REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO.1308 OF 2008

Commnr. of Central Excise ... Appellant (s)

Versus

M/s. Gujarat Narmada Fertilizers Co. Ltd. ... Respondent(s)

WITH

Civil Appeal No.1862 of 2006

Civil Appeal Nos. 5553 of 2009
(Arising out of S.L.P. (C) No.4663 of 2009)

Civil Appeal No.4169 of 2008

JUDGMENT

S. H. KAPADIA, J.

1. Leave granted.

2. The short question which arises for determination in this batch of civil appeals is : whether the assessee(s) was required to reverse the CENVAT credit in terms of Rule 6(1) of Cenvat Credit Rules, 2002 on the quantity of LSHS which was used as "fuel" for producing steam and electricity, which, in turn, was used in

or in relation to the manufacture of exempted goods, namely, fertilizers, during the disputed period(s).

3. For the sake of convenience we may refer to the facts in Civil Appeal No.1308 of 2008 - Commnr. of Central Excise v. M/s. Gujarat Narmada Fertilisers Co. Ltd.

FACTS

4. The assessee is a manufacturer of excisable goods such as fertilizers,

methanol, formic acid, nitric acid, aceptic acid, etc. out of which fertilizers were exempt from central excise duty under Notification No.6/2000-CE, dated 1.3.2002. The respondent functioned under CENVAT Credit Rules, 2002 ("2002 Rules", for short) during the relevant period. There is no dispute that the entire quantity of Low Sulphur Heavy Stock (LSHS) was used as "fuel" within the respondent's factory for burning in the boiler plant for producing steam. There is no dispute that the entire steam was used within the factory directly in or in relation to manufacture of final products or for production of electricity which was

captively used in the manufacture of final products. The credit, however, was disallowed due to interpretation of Rule 6 of the 2002 Rules by the Commissioner who took the view that since fertilizers were exempted goods, credit on LSHS, even though used as "fuel" within the factory, was not allowable. Accordingly, one show cause notice was issued on 8.3.04 seeking to disallow CENVAT credit of Rs.2,17,61,795/- for the period March 2003 to September 2003. Vide Order dated 13.7.04, the said show cause notice stood confirmed by the Commissioner. The second show cause notice dated 28.7.04 was issued for a different period, namely, October 2003 to March 2004 which was also confirmed by the Commissioner who disallowed CENVAT credit vide his Order dated 30.8.04. Against the Commissioners' Orders, dated 13.7.04 and 30.8.04, disallowing the said CENVAT credit, the respondent preferred appeals before CESTAT. The said appeals were referred to a larger Bench who by the impugned decision dated 27.12.06 held that credit was admissible on LSHS used as "fuel". In passing the said Order the CESTAT followed the judgment of the

Gujarat High Court in the case of Commnr. of Central Excise and Customs v. M/s. Gujarat Narmada Valley reported in (2006) 193 ELT 136, in which it was held that in sub-rule (2) of Rule 6 of the 2002 Rules an exception stood carved out in case of inputs "intended to be used as fuel" and in such cases the necessity of maintenance of a separate account or denial of credit cannot be insisted upon.

RELEVANT RULES

5. We hereinbelow reproduce relevant rules of the Central Excise Rules, 1944 and CENVAT Credit Rules, 2002 which read as follow:

"The Central Excise Rules, 1944
(as it stood on 29.8.2000)

"AA. CREDIT OF DUTY PAID ON EXCISABLE GOODS USED AS INPUTS OR CAPITAL GOODS

RULE 57AD. Obligation of manufacturer of dutiable and exempted goods.- (1) CENVAT credit shall not be allowed on such quantity of inputs which is used in the manufacture of exempted goods, except in the circumstances mentioned in sub-rule (2).

(2)Where a manufacturer avails of CENVAT credit in respect of any inputs, except inputs intended to be used as fuel, and manufactures such final products which are chargeable to duty as well as exempted goods, then, the manufacturer shall maintain separate accounts for receipt, consumption and inventory of inputs meant for use in the manufacture of dutiable final products and the quantity of inputs meant for use in the manufacture of exempted goods and take CENVAT credit only on that quantity of inputs which is intended for use in the manufacture of dutiable goods. The manufacturer, opting not to maintain separate accounts shall follow either of the following conditions, as applicable to him, namely:-

(a) if the exempted goods are,-

(i) final products falling under Chapters 50 to 63 of the Schedule to the Central Excise Tariff Act, 1985 ;

