

OD – 6 to 10

IN THE HIGH COURT AT CALCUTTA
Special Jurisdiction
ORIGINAL SIDE

CEXA/22/2022
IA No.GA/1/2022
GA/2/2023

COMMISSIONER OF CENTRAL EXCISE
AND SERVICE TAX

-Versus-

M/S. INDIAN OIL CORPORATION
LTD. REFINERY DIVISION

CEXA/23/2022
IA No.GA/1/2022
GA/2/2023

COMMISSIONER OF CENTRAL EXCISE
AND SERVICE TAX

-Versus-

M/S. INDIAN OIL CORPORATION
LTD. REFINERY DIVISION

CEXA/24/2022
IA No.GA/1/2022
GA/2/2023

COMMISSIONER OF CENTRAL EXCISE
AND SERVICE TAX

-Versus-

M/S. INDIAN OIL CORPORATION
LTD. REFINERY DIVISION

CEXA/25/2022
IA No.GA/1/2022
GA/2/2023

COMMISSIONER OF CENTRAL EXCISE
AND SERVICE TAX

-Versus-

M/S. INDIAN OIL CORPORATION
LTD. REFINERY DIVISION

CEXA/26/2022
IA No.GA/1/2022
GA/2/2023

COMMISSIONER OF CENTRAL EXCISE
AND SERVICE TAX

-Versus-

M/S. INDIAN OIL CORPORATION
LTD. REFINERY DIVISION

BEFORE :
THE HON'BLE JUSTICE T.S. SIVAGNANAM
And
THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA
Date : 28th March, 2023

Appearance :
Mr. Bhaskar Prasad Banerjee, Adv.
Mr. Tapan Bhanja, Adv.
...for the appellant

Mr. Saurabh Bagaria, Adv.
Mr. Rites Goel, Adv.
...for the respondent.

The Court : There is a delay of 137 days in filing the
appeals.

We have heard Mr. Bhaskar Prasad Banerjee, learned counsel for the appellant and Mr. Saurabh Bagaria, learned Advocate for the respondent and perused the averments set out in the affidavit filed in support of the application for condonation. We find sufficient cause has been shown for not preferring the appeal within the period of limitation.

Accordingly, the application for condonation of delay is allowed and the delay in filing the appeals is condoned.

These appeals filed by the revenue under Section 35G of the Central Excise Act, 1944 (the 'Act' in short) are directed against the final order dated 2nd February, 2022 passed by the Customs, Excise and Service Tax Appellate Tribunal, Kolkata (the Tribunal) by which the appeals filed by the appellant/revenue were dismissed.

The Revenue has raised the following substantial questions of law for consideration:

- (i) *Whether the Learned Tribunal erred in law in not appreciating the grounds made out by the Department and relevant provisions of the Cenvat Credit Rules, 2004 and relying upon the decisions in the case of Tiara Advertising and the certificate of Chartered Accountant, has passed the impugned order which is not maintainable in the facts of the case ?*
- (ii) *Whether the Learned Tribunal is justified in holding that the appellant had taken credit on*

common inputs and input services only to the extent of 85% based on the certificate issued by their Chartered Accountant when such CA certificate does not mention any reference to credit reversal and/or forgone to the extent of 15% is respect of inputs for the period from April, 2006 to March, 2009 and whether the basis of relying on the said CA certificate, which culminated into a final decision by the Learned Tribunal is erroneous, perverse and wrong ?

- (iii) Whether in the context of the above the Learned Tribunal has failed to appreciate that the respondent had not fully complied with the requirement of the provisions of Rule 6(3)(ii) of the Cenvat Credit Rules, 2004 for the period from April, 2006 to March, 2009 ?*
- (iv) Whether the Learned Tribunal erred allowing the appeal of the respondent by relying on the judgment of the Hon'ble Telangana High Court in the case of Tiara Advertising v. UOI [2019 (30) GSTL 474 (Telangana)] when the revenue challenged the decision by filing a Special Leave Petition being Special Leave Petition (Civil) Diary No(s).23441/2020 and the said issue is pending consideration by the Hon'ble Supreme Court ?*

We have heard Mr. Bhaskar Prasad Banerjee, learned standing counsel assisted by Mr. Tapan Bhanja, learned Advocate for the appellant/revenue and Mr. Saurabh Bagaria, learned

Counsel assisted by Mr. Rites Goel, learned Advocate for the respondent/assessee.

