

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

FIRST APPEAL NO. 806 OF 2006

Commissioner of Central Excise
& Customs, Town Centre, N-5,
CIDCO, Aurangabad.

....Appellant.

Versus

1. M/s. Encore Healthcare Pvt. Ltd.,
D-5, M.I.D.C. Industrial Estate,
Paithan, Tq. Paithan,
District Aurangabad.
2. Shri. Sanjay F. Amla,
Associate Director,
C/o. M/s. Rhone Poulenc (I) Ltd.,
M.I.D.C., Paithan,
Tq. Paithan, Dist. Aurangabad.
3. Shri. P.P. Kulkarni,
Assistant Manager,
(Planning & Stores),
C/o. M/s. Rhone Poulenc (I) Ltd.,
M.I.D.C. Paithan,
Tq. Paithan, Dist. Aurangabad.

(Appeal is dismissed against
Respondent Nos. 2 and 3 as per
Registrar's order dated 22.11.2011)

....Respondents.

Mr. D.S. Ladda, Advocate for appellant.

Mr. Prasad Paranjape with Mr. J.R. Shah, Advocates for
respondent No. 1.

**CORAM : T.V. NALAWADE AND
SUNIL K. KOTWAL, JJ.
DATED : 01/03/2019**

JUDGMENT :

1) The appeal is filed against judgment and order of proceeding No. A/2227-2229/WZB/05/C-III/EB dated 26.9.2006 of Customs, Excise and Service Tax Appellate Tribunal, (CESTAT) West Zonal Bench at Mumbai. The said proceeding was filed by present respondent Nos. 1 to 3 to challenge the order passed by the Commissioner of Central Excise and Customs, Aurangabad in proceeding No. 31/CEX/2001 dated 26.12.2001. It appears that during pendency of the present proceeding, respondent Nos. 2 and 3 paid the penalty amount imposed by the Commissioner. The steps were not taken by the appellant to serve respondent Nos. 2 and 3 and the proceeding was dismissed as against them on 22.11.2011. The payment of penalty came to be made on 22.1.2012. Both the sides are heard.

2) The respondent company is engaged in manufacture of medicine falling under Chapter 30 of Central Excise Tariff Act, 1944. As assessee, it was manufacturing both dutiable and exempted products. It was availing modvat credit under Rule 57A of Central Excise Rules, 1944. On 24.7.1999 on the basis of information collected by the department, the staff of the appellant department visited the manufacturing unit of

respondent company situated at Aurangabad. The enquiry revealed that the assessee had availed modvat credit on inputs which were used for manufacturing of both dutiable and exempted products.

3) The investigation into the matter revealed that the assessee has not maintained separate inventory or separate accounts for the said common inputs. On receipt of the inputs, the same were entered in Bin Card maintained for common use of both dutiable and exempted products. When the inputs were to be issued for exempted products, some of them were used for dutiable products and they were shown to be transferred from Bin Card of exempted products to Bin Card of other products.

4) For deciding the matter against the manufacturer, assessee, the Commissioner considered some instances for illustration and those instances revealed that in some cases inputs were issued directly from Bin Card of common inputs for manufacture of exempted products, though in some cases they were transferred from Bin Card maintained from common inputs to Bin Card maintained for exempted products. The verification revealed that the assessee had not maintained separate inventory

and though separate Bin Cards were kept, they were for only some cases and in many cases inputs were issued directly from common Bin Card for manufacture of exempted goods or dutiable goods. The Commissioner, the adjudicating authority found that this was done to mislead the department and to show that separate inventories were maintained. In view of these circumstances, the circumstance that in some cases, the assessee had reversed the credit of inputs used in exempted products was not considered in favour of the assessee as it was not regular practice. Only in some cases like October 1996, February 1997 to June 1997, December 1997, January and February 1998, May 1998 and August 1998 the assessee had reversed the credit. But, for the rest period the assessee had not credited the modvat credit. Further, the assessee had not informed the particulars of reversal and the detail calculations of reversal were also not submitted to the department. On many occasions, the assessee had just debited the amount without any remark as to for what purpose the debit entry was made. On the basis of these circumstances, the Commissioner inferred that there was the intention to evade even the payment of 8% duty adjustment on exempted goods and by using such modus operandi, the assessee did not pay 8% of the price on exempted products and did not

comply the provision of section 57CC of Central Excise Rules, 1944.

