Customs, Excise & Service Tax Appellate Tribunal,
West Zonal Bench : Ahmedabad

REGIONAL BENCH - COURT NO. 3

EXCISE Appeal No. 413 of 2010

[Arising out of Order-in-Original No OIO-46/COMMR/2009 dated 29.11.2009 passed by Commissioner of Central Excise & ST, Rajkot]

Sumangal Glass Industries Pvt Limited **.... Appellant**
Plot No. 618-620, National Highway 8-A, Village-
Samakhiyali, Kutch, Gujarat

VERSUS

Commissioner of Central Excise & ST, Rajkot **.... Respondent**
Central Excise Bhavan, Race Course Ring Road
Income Tax Office, Rajkot, Gujarat-360001

APPEARANCE :

Shri S.J. Vyas and Shri Prakash Shah, Advocates for the Appellant
Shri Sanjiv Kinker, Superintendent (Authorised Representative) for the Respondent

CORAM: HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)
HON'BLE MR. RAJU, MEMBER (TECHNICAL)

FINAL ORDER NO. A/12498 / 2019

DATE OF HEARING : 12.12.2019
DATE OF DECISION: 20.12.2019

RAMESH NAIR :

The brief facts of the case are that the appellant are engaged in the manufacture of excisable goods falling under Chapter 70 of the first schedule of Central Excise Tariff Act, 1985 and holds Central Excise registration. They are also availing area based exemption Notification No. 39/2001-CE dated 31.07.2001. The appellant procured various capital goods during the year 2005-06 involving Cenvat credit of Rs. 75,55,267/-. Vide letter No. nil dated 11.01.2008, they informed the department that they had claimed depreciation of said capital goods under Section 32 of the Income Tax Act, 1961 and they are not taking/availing Cenvat credit in terms of Cenvat Credit Rules, 2004. Further, the appellant vide letter number nil dated 09.01.2008, submitted to jurisdictional Range Superintendent of Central Excise informed that they have taken the entire credit during the month of October 2007 and submitted that they have filed revised Income Tax return to the effect that depreciation has not been claimed on account of said capital goods procured in the year 2005-06.

2. On the basis of above information received by the department, a show cause notice was issued to the appellant wherein it was proposed to deny Cenvat credit availed on capital goods under Rule 14 of Cenvat Credit Rules, 2004 read with sub-Section (1) of Section 11A of Central Excise Act, 1944. It was also proposed to demand interest and imposition of penalty. The said show cause notice was adjudicated by the jurisdictional Commissioner vide the impugned order. The ground for denial of credit is that once the appellant have availed the depreciation, thereafter even by filing a revised return they are not entitled for the Cenvat credit, in terms of Rule 4 sub-rule (4) of Cenvat Credit Rules, 2004. Out of total credit denied, an amount of Rs. 2,72,769/- was related to building. Even though the appellant made a submission that this relates to credit of service tax on construction of factory building, the Learned Commissioner denied the Cenvat credit on the ground that said credit taken under the capital goods account, the same is not eligible for Cenvat credit. Being aggrieved by order-in-original which is impugned herein, the appellant filed the present appeal before this Tribunal.

3. Shri S.J. Vyas, Learned Counsel appearing on behalf of the appellant submits that the capital goods in question were received by the appellant during 2005-06 and the credit was taken in the month of October 2007. The depreciation was claimed in the Financial Year 2005-06 which was reversed and the revised Income Tax return for the assessment year 2007-08 has been filed after returning the depreciation. As per the revised return, the situation became as if no depreciation was claimed by the appellant. Accordingly, on this ground, the Cenvat credit cannot be denied. He submits

that the Adjudicating Authority also denied Cenvat credit of capital goods on the ground that the appellant have availed 100% of Cenvat credit in a Financial Year whereas, as per sub-rule (2)(a) of Rule 4 of Cenvat Credit Rules, 2004, the appellant was entitled to avail only 50% of the total Cenvat credit. In this regard, he submits that the appellant have not availed Cenvat credit during the year 2005-06 when the capital goods were received. They have taken entire Cenvat credit in October 2007 which falls under Financial Year 2007-08. Since the credit was not taken in the financial year of receipt of goods and the same was taken in subsequent financial year, the appellant was entitled for 100% credit. Therefore, on this ground also the Adjudicating Authority has grossly erred in disallowing the Cenvat credit.

4. As regards the dispute on the Cenvat credit of an amount of Rs. 2,72,769/- towards the capital goods head in balance sheet, it is his submission that this credit is against the service tax paid on the construction of factory building which is admissible in terms of rule 2(l) of Cenvat Credit Rules, 2004. Merely because the credit was taken under the head of capital goods, which is only a clerical error, benefit of Cenvat credit of service tax paid on construction of factory building, cannot be denied. He also submits that during the year of claiming depreciation on the capital goods in question and also in the subsequent Financial Years, the appellant was suffering a heavy loss which is more than the Cenvat credit involved. Therefore, even if it is contended that the appellant have claimed the depreciation, the same will not prejudice the Revenue for the reason that claiming of depreciation will not have any impact on the balance sheet as at the most, it will reduce the loss. But, since no profit accrued, no benefit of depreciation has gone to the appellant. Therefore, on this count also Cenvat credit cannot be denied.

In support of his submission, he placed reliance on the following judgments:-

(a) Progressive Systems vs. CCE, Bangalore – 2010 (251) ELT 536 (Tri. Bang.)

(b) CCE, Bangalore vs. Progressive Systems – 2011 (267) ELT 473 (Kar.)

(c) CST, Ahmedabad vs. Bharati Tele Ventures – 2018 (363) ELT 1068 (Tri. Ahmd.)

