

CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
West Zonal Bench AHMEDABAD

COURT NO. 3

Appeal Nos. E/10276-10281/2016, E/10686, 10736-10739/2017-DB

[Arising out of Order-in-Original No OIO-SUR-EXCUS-002-COM-009-010-011-15-16 dated 30.10.2015 and OIO-SUR-EXCUS-002-COM-061-16-17 dated 09.12.2016 passed by Commissioner of Central Excise & ST, Surat]

M/s. Oil and Natural Gas Corporation Limited : **Appellant**

vs.

Commissioner of Central Excise & ST, Surat : **Respondent**

Appearance:

Shri V. Sridharan, Sr. Advocate and Shri Anand Nainawati and Shri Jigar Shah,
Advocates for the Appellant

Shri Sameer Chitkara, Additional Commissioner (AR) for the Respondent

CORAM:

Hon'ble Mr. Ramesh Nair, Member (Judicial)

Hon'ble Mr. Raju, Member (Technical)

Date of Hearing : 27.12.2018

Date of Decision : 14.03.2019

Final Order No. A/10510-10520 / 2019

Per : Raju

These appeals have been filed by M/s. Oil and Natural Gas Corporation Limited (ONGC Limited for short) against denial of Cenvat credit on the input services utilized for the drilling activities undertaken at Mumbai offshore fields.

2. Ld. Counsel pointed out that Appellants is engaged in the manufacture and sale of petroleum products. This Unit has been assigned Central Excise Registration for manufacturing Naphtha, Lean Gas, Propane, LPG, SKQ/ATF, HSD and Sulphur which are all excisable goods. The raw materials required for the production of the above said products are Natural Gas and associated condensate which are acquired from the gas fields of Mumbai offshore through sub-sea trunk pipelines. Hazira plant separates different products by treating, condensing and fractionating the raw sour natural gas and condensate received from Gas wells of Bassein and Satellite (herein after referred as 'B&S') fields of Mumbai Offshore. B&S gas is called sour gas and condensate is sour condensate as it contains Hydrogen Sulphide (H₂S) and Carbon Dioxide (CO₂) which is being treated at Hazira plant. Oil and associated gas from Oil fields of Mumbai offshore is being processed at Uran plant. Hazira plant receives sour gas from B&S gas field of Mumbai Offshore and produces the following products by processing/ fractionating gas/condensate:

- (a) Liquefied Petroleum Gas(LPG)
- (b) Naphtha
- (c) Superior Kerosene Oil(SKO)
- (d) High Speed Diesel(HSD)
- (e) Sulphur
- (f) Propane(C₂)
- (g) Natural Gas
- (h) Aviation Turbine Fuel (ATE)

All the above mentioned products are excisable. Out of these, some quantity of LPG is cleared and sold for use by domestic consumers, whereas SKO is cleared and sold for onward sale to domestic consumers through the Public Distribution System, are exempted from Central Excise duty. The residual gas (after removing of the above products) largely comprising of methane, is exempted from levy of Central Excise duty. The Unit clears a part of LPG for industrial use by paying applicable Central Excise duty and part for domestic use. Similarly, sulphur and propane are cleared on payment of Central Excise duty. However Propane which is captively consumed is exempt from Excise duty. Naptha, attracting Central Excise duty, is partially exported under bond. Rest of Naptha is cleared on payment of applicable Central Excise duty. The Unit thus manufactures both exempted and dutiable products. Appellants found Gas deposits in Bassein and Satellite (B&S) fields of Mumbai Offshore. This field produces only sour Gas i.e. gas containing H₂S, CO₂ and other impurities. Therefore, B&S gas is called as sour gas and condensate is sour condensate as it contains Hydrogen Sulphide (H₂S) and Carbon Dioxide (CO₂). H₂S and CO₂ necessarily have to be removed from the gas to make it saleable. Appellant constructed offshore platform for initial processing of sour gas and Hazira Plant for the final processing of sour gas before sale. The entire quantity of sour gas extracted from BPA & BPB platforms is transported to Hazira plant and no gas is sold from the Processing Platforms. The Hazira Unit was

