

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CENTRAL EXCISE APPEAL NO. 240 OF 2007

The Commissioner of Central Excise, Raigad]	
Kendriya Utpad Shulk Bhavan, Plot No.1]	
Sector No.17, Khandeshwar, New Panvel,]	
Maharashtra 410 206.]	.. Appellant.
v/s.	
Ispat Metallics India Ltd.,]	
(Now merged with Ispat Industries Ltd.,]	
Geetapuram Dharamtor, Dolvi,]	
Taluka Pen, District Raigad.]	.. Respondent.

Mr. Swapnil Bangur, for the Appellant.
Mr. Vishal Agarwal, Mr. Ramnath Prabhu and Mr. P. K. Shetty, for the Respondent.

**CORAM: A.S.OKA &
M.S.SANKLECHA, JJ.**

**RESERVED ON : 4th APRIL, 2019.
PRONOUNCED ON : 12th APRIL, 2019.**

JUDGMENT (Per M. S.Sanklecha,J.):

This appeal under Section 35-G of the Central Excise Act, 1944 (the Act), challenges the order dated 13th February, 2007 passed by the Customs, Excise & Service Tax Appellate Tribunal (the Tribunal).

2 This appeal was admitted on 23rd July, 2008 on the following substantial questions of law:-

- “(a) *Whether M/s. IIL correctly reversed the CENVAT Credit while clearing the goods (inputs) to their sister concern M/s. IMIL?*
- (b) *Whether M/s. IMIL has correctly availed the CENVAT Credit as prescribed under Rule 3(6)(a) of CENVAT Credit Rules?”*

3 The Respondent- Ispat Metallics India Ltd., (IMIL) is engaged in manufacture of excisable goods falling under Chapter 72 of the Central Excise Tariff Act, 1985 (the Tariff Act). The IMIL received an Iron Ore Pellets from its sister concern- M/s. Ispat Industries Limited (M/s. IIL) for use in manufacture of its final goods. These Iron Ore Pellets received from M/s. IIL were admittedly manufactured by one M/s. Kundermukh Iron Ore Company Limited (M/s. Kundermukh) which is a 100% EOU.

4 M/s. IIL purchased Iron Ore Pellets from M/s. Kundermukh on payments of duty and in terms of CENVAT Credit Rules 2002 (Credit Rules, 2002) took the amount paid as duty on the Pellets as CENVAT Credit. However, this credit, M/s. IIL did not utilize/ use for the reason that the Iron Ore Pellets were not used for further manufacture of goods. These Iron Ore Pellets were cleared as such to M/s. IMIL under a cover of an invoice reflecting the payment of an amount equal to the credit taken on the Iron Ore Pellets when received from M/s. Kundermukh by M/s. IIL. This was done in terms of Rule 3(4) of the Credit Rules 2002. M/s. IMIL on receipt of the Iron Ore Pellets from M/s., IIL took the CENVAT Credit in terms of Rule 3(5) of the Credit Rules, 2002 as reflected in the invoice issued by M/s. IIL while clearing the Iron Ore Pellets to it under Rule 3(4) of the Credit Rules, 2002.

5 Thereafter, the Revenue issued two show cause- cum-demand

notices for the period aggregating to March, 2003 to March, 2004 to the Respondent-IMIL, calling upon it to show cause as to why excess CENVAT Credit taken in contravention of Rule 3(6)(a) (i) of the Credit Rules, 2002 should not be recovered. The basis of both the show cause notices was that the Iron Ore Pellets were manufactured by a 100% EUO, thus the credit which can be taken by the Respondent-IMIL is restricted/capped by the formula prescribed under Rule 3(6)(a) (i) of the Credit Rules, 2002. M/s. IMIL resisted both the show cause notices. However, the Commissioner of Central Excise by a common order dated 9th January, 2006 confirmed both the show cause notices dated 7th April, 2004 and 9th November, 2004. This by holding that in terms of Rule 3(6)(a) (i) of the Credit Rules 2002, the Respondent-IMIL can only take credit of the CENVAT Credit on the Iron Ore Pellets in terms of the formula prescribed in Rule 3(6)(a)(i) of the Credit Rules 2002, as Iron Ore Pellets had been manufactured by M/s. Kundermukh which is undisputedly a 100% EOU. Thus, demanding the excess CENVAT Credit of Rs.7.69 Crores in the aggregate and imposed an equivalent penalty under Section 11AC of the Act read with Rule 25 of the Central Excise Rule 2002 and Rule 13 of the Credit Rules 2002.

