Before Ajay Tewari & Avneesh Jhingan, JJ.

COMMISSIONER OF CENTRAL EXCISE, CHANDIGARH II- *Appellant*

versus

M/S WELSPUN CORPORATION LTD.-*Respondent*

CEA No. 18 of 2018

March 3, 2020

Central Excise Act, 1944 – Section 35g; Cenvat Credit Rules, 2004 – Rules 6(1), 6(2), 6(3); Central Excise Rules, 2002 – Rule 12AA – Benefit Of Rule 6 (3) Whether Available To Assessee – Irrespective Of Conduct – Cenvat Credit – Inputs In Manufacturing Of Exempted Goods. For manufacturer of dutiable and exempted goods or services to avail Cenvat Credit, separate accounts to be maintained.

Held that Rule 6(1) states that no cenvat credit shall be allowed on the inputs used in relation to manufacture of exempted goods. Sub-rule (2) provides exception to sub-rule (1), it deals with cases where (sic) the manufacturer or a provider of output service is involved in both dutiable as well as exempted goods or services. For availing (sic) CENVAT credit, separate accounts are to be maintained as envisaged in clauses (a) and (b) to the sub-rule. Sub-rule (3) starts with a non-obstantate clause and contemplates a (sic) situation where separate accounts are not maintained and provides for options. As per clause (i), 6% duty is to be paid of the value of exempted goods and services; or as per clause (ii), to pay an amount as determined under sub-rule (3A); or sub-clause (iii) provides that a separate account is to be maintained for receipt, consumption and inventory of input as per clause (a) to sub-rule (2) and CENVAT credit can only be taken on input under sub-clauses (ii) and (iv) of clause (a) also pay to the amount determined under sub-rule (3A) on the input service.

(Para 7)

Held that there is no dispute raised on the fact that till 20.08.2012, the nature of pipes manufactured was not determined as exempt because GMADA was not granted exemption certificate. The goods cleared were on payment/adjustment of duty under Rule 6(3) and also dutiable goods albeit is small ratio. The finding recorded by the Tribunal that dutiable goods were cleared on 5.11.2012 has not been challenged.

(Para 8)

Held that the contentions raised by learned counsel for the appellant are not well founded. Rule 6(2) provides no minimum ratio for the manufacture of exempted and dutiable goods. It deals with manufacturing of exempted and duty chargeable goods and in case of non-maintaining of separate accounts, then Rule 6(3) comes into operation and as per first option the manufacturer is liable to pay 6% of the value of exempted goods.

(Para 9)

Sourabh Goel, Senior Standing Counsel
for the appellant.

Ramnath Prabhu, Advocate
for the respondent.

AVNEESH JHINGAN, J.

(1) By this common order, two appeals bearing CEA Nos. 18 and 21 of 2018 are being disposed of as the issue involved is similar.

(2) The revenue has filed the appeals under Section 35-G of the Central Excise Act, 1944 (for short, 'the Act') against the order dated 10.8.2016 passed by the Customs, Excise & Service Tax Appellate Tribunal, Chandigarh (for short, 'the Tribunal') claiming following substantial questions of law:

> "(A) Whether the impugned order dated 10.8.2016, Annexure A-3 is based on surmises and conjectures and is therefore perverse and untenable in the eyes of law?
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> (B) Whether the Ld. Tribunal failed to appreciate the evidence on record to presume that the inputs at the start of manufacture are available for credit and therefore irrespective of the fact that the goods which were finally cleared were exempted, the assessee would be entitled to benefit of Rule 6(3) of the Cenvat Credit Rules?
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> (C) Whether the respondent who at the time of manufacturing and claiming cenvat credit was well aware that the goods were exempted is entitled to the benefit of Cenvat Credit only because he has paid 6% of the duty in terms of Rule 6(3) of the Cenvat Credit Rules, 2004?
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> (D) Whether the benefit of rule 6(3) of the Cenvat Credit

Rules is available to the assessee, irrespective of his conduct and malafide intention to avail cenvat credit on the inputs used in manufacturing of exempted goods?

(E) Whether the Ld. Tribunal failed to appreciate that the adjudicating authority had relied upon ER-1 return filed by the respondent itself to come to a conclusion that goods cleared from 09/2012 to 4.11.2012 were exempted goods and therefore the respondent at the time of purchase of inputs as well as manufacturing of final goods was aware of the exemption certificate in favour of the GMADA?