created specifically for processing of sour natural gas and its condensate which arises during the transportation of natural gas through sub-sea high pressure process pipeline from Bombay offshore to Hazira. The H₂S and CO₂ are not removed at the Process Platforms. The place where H₂S and CO₂ are removed from the gas is known as Gas Sweetening Unit at Hazira. The Gas Terminal at Hazira receives a mixture of sour gas and gas condensate through high pressure pipeline from Mumbai offshore. The gas and condensate are separated in the slug catcher and sent to Gas Sweetening Unit (GSU) and Condensate Fractionating Unit (CFU), respectively. In view of the above processes resulting in production of excisable products viz. HSD, SKO, LPG, ATE, Naphtha, Propane, Natural gas etc. start at the gas wells of B&S gas field of Mumbai Offshore and are carried out in different stages at Well-heads, Process Platforms and are completed at the Hazira plant, where the excisable products (both exempt and dutiable) finally emerge as visible marketable products. The entire production process being a continuous and integrated process, the services availed at any of the area of operation, namely, Well-heads, Process Platforms, Pipelines, Vessels, Hazira Plant, administrative offices at Mumbai etc., have been availed in or in relation to production/manufacture of the excisable products referred above. The processes resulting in production of excisable products viz. Propane(C₃) LPG(C₃C₄), Naphtha, Natural Gas etc start at the oil wells and are carried out in different stages at Well-heads,

Well Platforms, Process Platforms and are completed at the Hazira plant, where, the products referred finally emerge as visible marketable products. The entire production process is an integral whole. The services availed at any of the area of operation, namely, Well-heads, Well Platforms, Process Platforms, Pipelines, Vessels, Hazira Plant, administrative offices at Mumbai etc., have been availed in or in relation to production/manufacture of the excisable products referred above.

3.1. Ld. Counsel submits that since the Appellants are manufacturer of dutiable and exempted goods, therefore they take credit on all input services specified under Rule 6(5) of the Cenvat credit Rules, 2004 which are commonly used in the manufacture of dutiable and exempted goods. In respect of services other than those specified under Rule 6(5), credit in proportion to the dutiable turnover is availed. Ld. Counsel submits that all ISDs while distributing the credit to Hazira Plant, have intimated the Superintendent having jurisdiction over the ISD premises vide letter dated 31 .03.2009 about the fact of distribution of credit and nexus of the services with the manufacture of goods.

3.2. The following show cause notices were issued to the Appellants proposing to demand Cenvat credit availed by Appellants on the basis of invoices issued by the ISDs.

- (a) Show cause notice dated 14.03.2014, for the period February 2013 to August 2013 for demanding duty of Rs. 84,00,32,623/-.
- (b) Show cause notice dated 23.05.2014, for the period September 2013 to February 2014 for demanding duty of Rs. 59,82,12,591/-.
- (c) Show cause notice dated 10.03.2015, for the period March 2014 to November 2014 for demanding duty of Rs. 35,62,54,292/-.

Ld. Counsel submits that the credit was sought to be denied on the ground that the Appellants were not eligible to avail credit of service tax distributed by ISDs on the reasons mentioned in the cause notice. The show cause notices alleged that the Cenvat Credit distributed by the ISDs pertains to input services availed and used exclusively at the oil fields of Mumbai offshore. It alleged that Crude oil and natural gas were produced / manufactured at Mumbai offshore. The Show cause notices consider the crude oil and natural gas as final products and state that crude oil and natural gas are exempted excisable goods therefore, Cenvat credit of services used at Mumbai Off shore is not admissible. The show cause notices also alleged that input service credit was also not admissible for the reason that the services had no nexus with the manufacture at Hazira Plant because the services have been used exclusively in Mumbai Offshore prior to transportation of inputs i.e. Crude Oil and Natural gas to the onshore Plant. The show cause notices also stated that merely because the

manufacturer of the inputs and the final product are the same person/group/company it cannot be said that the services used for manufacture of inputs are input services for the final products manufactured by using the said inputs at the other site of the same manufacturer. The show cause notices further alleged that the units of ONGC were located at separate locations and are in separate jurisdictions and hence it cannot be held that services used at one unit are Input Service for the other.

