

- EBR

OFFICE OF THE COMMISSIONER OF CENTRAL EXCISE & SERVICE TAX
PLOT NO. 6776/B-1, "SIDDHI SADAN" BUILDING,
NARAYAN UPADHYAY MARG,
BHAVNAGAR - 364 001.

F. No. V. 28/15-35/Dem/HQ/2004

Date of order : 30.12.2011

Date of issue : 27.02.2011

Passed by Shri Harcharan Singh, Additional Commissioner.

Order-in-Original No. 18/ADC/BVR/201112

This copy is granted free of charge for private use of the person(s) to whom it is sent.

Any person(s) deeming himself aggrieved by this order may appeal against this order to the Commissioner Central Excise (Appeals), Central Excise Bhavan, Race Course Ring Road, Rajkot-360001 within 60 days from the date of its communication. The appeal should bear a court fee stamp of Rs. 2.50 paise only.

The appeal should be filed in form EA-1 in duplicate, as per the provisions of Section 35(1) of the Central Excise Act, 1944 read with Rule 3 of the Central Excise (Appeals) Rules, 2002. It should be signed by the appellants in accordance with the provisions of sub-rule (2) of Rule 3 of the Central Excise (Appeals) Rules, 2002.

- It should be accompanied with the following :
- Copy of appeal in duplicate

Copies of the order, one of which shall be certified copy OR the other must bear a court fee stamp of Rs. 2.50 paise as per Schedule 1 to Article 6 of the Court Fee Stamp Act, 1870.

Sub:- Show Cause Notice Number F. No. V/15-35/Dem/HQ/2004 dated 29.09.2004.

BRIEF FACTS OF THE CASE:

1.1 M/s Dhrangadhra Chemical Works Limited, Opposite Railway Station Dhrangadhra (hereinafter referred to as 'the Noticee'), having Central Excise vide number AAACD0559NXM001 are engaged in manufacture of excisable goods viz. Soda Ash falling under Chapter Sub Heading No. 2836.10 of the First Schedule to Central Excise Tariff Act. The Noticee is availing the benefit of credit of duty paid on inputs as well as capital goods in terms of the provision of Cenvat Credit Rules.

1.2 It was observed by CERA, Ahmedabad from the records of the Noticee that they had availed Cenvat credit of Rs. 18,42,220/- during the period from September, 2003 to March, 2004 being the duty paid on structural material viz. MS Bars, Plates, Angles, etc falling under Chapter 72 & 73 of the Central Excise Tariff considering the same as input in terms of Cenvat Credit Rules. The Cenvat credit on material viz. MS Bars, Plates, Angles, etc. falling under Chapter 72 & 73 of the Central Excise Tariff was not admissible to them in as much as the said material do not qualify as capital goods as per Rule 2(b) of the Cenvat Credit Rules, 2002.

1.3 Therefore, show cause notice F. No. V.28/15-35/Dem/GQ/2004 dated 29.09.2004 was issued to the Noticee asking them to show cause as to why Cenvat Credit amounting to Rs. 18,42,220/- should not be recovered from them under Rule 12 of the Cenvat Credit Rules, 2002 read with Section 11A(1) of the Central Excise Act, 1944 alongwith interest under

Section 11AB of the said Act as well as with consequential penal action in terms of the provision of Section 11AC of the Central Excise Act, 1944.

WRITTEN SUBMISSIONS:

2.1 The Noticee vide its letter dated 20.12.2004 submitted reply to SCN dated 27.09.2004, wherein it interalia stated as under:

(i) The SCNs are issued on the basis of Audit objection and not on the basis of independent inquiry;

(ii) The Noticee requires various machineries, equipments and plants. Some of which are fabricated in factory for which they need Tubes, plates, sheets, Beam, Channel, Bars etc and these goods are used for manufacturing of machines and in other related operations for manufacture of final product;

(iii) Credit on such inputs utilized for manufacture of capital goods captively used within factory of production is admissible under Cenvat Credit Rules. These proposition of law has well settled by T ribunals in number of decisions;

(iv) The definition of Capital goods does not provide that only those machines etc which are directly used in manufacturing process can only be termed as capital goods but also provide that the goods which are used directly or indirectly in the process for manufacturing of final product are also eligible under Cenvat rules.