(F) Whether the respondent who had manipulated a purchase order dated 5.11.2012 only in order to bring otherwise exempt goods in a mixed bag an then to claim cenvat credit by paying 06% duty in terms of Rule 6(3) of the CCR, 2004 is entitled to the benefit of Rule 6(3) to avail cenvat credit on inputs used in manufacturing of exempt goods?"

(3) The facts are that M/s Welspun Project Ltd. (for short, 'WPL') is engaged in manufacture of M.S. Pipes, it received order of supply of pipes from GMADA on 5.3.2012. As per the condition of purchase order, the pipes were to be supplied subject to exemption under Notification No. 12/2012-CE dated 17.3.2012 and if the GMADA failed to get exemption certificate under the said notification, in that case duty was to be paid on the pipes. M/s Welspun Corporation Ltd. (for short, 'WCL') acquired a unit in July, 2012 and started manufacturing of pipes. WPL placed the order on 20.7.2012 to WCL for the pipes which were to be supplied by it to GMADA. On 20.8.2012, GMADA obtained an exemption certificate. On 5.11.2012, WPL placed another order to WCL for supply of pipes and on the supply duty was leviable. It would be worth taking note at this stage that both the orders were for supply of HSAW pipes 2250 mm D 12 mm wall thickness. The period in dispute is from September, 2012 to June, 2013 in which it was claimed by assessee that exempted dutiable goods were manufactured and supplied. The department on the basis of information that the respondents were claiming cenvat credit on the raw material used for manufacture of exempted goods, issued show cause notices. Replies were filed denying the allegation and stating that the goods manufactured were cleared on payment of duty and also after availing exemption under notification dated 17.3.2012 by reversing the amount @ 6% as stipulated in Rule 6(3)(1) of the CENVAT Credit

Rules, 2004 (for short, 'the Rules'). The premises were visited by the preventive staff. Order dated 30.9.2014 was passed by the Commissioner of Central Excise holding that cenvat credit on inputs was wrongly availed and that the purchase order dated 5.11.2012 was only to facilitate availing of cenvat credit. Thereafter, appeals were preferred before the Tribunal which allowed the appeals vide order dated 10.8.2016, hence the present appeals.

(4) Though substantial questions of law (A) to (F) have been proposed, however, question (D) would be relevant to decide the issue involved in the present appeals.

(5) Learned counsel for the appellant argued that WCL acquired the unit only in July, 2012 and that order for supply of pipes which were to be supplied to GMADA by WPL was placed in July, 2012 and till 4.11.2012, WCL was only manufacturing exempted goods hence could not claim benefit of Rule 6(3) of the Rules. A feeble attempt was made to argue that the conduct in availing cenvat credit was malafide and the order placed in November, 2012 for supply of pipes leviable to duty was merely with the intention to get benefit of Rule 6. However, the said allegation of malafide or fraud could not be substantiated by the material on record.

(6) For reference, Rule 6(1) to (3) of the Rules is reproducedas under:

> "(1) The CENVAT credit shall not be allowed on such quantity of input used in or in relation to the manufacture of exempted goods or for provision of exempted services, or input service used in or in relation to the manufacture of exempted goods and their clearance upto the place of removal or for provision of exempted services, except in the circumstances mentioned in sub-rule (2):
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> **Provided** that the CENVAT credit on inputs shall not be denied to the job worker referred to in rule 12AA of the Central Excise Rules, 2002, on the ground that the said inputs are used in the manufacture of goods cleared without payment of duty under the provisions of that rule.
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> (2) Where a manufacturer or provided of output service avails of CENVAT credit in respect of any inputs or input services and manufactures such final products or provides such output service which are chargeable to duty or tax as well as exempted goods or services, then, the manufacturer or provider of output

service shall maintain separate accounts for --

(a) the receipt, consumption and inventory of inputs used--

(i) in or in relation to the manufacture of exempted goods;

(ii) in or in relation to the manufacture of dutiable final products excluding exempted goods;

(iii) for the provision of exempted services;

(iv) for the provision of output services excluding exempted services; and

(b) the receipt and use of input services--

(i) in or in relation to the manufacture of exempted goods and their clearance upto the place of removal;

(ii) in or in relation to the manufacture of dutiable final products, excluding exemptted goods, and their clearance upto the place of removal;

(iii) for the provision of exempted services; and

(iv) for the provision of output services excluding exempted services, and shall take CENVAT credit only on inputs under sub- clause (ii) and (iv) of clause (a) and input services under sub- clauses (ii) and (iv) of clause (b).