3.3 The Ld. Counsel further argued that a show cause notice dated 08.04.2010 was issued to the Appellant's Uran Unit on the same ground as to the wrongful availment of Cenvat credit by Appellant's Uran Plant which was distributed by the five ISD's of M/s. ONGC, Mumbai Offshore on 'input services' availed of and used exclusively at the oil fields of Mumbai Offshore. It was alleged by the Department that since crude oil and natural gas are exempted from excise duty, Cenvat credit of services used at Mumbai Offshore was not admissible to Appellant's Uran Plant. The lower authorities had passed the order against the Appellants. The Tribunal vide Order dated 29.12.2012 confirmed the demand of duty and disallowed Cenvat credit amounting to Rs. 40.57 crores. An Appeal was preferred before the Hon'ble High Court of Bombay by the Appellants. One of the issues decided by the Hon'ble High Court was whether the Appellate

Tribunal was right in holding that the Appellants are not eligible to Cenvat credit of service tax paid on input services received by the Appellants even on a pro-rata basis for payment of excise duty on dutiable final products solely on the finding that crude oil and natural gas are exempted but saleable/marketable in themselves. The Hon'ble High Court vide order dated 01.03.2013 answered the issue in favour of the Appellants. The Hon'ble High Court of Bombay has held as under:-

“14. Now, in the present case, ONGC is a manufacturer both of dutiable and exempted products. Crude oil as well as natural gases are exempted products. The Tribunal has held against the Appellant in regard to its entitlement to avail of input service on the ground that crude oil at Mumbai Offshore is in itself a saleable commodity since it is transferred or sold in part to other purchasers at Mumbai Offshore. According to the Tribunal, the input services are entirely being used in the manufacture of crude oil/natural gas both of which are exempted from duty and that in consequence the Appellant is not entitled to Cenvat credit. The Appellant, as a manufacturer of exempted products would not be entitled to Cenvat Credit on such quantity of input service which is used in the manufacture of exempted goods, this being the plain stipulation contained in rule 6(1). This is subject to Rule 6(5) which has an over-riding provision which allows the availment of Cenvat credit in respect of certain specified taxable services unless they are used exclusively in or in relation to the manufacture of exempted goods. But the point to note is that merely because the Appellant manufactures exempted goods, that would be no justification to disallow to it the benefit of availing of Cenvat credit on that quantity of input service which is utilised in or in relation to the manufacture of dutiable final products. As we have noted earlier, the definition of the expression ‘input service’ is cast in broad terms. The expression “input service” means any service used by the manufacturer, whether directly or indirectly or in or in relation to the manufacture of final products. It is impossible to accept the hypothesis that would assert, that input services that are utilized by the Appellant in or in relation to the process of manufacture that takes place at Mumbai Offshore is not a service that is used by the manufacturer in or in relation to the manufacture of dutiable final products. The dutiable final products that are manufactured by the Appellant at its Uran plant are fundamentally premised upon the manufacturing process which commences at Mumbai Offshore. There can be no manner of doubt that the input services which go into the process of production at Mumbai Offshore meet the description of services that are utilised by the manufacturer directly or indirectly in or in relation to the manufacture of dutiable final products. The manufacture of the dutiable final products cannot take place without the process in question. To accept the contention of the

Revenue would be to completely ignore the implication of the words “used by the manufacturer, whether directly or indirectly, in or in relation to the manufacture of final products.” Such a construction as proposed by the Revenue is impermissible. These words used in the subordinate legislation fulfill the statutory object and purpose of presenting a cascading effect and burden of duty. They must be given their plain and natural meaning. At the same time, it would be necessary to clarify that Cenvat credit can be availed of only on that quantity of input service which is used in the manufacture of dutiable goods.

