IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/TAX APPEAL NO. 219 of 2022

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE J.B.PARDIWALA

and
HONOURABLE MS. JUSTICE NISHA M. THAKORE

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

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THE PRINCIPAL COMMISSIONER, CENTRAL GST AND CENTRAL EXCISE
Versus
M/S. RELIANCE INDUSTRIES LTD.

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MR NIKUNT K RAVAL(5558) for the Appellant(s) No. 1
MR MIHIR JOSHI, MR NISARNG DESAI, MR VIPIN JAIN, MS. SHILPA BELANI, MR. RAMNATH PRABHU, MS. DIMPLE GOHIL FOR GANDHI GANDHI LAW ASSOCIATES(12275) for the Opponent(s) No. 1

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CORAM:**HONOURABLE MR. JUSTICE J.B.PARDIWALA**
and
HONOURABLE MS. JUSTICE NISHA M. THAKORE

Date : 05/05/2022

ORAL JUDGMENT
(PER : HONOURABLE MR. JUSTICE J.B.PARDIWALA)

1. This Tax Appeal under Section 35G of the Central Excise Act, 1944, is at the instance of the Revenue and is directed against the order passed by the Customs Excise and Service Tax

Appellate Tribunal, West Zonal Bench at Ahmedabasd dated 11.10.2021 in Excise Appeals Nos.12204 of 2019 and 12205 of 2019 respectively. The Revenue has proposed the following questions of law for the consideration of this Court:

"(i) "Whether the order passed by the Hon'ble Tribunal, wherein, the Hon'ble Tribunal has granted relief by exempting application of Rule 6 of the CENVAT Rules to clearance of LPG, which was produced as joint petroleum product with other dutiable petroleum product by chemical reaction/fraction of common blend of raw material is proper?"

(ii) "Whether the Hon'ble Tribunal was right in holding that the Respondents are not required to pay any amount under Rule 6(3) of Cenvat Credit Rules, 2004 in respect of LPG cleared under exemption under PDSP?"

(iii) "Whether the Hon'ble Tribunal was right in allowing additional new grounds filed by the Respondents that Liquefied Petroleum Gas is a Byproduct and therefore Rule 6 has no application in the case of Liquefied Petroleum Gas?"

(v) "Whether the Hon'ble Tribunal was right in holding Liquefied Petroleum Gases as a byproduct of petroleum refinery and not as a joint product with other petroleum products that emerge by chemical reaction/fraction of common blend of raw material?"

2. It appears from the materials on record that a notice dated 26.10.2016 was issued to the respondent calling upon to show cause as to why the refund claim towards the Excise duty of Rs.8,31,32,211/- filed dated 28.07.2016 should not be rejected. The claim towards refund by the respondent was on the following grounds:

"i) The provisions of Rule 6(1) of the Cenvat Credit Rules, 2004 are not applicable to product LPG which is leviable

to excise duty @ 8% LPG is not exempted goods. Rule 6(1) prohibits for allowing Cenvat Credit on input or input service which are used in the manufacture of exempted goods.

i) Whenever Ready LPG is removed to PSU Oil companies under Domestic LPG Subsidy Scheme, End Use exemption of duty is claimed. There is no prohibition in Cenvat Credit Rules restricting availment of credit on input and input services when exemption is claimed under End Use Notification at the time of removal of goods. The prohibition is only for availment of credit both for input and input services for manufacture of exempted goods.

ii) When input and input services credit are availed for excisable goods which is the case of LPG, there is no restriction in the Cenvat Credit Rules, 2004 for utilizing the credit thus availed.

iii) In view of the above, they are not required to reverse the input and input services credit under Rule 6(3) of the Cenvat Credit Rules, 2004, for removing LPG under End Use exemption Notification to PSU Oil companies under Domestic LPG subsidy Scheme."