5) The assessee had taken following defences in reply to show cause notice :-

(a) The assessee had reversed proportionate modvat credit taken on such common inputs which were used for exempted products.

(b) They admitted that there was some procedural mistake, but they contended that there was not malafide behind the mistake and there was no intention to evade the duty.

(c) They contended that they had availed the total modvat credit of Rs.11,17,520/- on such common inputs during the period covered by the show cause notice and they had reversed total proportionate credit of Rs.4,99,572/-, though the amount could have been Rs.4,67,866/-.

(d) The assessee also contended that it is not the case of incorrect availment of modvat credit and provisions of Rule 57I were not applicable.

6) After hearing both the sides, the Commissioner had made order under challenge by giving following reasons :-

“- the assessee has suppressed the facts of availment of modvat credit on common inputs.

- the maintenance of separate Bin Cards for exempted products was intentional to show that the separate inventory was being maintained, however the facts are that the separate inventory was not maintained, but only an entry was made by transferring inputs on which modvat credit was availed from common Bin Card to the Bin Card of the said input maintained for exempted products.

The assessee had suppressed the facts of reversal also, by not submitting the detailed working of reversal giving detail remark as to for what purpose the said amount was reversed. Such debits were made occasionally without giving any details or particulars for example, reversal was made in Oct. 96, Feb. 97 to June 97, Dec. 97, Jan & Feb. 98, May 98 & Aug. 98 and for rest of period no debit was done. Thus the reversal was also not proper and regular.”

After considering the record collected during investigation, the order of imposing liability of Rs.95,81,672/- was made. During

pendency of that proceeding amount of Rs.11,60,480/- was paid by the assessee and it was directed to be adjusted against the liability imposed.

7) As against the aforesaid order of Commissioner, the order of CESTAT is as under :-

“Heard both sides. Considering the fact that credit availed in respect of common inputs has been reversed before taking such inputs for use in exempted goods, we are of the view that the appellants have complied with the requirement of the rules. As such, we set aside the impugned order and allow the appeal.

2. Our order as above was pronounced in open court on the date of hearing on 26.9.2005.”

The aforesaid order of CESTAT shows that no facts are considered and aforesaid circumstances mentioned by the Commissioner are not considered. It can be said that only the contention made by the assessee was accepted as it is. In such a case, the reversal availed before clearance of goods cannot help much as on facts, the liability needs to be ascertained. Though while admitting appeal of the department, three substantial questions of law were formulated, the aforesaid discussion shows that relevant material

is not at all considered by the CESTAT and that also becomes substantial question of law. Following were the three substantial questions of law formulated by this Court on 28.8.2006 for admitting the appeal.

(1) Whether, the respondent assessee had contravened the provisions of Rule 57-CC of the Central Excise Rules, 1944 ?

(2) Whether, the respondent assessee having availed the Modavat Credit under Rule 57-A on common inputs but having failed to pay @ 8% on the exempted product nor having maintained the separate inventory for the inputs used for the manufacture and exempted product amounts to contravention of Rule 57-CC of the Central Excise Rules, 1944 ?

(3) Whether the respondent assessee is required to pay @8% of price of exempted goods in terms of Rule 57-CC ?

8) Both the sides drew the attention of this Court to Finance Act, 2010 and particularly section 68(2) which is as under :-

68. (1)

(2) Where a person opts to pay the amount in accordance with the provisions of the Central Excise Rules, 1944 as amended by sub-section (1), he shall pay the amount along with interest specified thereunder and make an application to the Commissioner of Central Excise along with documentary evidence and a certificate from a Chartered Accountant or a Cost Accountant certifying the amount of input credit attributable to the inputs used in or in relation to the manufacture of the final products, which are exempted from the whole of the duty of excise leviable thereon or chargeable to *nil* rate of duty, within a period of six months from the date on which the Finance Bill, 2010 receives the assent of the President."