The moot question involved in these appeals is whether the respondent has fulfilled his obligation under Rule 6(2) of the Cenvat Credit Rules, 2004 by taking only 85% of the credit on the common input service. The revenue had issued show cause notice alleging that the assessee has cleared final products manufactured by them without payment of duty but failed to pay an amount equivalent to 10% of the price of final products which were manufactured by them. It was alleged that the respondent/assessee did not maintain separate accounts for receipt, consumption and inventory of input and input services meant for use in the manufacture of dutiable and exempted goods or services and proportionate Cenvat Credit on such inputs has not been expunged for the period from March, 2007 to December, 2007 and the subject goods were cleared at the NIL rate of duty but exemption notification under which goods have been removed were not mentioned in the ER 1 returns submitted by the assessee.

There was an earlier round of litigation which travelled upto to the Tribunal and the Tribunal by order dated 20th March, 2012 set aside the order of the Commissioner and remanded the matter for de novo consideration. Pursuant to

which the Commissioner took up the case for de novo consideration and by order dated 15th December, 2016 (the dates of the orders passed by the Commissioner in the other appeals are different. However, since we have taken up CEXA/22/2022 as lead case, the dates which are relevant to the said case are taken into consideration) dropped the proceedings holding that the assessee has fulfilled the obligation under Rule 6 of the Cenvat Credit Rules, 2004 inasmuch as they have not taken credit of duty in respect of such portion of the input/input services which were subsequently used by them for manufacture of exempted goods and, therefore, the alleged contravention of the provisions of the Cenvat Credit Rules, 2004 did not occur. Therefore, the question of recovery of Cenvat Credit attributable to the exempted finished goods does not arise. The Commissioner held that there is no evasion of duty on the part of the assessee, hence penalty and interest as proposed in the show cause notice is not liable to be imposed and, therefore, the proceedings initiated pursuant to the show cause notices are to be dropped and, accordingly, the same were directed to be dropped. The revenue was on appeal against such order before the Tribunal. The Tribunal framed the following questions for consideration while examining the appeals:

- (a) *Are the SCNs demanding an amount of 10% of the value of exempted goods under Rule 6(3) of the CCR, which culminated in the impugned orders legally sustainable?*
- (b) *Was the Commissioner correct in examining the three cases where the orders were in the remand proceedings in terms of Rule 6(2) of the CCR or has the Commissioner gone beyond the scope of the remand?*
- (c) *Has the respondent fulfilled its obligations under Rule 6(2) of the CCR by taking only 85% of the credit on the common input services?*
- (d) *Is the demand under Rule 14 invoking extended period of limitation in the SCN sustainable?*
- (e) *Is a penalty imposable under Rule 15 of the CCR, 2004?*

Though it may be true that the learned Tribunal has made an elaborate exercise examining the effect of Rule 6 of the Cenval Credit Rules, post and pre-amendment, in our view such an exercise may not be required in these appeals if we consider question no.(c) as framed by the Tribunal as the first issue and if the issue is decided against the revenue, then the other issues need not be gone into. Thus, the first question would be whether the assessee had fulfilled its obligation under Rule 6(2) of the Rules by taking only 85% of the credit on the common input services. This being fully factual issue, we refer to the order passed by the Tribunal. The Tribunal

after noting the provisions of the Rules, took note of the circular issued by the Board in Circular No.868/6/2008-CX dated 9th May, 2008 which gives an opportunity to a manufacturer to furnish a certificate from the cost accountant/chartered accountant giving details of quantity of input used in the manufacture of exempted goods value thereof and Cenvat Credit taken on this inputs to be submitted at the end of the year. It is not in dispute that the assessee had submitted a chartered accountant's certificate dated 15th November, 2010. The Commissioner while examining the said certificate found that the certificate shows the financial year wise/month wise percentage of cenvat credit paid both on input and input services vis-à-vis the percentage of duty paid, clearance and non-duty paid clearance covering the period from 2006-07 to 2009-10 which include the duty paid bonded and NRD dispatches. Therefore, the Commissioner held that non-availing of Cenvat credit upto 15% could be equated as availing of 100% credit on all the common inputs and payment of duty upto 15% of the value of the common inputs which could be attributable to having been used for the manufacture of exempted products. Further, it was held that payment of 15% duty was made within the due date. Therefore, the question of payment of interest does not arise and hence, it could be concluded that the assessee has complied