6 Being aggrieved with the above dated 9th January, 2006 passed by the Commissioner of Central Excise, the Respondent-M/s. IMIL filed an appeal to the Tribunal. By the impugned order dated 13th February, 2007, the Tribunal allowed the Respondent's appeal. This by holding that the provisions of Rule 3 (6)(a) of the Credit Rules 2002 only restricts the taking of credit in respect of duties in terms of Rule 3(1) of the Credit Rules 2002 and does not bar the Respondent-M/s. IMIL from availing the credit of the entire amount paid by IMIL in terms of Rule 3(4)

of the Credit Rules, 2002 in terms of Rule 3(5) of the Credit Rules 2002. It also held that in the absence of M/s. IIL being made party to the proceedings, it is not open to the Revenue to reassess the duty payable by M/s. IIL of which credit is taken by M/s. IMIL. Thus, making the demand bad.

7 Before we consider the two substantial questions of law in the context of the submissions made, it may be necessary to reproduce the relevant provisions of Rule 3 of the Credit Rules, 2002 which arise for our consideration. They are as under:-

RULE-3 – CENVAT Credit- (1) A manufacturer or producer of final products shall be allowed to take credit (hereinafter referred to as the CENVAT credit) of-

- (i) the duty of excise specified in the First Schedule to the Tariff Act, leviable under the Act;
 - (ii) the duty of excise specified in the Second Schedule to the Tariff Act, leviable under the Act;
 - (iii) the additional duty of excise leviable under Section 3 of the Additional Duties of Excise (Textile and Textile Articles) Act, 1978 (40 of 1978);
 - (iv) the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957);
 - (v) the National Calamity Contingent duty leviable under section 136 of the Finance Act, 2001 (14 of 2001), as amended by clause 161 of the Finance Bill 2003, which clause has, by virtue of the declaration made in the said Finance Bill under the Provisional Collection of Taxes Act, 1931 (16 of 1931) the force of law; and
 - (vi) the additional duty leviable under Section 3 of the Customs Tariff Act, equivalent to the duty of excise specified under clauses (i), (ii), (iii), (iv) and (v) above,
- paid on any inputs or capital goods received in the factory on or after the first day of March, 2002, including the said duties paid on any inputs used in the manufacture or intermediate products,

by a job-worker availing the benefit of exemption specified in the notification of the Government of India in the Ministry of Finance (Department of Revenue), No.214/86- Central Excise, dated the 25th March, 1986, published vide number G.S.R. 547 (E) dated the 25th March, 1986 and received by the manufacturer for use in, or in relation to, the manufacture of final producer, on or after the first day of March, 2002.

2 and 3

4 When inputs or capital goods, on which CENVAT credit has been taken, are removed as such from the factory, the manufacturer of the final products shall pay an amount equal to the credit availed in respect of such inputs or capital goods and such removal shall be made under the cover of an invoice referred to in rule 7.

5 The amount paid under sub-rule (4) shall be eligible as CENVAT credit as if it was a duty paid by the person who removed such goods under sub-rule (4).

