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24.10.2018

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Plot No. 127, GIDC [illegible] Junagadh

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:: ORDER-IN-APPEAL ::

M/s. Ardor Polymers Pvt. Ltd., Plot No. 327, GIDC-II, Sabalpur, Junagadh (hereinafter referred to as "the appellant") filed present two appeals No. (i) V2/149/BVR/2017 and (ii) V2/150/BVR/2017 against Orders-in-Original No. (i) AC/JND/19/2017 dated 15.03.2017 and (ii) AC/JND/20/2017 dated 15.03.2017 respectively (hereinafter referred to as "the impugned orders") passed by the Assistant Commissioner, Central Excise, Junagadh (hereinafter referred to as "the lower adjudicating authority").

2. Two Show Cause cum Demand Notices No. (i) [illegible]/2014-15 dated 05.01.2015 for the period from April, 2013 to March, 2014 for recovery of Rs. [illegible]29,578/- and (ii) [illegible]/2015 dated 14.12.2015 for the period from April, 2014 to March, 2015 for recovery of Rs. 4,95,497/- and appropriation of Rs. 1,17,462/- already paid by the appellant were issued.

2.1 The brief facts of the case are that the appellant had manufactured Emitting Pipes, Non Lateral Pipes and Sprinkler Pipes and cleared the said goods without payment of central excise duty, treating the said goods as parts of appliances viz. drip irrigation systems used in agriculture in terms of Sr. No. 212 of the Notification No. 12/2012-CE dated 17.03.2012. The appellant had also manufactured Rigid PVC Pipes and cleared without payment of central excise duty as parts of drip irrigation systems in terms of Sr. No. 212 of the Notification No. 12/2012-CE dated 17.03.2012 as well as on payment of central excise duty in open market after availing exemption upto clearance value of Rs. 150 lakhs in terms of Notification No. 8/2003-CE dated 01.03.2003 and availed cenvat credit on inputs used in manufacturing of Rigid PVC Pipes [illegible] but they did not avail cenvat credit on inputs used in the manufacture of other pipes (other than Rigid PVC Pipes). Since the appellant had availed cenvat credit on common inputs used in manufacture of Rigid PVC Pipes - dutiable as well as exempted, the appellant was required to maintain separate accounts and ought to have availed cenvat credit only on those inputs, which were used in the manufacture of dutiable goods, however, appellant did not maintain separate accounts as per Rule 6(2) of Cenvat Credit Rules, 2004 (hereinafter referred to as "CCR, 2004") and did not pay amount as determined under Rule 6(3A) of CCR, 2004. The Department alleged that the appellant was required to pay an amount of 6% of the value of drip irrigation system as per Rule 6(3)(i) of CCR, 2004, as they neither complied with provisions of Rule 6(2) of CCR, 2004 by not maintaining separate accounts nor followed procedure prescribed under Rule 6(3A) of CCR,

2004. The appellant was also found using more than one set of invoices and used separate series of invoices bearing prefix 'D' for clearance of assembled/ un-assembled drip Irrigation System without applying for and obtaining permission to use more than one set of invoices from the jurisdictional Assistant Commissioner in terms of Rule 11(1) of Central Excise Rules, 2002 (hereinafter referred to as 'the Rules'). The appellant had manufactured Rigid PVC Pipes, Emitting Pipes, Plain Lateral Pipes and Service Pipes but not mentioned production and clearance of Plain Lateral Pipes and Service Pipes in ER-3 returns during the period from April, 2013 to March, 2014. It was alleged that the appellant had not declared manufacturing of drip irrigation systems in ER-3 returns during the period from April, 2014 to March, 2015 and thereby contravened the provisions of Rule 12 of the Rules. It also alleged that appellant did not mention the production and clearance of Rigid PVC Pipes used for manufacture of drip irrigation systems in ER-3 returns for financial year 2013-14 and first half of financial year 2014-15 and thereby contravened provisions of Rule 12 of the Rules.