This provision also shows that even if it is given retrospective effect, the satisfaction of the Commissioner of Central Excise is involved and he is expected to take decision and further time limit was given for the same. That is not done by the assessee and it can be said that the assessee did not approach the Commissioner as there was the order of CESTAT in his favour.

9) The learned counsel for petitioner placed reliance on

the observations made by this Court in the case reported as **2009 (244) E.L.T. 321 (Bom.) [Commissioner of C. Ex. Thane-I Vs. Nicholas Piramal (India) Ltd.]**. This order is in respect of the present assessee, though during pendency the factory was transferred to Encore. The period involved was March 2002 to December 2003. In that matter also CESTAT had decided in favour of the company and the proceeding filed in the High Court by the department came to be allowed with following observations :-

“If however an assessee can reverse the credit on the final product, before the goods are taken out of the factory, we fail to understand why on the same basis it is not possible to maintain records of the very same inputs which are used in the manufacture of final products at an intermediate stage... The rule making authority however noting that inputs may be used both for manufacturing final products which may be dutiable and other final products which are exempt, has provided that such manufacturer will be given credit in so far as inputs used for manufacturing of dutiable goods, if accounts are maintained in terms of the rules. Therefore merely because the assessee contends that he is willing to forego credit on inputs used in the manufacture of exempted final product does not

warrant a departure from the requirements of Rule (2) and 6(3). The rules contemplate that on failure to maintain accounts in terms of Rule 6(2) the consequences would be in terms of Rule 6(3)(a) or (b)."

10) On the other hand, the learned counsel for respondent placed reliance on Rule 57CC, the aforesaid extract of Finance Act, 2010 and following cases.

(i) 2017 (349) E.L.T. 18 (Bom.)
[Commissioner of Central Excise, Mumbai Vs. IVP Ltd.],

(ii) 2019 (349) E.L.T. 33 (Bom.)
[Commissioner of Central Excise Vs. Nicholas Piramal Ltd.],

(iii) 2015 (315) E.L.T. 388 (Mad.)
[Commissioner of Central Excise, Chennai-II Vs. ICMC Corporation Ltd.],

(iv) 2015 (323) E.L.T. 323 (Mad.)
[Commissioner of C. Ex., Puducherry Vs. CESTAT, Chennai],

(v) 2016 (336) E.L.T. 477 (A.P.) [Commr. Of C. Ex. Hyderabad-II Vs. SPM Industries India Pvt. Ltd.],

(vi) 1996 (81) E.L.T. 3 (S.C.) [Chandrapur Magnet Wires (P) Ltd. Vs. Collector of C. Excise, Nagpur],

(vii) 2002 (149) E.L.T. 490 (Tri. - Mumbai)
[Pushpaman Forgings Vs. Commissioner of Central Excise, Mumbai-VII],

(viii) (1981) 2 SCC 460 [CIT Vs. B.C. Srinivasa Setty],

(ix) 2008 (225) E.L.T. 181 (Bom.) [Commr. Of C. Ex. & Cus., Aurangabad Vs. Concept Pharmaceuticals Ltd.],

(x) 2008 (232) E.L.T. 156 (Tri.- Del.) [Goyal Proteins Ltd. Vs. Commissioner of C. Ex., Jaipur],

(xi) 2017 (355) E.L.T. 72 (Raj.) [Commissioner of Central Excise Vs. Goya Proteins Ltd.].

This Court holds that at this stage, it is not possible to consider the matter in detail as from the nature of order made by CESTAT, it can be said that necessary material is not considered by the CESTAT and there was non application of mind.

11) In the result, the appeal is allowed. The judgment and order of CESTAT is hereby set aside. The matter is remanded back for fresh decision which needs to be given after considering the relevant material and CESTAT is expected to give reasoned order in respect of the material available against the assessee.

[SUNIL K. KOTWAL, J.]

[T.V. NALAWADE, J.]

ssc/