with the amended provisions of Rule 6 of the Cenvat Credit Rules, 2004 brought about by the Finance Act, 2010. Further, after taking note of the certificates, the Commissioner noted that the percentage of credit not availed or forgone is always more than or equal to the percentage of non-duty paid clearance and in view of the said factual position, opined that there has been sufficient compliance by the assessee as far as maintenance of separate account or for that matter they have followed Rule 6(2) of the said Rules. Furthermore, the Commissioner had noted the submission made by the assessee that for the period from April, 2006 to March, 2009 the same approach was adopted and, therefore, a different view cannot be taken for the period under consideration. The Tribunal, on its part, has re-examined the factual position.

It is pointed by the learned standing counsel for the revenue that the Tribunal has taken note of the decision in the case of *Tiara Advertising vs. Union of India* reported in 2019 (30) GSTL 474 (Telangana) and an appeal has been filed against the said decision before the Supreme Court. As pointed out by us earlier, we have taken up for consideration question no.(c) which had been framed by the Tribunal and the issue as to whether the decision in *Tiara Advertising (supra)* has to be examined or not will arise only if question no.(c) (*supra*) is

decided in favour of the revenue. Therefore, we revert back to the factual position to examine the correctness of the order passed by the learned Tribunal. The Tribunal examined Rule 6(2) of the Rules and noted compliances that are required to be done by an assessee where common input or input services are utilised. The Tribunal examined the Chartered Accountant's certificate issued by the person who audited the accounts of the assessee who has given the percentage of exempted goods cleared by them and noted that they never exceeded 15% and they have taken credit on the common input and input services only to the extent of 85%. Thus, taking note of the evidence produced by the assessee, the Tribunal held that the assessee has more than fully met the requirement of Rule 6(2). Further, they found fault with the revenue by pointing out that the revenue has not placed any evidence to show that proportionate amount of Cenvat credit was reversed/not taken by the assessee, was calculated wrongly. Furthermore, the revenue has not produced any alternative calculations to show how much could have been reversed/not taken. Therefore, in the absence of any other evidence, the Tribunal examined the Chartered Accountant's certificate produced by the assessee and held that the assessee had sufficiently met the requirements of maintenance of separate accounts under Rule 6(2) and,

therefore, upheld the order passed by the Commissioner who had dropped all the demands raised against the assessee. It is pointed out by the learned counsel for the revenue that after the order passed by the Tribunal, the Department has issued certain letters, the first of which is dated 29th April, 2022 and the assessee has also submitted reply and further communication has been sent to the assessee. These communications have been sent to the assessee for the period covered in CEXA/22/2022 and CEXA/24/2022.

In our opinion, the Department having issued such communication, it goes without saying that they have now embarked upon an exercise to examine the contents of the Chartered Accountant's certificate. This would indirectly mean that the contest which was made before the Tribunal with regard to the Chartered Accountant's certificate does not any longer survive and it is only the contents thereof, sufficiency or insufficiency of the material contained in the certificate which is now being pursued by the Department. Therefore, technically we would not be wrong in observing that the revenue has accepted that portion of the order passed by the Tribunal which answered question no.(c).

In the light of the above discussion, we are of the considered view that the Tribunal rightly answered question no.(c) in favour of the assessee.

In the light of the above conclusion, the other issue as regards the effect of the judgement in *Tiara Advertising* need not be gone into in these appeals. Thus, the appeals filed by the revenue are dismissed and the substantial questions of law(a), (b) and (d) are answered against the revenue and in favour of the assessee and substantial question of law (e) is left open.

Consequently, the connected applications for stay also stand closed.

(T.S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)