009, they paid an amount in respect of molasses used in the manufacturer of Rectified Spirit and Extra Neutral Alcohol which were not applicable for the said period. They realised the error that they had paid/reversed higher amount of CENVAT credit in respect of the molasses.

9. They relied upon Section 11B of the Central Excise Act, 1944 and made a claim for refund but not for the period April, 2008 to March, 2009. What they did was they filed a refund claim on 31-3-2010 seeking re-credit of excess reversal of CENVAT credit in the sum of Rs.17,29,019/-. Annexure "D" is a

copy of the refund claim. The relevant portion of the same reads as under:-

“Jubilant Organosys Ltd., ECC No. AABCV0200HXM001 (the Company) having factory at Nimbut, Railway Station Nira, Taluka Baramati, District Pune-412 102, is engaged in the manufacture of organic chemicals using molasses as input. The molasses is used as a raw material for manufacture of rectified spirit (RS) which is further used in manufacturer of final products and also sold in the open market. Similarly, the RS manufactured using molasses is also used for manufacture of Extra Neutral Alcohol (ENA) with faint spirit emerging as by-product. The faint spirit is further used for manufacture of final products whereas ENA is sold in the market as well as used for further manufacture of non excisable goods in another unit of the Company. ENA and RS are exempted goods as defined in Rule 2(d) of the CENVAT Credit Rules, 2004 (the CENVAT Rules).

Considering the nature of the operation and the manufacturing process it is not feasible to maintain separate accounts for receipt, consumption and inventory of molasses for manufacture of dutiable and exempted goods in accordance with Rules 6(2) of the CENVAT Rules. Accordingly, the Company paid an amount equal to the prescribed percentage of the value of the exempted goods (Rule 6(3) of the CENVAT Rules) during the period from April-09 to Sep-09. While closing of the half yearly accounts and internal audit it was noticed that the Company has paid Rs.1729019/- in excess of the prescribed amount during the period.

It is submitted that the amount paid has not been recovered from the customers as it evident from the invoices for sale of the exempted products. Therefore, it is requested that the amount may be permitted to be credited to the CENVAT account. A personal hearing may

be granted before taking any decision on the issue.”

10. However, they were served with a Show Cause Notice dated 24-5-2010 proposing to reject this refund claim. A reply was claimed to be filed in which also a specific plea was raised by the assessee that they were required to pay only an amount equivalent to 10% / 15%, as the case may be, of the value of the exempted goods during the period April, 2009 to September, 2009. However, by mistake, they have followed the procedure prevailing prior to 1-4-2008 and reversed credit equivalent to the amount of credit taken on molasses as per Rule 6(3)(a) of the CENVAT Credit Rules, 2004, then prevailing.

11. That is how the principle of unjust enrichment is inapplicable.

12. The order-in-original passed on 16-7-2010 confirmed this Show Cause Notice. The finding in that order-in-original is specific and the Assistant Commissioner holds that as per Rule (3A) of the CCR, 2004, if the assessee opts to pay an amount equivalent to the CENVAT attributable to input, they should

intimate to the Range Superintendent, in writing, the description of the dutiable as well as exempted goods, CENVAT credit of the input lying in the balance as on the date of exercising the option. The Assistant Commissioner found that at the beginning of the financial year, the assessee was at liberty to pay duty as per the provision of Rule 6(3)(i) or 6(3)(ii) of the CENVAT Credit Rules, 2004. He held that it is amply clear from the facts and circumstances of the case that the assessee opted to pay the duty in terms of Rule 6(3)(ii) of the CENVAT Credit Rules, 2004. Since it is a well-reputed company, it cannot be said that they were not aware of the rules and regulations prevailing in the disputed period. They may say that it was a mistake but that stand or contention has no force. The specific finding is that in terms of the Explanation to Rule 6(3)(ii) of the CENVAT Credit Rules, 2004, the assessee cannot switch to the other option in midst of the financial year. Thus, this claim is an after-thought and by switching the options, the assessee is seeking to derive benefit. Hence, the claim of re-credit of Rs.17,29,019/- is incorrect and inadmissible.