(3) Notwithstanding anything contained in sub-rules (1) and (2), the manufacture of goods or the provider of output service, opting not to maintain separate accounts, shall follow any of the following options, as applicable to him, namely:-

(i) pay an amount equal to six per cent of value of the exempted goods and exempted services; or

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

(iii) maintain separate accounts for the 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.

Provided that if any duty of excise is paid on the exempted goods, the same shall be reduced from the amount payable

under clause (i):

Provided further that if any part of the value of a taxable service has been exempted on the condition that no CENVAT credit of inputs and input services, used for providing such taxable service, shall be taken then the amount specified in clause (i) shall be six per cent of the value so exempted: **Provided also** that in case of transportation of goods or passengers by rail the amount required to be paid under clause (i) shall be an amount equal to 2 per cent of value of the exempted services.

Explanation I.- If the manufacturer of goods or the provider of output service, avails any of the option under this sub-rule, he shall exercise such option for all exempted goods manufactured by him or, as the case may be, all exempted services provided by him, and such option shall not be withdrawn during the remaining part of the financial year.

Explanation II.-- For removal of doubt, it is hereby clarified that the credit shall not be allowed on inputs used exclusively in or in relation to the manufacture of exemplted goods or for provision of exempted services and on input services used exclusively in or in relation to the manufacture of exempted goods and their clearance upto the place of removal or for provision of exempted services.

Explanation III.-- No CENVAT credit shall be taken on the duty or tax paid on any goods and services that are not inputs or input services."

(7) Rule 6(1) states that no cenvat credit shall be allowed on the inputs used in relation to manufacture of exempted goods. Sub-rule (2) provides exception to sub-rule (1), it deals where the manufacturer or a provider of output service is involved in both dutiable as well as exempted goods or services. For availing the CENVAT credit, separate accounts are to be maintained as envisaged in clauses (a) and (b) to the sub-rule. Sub-rule (3) starts with a non-obstantate clause and contemplates the situation where separate accounts are not maintained and provides for options. As per clause (i), 6% duty is to be paid of the value of exempted goods and services; or as per clause (ii), to pay an amount as determined under sub- rule (3A); or sub-clause (iii) provides that a separate account is to be maintained for receipt, consumption and inventory of input as per clause (a) to sub-rule (2) and

CENVAT credit can only be taken on input under sub- clauses (ii) and (iv) of clause (a) and also pay to the amount determined under sub-rule (3A) on the input service.

(8) There is no dispute raised on the fact that till 20.8.2012, the nature of pipes manufactured was not determined as exempt because GMADA was not granted exemption certificate. The respondents were not maintaining separate books of account. The goods cleared were on payment/adjustment of duty under Rule 6(3) and also dutiable goods *albeit* in small ratio.The finding recorded by the Tribunal that dutiable goods were cleared on 5.11.2012 has not been challenged.

(9) The contentions raised by learned counsel for the appellant are not well founded. Rule 6(2) provides no minimum ratio for the manufacture of exempted and dutiable goods. It deals with manufacturing of exempted and duty chargeable goods and in case of non-maintaining of separate accounts, then Rule 6(3) comes into operation and as per first option the manufacturer is liable to pay 6% of the value of exempted goods.

(10) The submission that from September to 4.11.2012, WCL was only manufacturing exempted goods is merely on presumptions and the argument falls flat in view of the finding recorded by the Tribunal that on 5.11.2012 the goods were cleared on payment of duty. Without there being any manufacturing of dutiable goods prior to 4.11.2012, the goods could not have been cleared on 5.11.2012 on payment of duty. More-so, when clearance and supply of dutiable goods is accepted and there is no denial to the fact that a purchase order existed for supply of dutiable goods, on mere assumptions the intention cannot be determined or it can be concluded that the conduct was fraudulent. The authorities have also not appreciated the difference in manufacture and clearance of goods.

(11) In view of the findings of fact recorded by the Tribunal, it cannot be concluded that WCL till 04.11.2012 was indulging only in manufacture of exempted goods. No perversity has been pointed out in the order.

(12) No interference is called for in the order of the Tribunal. The appeals are dismissed.

Shubreet Kaur