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# M/S. BDH Industries Ltd And Others Vs Commissioner Of Central Excise, Mumbai-V

**Court:** Customs, Excise And Service Tax Appellate, Mumbai

**Date of Decision:** Jan. 8, 2024

**Acts Referred:** Cenvat Credit Rules, 2004 â€" Rule 6, 6(3)(i), 6(3)(ii)
Central Excise Rules, 2002 â€" Rule 26

**Hon'ble Judges:** Dr. Suvendu Kumar Pati, Member (J); Anil G. Shakkarwar, Member (T)

**Bench:** Division Bench

**Advocate:** Mehul Jivani, Sunil Kumar Katiyar

**Final Decision:** Allowed

## Judgement

Anil G. Shakkarwar, Member (T)

1. The above stated two appeals are taken together for decision since they are arising out of common impugned order.

2. Brief facts of the case are that the appellant M/s. BDH Industries Ltd. (hereinafter referred to as Ã¢â‚¬Å“appellantÃ¢â‚¬) was engaged in manufacture of

medicaments falling under Chapter 30 of the First Schedule to Central Excise Tariff Act, 1985. Out of the numerous medicaments manufactured by

the appellant, some were chargeable to normal duty of central excise whereas others were fully exempted vide Notification No. 04/2006-CE dated

01.03.2006. Appellant maintained separate records in respect of inputs going into the manufacture of dutiable medicaments and exempted

medicaments. Appellant availed cenvat credit of central excise duty on inputs going into the manufacture of medicaments which were chargeable to

central excise duty and did not avail cenvat credit of central excise duty paid on inputs which were going into the manufacture of medicaments which

were exempted. However, the appellant was also taking cenvat credit of service tax paid on various services which were common inputs to both

dutiable and exempted final products. However, the appellant was not maintaining separate accounts in respect of services which were utilized for

exempted final products and dutiable final products. Investigations were initiated against the appellant. During investigation, the appellant informed

Revenue that the appellant was taking cenvat credit of service tax paid on clearing agent services, bank clearing charges, telephone, insurance and

business auxiliary service. Appellant further informed Revenue through their letter dated 24.05.2012 that they reversed an amount of Rs.1,25,500/- out

of the cenvat credit availed on service tax paid on input services. On 07.01.2013, appellant submitted an intimation letter to the jurisdictional

Superintendent of Central Excise exercising option under Clause (ii) of sub-rule (3) of Rule 6 of Cenvat Credit Rules, 2004. During investigation,

appellant further stated that during the period from 01.04.2008 to 31.03.2012, appellant had availed total cenvat credit of Rs.26,81,413/- on service tax

paid on input services put together which were utilized for manufacture of both exempted and dutiable final products. Revenue has collected the value

of exempted goods and calculated the amount to be paid by the appellant under the provisions of Rule 6(3)(i) of Cenvat Credit Rules and arrived at the

figure of around Rs.3.08 crores being the amount liable to be demanded from the appellant on the basis of 10% or 5% of the value of exempted final

products cleared by the appellant. Appellant was issued with a show cause notice dated 29.04.2013 calling upon the appellant as to why an amount of

Rs.3,08,35,395/- should not be recovered from the appellant under the provisions of Rule 6(3)(i) of Cenvat Credit Rules, 2004. There was also a

proposal to impose penalty on the other appellant. Appellant submitted their reply to the show cause notice and also submitted written submissions

during the course of hearing. Appellant submitted to Revenue that after issue of show cause notice, appellant also debited an amount of Rs.5,48,128/-

on 01.06.2013 on account of cenvat credit availed on input services attributable to the exempted final products. It further submitted that on 27.06.2013,

appellant debited another amount of Rs.19,70,875/-in similar manner. Appellant further submitted that the entire cenvat credit of Rs.26,81,413/- for the

disputed period on service tax paid on services utilized for both dutiable and exempted products was reversed by the appellant and, therefore, the

proceedings may be closed. However, the original authority did not appreciate the submissions and through the impugned order-in-original, confirmed

the demand of Rs.3,08,35,395/- and imposed equal penalty. Further, the paid amount was appropriated and the other appellant was imposed with a

penalty of Rs.30,00,000/- under Rule 26 of Central Excise Rules, 2002. Aggrieved by the said order, appellants are before this Tribunal.