3. The respondent is engaged in the manufacture of excisable goods like Motor Spirit, High Speed Diesel, LPG etc. It is the case of the appellant that the respondent has been availing credit of duty paid on the input and capital goods and input service in terms of the provisions of the CENVAT Credit Rules, 2004. The refund claim was made in respect of the CENVAT Credit Reversed / Paid under Rule 6(3) of the CENVAT Credit Rules, 2004 for the period between April, 2015 and March, 2016 on removal of the LPG under the Domestic Subsidy Scheme as under:

i) The amount reversed / paid on inputs attributable to LPG in terms of Rule 6(3A)(c)(i) Rs.2,20,32,262/-.
Total: Rs.8,31,32,211/-

ii) Amount reversed / paid on input services as per formula

prescribed under rule 6(3A)(c) (iii) after final adjustment of credit in terms of rule 6(3A) (f) Rs.6,10,99,949/-.

4. The Deputy Commissioner, CGST & Central Excise, Division - 1, Jamnagar vide order dated 22.02.2018 rejected the refund claim. The operative part of the order passed by the Deputy Commissioner reads thus:

> *"ORDER::*
>
> *The refund claim of Rs.8,31,32,211/- filed by the Noticee i.e. M/s. Reliance Industries Ltd. Jamnagar, vide their reference No.RIL/JMN/Refinery/LPG Refund/2015-16/686 dated 28.07.2016 is rejected.*
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> *The Show Cause Notice No.LTU/MUM/G:LT-3/RIL/Refund/JMN/185/2016-17 dated 26.10.2016 issued by the Assistant Commissioner, Central Excise & Service Tax, (GLT-3) L.T.U., Mumbai is disposed off in above terms.*
>
> *(Manjunatha T.)*
> *Deputy Commissioner*
> *CGST & Central Excise Division-1,*
> *Jamnagar"*

5. The respondent went in Appeal before the Commissioner. The Appeal came to be allowed. The pivotal issue before the Commissioner was whether the respondent was entitled for the refund of the CENVAT Credit Reversed / Paid for the inputs attributable to the LPG in terms of Rule 6(3A) of the Rules, 2004. While allowing the Appeal, the Commissioner held as under:

> *"7.4 I find that the lower adjudicating authority has relied on decision of the Hon'ble CESTAT, Ahmedabad in the case of Essar Oil Limited reported as 2017 (345) ELT 645 (Tri. - Ahmd.) wherein it is held that the judgment of the Hon'ble Rajasthan High Court in the case of Hindustan Zinc Limited*

relied upon by Essar Oil Limited is not applicable since the factual matrix of the reported upon case was different. However, I find that the case of Essar Oil Limited is similar to the case of DCW Limited, which had cleared final products without payment of central excise duty under an exemption the assessee was not required to pay amount under Rule 57CC of Central Excise Rules, 1944. The appeal filed by the department before the Hon'ble CESTAT, Chennai has been dismissed vide order dated 24.6.2018 reported as 2009 (234) ELT 163 (Tri. - Chennai) upheld by the Hon'ble Madras High Court vide judgment dated 21.10.2008 reported as 2011 (274) ELT 183 (Mad.) and affirmed by the Hon'ble Supreme Court reported as 2014 (303) ELT 321 (SC). Hence, I find that the decision of the Hon'ble CESTAT, Ahmedabad in the case of Essar Oil Limited is per incuriam and TESTEDerefore, cannot be applied in the present case.

7.5 My above views are supported by the judgment of the Hon'ble Gujarat High Court in the case of Haiderbeg, Rahimbeg Mirza reported as 2016 (340) ELT 282 (Guj.) wherein it has been correctly held as under:

> *"13. After considering and discussing various case laws, the ApexCourt found that in case a Bench considering the question of law has either ignored a Constitution Bench judgment or a judgment of the Larger Bench either of the Apex Court or the High Court, the decision rendered by a Bench has to be held per incuriam.*
>
> *(Emphasis supplied)*