13. Now, when the matter was carried in appeal before the Appellate Authority, the Appellate Authority was to decide a specific ground of appeal and that is to be found in the Memo of Appeal as grounds A.2, A.3 and alternatively ground B.2 on pages 82 & 83 of the paper-book.

14. There was a specific ground raised that principle of unjust enrichment is inapplicable.

15. We could have understood that these grounds were raised in the Memo of Appeal but never pressed. However, that is not the position as is apparent from the arguments noted by the Appellate Authority in para 3 of its order and the submission in para 4. The point framed for determination was rejection of the refund claim in respect of excess CENVAT credit reversed by the assessee on the exempted goods cleared by the assessee. That is rejected on the ground that they have to discharge the duty liability under Rule 6(3)(ii) of the CENVAT Credit Rules, 2004 and the same was credited as per law. The very fact that this credit was reversed, is an option exercised *ipso facto*. Hence,

the reversal was correct. The question of excess duty having been reversed does not arise. The Adjudicating Authority does not have to produce any evidence. Relying upon Explanation-1 to Rule 6(3), the order of the Adjudicating Authority was maintained.

16. Aggrieved by both orders, an appeal was taken to the CESTAT in which as well there is a specific ground of appeal and to be found as grounds A.3, A.4, A.5 and insofar as the option is concerned, ground A.6 at pages 103-104 reads as under:-

“A.6 Thus, in order to follow the option under Rule 6(3) (ii), an assessee has to mandatorily comply with the prescribed procedure, without which the said option cannot be exercised. In the present case, the Appellant never intended to exercise option under Rule 6(3)(ii) and therefore did not follow any of the prescribed procedures/conditions. In view of the same, the Commissioner (Appeals)'s contention that the Appellant has followed Rule 6(3)(ii) is not correct. The facts remain that the Appellant intended to follow Rule 6(3)(i) with effect from 01/04/2008 for which no intimation is required but by mistake reversed credit following the earlier provisions, leading to excess reversal.”

17. The finding of the Appellate Authority was referred in grounds A.7 and A.8 and it was argued that the assessee had

even assuming without admitting that the Commissioner is correct, clear evidences on record. The assessee had already filed before the Commissioner (Appeals) a declaration from the management certifying that option under Rule 6(3)(ii) has not been exercised. However, that submission was not considered in the impugned order and no specific findings have been rendered in respect of the same.

18. To our mind, such an argument of the assessee and based on this ground was specifically raised, as noted in para 3 of the order under challenge. The CESTAT notes the arguments of the assessee's Advocate as also that of the respondent's representative.

19. It renders a finding in para 6 on running pages 37 & 38, entirely agreeing with the Commissioner (Appeals) and reproducing the finding from the Appellate Authority's order and endorsing its reliance on Explanation-1 to Rule 6(3). We have not seen any independent application of mind by the Tribunal. The Tribunal was expected, as the last fact finding authority, to

render specific finding. We do not think that the case could have been disposed of even if the revenue involved was not substantial, by a mere endorsement of the Appellate Authority's finding, particularly on the interpretation of the Rule prevailing at the relevant time. The Tribunal is not expected to endorse legal findings by the Adjudicating Body/Authority and that of the First Appellate Authority. Since the Tribunal comprises of both a Judicial Official and an Administrative Member, it is expected to apply its independent mind and particularly on the question/issue of interpretation of the Rule. This has precisely not been done in the instant case.

20. As a result of the above and particularly because it was argued before us by Ms Cardozo that at no time the assessee raised any ground and of the nature noted by us, that this lengthy order was necessitated.

21. In the light of the above, we proceed to quash and set aside the order of the CESTAT. We restore the appeal of the assessee to the file of the Tribunal for a decision afresh on merit

and in accordance with law. The Tribunal must render its independent conclusion on the issues involved and should not be influenced by its earlier findings and it is not expected to merely endorse what the Appellate Authority has done in the instant case. The Tribunal must allow both sides to place materials on record. It should also call for the original files before the authorities in the event it is necessary.

22. The appeal is allowed in the aforesaid terms with no order as to costs.

(PRAKASH D. NAIK, J.)

(S.C. DHARMADHIKARI, J.)