(ii) tyres of a kind used on animal drawn vehicles or handcarts and their tubes, falling within Chapter 40;

(iii) black and white television sets, falling within Chapter 85;

(iv) newsprint, in rolls or sheets, falling within Chapter heading No.48.01,

the manufacturer shall pay an amount equivalent to the CENVAT credit attributable to inputs used in or in relation to the manufacture of such final products at the time of their clearance from the factory, or

(b) if the exempted goods are other than those described in clause (a) above, the manufacturer shall pay an amount equal to eight per cent. of the total price, excluding sales tax and other taxes, if any, paid on such goods, of the exempted final product charged by the manufacturer for the sale of such goods at the time of their clearance from the factory.

Explanation.- The amount mentioned in (a) and (b) above shall be paid by the manufacturer by debiting the CENVAT credit or otherwise.

(3) No credit of the specified duty shall be allowed on capital goods which are used exclusively in the manufacture of exempted goods (other than final products which are exempt from the whole of the duty of excise leviable thereon under any notification where exemption is granted based upon the value or quantity of clearances made in a financial year).

(4) The provisions of sub- rule (1), sub-rule (2) and sub-rule (3) shall not be applicable in case the exempted goods are either,-

(i) cleared to a unit in a free trade zone; or

(ii) cleared to a hundred per cent. Export-oriented undertaking; or

(iii) cleared to a unit in an Electronic Hardware Technology Park or Software Technology Parks ; or

(iv) supplied to the United Nations or an international organization for their official use or supplied to projects funded by them, on which exemption of duty is available under notification of the Government of India in the Ministry of Finance (Department of Revenue) No.108/95-Central Excises, dated 28th August, 1995; or

(v) cleared for export under bond in terms of the provisions of rule 13."

CENVAT Credit Rules, 2002

RULE 6. Obligation of manufacturer of dutiable and exempted goods.-

1. The CENVAT credit shall not be allowed on such quantity of inputs which is used in the manufacture of exempted goods, except in the circumstances mentioned in sub-rule (2).

   Provided the CENVAT credit on inputs shall not be denied to job worker referred to in rule 12B 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.

2. Where a manufacturer avails of CENVAT credit in respect of any inputs, except inputs intended to be used as fuel, and manufactures such final products which are chargeable to duty as well as exempted goods, then, the manufacturer shall maintain separate accounts for receipt, consumption and inventory of inputs meant for use in the manufacture of dutiable final products and the quantity of inputs meant for use in the manufacture of exempted goods and take CENVAT credit only on that quantity of inputs which is intended for use in the manufacture of dutiable goods.

3. The manufacturer, opting not to maintain separate accounts shall follow either of the following conditions, as applicable to him, namely:-

a. if the exempted goods are-

i. goods falling within heading No. 22.04 of the First Schedule to the Tariff Act;

ii. Low Sulphur Heavy Stock (LSHS) falling within Chapter 27 of the said First Schedule used in the generation of electricity;

iii. Naphtha (RN) falling within Chapter 27 of the said First Schedule used in the manufacture of fertilizer;

iv. Omitted.

v. newsprint, in rolls or sheets, falling within heading No.48.01 of the said First Schedule;

vi. final products falling within Chapters 50 to 63 of the said First Schedule,

vii. Naptha (RN) and furnace oil falling within Chapter 27 of the said First Schedule used for generation of electricity;

viii. Goods supplied to defence personnel or for defence projects or to the Ministry of Defence for official purposes, under any of the following notifications of the Government of India in the erstwhile Ministry of Finance (Department of Revenue), namely:-

(1) No.70/92-Central Excise, dated the 17 June, 1992, G.S.R.595 (E), dated the 17 June, 1992;

(2) No.62/95-Central Excise, dated the 16 March, 1995, G.S.R.254 (E), dated the 16 March, 1995;

(3) No.63/95-Central Excise, dated the 16 March, 1995, G.S.R.255 (E), dated the 16 March, 1995;

(4) No.64/95-Central Excise, dated the 16 March, 1995, G.S.R.256(E), dated the 16 March, 1995;

the manufacturer shall pay an amount equivalent to the CENVAT credit attributable to inputs used in, or in relation to, the manufacture of such final products at the time of their clearance from the factory; or

b. if the exempted goods are other than those described in condition (a), the manufacturer shall pay an amount equal to eight per cent. of the total price, excluding sales tax and other taxes, if any, paid on such goods, of the exempted final product charged by the manufacturer for the sale of such goods at the time of their clearance from the factory.

