O/O THE PRINCIPAL COMMISSIONER (APPEALS), CGST & CENTRAL EXCISE

Date:

BHV-EXCUS-000-APP-209-2019

Date of Order: 15.07.2019

Date of Issue: 16.07.2019

Passed by Shri Kumar Santosh, Principal Commissioner (Appeals)

M/s Mepro Pharmaceuticals Pvt Ltd (Unit II), Q Road, Phase IV, GIDC Wadhwan City, Surendranagar

[illegible]

[illegible]

[illegible]

Revision application to Government of India

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

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[illegible]

[illegible]

:: ORDER-IN-APPEAL ::

The present appeal No. V2/2/EA2/BVR/2018-19 has been filed by Assistant Commissioner, CGST Division, Surendranagar on behalf of the Commissioner, Central GST & Central Excise, Bhavnagar (hereinafter referred to as "Department") in pursuance of the direction and authorization issued under sub-Section (2) of Section 35E of the Central Excise Act, 1944 against Order-In-Original No. 16/Demand/2018-19 dated 11.4.2018 (*hereinafter referred to as* 'impugned order') passed by the Asst. Commissioner, Central Goods & Service Tax Division, Surendranagar (*hereinafter referred to as* 'lower adjudicating authority') in the case of M/s Mepro Pharmaceuticals Pvt. Ltd (Unit II), Surendranagar (*hereinafter referred to as* 'Respondent').

2. The brief facts of the case are that the Respondent, holding Central Excise Registration No. AABCM4177GXM001, was engaged in the manufacture of P & P Medicaments falling under Chapter 30 of the Central Excise Tariff Act, 1985. During audit of the records of the Respondent, it was found by Audit that the Respondent had availed Cenvat credit of service tax paid on various services which were used in the manufacture of dutiable as well as exempted goods but the Respondent had not maintained separate accounts for receipt, consumption and inventory of inputs and input services meant for use in the manufacture of dutiable goods and exempted goods as envisaged in Rule 6 of the Cenvat Credit Rules, 2004 (hereinafter referred to as "CCR,2004"). Accordingly, the Respondent was allegedly required to pay an amount equal to 10% or 5% of value of clearance of exempted goods during the period from 1.4.2007 to 31.10.2011 whereas they reversed Cenvat credit of Rs. 1,39,301/- along with interest of Rs. 10,510/- on 16.1.2012, as informed by them to the jurisdictional Central Excise Range Superintendent.

2.1 Show Cause Notice No. V/15-21/Dem/Hq/2012-13 dated 1.5.2012 was issued to the Respondent calling them to show cause as to why Rs. 12,87,262/- should not be recovered from them under Rule 14 of CCR, 2004 read with Section 11A(1) of the Central Excise Act,1944 (hereinafter referred to as 'Act') along with interest under Rule 14 of CCR, 2004 read with Section 11AB and penalty under Rule 15 of CCR, 2004 read with Section 11AC of the Act be imposed on them.

2.3 The above Show Cause Notice was adjudicated by the lower adjudicating authority vide the impugned order and dropped the proceedings initiated vide Show Cause Notice dated 1.5.2012 holding that the Respondent had properly

reversed Cenvat credit attrou[illegible] goods and therefore, demand of amount equal to 10%/ 5% [illegible] exempted goods under Rule 6(3)(i) of CCR, 2004 is not sustainable.

3. The impugned order [illegible] the Department and appeal was filed on various grounds inter [illegible]

(i) The adjudicating auth[illegible] holding that since the entire Cenval Credit on common input [illegible] in relation to taxable as well as exempted services has been [illegible] the assessee along with interest, the demand under Rule 6(3) of [illegible] sustainable so far as the demand for the period 01.04.2007 to [illegible] concerned.

(ii) The Adjudicating Authority [illegible] in relying upon the amendment in Rule 6(3) of CCR, 2004 by [illegible] 2010. The said amendment was for the settlement of pending [illegible] the period from 10.09.2004 to 31.03.2008. In the present case the [illegible] issued to assessee on 02.05.2012. The dispute arose only after [illegible] detected that the assessee had been taking credit of Cenvat on [illegible] for their clearance of dutiable and exempted products without [illegible] separate records. Thus, it is not forthcoming how the amendment [illegible] brought out by the Finance Act, 2010 is relevant in dropping [illegible] by the adjudicating authority.