(v) The Noticee cited following citation in support of their submissions:

- a) M/s Rajasthan Spinning & Weaving Mills 2002(150) ELT 343;
- b) Global Sugar 2000(110) ELT 611;
- c) J K Cement Works 1999 (113) ELT 428;

(vi) The citation in case of Max GB Ltd 2003 (159) ELT 203 quoted in SCNs is not applicable in the present case;

(vii) The material in dispute, is in the nature of inputs, were used in relation to manufacture of machines, which are used within factory for manufacture of Soda Ash;

(viii) The material used within the factory and machines produced there from were exempted in terms of Notification 67/95-CE dated 16.03.1995. The Cenvat cannot be denied if inputs were used in any intermediate even if such intermediate was exempt from payment of duty;

(ix) There is no non-disclosure or suppression of facts on the part of noticee as all the records of inputs are entered in proper registers;

(x) Based on citation reported at 1994 (170) ELT 731, 1996 (84) ELT 58 and 1999 (30) RLT 223, the noticee stated that it maintained the Modvat Register, entered such transactions in register, removed input under proper invoices and report all these transactions in the return, there is no suppression of facts. Also, Assessment of these period have finalized. Therefore, extended period of limitation is not available under proviso to Section 11A(1) of the CE Act;

(xi) The penalty under Section 11AC cannot be invoked because there is no contravention with an intention to evade payment of duty.

(xii) The proposal to charge interest under Section 11AB of the Act is also without any authority of law.

(xiii) The Noticee drew attention toward citation reported at 2005 (182) ELT 61 wherein Tribunal held that such items of steel were to be considered as capital goods and credit of duties paid thereon was available under erstwhile rule 57Q of the Rules;

(xiv) The noticee requested to drop the proceeding of SCNs.

PERSONAL HEARING :

2.2 Personal Hearing was fixed on 11.0.2005, 08.02.2005 and 04.03.2005. Shri Dhaval K Shah, Advocate appeared on behalf of the Noticee on 04.03.2005 and submitted that the SCN is time barred and extended period of limitation is not invocable as the invoices have been submitted with monthly return; the goods were used in the capital goods and therefore credit cannot be denied, and SCN was issued on the basis of audit point without inquiry/investigation. Several case laws were submitted in support of their contention and requested to drop the SCN.

2.3 The Noticee vide letter dated 29.11.2005 submitted a certificate issued by Shri V N Trivedi, Chartered Engineer. The CE certified that different sections, types & sizes of steel is actually procured and used in fabrication, assembly & installation of plant and machinery of new plant (Solway Tower) with all it's auxiliaries and accessories e.g. tower, pumps, vessels, tanks, pipelines, compressors, cable trays, pipe racks etc.

2.4 Personal hearing in the matter was again fixed on 05.12.2011. Shri Dhaval K Shah, Advocate appeared for personal hearing on behalf of the Noticee. He submitted that the Noticee has taken Cenvat Credit on various items like stainless steel tubes, HSM Plates, PM Plates etc as input. They had used these inputs in fabrication of capital goods which ultimately used for manufacture of final product and therefore Cenvat credit as availed as input is proper and valid. He also submitted bunch of judgments in support of their contentions.

DISCUSSION & FINDINGS:

3.1 I have gone through the SCN, material / evidence available on records, submission made by or on behalf of the Noticee as well as those argued at the time of personal hearing.

3.2 The issue in the present case is regarding admissibility of credit of duty paid on material viz. MS Bars, Plates, Angles, etc. falling under Chapter 72 & 73 of the Central Excise Tariff, which have availed by the Noticee during the period from September, 2003 to August, 2004.