7.6 The appellant has further contended that for applicability of Rule 6(2) and Rule 6(3) of CCR, 2004, there should be two different final products in which common inputs are used. I find that the Hon'ble Madras High Court in the case of DCW Ltd. reported as 2011 (274) ELT 183 (Mad.) has held that for the provisions of Rule 57CC(1) to apply, there should be one final product which is dutiable and another final product which is exempted from payment of duty or chargeable to "Nil" rate of duty. I further find that the appeal filed by the department against the said judgment of the Hon'ble Madras High Court in the case of DCW Limited has been dismissed by the Hon'ble Supreme Court in a common

judgment in the case of Hindustan Zine Limited reported as 2014 (303) ELT 321 (SC). I find that the factual matrix of the case on hand is similar to that of case of DCW Limited. In the present the appellant has used common inputs and common input services for manufacture of only one final product i.e. LPG, part of which were cleared on payment of central excise duty and part of which were cleared under exemption subject to clearance of LPG to household domestic consumers at subsidized price under LPG Subsidy Scheme, 2002. I also find that the Hon'ble CESTAT in the case of Tanfac Industries Limited reported as 2010 TIOL-1299-CESTAT-MAD has held that when the goods manufactured by the assessee are excisable and the same are cleared to certain categories of customers under exemption Notification, provisions of Rule 6 are not attracted as the rule requires manufacture of two categories of products, one excisable and the other exempted. Similarly, the Hon'ble CESTAT in the case of Goyal Proteins Limited reported as 2015 (325) ELT 165 (Tri. - Del.) has held that when compliance of a provision is impossible, an assessee cannot be penalized for his failure to comply with the same. I further find that under erstwhile Rule 57CC of Central Excise Rules, 1944, a singular expression i.e. 'any final product' was used at the first place and therefore, there was a need to specifically use another singular expression i.e. 'any other final product' at the second place, however, in Rule 6(2) of CCR, 2004, the expressions have been used in plural i.e. 'final products' meaning thereby there must be at least two products. In view of above, I am of the considered 2 view that to apply provisions of Rule 6(2) and Rule 6(3) of CCR, 2004, there should be two different final products, one which is cleared on payment of central excise duty and another is cleared without payment of central excise and common input services for manufacture of only one final product i.e. LPG and quantum of LPG cleared without payment of central excise duty is known to the appellant at the time of clearance only.

8. In view of above, I hold that the appellant is not required to reverse cenvat credit under Rule 6(3) of CCR, 2004 in respect of inputs and input services used in the manufacture of LPG by the appellant since, provisions of Rule 6(1) and Rule 6(2) are not applicable because the exemption to LPG

was limited to the clearances made to house hold domestic consumers under LPG subsidy scheme. Hence, the appellant is entitled for refund claims of Cenvat credit reversed under Rule 6(3A) of CCR, 2004 and the impugned orders rejecting refund claims are not correct, legal & proper and hence liable to be set aside.

9. In view of above, I set aside the impugned orders and allow the appeals filed by the appellant.

9.1 The appeals filed by the appellant are disposed off as above.

Sd/-
(KUMAR SANTOSH)
PRINCIPAL COMMISSIONER (APPEALS)

By RPAD

To,
M/s. Reliance Industries Limited, Village
Meghpar, Padana, Gagva, District Jamnagar-361140"

6. The Revenue being dissatisfied with the order passed by the Commissioner went in Appeal before the Tribunal. The Tribunal dismissed the Appeals holding as under:

"4.5 The LPG generated during the course of manufacture of motor sprit MS), High Speed Diesel Oil, aviation Turbine fuel (ATF), Naphtha, Fuel oil etc. is dutiable right from the stage of receipt of input and input services till the completion of manufacture of LPG. Therefore, during that stage availment of Cenvat Credit is absolutely in conformation to Cenvat Credit Rules, 2004. In the process or refining crude oil to obtain value added finished goods namely motor sprit (MS), High Speed Diesel Oil, aviation Turbine fuel (ATF), Naphtha, Fuel oil etc. the LPG inevitably arises and tapped from the crude distillation unit, coker unit, fluid catalytic cracking & unit (FCCU), platformer unit etc. in these process it is not as if respondent had set out to manufacture LPG. The same arises in the refining process

and that the same could not have been limited or curtailed the production of LPG nor could have been manufactured other value added products using a less quantity of input of input services as whether the LPG then or otherwise. The quantum of input and input services will not get reduced even if LPG is not generated with main products. The same quantity of input and input services is required and indeed used for the manufacture of motor sprit (MS), High Speed Diesel Oil, aviation Turbine fuel (ATF), Naphtha, Fuel oil. Therefore, the input and input services of such dutiable product the Cenvat Credit on such input and input services cannot be curtailed or reduced by applying rule 6 (1), 6 (2) and 6 (3A) of Cenvat Credit Rules, 2004. In this undisputed facts when the entire quantity of input and input services was required for manufacture of dutiable finished goods and when LPG emerged inevitably without any deliberate attempt to manufacture it, the provision of Rule 6 (1) was not violated in any manner.

4.6 The identical issue has been considered by the jurisdictional Hon'ble Gujarat High Court in the case of Sterling Gelatin reported in 2011 (270) ELT200 (Guj.) wherein in the issue before the Hon'ble Court was that whether the assessee was required to pay an amount of 8%/10% of the value of exempted goods under Rule 6 (3) (b) of the CCR. as one of the inputs namely Hydrochloric acid was used in the manufacture of dutiable goods Gelatin) as well as for manufacture of exempted goods Dicalcium Phosphate and the assessee was not maintaining separate account under rule 6(2) of CCR 2004. The Hon'ble Gujarat High Court after examining the provision of Cenvat scheme and the argument that the assessee therein could not have manufactured Gelatin using a lesser quantity of Hydrochloric acid held that rule 6 (1) of the CCR itself would not come into play. The relevant observation of Hon'ble High Court is reproduced below:

> *"6. The undisputed facts of the care are that the purpose of manufacture of Gelatin, cleared bone chips are charged to acidulation vats with the help of conveyors. Each vat is filled with pre-determined quantity of bine chips and then soaked with Hydrochloric Acid. The bones contain mineral matter like Phosphate Salts. The*

Hydrochloric Acid leaches out the phosphates forming Mono Calcium Phosphate. The phosphate solution commonly known as Mother Liquor is pumped out of the acidulation vats into precipitation tanks where lime solution is added which reacts with Mono Calcium Phosphate converting it into Di-Calcium Phosphate Insofar as manufacture of Gelatin is concerned, after removal of Mother Liquor the demineralised bones are hydraulically transported to the washing section and thereafter processed further to manufacture Gelatin. The above manufacturing process shows that while soaking the bone chips in Hydrochloric Acid a waste product: viz, Mother Liquor ipso facto comes into existence. It is not as if there is a deliberate attempt on the part of the manufacturer to manufacture the Mother Liquor which emerges as a by-product during the course of manufacture of Gelatin. Moreover, it is not as if a particular quantity of Hydrochloric acid is used for the manufacture of Gelatin and a particular quantity is used for the production of Mother Liquor (whether ascertainable or unascertainable), the entire quantity of Hydrochloric acid in respect of which Cenvat credit is availed of is used by the respondent for the manufacture of Gelatin. Considering the process of manufacture adopted by the respondent, it is not possible to manufacture Gelatin without corresponding production of Mother Liquor This Mother Liquor which otherwise is in the nature of a waste product, is used by the respondent assessed for the manufacture of Di-Calcium Phosphate.