(iii) The payment of [illegible] determined under sub-rule (3A), the provisions of sub-rule are unambiguous and therefore, if the procedure set out in the said sub-rule is not followed, the option for proportional/full reversal at the behest of audit or on the assessee's own volition is not permissible. In such cases, the assessee not opting [illegible] to the provisions of Rule 6(3)(ii) or 6(3)(iii) has no option but to pay an amount as applicable, on the value of the exempted goods and exempted [illegible] the case may be in terms of Rule 6(3)(i) ibid and Department relied upon case law of Nicholas Piramal (India) Ltd. reported at 2009 (244) E.L.T. [illegible]

(iv) Non-compliance of the specified procedures cannot be condoned as mere procedural lapse, inasmuch as, the conditions and procedures prescribed under Rule 6(3A) of CCR, 2004 are substantive requirements for availing the benefit of Rule 6(3) (ii) of CCR, 2004 and Department relied upon case law of Tata Steel Ltd. - 2014 (033) STR 440 (Tri-Kolkata). Since, the assessee has not followed the conditions and procedures mandated under Rule 6(3A), they have no option except to pay an amount demanded in the Show Cause Notice. Thus, the

adjudicating authority has erred in dropping the total demand of service tax amounting to Rs.12,87,262/- along with applicable interest and penalty.

3.1 The Respondent vide letter dated 5.9.2018 submitted Memorandum of Cross Objections, *inter alia*, submitting as under:

(i) The Department erred in taking plea that the Respondent cannot opt for the option under Rule 6(3)(ii) merely because they had not submitted intimation under Rule 6(3A) to the Department. The submission of intimation enables the Department to the understand the option exercised by manufacturer for verification purpose and it is only for administrative convenience of the Department. This condition has no impact on amount of credit to be reversed by the manufacturer. Hence, it is submitted that non submission of intimation cannot amount to non-eligibility to reverse credit as prescribed under Rule 6(3A) and relied upon following case laws:

(a) Aster Pvt Ltd- 2016(43) STR 411;
(b) Cranes & Structural Engineers - 2017 (347) ELT 172;
(c) Bhingar Urban Co-op Bank Ltd- 2016 (41) STR 673;
(d) Prestige Metal System (I) Pvt Ltd- 2017(349) ELT 347.

(ii) The issue is no longer res-integra and the Hon'ble CESTAT has accepted the reversal of Cenvat credit under Rule 6(3)(iii) even when intimation was not filed by the manufacturers as held in the following case laws:

(e) Citon Drugs & Pharma Pvt Ltd - 2016-TIOL-1415-CESTAT-MUM
(h) Sahyadri Starch & Industrial Pvt Ltd- 2016-TIOL-615-CESTAT-MUM

(iii) Rule 6(3A) provides manner of reversal of Cenvat credit and lays down procedure to reverse the Cenvat credit. Hence, this Rule is procedural in nature and non observation of conditions specified in Rule 6(3A) would not make them ineligible to claim benefit of Rule 6(3)(ii) of CCR, 2004.

(iv) Once credit is reversed on exempted goods, it is deemed that credit has not been taken and therefore, provisions of Rule 6(3) read with Rule 6(2) of CCR, 2004 would not apply and they relied upon case law of EIA Technologies Pvt Ltd- 2018-TIOL-569-HC-KAR.

(v) The impugned order passed by the adjudicating authority is just and legal and requires to be upheld. The adjudicating authority has considered entire legal position prior to dropping of demand.

3.2 In Personal Hearing, no one appeared on behalf of the Department whereas Shri Manuj Chauhan, C.A. appeared on behalf of the Respondent and submitted compilation of case laws and legal position evidencing amendment in

Rule 6(3) of CCR, 2004 by [illegible] (3AA) and (3AB) w.e.f. 1.4.2016 stipulating that an assessee [illegible] referred to in clause (ii) of sub-Rule (3) calculated for each [illegible] clause (c) of sub-Rule (3A) along with interest @15% p.a. and [illegible] effective retrospectively by sub rule (3AB); that they have paid the [illegible] along with interest and this has not been disputed by the Department [illegible] Hon'ble CESTAT, Mumbai in the case of IG Petrochemicals reported [illegible]-CESTAT-MUM has allowed such mistakes to be treated as [illegible] and rejected Departmental appeal vide their Order dated [illegible] view of above facts and legal position, the appeal of the Department [illegible] be rejected.

Findings:

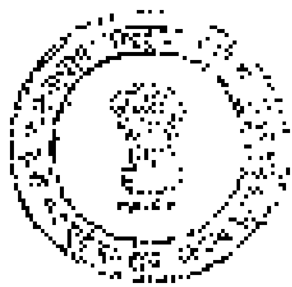
4. I have carefully gone through the facts of the case, the impugned order, the contentions made by the [illegible] in the Appeal Memorandum and the submissions made by the Respondent in [illegible] Memorandum of Cross-Objections as well as written and oral submissions during Personal Hearing. The issue to be decided in the present appeal is whether the impugned order dropping demand of Cenvat credit of Rs. 12,87,269/- is [illegible] legal and proper or otherwise.