6 Notwithstanding anything contained in sub-rule (1),

(a) CENVAT credit in respect of inputs or capital goods produced or manufactured-

(i) in a zone or by a hundred per cent, export-oriented undertaking or by a hundred per cent. Export-oriented undertaking or by a unit in an Electronic Hardware Technology Park or Software Technology Park (other than a unit which pays excise duty under section 3 of the Act read with notification No.8/97-Central Excise, dated the 1st March, 1997 number G.S.R. 114 (E), dated the 1st March 1994 or No.20/2002-Central Excise, dated the 1st March, 2002) and used in the manufacture of the final products in any other place in India, in case the unit pays excise duty under section 3 of the Act read with notification No.2/95 Central Excise, dated the 4th January, 1995 number G.S.R. 189(E), dated the 4th January, 1995 shall be admissible equivalent to the amount calculated in the following manner, namely:-

Fifty per cent of [X multiplied by (1+BCD/100) multiplied by (CVD/100)], where BCD and CVD denote ad valorem rates, in per cent of basic customs duty and additional duty of customs leviable on the inputs or the capital goods respectively and X denotes the assessable value.”

8 We will now consider the two substantial questions of law which had been admitted for consideration in seritam.

9 **Re. Question (a):-**

- (i) From the facts, it is clear that the Respondent – M/s. IML had purchased Iron Ore Pellets from M/s. IIL. It is also an admitted position that M/s. IIL in turn had purchased inputs i.e. Iron Ore Pellets from M/s. Kundermukh which is a 100% EOU. Further, it is undisputed that M/s. IIL on receipt of Iron Ore Pellets, took CENVAT Credit of the duty paid by M/s. Kundermukh. However, it did not use the purchased inputs i.e. Iron Ore Pellets for further manufacture. In fact, the Iron Ore Pellets were removed by M/s. IIL as such i.e. as received from M/s. Kundermukh.
- (ii) In the above facts, Rule 3(4) of the Credit Rules 2002 is clearly applicable. Thus, M/s. IIL is entitled to remove the Iron Ore Pellets received from M/s. Kundermukh on payment of an amount equal to the credit taken in respect of such inputs on receipt from M/s. Kundermukh. In turn, the Respondent-IMIL is eligible to take CENVAT Credit on the amount which has been paid by M/s. IIL on removal the Iron Ore Pellets purchased from M/s. Kundermukh as such to it. This on the basis of the amount shown under the invoice issued by M/s. IIL. This in accord with Rule 3(5) of the Credit Rules 2002.
- (iii) In the above facts and the self evident position in law, no fault can be found with M/s. IIL, reversing the CENVAT Credit to the extent of credit which it had availed in respect of the Iron Ore Pellets which it had received from M/s. Kundermukh. Therefore,

when removing the Iron Ore Pellets as such i.e. without it being used in manufacture of any other product or it being processed per se, it had correctly in terms of Rule 3(4) of the Credit Rules, 2002 had correctly reversed the CENVAT Credit taken. This in view of the clear mandate of Rule 3(4) of the Credit Rules 2002.

- (iv) Therefore, no fault can be found with M/s. IIL reversing the CENVAT Credit taken on receipt of Iron Ore Pellets from M/s. Kundermukh while clearing the Iron Ore Pellets to the Respondent-IMIL.
- (v) In the above view, question (a) is to be answered in the affirmative i.e. in favour of the Respondent-Assessee and against the Appellant-Revenue.

10 Re. Question (b):-

- (i) From the facts as recorded herein above, it is clear that Respondent-M/s. IMIL had taken credit of the CENVAT Credit of the amount which had been reversed and/or paid by M/s. IIL while clearing the inputs i.e. Iron Ore Pellets purchased from the said M/s. Kundermukh as such to the Respondent- M/s. IMIL. On receipt of these goods, M/s. IMIL sought to take credit of the entire amount of the CENVAT Credit paid on reversal of the credit availed of by M/s. IIL. It is further an un-disputed position that the Respondent- M/s. IMIL has used the inputs in manufacture of its final products.
- (ii) Mr. Bangur, the learned Counsel appearing in support of the Appeal submits as under:-