3.3 During the relevant period, the Cenvat Credit Rules 2002 were in force, which were superseded by the Cenvat Credit Rules, 2004 with effect from September 2004. Therefore, it is useful to appraise the relevant text of the erstwhile Cenvat Credit Rules, 2002, as under:

2. Definitions.- In these rules, unless the context otherwise requires,-

(a) *"Act" means the Central Excise Act, 1944 (1 of 1944);*

(b) *"capital goods" means,-*

- (i) *all goods falling under Chapter 82, Chapter 84, Chapter 85, Chapter 90, heading No. 68.02 and sub-heading No. 6801.10 of the First Schedule to the Tariff Act;*
- (ii) *pollution control equipment*
- (iii) *components, spares and accessories of the goods specified at (i) and (ii) above;*

- (iv) *moulds and dies;*
 - (v) *refractories and refractory materials;*
 - (vi) *tubes and pipes and fittings thereof; and*
 - (vii) *storage tank, used in the factory of the manufacturer of the final products, but does not include any equipment or appliance used in an office;*
- (c) *"Customs Tariff Act" means the Customs Tariff Act, 1975 (51 of 1975);*
- (d) *"exempted goods" means goods which are exempt from the whole of the duty of excise leviable thereon, and includes goods which are chargeable to "Nil" rate of duty;*
- (e) *"final products" means excisable goods manufactured or produced from inputs, except matches;*
- (f) *"first stage dealer" means a dealer who purchases the goods directly from,- (i) the manufacturer under the cover of an invoice issued in terms of the provisions of Central Excise Rules, 2002 or from the depot of the said manufacturer, or from premises of the consignment agent of the said manufacturer or from any other premises from where the goods are sold by or on behalf of the said manufacturer, under cover of an invoice; or (ii) an importer or from the depot of an importer or from the premises of the consignment agent of the importer, under cover of an invoice;*
- (g) *"input" means all goods, except high speed diesel oil and motor spirit, commonly known as petrol, used in or in relation to the manufacture of final products whether directly or indirectly and whether contained in the final product or not, and includes lubricating oils, greases, cutting oils, coolants, accessories of the final products cleared along with the final product, goods used as paint, or as packing material, or as fuel, or for generation of electricity or steam used for manufacture of final products or for any other purpose, within the factory of production.*

Explanation 1. The high speed diesel oil or motor spirit, commonly known as petrol, shall not be treated as an input for any purpose whatsoever.

Explanation 2. Inputs include goods used in the manufacture of capital goods which are further used in the factory of the manufacturer;

3.4.1 In the instant case, the Noticee had availed credit of duty paid on structural material viz. MS Bars, Plates, Angles etc. falling under Chapter 72 & 73 of the Central Excise Tariff as input and claimed that the same had used for fabrication of various plant and machineries of new plant (Solway Tower) with all its auxiliaries and accessories e.g. tower, pumps, vessels, tanks, pipelines, compressors, cable trays, pipe racks etc..

3.4.2 As per explanation to Section 2(g) of the Cenvat Credit Rules, 2002, the input includes goods used for the manufacture of capital goods which are further used in factory of manufacturer. Here the terms 'capital goods' means the capital goods as defined under Section 2(b) of the Cenvat Credit Rules, 2002. In view of this, credit of duty, paid on those materials, used for manufacture of the item which does qualify as capital good, is only admissible. In case, the item/machinery/plant/equipment etc, so manufactured out of these material, do not qualify as capital goods, credit of duty paid thereon is not admissible to the Noticee.

3.4.3 To avail credit of duty paid on material used for manufacture of capital goods, it is necessary on the part of the Noticee to declare the description of goods to be manufactured out of these materials; classify the same in terms of Central Excise Tariff and thereafter justify the same as capital goods within the meaning as stipulated under rule 2(b) *ibid*. The manufactured capital good(s) is/are required to be accounted for as production in the relevant registers/records. The removal for such capital good(s) for captive consumption should also be recorded in relevant register/records. Invoice for payment of duty or claiming exemption may also be raised by the Noticee. All such production, clearances and payment of duty or exemption claim should also be reflected in their periodical returns.