5. I find that the proceedings were initiated against the Respondent on the ground that the Respondent had availed Cenvat credit of service tax paid on various services which were used in the manufacture of dutiable as well as exempted goods but the Respondent had not maintained separate accounts for receipt, consumption and inventory of inputs and input services meant for use in the manufacture of dutiable goods and exempted goods as envisaged in Rule 6 of CCR,2004 and hence, the Respondent was allegedly liable to pay an amount equal to 10% or 5% of value of clearance of exempted goods during the period from 1.4.2007 to 31.10.2011. The adjudicating authority dropped the demand by holding that the Respondent has subsequently reversed Cenvat credit attributable to exempted goods and therefore, demand of amount equal to 10% / 5% of value of exempted goods under Rule 6(3)(i) of CCR, 2004 is not sustainable. The Department filed appeal on the ground that the adjudicating authority erred in relying upon the amendment in the Rule 6(3) of CCR, 2004 by the Finance Act, 2010 which was for the settlement of pending dispute for the period 10.09.2004 to 31.03.2008 and hence, not applicable; that the assessee not opting to procedure prescribed under Rule 6(3)(ii) or Rule 6(3)(iii) of CCR,2004 has no option but to pay an amount as applicable on the value of the exempted goods in terms of Rule 6(3)(i) ibid; that non-compliance of the specified procedures cannot be condoned as mere procedural lapse, inasmuch

as, the conditions and procedures prescribed under Rule 6(3A) of CCR,2004 are substantive requirement for availing the benefit of Rule 6(3) (ii) of CCR, 2004. The Respondent filed Memorandum of Cross Objections contesting that the issue is no longer res-integra and the Hon'ble CESTAT has accepted the reversal of Cenvat credit under Rule 6(3)(ii) even when intimation was not filed by the manufacturer; that Rule 6(3A) is procedural in nature and non observation of condition specified in Rule 6(3A) would not make them ineligible to claim benefit of Rule 6(3)(ii) of CCR, 2004; that once credit is reversed on exempted goods, it is deemed that credit has not been taken and therefore provision of Rule 6(3) read with Rule 6(2) of CCR, 2004 would not apply.

6. I would like to reproduce Rule 6 of CCR, 2004 prevailing at the material time, which reads as under:

> *Rule 6. Obligation of manufacturer of dutiable and exempted goods and provider of taxable and exempted services -*
>
> *(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 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):*
>
> *Provided ....*
>
> *(2) Where a manufacturer or provider 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 receipt, consumption and inventory of input and input service meant for use in the manufacture of dutiable final products or in providing output service and the quantity of input meant for use in the manufacture of exempted goods or services and take CENVAT credit only on that quantity of input or input service which is intended for use in the manufacture of dutiable goods or in providing output service on which service tax is payable.*
>
> *(3) Notwithstanding anything contained in sub-rules (1) and (2), the manufacturer of goods or the provider of output service, opting not to maintain separate accounts, shall follow any one of the following options, as applicable to him, namely:-*
>
> *(i) pay an amount equal to six percent of value of the exempted goods and value of the exempted services; or*
>
> *(ii) pay an amount as determined under sub-rule (3A); or*
> *(iii) ....*
> *Provided that ....*



Provided further ....

Provided also ....

Explanation I.- .....

Explanation II. - ......

Explanation III. - ......

(3A) <u>For determination and payment of amount payable under clause (ii)</u> of sub-rule (3), the manufacturer of goods or the <u>provider of output service shall follow the following procedure and conditions, namely:</u>

(a) ...

(b) the manufacturer of goods or the provider of output service shall determine and pay, provisionally, for every month, -

(i) ......

(ii) ....

(iii) The amount attributable to input services used in or in relation to manufacture of exempted goods and their clearance upto the place of removal or provision of exempted services (provisional) = (D/F) multiplied by G, where D denotes total value of exempted services provided plus the total value of exempted goods manufactured and removed during the preceding financial year, F denotes total value of output and exempted services provided, and total value of dutiable and exempted goods manufactured and removed, during the preceding financial year, and G denotes total CENVAT credit taken on input services during the month.

(c) <u>the manufacturer of goods or the provider of output service shall determine finally the amount of CENVAT credit attributable</u> to exempted <u>goods and exempted services for the whole financial year in the following manner, namely: -</u>

(i) ... ...