2.2 The lower adjudicating authority vide impugned orders confirmed demand of Rs. 1,79,273/- and Rs. 4,54,103/- respectively under Rule 14 of CCR, 2004 read with Section 11A(10) of the Central Excise Act, 1944 (hereinafter referred to as 'the Act') along with interest under Rule 14 of CCR, 2004 read with Section 11AA of the Act and appropriated Rs. 1,17,103/- already paid by the appellant during the period from April, 2014 to March, 2015; imposed penalty of Rs. 1,79,343/- and Rs. 2,34,407/- respectively under Rule 15(2) of CCR, 2004 read with Section 11AC of the Act and penalty of Rs. 10,000/- (Rs. 5,000/- under both the impugned orders) under Rule 27 of Rules for contravention of Rule 11(1) of Rules; also imposed penalty of Rs. 4,000/- (Rs. 2,000/- under both the impugned orders) under Rule 27 of Rules for contravention of Rule 12(1) of Rules for non mentioning of production and clearance of drip irrigation system and imposed penalty of Rs. 4,000/- (Rs. 2,000/- under both the impugned orders) under Rule 27 of Rules for contravention of Rule 12(1) of Rules.

3. Being aggrieved by the impugned order, the appellant filed the present appeals, interalia, on the following grounds:-

(i) The appellant supplied large number of parts of drip irrigation system which are bought from open market and directly supplied by respective suppliers to the buyer's place without even bringing them to factory of the appellant and supplied only Rigid PVC Pipes by the appellant. The appellant had issued invoices reselling these bought out items along with Rigid PVC Pipes, as a part of Drip Irrigation System. The appellant had never manufactured drip irrigation system and hence demand of amount as per Rule 6(3) of the Rules on value of drip irrigation system is not maintainable.

(iii) The lower adjudicating authority has taken value of drip irrigation system for the purpose of applying Rule 6(3) of the Rules based on believing that the appellant have availed credit on inputs used in manufacture of Rigid PVC Pipes cleared on payment of duty in open market as dutiable goods and this is [illegible] incorrect. Rule 6(3) of CCR, 2004 would apply to the value of exempted product only and not on any other final products which even otherwise is not manufactured by the appellant.

(iv) There is no suppression of facts as details of manufacture and clearance of items from factory as well as details of bought out items are duly recorded in books of account and hence they are not liable to mandatory penalty under the provisions of Rule 15 of CCR, 2004 read with Section 11AC of the Act.

4. Personal hearing in the matter was attended by Shri Vikas Mehta, Consultant, who reiterated the grounds of appeals and submitted that they are not manufacturer of Drip Irrigation System but manufacturer of Pipes only; that the Drip Irrigation System cannot be manufactured by them or anyone in factory but in field for which they have paid service tax; that Department is asking to pay 6% on value of Drip Irrigation system whereas 6% is payable on value of PVC Pipes, which they have paid in one case and willing to pay in another case; that the appeal should be allowed in view of above facts and decisions pronounced in the case The [illegible] Industries (India) Ltd. reported in 2015 ([illegible]) ELT 579 (Tri.-Del.) and Rocket Engineering Corporation Ltd. reported as 2006 ([illegible]) ELT 441 (Tri.-Mumbai).

Findings: -

5. I have carefully gone through the facts of the case, impugned orders, appeal memoranda and submissions of the appellant including those made at the time of personal hearing.

6. The issues to be decided in the present appeal are:

(i) whether the appellant is liable to pay an amount equivalent to 6% of value of Rigid PVC Pipes or value of Drip Irrigation System, under Rule 6(3) of CCR, 2004;

(ii) whether order for recovery of interest under Rule 14 of the CCR, 2004 and imposition of penalty under Rule 15 of the CCR, 2004 is correct or not?

7. I find that the appellant availed Cenvat credit on common inputs used to manufacture Rigid PVC Pipes used in drip irrigation system for agricultural purpose and bearing exempted vide Sr. No. 2[illegible] of Notification No. 12/2012-CE dated 17.03.2012 and Rigid PVC Pipes cleared for other than agricultural purposes on payment of CE duty. The department initiated proceedings for recovery of amount on value of drip irrigation system under Rule 6(3) of CCR, 2004 even though the appellant have manufactured and cleared PVC Pipes without payment of CE duty and not drip irrigation system which was being installed in the fields after providing of various services and the appellant has paid service tax on the installation charges of drip irrigation system. The impugned order has failed to provide evidence as to how the appellant can be asked to pay amount under Rule 6(3) treating appellant as manufacturer of Drip Irrigation System, which is not manufactured by the appellant but installed by providing various other parts from open market and service tax has been paid by the appellant in all cases on installation charges of drip irrigation system, as contended by them.