8. Thus, on a plain reading sub-rule (1) of rule 6, it is apparent that CENVAT credit is admissible in respect of the inputs used in the manufacture of dutiable goods and is inadmissible on such quantity of inputs which is used in the manufacture of exempted goods, Sub-rule (2) imposes an obligation on the manufacturer who manufactures final products and exempted goods from the common input to maintain separate accounts for receipt, consumption and inventory of inputs. Examining the applicability of the aforesaid rules to the facts of the present case, as noted hereinabove, it is not as if more quantity of Hydrochloric Acid is used than that required for manufacturing Gelatin or that by using a smaller

amount of Hydrochloric Acid, the production of Mother Liquor could be averted. In the manufacturing process adopted by the assessee, it is not possible to manufacture Gelatin without Mother Liquor coming into existence. Thus, when the entire quantity of input viz. Hydrochloric Acid is used in the manufacture of the final product being Gelatin which is a dutiable product, the mere fact that a by-product emerges during the process would not bring the by-product within the ambit of Rule 6 of the Rules so as to call for maintaining separate accounts in respect of the same. When the entire quantity of input is used in the manufacture of Gelatin, the question of maintaining separate accounts or of paying on percentage of the total price of the exempted goods would not arise. In the peculiar facts of the present case, sub-rule (1) of Rule 6, itself would not come into play inasmuch the manufacturer does not deliberately use any quantity of the inputs, viz. Hydrochloric Acid for manufacturing Mother Liquor, the entire Hydrochloric Acid is used in the manufacture of Gelatin. Thus, when no input is specifically used for the purpose of manufacturing Di-Calcium Phosphate, there would be no question of maintaining separate accounts for receipt. consumption and inventory of input.

10. In the facts of the present case, it is not as if by using a smaller quantity of input Hydrochloric Acid, the respondent could have averted the emergence of Mother Liquor. In other words, in the technology utilized by the respondent for the manufacture of Gelatin, the emergence of Mother Liquor was inevitable. Hence, while it is no doubt correct to say that Hydrochloric Acid has been used in or in relation to manufacture of Mother Liquor, the identical quantity of the same goods has simultaneously been used in the manufacture of Gelatin. The emergence of Mother Liquor during the course of manufacture of Gelatin, therefore, by itself is not a ground to invoke the provisions of Rule 6 of the Rules.

12. On behalf of the appellant it has been submitted that common input Hydrochloric Acid was used in the manufacture of both Gelatin as well as Di-Calcium Phosphate hence, in the light of the provisions of Rule

6(2) of the Cervat Credit Rules, 2002, the respondent was required to maintain separate accounts for receipt; consumption and manufacturing Mother Liquor, the entire Hydrochloric Acid is used in the manufacture of Gelatin. Thus, when no input is specifically used for the purpose of manufacturing Di-Calcium Phosphate, there would be no question of maintaining separate accounts for receipt; consumption and inventory of input inventory of input meant for use in the manufacture of dutiable final products and the quantity of input meant for use in the manufacture of exempted products and take cenvat credit only on that quantity of input which was intended for use in the manufacture of dutiable goods. In the present case, the assessee has taken cenvat credit only on that quantity of input, which was intended for use in the manufacture of dutiable goods, therefore, also the question of invoking sub-rule (2) of Rule 6 of the Rules would not arise.

13. Insofar as reliance placed upon the decision of the Bombay High Court in the case of Commissioner of Central Excise, Thane-1 v. Nicholas Piramal (India) Ltd. (supra) is concerned, the same would have no applicability to the facts of the present case inasmuch as in the facts of the said case, common input had been consciously used in the manufacture of two final products, whereas in the facts of the present case, the input Hydrochloric Acid is used for the manufacture of Gelatin alone, however during the course of manufacturing process a by-product viz. Mother liquor also emerges.