3. Heard the learned Chartered Accountant on behalf of the appellant. Learned Chartered Accountant has submitted that the appellant has submitted

their option under clause (ii) of sub-rule (3) of Rule 6 of Cenvat Credit Rules, 2004 on 07.01.2013 before issue of show cause notice and, therefore,

they were not liable to pay 5% or 10% amount required under Clause (i) of sub-rule (3) of Rule 6 ibid and, therefore, the impugned order is bad in law.

Further, he has submitted that the entire cenvat credit availed on service tax paid on services utilized both for exempted and dutiable final products

was debited and, therefore, as held by various precedent judicial rulings, the amount at the rate of 5% or 10% was not payable by the appellant. He

has relied on ruling by HonÃ¢â‚¬â„¢ble Supreme Court in the case of Chandrapur Magnet Wires (P) Ltd. vs. CCE, Nagpur reported at 1996 (81) ELT 3

(SC) and further submitted that on the basis of ruling by HonÃ¢â‚¬â„¢ble Supreme Court in the above stated case, this Tribunal in the case of CCE,

Udaipur vs. Secure Meters Ltd. reported at 2017 (354) ELT 146 (Tri.-Del.)has held that it is immaterial as to whether the reversal of availed cenvat

credit is before clearance or after clearance of the goods and once the cenvat credit is reversed, it is as if the same has never been availed. He has

further submitted that the said decision of this Tribunal has been affirmed by HonÃ¢â‚¬â„¢ble Rajasthan High Court as reported at 2017 (354) ELT A32

(Raj.). He has further argued that the appellant has reversed entire cenvat credit availed on account of service tax paid on services which were

utilized by them in respect of dutiable and exempted final products and that the appellant has reversed entire cenvat credit and in view of the above

stated judicial decisions, appellant has never availed the said cenvat credit. Further, he argued that it is undisputed fact that the appellant has not

availed cenvat credit in respect of central excise duty paid on inputs going into manufacture of exempted final products and, therefore, after the

reversal of entire cenvat credit availed on input services, there is no case covered by the provision of law which attracts payment of amount of 5% or

10% of the value of exempted final products. He has further requested to set aside the impugned order in view of his submissions.

4. Learned AR has supported the impugned order.

5. We have carefully gone through the record of the case and submissions made. We note that the appellant had debited entire cenvat credit availed

on account of service tax paid on input services, even if a part of the input services were utilized in the manufacture of dutiable final products. We

also note that central excise duty paid on inputs which were going into the manufacture of exempted final products was not availed by the appellant.

We also note that this Tribunal in the case of CCE, Udaipur vs. Secure Meters Ltd. (supra) has held that even if subsequent to clearance, the availed

cenvat credit is debited, then it is as if the cenvat credit was never availed. The said view of this Tribunal was affirmed by HonÃ¢â‚¬â„¢ble Rajasthan

High Court. For the sake of ready reference, we reproduce para 7 of the final order of this Tribunal in the case of CCE, Udaipur vs. Secure Meters

Ltd. followed by the order passed by HonÃ¢â‚¬â„¢ble Rajasthan High Court dismissing the appeal filed by Revenue against the said final order.

Ã¢â‚¬Å“7. We find that the issue is no more res integra. Commissioner (Appeals) has granted relief to the assessee by following the Larger Bench

decision of the Tribunal in the case of Franco Italion Co. Pvt. Ltd. [2000 (120) E.L.T. 792] as also the HonÃ¢â‚¬â„¢ble Supreme Court decision in the

case of Chandrapur Magnet [1996 (81) E.L.T. 3 (S.C.)]. He has also relied upon the decision of HonÃ¢â‚¬â„¢ble Allahabad High Court in the case of

Hello Minerals Water (P) Ltd. [2004 (174) E.L.T. 422 (All.)]. We have also taken note of the list of decisions supplied to us by the learned advocate

for the respondents, laying down that such reversal, even if subsequent to clearance of final product, is appropriate and result in a situation as if no

credit was ever availed by the assessee. One such reference can be made to Gujarat High Court decision in the case of CCE v. Ashima Dyecot Ltd.