7.1 It is true that as per Rule 6(1) of the CCR, 2004, Cenvat credit shall not be allowed on such quantity of inputs and input services, which are used towards exempted finished goods, except in the circumstances mentioned in Rule 6(2), which provides that a manufacturer shall maintain separate accounts for inputs meant for use in manufacture of dutiable final products and to take Cenvat credit only on that quantity of inputs, which are intended for use in manufacture of dutiable final products. As per Rule 6(3) of the CCR, 2004, the manufacturer has the option not to follow the above procedure and follow the procedure to pay an amount equivalent to the Cenvat credit attributable to the inputs used for provision of exempted products subject to the conditions and procedure specified in sub-rule (3A). Thus, it is clear that in cases where common inputs are used for manufacture of final products, which are dutiable as well as exempted products, the proportionate credit attributable to the exempted goods is required to be reversed. On failure to comply with Rule 6(2) and Rule 6(3A) of CCR, 2004, the manufacturer is required to pay an amount equal to 6% of the value of exempted goods in terms of Rule 6(3) of CCR, 2004.

7.2 The appellant contended that they had never manufactured drip irrigation system and hence demand of amount as per Rule 6(3) of CCR, 2004 on value of drip irrigation system is not maintainable. I find that the appellant has cleared Rigid PVC Pipes manufactured by them to get the drip irrigation system installed on the field of buyers through the drip/sprinkler system [illegible] supplied by the respective suppliers to the buyer's field and the appellant has issued invoices incorporating these bought out items along with their manufactured product Rigid PVC Pipes as parts of irrigation system under heading 8424 90 00 of Central Excise Tariff Act, 1985 and cleared Rigid PVC Pipes without payment of central excise duty. It is a fact on record that the appellant used common inputs or common input services, which were also used to manufacture Rigid PVC Pipes cleared on payment of central excise duty as well as cleared without payment of central excise duty as part of drip irrigation system. Therefore, value of Rigid PVC Pipes so cleared without payment of central excise duty would be relevant so far as reversal of amount under Rule 6(3) of CCR, 2004 is concerned. Hence, I am of the considered view that confirmation of recovery of amount @ 5% on value of drip irrigation system is unjustified and legally unsustainable in terms of Rule 6(3) of CCR, 2004.

7.1 My above view is supported by the decision of the Hon'ble CESTAT, Delhi in the case of [illegible] (India) Ltd. as reported in [illegible] (Tri. - Del.), wherein it was held as under:

> *"8. On the second issue regarding whether or not the assessee is covered in paying 5%/6% of value of exempted cleared HDPE pipes, we find that in the assessees' own case the matter was decided in their favour earlier. See Final Order No. [illegible], dated 16-7-2015. The Tribunal held that when the assessee [illegible] 10% of the value of HDPE pipes used for manufacturing sprinkler system they are not required to pay 10% of value of the sprinkler system, relying on the earlier decision in the appellant's/assessee's own case vide Final Order No. [illegible]. In the said order relying on the Larger Bench decision in [illegible] reported in 2007 (209) E.L.T. 389 (Tri. - L.B.).*
>
> *9. Considering the above decisions, we find that the demand for an amount of 5% to 10% on the assessee cannot be sustained."*
>
> *(emphasis supplied)*

8. The period under dispute is from April, 2013 to March, 2014 and from April, 2014 to March, 2015. I find that during April, 2013 to March, 2014, the appellant had cleared Rigid PVC Pipes for use in drip irrigation system, however,

goods; thus the said correct not reported by the appellant in their respective ER-3 returns and also did not pay amount under Rule 6(3) of CCR, 2004. I find that the appellant is liable to pay amount @ 6% of the value of Rigid PVC Pipes cleared without payment of central excise duty for use in drip irrigation system and not amount @6% of the value of drip irrigation system as it has not been manufactured by the appellant in the factory but installed in the fields with the help of many bought out items like sprinkler system etc. The appellant has submitted that they have paid applicable service tax on the installation charges of drip irrigation system in the farmer/buyer's places. To be fair to the appellant, it is also noted that the appellant, during personal hearing, accepted to pay amount @ 6% on the value of Rigid PVC Pipes cleared by them availing exemption. The appellant had not shown the details of clearances of Rigid PVC Pipes without payment of central excise duty in their ER-3 Returns and hence, they are liable to pay interest under Rule 14 of CCR, 2004 and are also liable to penalty under Rule 15 of CCR, 2004 read with Section 11AC of the Act. I also find that the appellant had used more than one Invoice Book at same time and therefore, they violated Rule 11(1) of Rules and hence imposition of penalty of Rs. 5,000/- by the impugned order is justifiable. Appellant had not declared quantity of Rigid PVC Pipes cleared for use in drip irrigation system and hence, they are also liable to pay penalty of Rs. 2,000/- imposed in the impugned order under Rule 27 of Rules for contravention of Rule 12(1) of the Rules.