14. In the light of the view taken by the Court, it is immaterial as to whether or not the new applicable rules, viz., Cenvat Credit Rules, 2002/2004 contain any provisions akin to Rule 57CC and Rule 57D of the erstwhile Central Excise Rules, 1944"

Applying the ratio the above judgment which directly applicable to the facts of the present case for the reason that in the aforesaid judgment the appellant intended to manufacture gelatin as the main product and exempted goods i.e. Dicalcium Phosphate generated unavoidably in the

course of manufacture of gelatin same quantum of input and input services used for manufacture of gelatin. In the present case the entire quantity of input and input services was used for manufacture of dutiable products namely motor sprit (MS), High Speed Diesel Oil, aviation Turbine fuel (ATF),Naphtha, Fuel oil etc. only because of generation of LPG the quantum of input and input services used for manufacture of motor sprit (MS), High Speed Diesel Oil, aviation Turbine fuel (ATF), Naphtha, Fuel oil etc. does not get reduced that same entire quantity of input and input services has been used in manufacture of dutiable goods even though the LPG is generated in the stream of entire manufacture process. The Cenvat credit of only such quantity of input and input services to be denied which is not used in the manufacture dutiable goods but in the present case there is no dispute that the entire quantity of input and input services has been used for manufacture of dutiable goods therefore even though the LPG arising in the course of manufacture only because of that it cannot be said that there is reduction in the quantity of input and input services used in the manufacture dutiable goods."

7. In such circumstances referred to above, the Revenue is here before this Court with the present Tax Appeal.

8. We have heard Mr. Nikunt Raval, the learned senior standing counsel appearing for the Revenue and Mr. Mihir Joshi, the learned senior counsel appearing for the respondent.

9. The contentions of the Respondent which found acceptance with the Tribunal are the following -

a. That LPG is not an exempted product as it attracts duty when cleared from the factory, save an except when it is cleared for supply under the PDS through Oil Marketing Companies. Rule 6 therefore does not

apply to the Respondent as the same can be invoked only where two different final products, one dutiable and other exempt, as held by Madras High Court in the case of **CCE vs DCW - 2011 (274) E.L.T. 183.**

b. The object behind Rule 6 is to determine the quantity of input and input services that have gone in the manufacture of exempted goods. In this case inputs and input services required for manufacturing value added final products such as Motor Spirit, High Speed Diesel, Aviation Turbine Fuel, Naptha, etc are common with those for the manufacture of LPG and therefore applying the judgment in the case of **CCE vs. Sterling Gelatin reported in 2011 (270) E.L.T. 200 (Guj.)** no part of the cenvat credit needs to be reversed as the entire quantity of inputs and input services are required and actually consumed for the manufacture of dutiable final product. No incremental quantity of input and input services are required for producing the exempt final product.

c. That Rule 6 is otherwise incapable of application as the point of time the inputs and inputs services are received it is impossible for any manufacturer to

decide the exact quantity of input and input services that will get consumed in the manufacture of exempted goods vis-à-vis the quantity of input and input services that would be used for the manufacture of dutiable final products, as held by the Rajasthan High Court has, in the case of Hindustan Zinc reported in 2008 (223) ELT 149, which has been affirmed by the Apex Court in 2014 (303) ELT 321. The requirement of maintain separate accounts regarding receipt and consumption in these circumstances is an impossible condition to fulfill and consequently deemed to be per se satisfied.

d. LPG inevitably emerges in the process of refining of crude oil and is therefore a by-product. Even by applying the principle of Equal Economic Importance laid down by the Larger Bench of the Tribunal in the case of **Alkali Manufacturer Association of India v DGAD** reported in 2016 (342) ELT 465, LPG is a by-product, as the value of its clearances under exemption was a meagre 0.64 and 0.38 of the total value of clearances for FY 2015-16 and 2016-17. It is settled law that the requirement of reversal under

Rule 6 of CCR does not apply to by-products.

10. The Revenue has, in the present appeal, primarily contended that the Tribunal has erred in holding that LPG emerges as a by-product and hence the provisions of Rule 6 of CCR have no application. It has also contended that the judgment in the case of Sterling Gelatin is not applicable to the facts of the present case.

11. It is submitted that the Tribunal has rightly held that LPG is a by-product, as it arises inevitably in the process of manufacture of Motor Spirit, High Speed Diesel, Aviation Turbine Fuel etc., as well as by virtue of the fact that it does not have Equal Economic Importance vis-à-vis the value added final products. However, assuming for the sake of argument that LPG is not a by-product, even then, there being no dispute in the present appeal on the other findings arrived at by the Tribunal, the appeal filed by the Revenue thus deserves to be dismissed.