3.4.4 In the instant case, the Chartered Engineer of the Noticee certified that the materials under dispute were used for fabrication of various plant and machineries of new plant (Solway Tower) with all its auxiliaries and accessories e.g. tower, pumps, vessels, tanks, pipelines, compressors, cable trays, pipe racks etc. The certificate explicitly makes the picture clear that the Noticee had manufactured various machinery/plant/equipment/accessories etc. Since 2004, the Noticee had never come forward with a declaration of the description of each machinery / plant / equipment and its classification to justify whether the same do qualify as 'Capital good' within stipulated meaning of capital goods as described under Rule 2(b) of the Cenvat Credit Rules, 2002. The Noticee also failed to show the production records of all these capital goods as well as records / documents showing removal of same for captive consumption. The Noticee also failed to produce copy of invoice, if raised, for captive consumption under claim of exemption in terms of Notification No. 67/95-CE dated 16.03.1995. Also, there is no evidence on record showing declaration of production and clearances of these capital goods in their periodical return submitted to appropriate forum of central excise.

3.4.5 In view of the above, where the description and classification of various machinery / plant / equipment / accessories etc. which manufactured by using the material under dispute is not known, it is not possible to justify as to whether the same is qualifying as capital goods within stipulated meaning of capital goods as described under Rule 2(b) of the Cenvat Credit Rules, 2002 or otherwise. Therefore, where the resultant product is justified as capital goods, credit of duty paid on the material used for manufacture of any item is admissible to the Noticee.

3.5 The Noticee did not show production of all these goods as well as removal of same for captive consumption in their record / register. The Noticee did not raise invoice for captive consumption under claim of exemption in terms of Notification No. 67/95-CE dated 16.03.1995. The Noticee did not declare production and clearances of these capital goods in their periodical return. These lapses on the part of Noticee tantamount to suppression of facts and extended period of limitation is rightly invocable.

3.6 In light of the facts and circumstances mentioned hereinabove, I find that the Noticee have wrongly credit of duty paid of Rs. 18,42,220/- during the period from September, 2003 to March, 2004 on structural materials falling under Chapter 72 & 73 of the Central Excise Tariff and the same liable to be recovered from the Noticee from them under Rule 12 of the Cenvat Credit Rules readwith Section 11A(1) of the Central Excise Act, 1944 along with interest under Section 11AB of the said Act as well as with consequential penal action in terms of the provision of Section 11AC of the Central Excise Act 1944.

3.7 In view of the above, I pass the following order:

ORDER

- I. I confirm an amount of Rs. 18,42,220/- (Rupees eighteen lacs, forty two thousand, two hundred and twenty only) as wrongly availed credit and order to recover from the

Noticee under Rule 12 of the erstwhile Cenvat Credit Rules, 2002 read with Section 11A of the Central Excise Act, 1944 which should be paid forthwith by the Noticee;

- II. I order to charge and recover interest on the confirmed amount under Section 11AB of the Central Excise Act, 1944 which should be paid forthwith by the Noticee;
- III. I impose penalty of Rs. 18,42,220/- (Rupees eighteen lacs, forty two thousand, two hundred and twenty only) upon the Noticee under Section 11AC of the Central Excise Act, 1944 which should be paid forthwith by the Noticee;

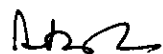
sd/-

(HARCHARAN SINGH)
ADDL. COMMISSIONER

To,
M/s. Dhrangadhra Chemical Works Limited,
Opposite Railway Station,
Dhrangadhra,
District Surendranagar-363 310.

Copy to :-

- (i) Commissioner, Central Excise, Bhavnagar.
(ii) Assistant Commissioner, Central Excise Division, Surendranagar,
(iii) Deputy Commissioner (Audit), Central Excise, Bhavnagar.
(iv) Superintendent, Central Excise, AR-Dhrangadhra.
(v) Superintendent (Recovery Cell), Central Excise Hqrs, Bhavnagar
(vi) Guard File.



23/2/2012

ADDL. COMMISSIONER