- (a) In terms of Rule 3(6)(a) (i) of the Credit Rules, 2002, the Respondent-IMIL is prohibited from taking credit in excess of

formula prescribed therein. This as the inputs namely – Iron Ore Pellets received by it for use in manufacture of its final products were manufactured by M/s. Kundermukh which was a 100% EOU;

- (b) The provisions of Rule 3(4) and 3(5) of the Credit Rules, 2002 would have no application to the present facts in view of the non-obstante Rule 3(6) of the Credit Rules, 2002. This as the recipients of inputs i.e. Iron Ore Pellets who use it in the manufacture of final products are restricted from taking CENVAT Credit in excess of the formula prescribed therein, if the Pellets have been manufactured, inter alia by a 100% EOU. In this case, admittedly, the Iron Ore Pellets have been manufactured by the said M/s. Kundermukh which is a 100% EOU. Thus, the entitlement and eligibility to take credit in respect of said goods is capped by the formula provided under Rule 3(6)(a) (i) of the Credit Rules 2002.

- (iii) As against the above, Mr. Agarwal, learned Counsel appearing for the Respondent submits as under:-

- (a) Rule 3(6)(a) (i) of the Credit Rules 2002 would have no application to the present facts. This as the non-obstante Rule 3(6) of the Credit Rules is only in respect of sub-rule (1) of Rule 3. Therefore, it does not, in any manner restrict the operation of Rule 3(4) and (1) of the Credit Rules, 2002. Thus, the Respondent-IMIL is entitled to take credit of the CENVAT Credit as reflected in the invoice issued by M/s. IIL while supplying the Iron Ore Pellets to the Respondent-IMIL;

- (b) The provisions of Rule 3(6)(a) of the Credit Rules, 2002 is not workable as it would put an impossible burden upon a party to find out the origin of the inputs i.e. the source of manufacture of the inputs or capital goods received by it in normal course of business. This before it can take the CENVAT Credit as reflected in the invoice covering inputs received by it. Therefore, it is submitted that the Rule 3(6)(a) (I) of the Act is not capable of being acted upon and thus, must be ignored; and
- (c) In any case, without the supplier i.e. M/s. IIL being made a party to the proceedings, it is not open to the Revenue to reassess the value of the supplier's its clearance/ removal.
- (iv) We have considered the rival submissions. We note that it is the case of the Revenue that credit available to the Respondent-M/s. IMIL is restricted in the manner provided in Rule 3(6)(a)(i) of the Credit Rules 2002. This in view of the fact that the inputs namely – Iron Ore Pellets have been admittedly manufactured by a 100% EOU namely – M/s. Kundermukh. While on the other hand, it is the case of the Respondent-M/s. IMIL that the credit which has been taken by it in terms of Rule 3(5) of the Credit Rules 2002 is the correct credit and calls for no interference.
- (v) It is an accepted position that the object of the CENVAT provisions is to reduce the cascading effect of taxes. Thus, Rule 3(1) of the Credit Rules 2002 provides that a manufacturer or the producer of the final product is allowed to take credit, *inter alia* in respect of duties of excise paid on the inputs or capital goods received by it to the extent it is already been paid on inputs/ capital goods. Thus,

providing for taking credit of the entire amount of duty paid on the inputs and/or capital goods is available to the manufacture/producer who receives the inputs under the Credit Rules 2002. However, Section 3(6) of the Credit Rules 2002, begins with a non-obstinate clause to anything contained in Rule 3(1) of the Credit Rules 2002. Therefore, this restricts the taking of a credit on the inputs i.e. Iron Ore Pellets if the same is being used by the Respondent in the manufacture of final products as if the inputs have been manufactured among others by a 100% EOU such as in this case. This restriction is on the taking of the CENVAT Credit of the inputs used in the manufacture of final products. Thus, the restriction/ capping of taking CENVAT Credit would therefore apply even if the supplier of the inputs is not the 100% EOU itself, as the restriction is not on the basis of supplier/ seller of the inputs but the manufacturer of the inputs and is applicable only where the recipient uses the inputs in further manufacture. Thus, the above Rule 3(6) of Credit Rules 2002 would apply even where inputs had been received under Rule 3(4) of the Credit Rules, 2002. It is not as though Rule 3(4) and 3(6) of Credit Rules, 2002 are mutually exclusive. Therefore, the impugned order of the Tribunal proceeds incorrectly on the basis that there can be no limitation/ capping on the credit taken by the Respondent-M/s. IMIL where the goods have been supplied by M/s. IIL i.e. supplier in terms of Rule 3(4) of the Credit Rules, 2002. Thus it is a complete misreading of the provisions. The capping of the CENVAT Credit is only in case of that manufacturer who uses the inputs in further manufacture and does not apply to a