12. Insofar as the challenge in the Revenue's appeal to the inapplicability of the judgment in the case of Sterling Gelatin is concerned, it is submitted that there is nothing in the appeal to disprove the findings of fact arrived at by the Tribunal, that –

a. the assessee could not have manufactured its value added products such as Motor Spirit, High Speed Diesel, Aviation Turbine Fuel, Naptha, etc., using a lesser quantity of inputs or input services; and,

b. LPG inevitably arises in the manufacture of the aforementioned value added products and that no incremental inputs or input services are used for the same.

It is also relevant to note here that this Court has in the case of Sterling Gelatin held that the provisions of Rule 6 of CCR are inapplicable if the dutiable final product could not have been manufactured using a lesser quantity of inputs and input services.

13. In the case of Sterling Gelatin (Supra), the assessee therein had availed credit on hydrochloric acid, which was used in the manufacture of dutiable final product viz. gelatin as well as in the manufacture of exempted goods viz. Di-Calcium Phosphate. The issue before the Court was whether the assessee was required to pay an amount of 8%/10% of the value of exempted goods under Rule 6(3)(b) of the CCR. This Court, held that since the assessee could not have manufactured gelatin (dutiable final product) using a lesser quantity of hydrochloric acid, Rules 6(1) and 6(2) of the

CCR would not come into play. The relevant observations of this Court are extracted herein below for ease of reference:

> *"8. Thus, on a plain reading sub-rule (1) of Rule 6, it is apparent that CENVAT credit is admissible in respect of the inputs used in the manufacture of dutiable goods and is inadmissible on such quantity of inputs which is used in the manufacture of exempted goods. Sub-rule (2) imposes an obligation on the manufacturer who manufactures final products and exempted goods from the common input to maintain separate accounts for receipt, consumption and inventory of inputs.* ***Examining the applicability of the aforesaid rules to the facts of the present case, as noted hereinabove, it is not as if more quantity of Hydrochloric Acid is used than that required for manufacturing Gelatin or that by using a smaller amount of Hydrochloric Acid, the production of Mother Liquor could be averted. In the manufacturing process adopted by the assessee, it is not possible to manufacture Gelatin without Mother Liquor coming into existence****. …….. When the entire quantity of input is used in the manufacture of Gelatin, the question of maintaining separate accounts or of paying a percentage of the total price of the exempted goods would not arise. In the peculiar facts of the present case, sub-rule (1) of Rule 6, itself would not come into play inasmuch the manufacturer does not deliberately use any quantity of the inputs, viz. Hydrochloric Acid for manufacturing Mother Liquor, the entire Hydrochloric Acid is used in the manufacture of Gelatin. Thus, when no input is specifically used for the purpose of manufacturing Di-Calcium Phosphate, there would be no question of maintaining separate accounts for receipt, consumption and inventory of input.*
>
> *……*

> ***10. <u>In the facts of the present case, it is not as if by using a smaller quantity of input Hydrochloric Acid, the respondent could have averted the emergence of Mother Liquor. In other words, in the technology utilized by the respondent for the manufacture of Gelatin, the emergence of Mother Liquor was inevitable.</u> ……***
>
> ***12.*** *On behalf of the appellant it has been submitted that common input Hydrochloric Acid was used in the manufacture of both Gelatin as well as Di-Calcium Phosphate hence, in the light of the provisions of Rule 6(2) of the Cenvat Credit Rules, 2002, the respondent was required to maintain separate accounts for receipt, consumption and inventory of input meant for use in the manufacture of dutiable final products and the quantity of input meant for use in the manufacture of exempted products and take cenvat credit only on that quantity of input which was intended for use in the manufacture of dutiable goods. In the present case, the assessee has taken cenvat credit only on that quantity of input, which was intended for use in the manufacture of dutiable goods, therefore, also the question of invoking sub-rule (2) of Rule 6 of the Rules would not arise."*

14. It can be seen from the aforesaid extract that this Court did not rule out the applicability of Rules 6(1) and 6(2) of the CCR on the ground that the exempt product was a by-product, but has done so by observing that the assessee could not have used a lesser quantity of inputs and inputs for manufacture of its dutiable final product.