6.1 For the period from April, 2014 to March, 2015, I find that the appellant reflected the aggregate value Rs. 2,53,07,809/- of clearance of excisable goods viz. Rigid PVC Pipes in ER-3 returns for the preceding financial year 2013-14, which is not exceeding Rs. 4.00 Crores and also opted out from cenvat credit scheme on 01.04.2013 in terms of Notification No. 08/2003-CE dated 01.03.2003. Therefore, the appellant was eligible for benefit of exemption of Notification No. 08/2003-CE dated 01.03.2003 in the next financial year 2014-15 and they had availed the same benefit. I find that the appellant crossed the exemption limit of Rs. 1.50 Crore and reflected availment of cenvat credit from October, 2014 to March, 2015 in their ER-3 returns and also paid Rs. [illegible]/- @6% of the value of exempted Rigid PVC Pipes valued at Rs. 19,[illegible]/- during this period and declared reversal details in respective ER-3 returns. Hence, I find that the appellant has paid amount @6% of value of Rigid PVC Pipes prior to the issuance of impugned SCN dated 11.12.2015 and therefore, question of recovery of interest under Rule 14 of CCR, 2004 and imposition of penalty under Rule 15 of CCR, 2004 read with Section 11AC of the Act would not arise. I also find that the appellant has correctly declared [illegible] clearance of Rigid PVC Pipes on payment of central excise duty as well as cleared for use in drip irrigation system for the financial year 2014-15. Accordingly, I set aside the order for recovery of amount under Rule 6(3) of CCR, 2004 and other Rule [illegible] 6% at the [illegible] on the value of drip irrigation system. I also set aside penalty imposed under Rule 15 of CCR, 2004 read with Section 11AC of the Act for F.Y. 2014-15 as well as penalty imposed under Rule 27 of Rules. However, penalty of Rs. 2,000/- imposed under Rule 27 of Rules for contravention of Rule 11(4) of Rules is upheld for using more than one invoice book.

8.2 The value of Rigid PVC Pipes used for drip irrigation system is not forthcoming in records available in the file. Hence, this appellate authority is not in a position to quantify the amount payable by the appellant under Rule 6(3) of the Rules and hence, the matter is required to be remanded back to the jurisdictional adjudicating authority to determine the amount required to be recovered @ 6% of value of Rigid PVC Pipes cleared under exemption during both F.Y. 2013-14 & 2014-15.

9. In view of above, I set aside both the impugned orders and allow appeals by way of remand to quantify demand payable @6% of value of Rigid PVC Pipes along with interest. The jurisdictional adjudicating authority shall pass orders within 4 months of the receipt of this order in the light of my decision recorded in Para 8 & 8.1 and the submissions made by the appellant within 2 months from the receipt of this order in de-novo proceedings.

९.१ अपीलकर्ता द्वारा दर्ज की गई अपीलों का निपटारा उपरोक्त तरीके से किया जाता है।

9.1 The appeals filed by the appellant stand disposed off in above terms.

[illegible]
आयुक्त (अपील्स)

By Regd. Post AD

To,

M/s. Active Polymers Pvt. Ltd., Plot No. 327, GIDC-II, Sabalpur, Junagadh	मे. एक्टिव पॉलिमर्स प्रा. लि., प्लॉट नं. 327, जीआईडीसी-II सबलपुर, जूनागढ़

Copy for information and necessary action to:

1. The Chief Commissioner, GST & Central Excise, Ahmedabad Zone, Ahmedabad for his kind information.
2. The Commissioner, GST & Central Excise, Bhavnagar Commissionerate, Bhavnagar.
3. The Assistant Commissioner, GST & Central Excise Division Junagadh, Junagadh.
4. Guard File.
5. P.A. File V2/[illegible]/BVR/2017.