17. For these reasons, we have come to the conclusion that the Tribunal was in error in coming to the conclusion that the Appellant was dis-entitled to the benefit of Cenvat credit in respect of the input services used in or in relation to the manufacture of dutiable final products on the ground, as the Tribunal held, that crude oil which is subject to a further process of manufacture at the Uran plant for the production of dutiable final products is exempted from central excise duty. ONGC admittedly also produces dutiable final products. The production of those dutiable products is possible only on the continuous supply of crude oil. We, however, clarify that as a manufacturer of both dutiable and exempted goods, the Appellant would be required to comply with the discipline and rigour of rule 6 and would be entitled to take Cenvat credit only on that quantity of input service which is used in the manufacture of the ultimate dutiable product. We accordingly answer question (a) in the negative.”

It was submitted that following the above order of the Hon’ble Bombay High Court, the Commissioner of Central Excise, Raigad, vide Order-in-Original No. 82- 83/MAK(82-83)COMMR/RGD/13-14 dated 17.10.2013, dropped the demand pertaining to the Appellant’s Uran plant for the same issue. Further, the Hon’ble CESTAT, Ahmedabad, vide Order No. A/12220-12243/2014 dated 24.11.2015 allowed 25 appeals of the Appellants pertaining to the same issue. He submits that the Ld. Commissioner has completely ignored the same and proceeded to confirm the demand in gross violation of principles of judicial discipline. He argued that the impugned order passed is without application of mind and without appreciating the facts as well as the submissions of the appellants.

3.4 Ld. Counsel argued that the Commissioner placed reliance on the judgment of the Hon'ble Gujarat High Court in the case of B.G. Exploration & Production India Limited. He submits that the facts of the case decided by the Hon'ble High Court of Gujarat are significantly different in following respects:-

- (a) That the decision was rendered in the context of sales tax.
- (b) In this case, a specific Production Sharing Contract (PSC) was entered into between the Government of India, British Gas Exploration and Production India Limited. (BGEPIIL), Reliance Industries Limited (RIL) and Oil and Natural Gas Corporation Limited (ONGCL) for exploration/production of petroleum from Panna Mukta field. GAIL was appointed as the nominee of the Govt. of India.
- (c) In case of PM JV, the PSC provides that gas has to be sold to the Govt. or its nominee at offshore.
- (d) In case of PM JV, the producer is M/s BSEPIL and the Appellants are only a consortium member.
- (e) M/s BGEPIIL as a producer of natural gas from PM JV field discharges tax liability such as royalty etc. as an assessee where the Appellants are not an assessee.
- (f) The Hon'ble High Court has held that the sale takes place in offshore based on the provisions of PSC of PM JV.

(g) The gas extracted from PM JV field is not used for manufacturing of any excisable product at ONGC, Hazira but is wholly sold to Govt. of India or its nominee.

(h) The present case under dispute pertains to production of sour gas from the nominated field where there is no PSC. Here the delivery point is in terms of gas sale agreement. In the case under dispute, the same is in Hazira and Sales Tax/ VAT is payable on it. There is no dispute regarding place of delivery and applicability of VAT in such case.

4.1 Ld. AR for the Revenue argued that the decision of Hon'ble High Court of Gujarat in the case of *British Gas Exploration and Production India Limited* clearly held that the Gas manufactured by Mumbai Offshore is a marketable commodity. He argued that it is a fact that the Gas generated at Mumbai High, which is transported to Hazira, is not excisable. He argued that in these circumstances, no credit of service utilised in respect of operations at Mumbai High could be availed, since the product generated at Mumbai High was not excisable. Ld. AR argued that the submissions made before the Hon'ble High Court of Gujarat and in the instant case are contradictory. He argued that, before the Hon'ble High Court it was argued that the natural gas includes sour gas; that the natural gas can be ascertained and appropriated at the Mumbai offshore; that ONCG Limited