Explanation I.- The amount mentioned in conditions (a) and (b) shall be paid by the manufacturer by debiting the CENVAT credit or otherwise.

Explanation II.- If the manufacturer fails to pay the said amount, it shall be recovered along with interest in the same manner, as provided in rule 12, for recovery of CENVAT credit wrongly taken. "

6. It may be noted that sub-rules (1) and (2) of Rule 57AD of the Central Excise Rules, 1944 is pari materia with sub-rules (1) and (2) of Rule 6 of the CENVAT Credit Rules, 2002.

SUBMISSIONS

7. According to Shri Gourab Banerji, learned Addl. Solicitor General appearing for the Department, Rule 57AD(1)/Rule 6(1) is a general bar that CENVAT credit is not admissible on such quantity of inputs which are used in the manufacture of exempted goods. According to learned counsel, this bar is consistent with the basic idea of CENVAT scheme. Learned counsel submitted that on a bare reading of sub-rule (2) of Rule 6 of the 2002 Rules, it is clear that the said sub-rule imposes an obligation on the manufacturer when he is manufacturing dutiable and exempted goods to either maintain separate accounts qua inputs on dutiable and exempted goods or if he does not choose to do so he has to pay certain specified amount. In the alternative, learned counsel submitted that since LSHS was used for generation of electricity or steam it did

not fall in the category of "inputs used as fuel" and consequently the assessee herein was required to maintain separate account or pay a certain specified amount under sub-rules (2) and (3) of Rule 6 of the 2002 Rules.

8. Shri S.K. Bagaria, learned senior counsel appearing on behalf of the assessee(s), submitted that inputs "intended to be used as fuel" have been specifically excluded from the obligations under Rule 6 of the CENVAT Credit Rules, 2002. According to learned counsel, inputs "intended to be used as fuel" have been specifically excluded from the requirement of sub-rule (2) by using the expression "except inputs intended to be used as fuel" and consequently the obligation of maintaining separate accounts and taking credit only on inputs intended for use in the manufacture of dutiable goods is not applicable in respect of inputs "intended to be used as fuel". According to learned counsel, under sub-rule (3) of Rule 6, a manufacturer opting not to maintain separate accounts has to follow either of the two conditions mentioned in clauses (a) and (b) of sub-rule (3) of Rule 6. Clause (a) applies to specified exempted goods whereas clause

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(b) applies to exempted goods other than those mentioned in clause (a). In respect of exempted goods covered by clause (b), the manufacturer shall pay an amount equal to 8%/10%, as the case may be, of the total price, excluding taxes, if any, charged by the manufacturer for sale of such goods. Therefore, according to learned counsel, sub-rule (3) makes it clear that it applies only to cases where a manufacturer is required to maintain separate accounts under sub-rule (2) but opted not to do so and since in the present case LSHS is used as "fuel", sub-rule (2), which carves out an exception to goods used as "fuel", is not applicable, and therefore the assessee(s) was not required to maintain separate accounts. In other words, according to learned counsel, inputs "intended to be used as fuel"

have been specifically excluded from the obligation of maintaining separate accounts under sub-rule (2) and, therefore, in respect of these inputs there is no question of opting or not opting to maintain separate accounts under sub-rule (2) and consequently the present case cannot be covered by sub-rule (3) which applies only to a manufacturer opting not to maintain separate account(s).

FINDINGS

9. As can be seen from the submissions, the contention of the assessee is that exclusion of fuel-inputs from the purview of sub-rule (2) of Rule 6 would mean that such inputs are also automatically excluded from sub-rule (1) whereas according to the Department sub-rule (1) is a general rule which provides, that except for the circumstances mentioned in sub-rule (2), CENVAT credit shall not be allowed on such quantity of inputs used in the manufacture of exempted goods and even though fuel-inputs are excluded from sub-rule (2), such inputs would still fall under sub-rule (1).