(ii) ....

(iii) the amount attributable to input services used in or in relation to manufacture of exempted goods and their clearance upto the place of removal or provision of exempted services = <u>(M/N) multiplied by P</u>, where M denotes total value of exempted services provided plus the total value of exempted goods manufactured and removed during the financial year, N denotes total value of output and exempted services provided, and total value of dutiable and exempted goods manufactured and removed, during the financial year, and <u>P denotes total CENVAT credit taken on input services during the financial year</u>.

6.1 I find that Rule 6 of CCR, 2004 casts obligations upon manufacturer of dutiable and exempted goods inasmuch as Rule 6(1) of CCR, 2004 disallows Cenvat credit on input service used in manufacture of exempted goods except in

the circumstances specified in sub-rule (2); that Rule 6(2) of CCR, 2004 provides that the manufacturer /service provider shall maintain separate accounts of inputs and input services meant for use in manufacture of dutiable and exempted goods or for providing taxable service and exempted service and take CENVAT credit only on that input/ input service, which is intended for use in manufacture of dutiable goods or for providing taxable service; that Rule 6(3) provides an option to such manufacturer / service provider to pay an amount at the rate of 5% of value of exempted input/ service provided or to pay amount attributable to input/input service used in or in relation to manufacture of exempted goods/ providing of exempted service as per formula prescribed under Rule 6(3A) of CCR, 2004, if the manufacturer/service provider does not opt to maintain separate records.

6.2 I find that intent and object of legislation behind above Rule 6 of CCR, 2004 is not to allow Cenvat credit on input / input service, which is used in manufacture of exempted goods / providing exempted service and to deal with the situation where Cenvat credit is availed on inputs/input service, which are used in manufacture of dutiable goods/ exempted goods or for providing both taxable and exempted services and no separate records are maintained, the legislation has provided option to pay amount at the percentage specified in Rule 6(3)(i) of CCR, 2004 or to pay amount attributable to input services used in providing exempted services under Rule 6(3A) of CCR, 2004 and framed formula to arrive at Cenvat credit attributable to provision of exempted services so as to achieve the objectives of Cenvat Credit Scheme. In the instant case, the Respondent has availed Cenvat credit on input services which were commonly used for both dutiable and exempted goods, however, they had not given option available under Rule 6(3)(ii) to follow Rule 6(3A) of CCR, 2004. It is settled principle of law that when statute provides certain procedure to be performed in a particular way, it is not open for the assessee to ignore such procedure and non compliance of such procedure cannot be condone as procedural lapse. My views are supported by the Judgement passed by the Hon'ble Supreme Court in the case of Ambay Cements reported as 2004 (178) E.L.T. 55 (S.C.), wherein it has been held that,

> "26. Whenever the statute prescribes that a particular act is to be done in a particular manner and also lays down that failure to comply with the said requirement leads to severe consequences, such requirement would be mandatory. It is the cardinal rule of the interpretation that where a statute provides that a particular thing should be done, it should be done in the manner prescribed and not in any other way. It is also settled rule of

interpretation that makes a statutory provision mandatory in character, it must be strictly construed and followed. Since the requirement, in the instant case, of obtaining prior permission is mandatory, therefore, non-compliance of the same must result in cancelling the concession made in favour of the grantee-the respondent(s) herein."

7. The Respondent contended that insertion of sub-rule (3AA) in Rule 6(3) of CCR, 2004 w.e.f. 1.4.2016 has been made effective retrospectively by virtue of sub-rule (3AB) of CCR, 2004. Since they have paid the amount as envisaged in Rule 6(3)(ii) along with interest, which has not been disputed by the Department, I find it is pertinent to examine sub-rule 3(AA) and sub-rule 3(AB) of Rule 6 of CCR, 2004, which are reproduced as under:

> "(3AA) Where a manufacturer or a provider of output service has failed to exercise the option under sub-rule (3) and follow the procedure provided under sub-rule (3A), the Central Excise officer competent to adjudicate a case based on amount of CENVAT credit involved, may allow such manufacturer or provider of output service to follow the said procedure and pay the amount referred to in clause (ii) of sub-rule (3), calculated for each of the months, mutatis-mutandis in terms of clause (c) of sub-rule (3A), with interest calculated at the rate of fifteen per cent. per annum from the due date for payment of amount for each of the month, till the date of payment thereof.
>
> (3AB) An assessee who has failed to pay the amount under clause (ii) or clause (iii) of sub-rule (3) in the financial year 2015-16, shall pay the amount along with interest or take credit for the said financial year in terms of clauses (c), (d), (e), (f), (g), (h) or (i) of sub-rule (3A), as they prevail on the day of publication of this notification and for this purpose, these provisions shall be deemed to be in existence till the 30th June, 2016."