pipelines are used for transportation purpose; that sour gas and sweet gas are more or less one and that as per the demand of Gas Authority of India Limited (GAIL), they have to sell sweetened gas at the sweetening process available at their Hazira Plant and the process of sweetening of sour gas, carried out at their Hazira Plant, does not amount to manufacture as there is not much change in the basic characteristics in these gases. Whereas, in their submissions in the instant case, they stated that Natural Gas and Sour Gas are two distinct items; that no natural gas is produced at Mumbai Offshore and only sour gas is produced; that sour gas is an intermediate product for the manufacturing of final goods at their Hazira Plant; that's sour gas is very toxic and cannot be marketed in such form and that transmission lines from Mumbai offshore to Hazira Plant makes them an integrated manufacturing unit. He argued that the Hon'ble High Court of Gujarat came to the following conclusion :-

“On a conjoint reading of the Production sharing contract and Interim sales and purchase agreement, it is apparent that was agreed to be sold and purchased was Natural Gas.”

4.2. Ld. AR argued that the contention of the appellant that the Gas generated at Well Head Mumbai high is not saleable commodity, is therefore, incorrect. He also submits that in the above circumstances, the claim of the appellant that Gas generated as an intermediate product, is also incorrect. Ld. AR argued that the process of sweetening is also carrying

out at the platform at Mumbai High and therefore, it cannot be said that the sweetening plant located at Hazira is an integral part of the process. He further submitted that Mumbai High has a separate Central Excise registration for carrying out the manufacturing activity and therefore, credit in respect of services availed at Mumbai High would not be admissible for transportation to the plant located at Hazira. Ld. AR further pointed out that Crude Oil and Natural gas are exempted products and Mumbai High platform of ONGC Limited are engaged exclusively in the manufacture of excisable goods and are also a separate and distinct unit. Ld. AR pointed out that Rule 7 of Cenvat Credit Rules clearly prescribes that Cenvat credit of service tax attributable to service used in unit exclusively engaged in the manufacture of exempted goods or providing exempted services, shall not be distributed. He argued that in the instant case, the Mumbai High platform is separately registered unit, which is engaged in the production of Crude Oil and Gas which are exempted commodity. Thus, Cenvat credit on input services availed for the activities undertaken at Mumbai High cannot be distributed.

5. We have gone through the rival submissions. The relevant provisions of law for distribution of credit is as under:-

“Rule 7. Manner of distribution of credit by input service distributor. –

The input service distributor *may distribute* the CENVAT credit in respect of the service tax paid on the input service to its manufacturing units or units providing output service, subject to the following conditions, namely :-

- (a) the credit distributed against a document referred to in Rule 9 does not exceed the amount of service tax paid thereon;
- (b) credit of service tax attributable to service used in a unit exclusively engaged in manufacture of exempted goods or providing of exempted services shall not be distributed;
- (c) credit of service tax attributable to service used wholly by a unit shall be distributed only to that unit; and
- (d) credit of service tax attributable to service used in more than one unit shall be distributed *pro rata* on the basis of the turnover during the relevant period of the concerned unit to the sum total of the turnover of all the units to which the service relates during the same period.”

The appellants have distributed credit availed by them in respect of services availed at their offshore facility which is separately registered under Central Excise. The credit was also distributed to their plant located at Raigad. In the case of plant located at Raigad, the matter went up to the Hon'ble High Court of Bombay. The Hon'ble High Court vide order reported at *2013 (32) STR 31 (Bom.)* held that the said distribution of credit cannot be denied.