manufacturer who on acquisition of inputs does not use it for further manufacture but removes it as such so as to be governed by Rule 3(4) of the Credit Rules 2002. Thus in such case Rule 3(6)(a) of the Credit Rules, 2002 will prevail over Rule 3(5) of the Credit Rules, 2002 as it reduces the availing of credit in respect of goods manufactured by a 100% EOU.

- (vi) The next submission that the entire exercise of restricting the credit is an exercise for reassessing the duty paid by the supplier viz. M/s. IIL. Therefore, the submission that this exercise cannot be done in the absence of M/s. IIL in the present facts cannot be accepted. We have already held in answer to question (a) that M/s. IIL had correctly paid the CENVAT Credit while supplying the inputs to the Respondent- M/s. IMIL. This has no bearing to the question of the quantum of credit which can be taken by the Respondent – M/s. IMIL. This is so as the same is restricted/ capped by virtue of Rule 3(6) of the Credit Rules, 2002. This for the reason that M/s. IMIL use the inputs in further manufacture and the inputs are admittedly manufactured by M/s. Kundermukh as 100% EOU. Therefore, the reliance by the Respondent in the following decisions in :-
- (a) CCE & C v/s. MDS Switchgear Ltd., 2008 (229) ELT 485;
 - (b) CCE, Goa v/s. Nestle India Ltd. 2012 (275) ELT 49;
 - (c) CCEx, Ahmedabad -III v/s. Nahar Granites Ltd., 2014 (305) ELT 9;
 - (d) CCE, Chennai-I v/s. CEGAT, Chennai 2006 (202) ELT 753;
and
 - (e) V. G. Steel Industry v/s. CCE 2011 (271) ELT 508

are all inappropriate. All of them are inapplicable to the facts of the present case. In none of the above cases which the Respondent relied upon was the issue of Rule 3(6)(a) of the Credit Rules 2002 was a subject matter of consideration.

- (vii) The submission that Rule 3(6) of the Credit Rules, 2002 is unworkable as every recipient of inputs availing CENVAT Credit, would then have to find out the source of the input, which is impossible. In the present facts, this submission is academic, as it is an undisputed position that the inputs have been manufactured by a 100% EOU. Thus, we find no merit in this submission.
- (viii) In the above circumstances, this substantial question of law has to be answered in the negative i.e. in favour of the Appellant-Revenue and against the Respondent-Assessee.

11 Therefore, the two substantial questions of law are answered as under:-

- (i) Question (a) is answered in the affirmative i.e. in favour of the Respondent-Assessee and against the Appellant-Revenue; and
- (ii) Question (b) is answered in the negative i.e. in favour of the Appellant-Revenue and against the Respondent-Assessee.

12 In view of our answer to question (b) the appeal has to be allowed in favour of the Revenue. This is so our answer to question (a) does not affect the primary issue/ controversy in this appeal as posed in question (b) between the parties viz- whether the CENVAT Credit can be restricted in view of Rule 3(6) of the Credit Rules, 2002. This has been answered by holding that taking of CENVAT Credit can be restricted. Therefore, the appeal has to be allowed in favour of the Revenue.

13 Accordingly, **Appeal** is **allowed** in the above terms.

(M.S.SANKLECHA,J.)

(A.S.OKA,J.)