15. It is further submitted that the Apex Court has, in the case of in the case of **CCE vs. National Organic Chemical Industries Limited, 2008 (232) ELT 193 (SC)** held that if the dutiable final product could not have been manufactured using a lesser quantity of inputs, then the entire input must be attributed to having been used in the manufacture of the said dutiable final product, even if some other exempt final product emerges, inevitably. This is also the ratio of the judgment of the Apex Court in the case of **Swadeshi Polytex Ltd. vs. CCE reported in 1989 (44) ELT 794 (SC)**. The relevant observations of the Apex Court are reproduced herein below for ease of reference –

> *"20……..It is clear, therefore, that the Tribunal failed to interpret the words of the exemption notification No. 201/79 properly and fully.* ***The said notification exempted all excisable goods on which the duty of excise was leviable and in the manufacture of which any goods falling under Tariff Item 68 (i.e. inputs) had been used from so much of the duty of excise leviable thereon as was equivalent to the duty of excise already paid on the inputs. It is clear, however, that ethylene glycol was used in the manufacture of polyester fibre. It appears that methanol arises as a part and parcel of the chemical reaction during the process of manufacture when ethylene glycol interacts with DMT to produce polyester fibre. It is not possible to use a lesser quantum of the ethylene glycol to prevent methanol from arising for producing a certain quantity of***

polyester fibre. Thus, the quantity of ethylene glycol required to produce a certain quantum of polyester fibre is determined by the chemical reaction. It may be mentioned herein that it is not as if the appellants have used excess ethylene glycol wantedly to produce the methanol. It is clear that the appellants are not engaged in the production of methanol but in the production of polyester fibre. That position is undisputed*. Therefore, it appears that the Tribunal erred when it held that the appellants were not entitled to a part of the credit of duty since ethylene glycol when it interacts with DMT also gives rise to methanol. This construction would frustrate the object of exemption if something which evidently arises out of the interaction. Even prior to amendment to notification No. 201/79 with effect from 11-4-87, the only situation where the credit of the duty paid on the inputs could be denied was only where the final products were wholly exempt from the duty of excise or chargeable to nil rate of duty. In the present case, the excisable goods, namely, polyester fibre were not wholly exempt from duty nor chargeable to nil rate of duty. It cannot be read in the notification that the notification would not be available in case non-excisable goods arise during the course of manufacture. In fact, the Tribunal seems to have erred in not bearing in mind that exemption notification was pressed in service in respect of polyester fibre which is excisable goods and not in respect of methanol which arises as a by-product as a part and parcel of chemical reaction. It appears further on a comparison of the Rule 56A and the Notifn. No. 201/79 that these deal with the identical situation*

22. In our opinion , the same analogy

> ***and reasoning would apply when the methanol arises as a result of chemical reaction and not as a result of any by-product. In the instant case, the methanol was non-excisable. Just because methanol arises as a part and parcel of the chemical reaction during the process of manufacture, it cannot be said that methanol was not used in the manufacture of polyester fibre****. The intention of the Government is evident furthermore, from the trade notice of Pune Collectorate No. 31/81. The Tribunal, therefore, should have taken into consideration the trade notice for interpretation of exemption Notifn. No. 201/79, which was para materia with Rule 56A."*

Thus, the issue whether the LPG is byproduct or otherwise has become academic and need not required to be decide.

In the result this Appeal fails and is hereby dismissed.

(J. B. PARDIWALA, J)

(NISHA M. THAKORE,J)

Y.N. VYAS