The Hon'ble High Court observed as follows:-

“14. Now, in the present case, ONGC is a manufacturer both of dutiable and exempted products. Crude oil as well as natural gases are exempted products. The Tribunal has held against the Appellant in regard to its entitlement to avail of input service on the ground that crude oil at Mumbai Offshore is in itself a saleable commodity since it is transferred or sold in part to other purchasers at Mumbai Offshore. According to the Tribunal, the input services are entirely being used in the manufacture of crude oil/natural gas both of which are exempted from duty and that in consequence the Appellant is not entitled to Cenvat credit. The Appellant, as a manufacturer of exempted products would not be entitled to Cenvat credit on such quantity of input service which is used in the manufacture of exempted goods, this being the plain stipulation contained in Rule 6(1). This is subject to Rule 6(5) which has an overriding provision which allows the availment of Cenvat credit in respect of certain specified taxable services unless they are used exclusively in or in relation to the manufacture of exempted goods. But the point to note is that merely because the Appellant manufactures exempted goods, that would be no justification to disallow to it the benefit of availing of Cenvat credit on that quantity of input service which is utilised in or in relation to the manufacture of dutiable final products. As we have noted earlier, the definition of the expression “input service” is cast in broad terms. The expression “input service” means any service used by the manufacture, whether directly or indirectly or in or in relation to the manufacture of final products. It is impossible to accept the hypothesis that would assert, that input

services that are utilized by the Appellant in or in relation to the process of manufacture that takes place at Mumbai Offshore is not a service that is used by the manufacturer in or in relation to the manufacture of dutiable final products. The dutiable final products that are manufactured by the Appellant at its Uran plant are fundamentally premised upon the manufacturing process which commences at Mumbai Offshore. There can be no manner of doubt that the input services which go into the process of production at Mumbai Offshore meet the description of services that are utilised by the manufacturer directly or indirectly in or in relation to the manufacture of dutiable final products. The manufacture of the dutiable final products cannot take place without the process in question. To accept the contention of the Revenue would be to completely ignore the implication of the words "used by the manufacturer, whether *directly or indirectly, in or in relation to* the manufacture of final products." Such a construction as proposed by the Revenue is impermissible. These words used in the subordinate legislation fulfill the statutory object and purpose of presenting a cascading effect and burden of duty. They must be given their plain and natural meaning. At the same time, it would be necessary to clarify that Cenvat credit can be availed of only on that quantity of input service which is used in the manufacture of dutiable goods.

17. For these reasons, we have come to the conclusion that the Tribunal was in error in coming to the conclusion that the Appellant was disentitled to the benefit of Cenvat credit in respect of the input services used in or in relation to the manufacture of dutiable final products on the ground, as the Tribunal held, that crude oil which is subject to a further process of manufacture at the Uran plant for the production of dutiable final products is exempted from Central Excise duty. ONGC admittedly also produces dutiable final products. The production of those dutiable products is possible only on the continuous supply of crude oil. We, however, clarify that as a manufacturer of both dutiable and exempted goods, the Appellant would be required to comply with the discipline and rigour of Rule 6 and would be entitled to take Cenvat credit only on that quantity of input service which is used in the manufacture of the ultimate dutiable product. We accordingly answer question (a) in the negative."

The impugned order seeks to differentiate the said order of Hon'ble High Court of Bombay on the strength of order passed by Hon'ble Gujarat High Court in the case of M/s. BG Exploration and Production India Limited, M/s. Reliance Industries Limited and the appellant themselves. The issue involved in that case was about leviability of sale tax on the material sold from such offshore locations. Ld. Commissioner has sought to differentiate the order of Hon'ble High Court of Bombay on the ground that while appellants had contended that the gas generated at the well head at Mumbai High is not salable, Hon'ble Gujarat High Court has held otherwise

in case of *BG Exploration and Production India Limited*. We are of the opinion that this fact is not relevant for the purpose of distinguishing the decision of Hon'ble High Court of Bombay which is on an identical issue. The perusal of the relevant Rule 7 of Cenvat Credit Rules, 2004 shows that word 'sale' does not appear anywhere in the Rule. In fact the whole Rule is premised on the use of services in or in relation to manufacture of finished products where the invoices are received at a place different from the manufacturing facility for the reason that such services are availed commonly by different units/ manufacturers.

6. In view of the above, we find that distinction made by the Commissioner on the basis of this fact is misplaced. The ratio of the decision of Hon'ble High Court of Bombay is squarely applicable to the present case. Consequently, relying on the aforesaid decision of Hon'ble Bombay High Court, the appeals are allowed.

(Order pronounced in the open court 14.03.2019)

Raju
Member (Technical)

Ramesh Nair
Member (Judicial)