10. In our view, sub-rule (1) is plenary. It restates a principle, namely, that CENVAT credit for duty paid on inputs used in the manufacture of exempted final products is not allowable. This principle is in-built in the very structure of the CENVAT scheme. Sub-rule (1), therefore, merely highlights that principle. Sub-rule (1) covers all inputs, including fuel, whereas sub-rule (2) refers to non-fuel-inputs. Sub-rule (2) covers a situation where common cenvatted inputs are used

in or in relation to manufacture of dutiable final product and exempted final product but the fuel-input is excluded from that sub-rule. However, exclusion of

fuel-input vis-à-vis non-fuel-input would still fall in sub-rule (1). As stated above, sub-rule (1) is plenary, hence, it cannot be said that because sub-rule (2) is inapplicable to fuel-input(s), CENVAT credit is automatically available to such inputs even if they are used in the manufacture of exempted goods. The cumulative reading of sub-rules (1) and (2) makes it abundantly clear that the circumstances specified in sub-rule (2), which inter alia requires separate accounting of inputs, are not applicable to the fuel-input(s). However, the said sub-rule (2) nowhere says that the legal effect of sub-rule (1) will stand terminated in respect of fuel-inputs which do not fall in sub-rule (2). In other words, the legal effect of sub-rule (1) has to be applied to all inputs including fuel-inputs, only exception being non-fuel-inputs, for which one has to maintain separate accounts or in its absence pay 8% /10% of the total price of the exempted final products. Therefore, sub-rule (1) shall apply in respect of goods

used as "fuel" and on such application, the credit will not be permissible on such quantity of fuel which is used in the manufacture of exempted goods. In our view, the above aspect has not been properly appreciated by the Gujarat High Court in the above case of M/s. Gujarat Narmada Valley reported in (2006) 193 ELT 136 (supra).

11. For the above reasons, we find merit in the Department’s civil appeals.

12. Before concluding, one point needs to be noted. In this batch of cases there is a civil appeal bearing Civil Appeal No.1862 of 2006 - CCEC,

Vadodara v. M/s. Gujarat Narmada Valley which concerns the period November 2000 to February 2001. In that matter, apart from interpretation of Rule 6(1) and Rule 6(2), the question which arises for determination is : whether the Department was right in reversing proportionate CENVAT credit to the extent of electricity wheeled out/cleared to the Grid and to the Township. Therefore, on the question of interpretation of Rule 6(1) and Rule 6(2), the above reasoning

squarely covers the case. On the question of reversal of CENVAT credit, to the extent of the electricity wheeled out/cleared to the Grid and to the Township, our Judgment delivered today in the case of M/s. Maruti Suzuki Ltd. v. Commissioner of Central Excise, Delhi-III [Civil Appeal No. of 2009 -(arising out of S.L.P. (C) No.3826 of 2009)], would apply.

13. It may be noted that litigation on interpretation of CENVAT Credit Rules has arisen on account of various conflicting decisions given by the various Benches of CESTAT, the reason being that the Rules have not been properly drafted. In the circumstances, we are of the view that in this batch of cases no penalty is leviable, however, in order to decide the amount of duty payable by each of the assessees, the matters are remitted to the Adjudicating Authority to decide the amount of duty payable without penalty on reversal of credit to the extent of the input being used in the manufacture of exempted final products/to the extent of the excess electricity being wheeled out to the Grid and to the Township.

14. Subject to what is stated above, the civil appeals filed by the Department

are allowed with no order as to costs.

.....J.
(S.H. KAPADIA)

.....J.
(AFTAB ALAM)

New Delhi;
August 17, 2009.

ITEM No.1C Court No.3 SECTION III
(For judgment)

SUPR EME COURT OF I N D I A
RECORD OF PROCEEDINGS

CIVIL APPEAL NO.1308 OF 2008

COMMISSIONER OF CENTRALEXCISE Appellant (s)

VERSUS

M/S GUJARAT NARMADA FERTILIZERS CO. LTD. Respondent (s)

WITH

CIVIL APPEAL NO.1862 OF 2006

CIVIL APPEAL NO.4169 OF 2008

CIVIL APPEAL NO. 5553 OF 2009 @ SLP(C) NO.4663 OF 2009

Date : 17/08/2009 The matter was called on for judgement today.

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For Appellant (s) Mr. Gourab Banerji, A.S.G.
Mr. B.V.B. Das, Adv.

For Respondent (s) Mr. S.K. Bagaria, Sr.Adv.
Ms. Meenakshi Arora, Adv.

Hon'ble Mr. Justice S.H.Kapadia pronounced the judgment of the Bench comprising His Lordship and Hon'ble Mr. Justice Aftab Alam.

Leave granted.

The appeals are allowed with no order as to costs, in terms of the signed judgment.

(N. ANNAPURNA)
COURT MASTER

(MADHU SAXENA)
COURT MASTER

(Signed REPORTABLE judgment is placed on the file)