[2008 (232) E.L.T. 580 (Guj.) = 2008 (12) S.T.R. 701 (Guj.)] affirmed by the HonÃ¢â‚¬â„¢ble Supreme Court as reported at [2009 (240) E.L.T. A41

(S.C.)]. Inasmuch as the issue is decided, we find no reason to interfere in the impugned order of Commissioner (Appeals). Accordingly,

RevenueÃ¢â‚¬â„¢s appeal is rejected.Ã¢â‚¬â€‹

The following is the order passed by HonÃ¢â‚¬â„¢ble Rajasthan High Court on appeal filed by Revenue against the above said final order of this Tribunal:

Ã¢â‚¬Å“To question correctness of the final order dated 30-6-2016 passed by the Customs, Excise and Service Tax Appellate Tribunal, New Delhi in

Excise Appeal No. 885/2009, this appeal is preferred.

The facts necessary to be noticed for adjudication of the instant appeal are that the respondent assessee is engaged in manufacture of exempted as

well as dutiable final product. The assessee availed Cenvat credit on duty paid on inputs being used on both types of products. A notice to show cause

was issued and immediately thereafter the assessee reversed the Cenvat credit attributable to inputs and input service used in the manufacture of

exempted final product. The assessing officer imposed a penalty on the count that Cenvat credit was availed even on exempted final product and

reversal was made only after issuance of notice to show cause. The Commissioner (Appeals) accepted the appeal preferred by the assessee by

arriving at the conclusion that once reversal has already been made, no penalty could have been imposed. The order passed by the Commissioner

(Appeals) came to be affirmed by the Customs, Excise and Service Tax Appellate Tribunal under the order impugned dated 30-6-2016.

From perusal of the facts stated in the order passed by the Commissioner (Appeals) and the Tribunal, it is apparent that the findings are based upon

the law laid down by HonÃ¢â‚¬â„¢ble Supreme Court in the case of Chandrapur Magnet Wires (P) Ltd., Nagpur v. Collector of Central Excise, Central

Excise Collectorate, Nagpur reported in (1996) 2 SCC 159. In the case aforesaid, the Apex Court held that no penalty could have been imposed after

reversal of the Cenvat benefit availed on an exempted final product. The only difference in the instant matter is that the reversal in the case in hand

was made after issuance of notice to show cause. We are of considered opinion that the prime issue is reversal and not the issuance of notice to show

cause, as such, we do not find any wrong with the order passed by the Tribunal affirming the order passed by the Commissioner (Appeals).

The appeal, as such, is having no merit. Hence, dismissed.Ã¢â‚¬â€‹

6. On going through the case record and by applying the ruling by HonÃ¢â‚¬â„¢ble Rajasthan High Court and final order of this Tribunal in the referred

case, it is very clear that even if availed cenvat credit is debited subsequent to the clearance of the goods, it is to be treated as if cenvat credit was

never availed. The law provides that 5% or 10% of value of exempted final products is to be recovered if cenvat credit is availed and such services

are utilized both for exempted and dutiable goods. In the present case, in view of the final order of this Tribunal (supra), the appellant had not availed

cenvat credit at all for the reason that it had debited the entire availed cenvat credit. Therefore, the question of recovery of 5% or 10% of the value of

the exempted goods does not arise. We, therefore, set aside the impugned order. As a result, the demand confirmed and penalty imposed on the

appellant and penalty imposed on the other appellant are set aside.

7. In view of the above, both appeals are allowed by setting aside the impugned order-in-original.