7.1 I find that Rule 6(3AA) provides that a manufacturer or service provider who failed to give prior intimation, may be allowed to follow the procedure and pay amount as referred in Rule 6(3)(ii) of CCR, 2004. I find that this provision was inserted in Rule 6 of CCR, 2004 w.e.f. 1.4.2016 and the same is prospective in nature and applicable with retrospective effect only for F.Y. 2015-16 and hence, not applicable to the period of this appeal. I find that Rule 6(3AB) is applicable to those assesses who exercised option for following procedure prescribed under Rule 6(3)(ii) or Rule 6(3)(iii) for the financial year 2015-16. This sub-rule provides that existing Rule 6 of CCR, 2004 would continue to be in operation till 30.6.2016. The period involved in the present appeal is from 1.4.2007 to 31.10.2011 and hence, this sub-rule is not applicable to the present

case. My views are supported by the clarification issued by CBEC vide Circular No. 334/8/2016-TRU dated 29.2.2016 as under :

> "(vii) A new sub-rule (3AA) is being inserted to provide that a manufacturer or a provider of output service who has failed to follow the procedure of giving prior intimation, may be allowed, by a Central Excise officer, competent to adjudicate such case, to follow the procedure and pay the amount prescribed subject to payment of interest calculated at the rate of fifteen per cent per annum.
>
> (viii) A new sub-rule (3AB) is being inserted as <u>transitional provision to provide that the existing rule 6 of CCR would continue to be in operation upto 30-6-2016, for the units who are required to discharge the obligation in respect of financial year 2015-16."</u>

(Emphasis supplied)

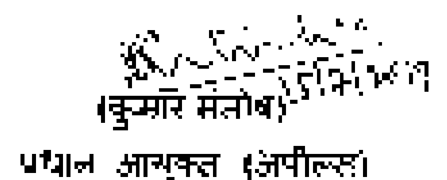
8. In view of above, I am of the considered view that the Respondent is not eligible to pay amount attributable to input services used in or in relation to manufacture of exempted goods under Rule 6(3)(ii) of CCR, 2004 in absence of any option given and the Respondent is required to pay amount at the rate of 10% / 5% of value of exempted services under Rule 6(3)(i) of CCR, 2004. The lower adjudicating authority has wrongly dropped demand proceedings. I, therefore, have no option but to allow Departmental appeal to confirm demand of Rs. 12,87,262/-, along with interest, under Rule 14 of CCR, 2014.

8.1 I find that the Respondent was registered with Central Excise and was aware of the provisions of Central Excise Law and even then the Respondent had availed Cenvat credit on input services which were commonly used in the manufacture of dutiable and exempted goods and did not follow Rule 6 of CCR, 2004. The Respondent had suppressed the facts of availment of Cenvat credit and use of input services in the manufacture of dutiable and exempted goods with intent to evade payment of duty and therefore, the Respondent is liable to penalty of Rs. 12,87,262/- under Rule 15 of CCR, 2004.

9. In view of above, I set aside the impugned order and allow the Appeal filed by the Department.

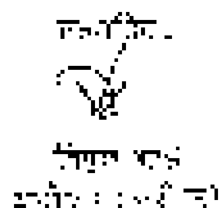
9.1. विभाग द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

9.1. The appeal filed by the Department is disposed off as above.



(कुमार संतोष)

प्रधान आयुक्त (अपील्स)



By Regd. Post

To,
M/s Mepro Pharmaceuticals [illegible]
(Unit II),
Q Road, Phase-IV,
GIDC, Wadhvan City,
District Surendranagar.

[illegible]
[illegible] फार्मास्युटिकल्स प्राइवेट
[illegible] (यूनिट-II),
[illegible] फेज-IV, जीआईडीसी,
[illegible]
[illegible] सुरेन्द्रनगर।

प्रति:-

1) प्रधान मुख्य आयुक्त, वस्तु [illegible] एवं केन्द्रीय उत्पाद शुल्क, गुजरात क्षेत्र, अहमदाबाद को [illegible]
2) आयुक्त, वस्तु [illegible] उत्पाद शुल्क, भावनगर आयुक्तालय, भावनगर को आवश्यक कार्यवाही हेतु।
3) सहायक आयुक्त, वस्तु [illegible] केन्द्रीय उत्पाद शुल्क, सुरेन्द्रनगर मण्डल को आवश्यक कार्यवाही हेतु।
4) गार्ड फाइल।