(d) Nidhi Pipes Limited vs. CCE, Chandigarh-II – 2016 (343) ELT 1014 (Tri. Chand.)

(e) CCE, Tirupati vs. Mangal Precision Products – 2017 (346) ELT 312 (Tri. Hyd.)

(f) CCE, Surat vs. Nish Fibers – 2010 (257) ELT 81 (Guj.)

(g) Steelman Rolling Mills – 2018 (5) TMI 1407 (Tri. Chand.)

5. Shri Sanjiv Kinker, Learned Superintendent (Authorised Representative) appearing on behalf of Revenue reiterates the findings of the impugned order. He further submits that as per rule 4 (4) of Cenvat Credit Rules, 2004, once the depreciation has been claimed there is no option left for the assessee except to forego Cenvat credit in respect of such capital goods on which depreciation was claimed. He placed reliance on the judgment of this Tribunal reported at *Gujarat Alkalies & Chemicals Limited vs. CCE, Vadodara – 2010 (262) ELT 753 (Tri. Ahmd.)*.

6. We have carefully considered the submissions made by both sides and perused the record. We find that the facts of the case are not much under dispute inasmuch as the appellant have received the capital goods in the year 2005-06; they, though claimed depreciation under Section 32 of

Income Tax Act on the said capital goods but the said depreciation was returned by filing a revised Income Tax return in the subsequent Financial Year; Cenvat credit to the tune of Rs. 2,72,769/- is related to service tax paid on the construction of factory building, however, on the said building the appellant had claimed depreciation. Keeping the above facts in view, we find that appellant during the relevant Financial Years i.e. 2005-06 when the capital goods were received and in the Financial Year 2006-07 when the depreciation was claimed, the appellant were suffering losses therefore, even though the depreciation was claimed it does not have any effect under the Income Tax. The objective of non-claiming of depreciation is to avoid double benefit i.e. one is the benefit of Cenvat credit and the other is depreciation in Income Tax which reduce the income tax liability. Since the appellant had no profits in relevant Financial Years, even claiming of depreciation did not lead to double benefit. We further find that even though initially the depreciation was claimed and subsequently the same was returned by filing revised Income Tax return, the situation became as if no depreciation was claimed. Hence, compliance of Rule 4 (4) of Cenvat Credit Rules, 2004 has been made. An identical issue has been considered by the Hon'ble Gujarat High Court in the case of Nish Fibres (supra), wherein the Hon'ble Court passed the following order:-

> "**9.** We have considered the submissions made by Mr. R.J. Oza, the learned Senior Standing Counsel and perused the order under appeal as well as all the three decisions of the Tribunals, which are referred to hereinabove.
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> **10.** The moot question for our consideration is as to whether the respondent-assessee has, in fact, claimed the depreciation and whether such claim has been allowed by the department. If the claim of depreciation is allowed then in that case the assessee cannot claim Modvat credit under the Central Excise Act. However this very aspect has been factually verified by the Commissioner (Appeals). It is specifically observed that in order to confirm the authenticity of the certificate, the predecessor of the Commissioner (Appeals) wrote a letter to the Commissioner of Income Tax, Surat with the request to confirm the authenticity of the said certificate, and in reply to that letter, the Commissioner of Income Tax has certified the authenticity of the said certificate. He, therefore, observed that the appellant has not availed depreciation on the value representing the amount of duty under the Income Tax Act, and therefore, he has not

endorsed the view of the adjudicating authority. He has also observed that the condition for availment of modvat credit on capital goods is complied with by corrective method, even if at a later stage, and hence, the substantial benefit should not be denied. The CESTAT has also taken the same view.

11. So far as the judgment relied upon by Mr. R.J. Oza, i.e. *M/s. Narayan Krishna Spinners Ltd*. v. *Commissioner of C. Ex., Coimbatore* (supra) is concerned, the facts are very clear. It is specifically observed therein that the depreciation claim of Rs. 40,626/- has not been withdrawn by the said appellant. The mis-declaration by the appellant under Rule 57-T was crystal clear. The Tribunal has therefore, taken the view in that case that the facts and circumstances are substantially different from those of *Alcobex Metals Ltd*. (supra).

12. It is important to note here that, in the case of *C.C.E Coimbatore* v. *Veejay Lakshmi Engineering Works Ltd*. (supra), the Tribunal has, in terms, held that as the Respondent assessee had withdrawn the inadmissible claim for depreciation in the I.T. Return, though not immediately, by such action they absolved of the charge that they had availed the benefit of capital goods credit and claimed depreciation for the same amount simultaneously. The case of *M/s. Narayan Krishna Spinners Ltd.* v. *Commissioner of C. Ex., Coimbatore* (supra) was relied upon by the Revenue. The Tribunal has however held that the fact of the decision cited are not comparable to the facts of the instant case, and hence, ultimately, the Tribunal has dismissed the appeal filed by the Revenue. Moreover, in that decision, the Tribunal has relied on a decision in the case of *Chandra Praba Cottage Spinning Mills* v. *CCE, Salem*, 2006 (203) E.L.T. 578 (Tri. Chennai), wherein the demand of Cenvat credit and penalty imposed on the appellants had been vacated.

13. In view of the above discussion, we are of the view that the position is well settled in law. The whole idea is that the assessee should not be permitted to claim double benefit, i.e. under the Income Tax Act as well as Central Excise Rules. Admittedly, the appellant has not claimed the benefit under the Income Tax Act and the claim regarding depreciation was withdrawn by filing the revised return and that revised return has been accepted. Considering these undisputed facts, there is no reason to deny the Modvat credit to the respondent assessee. We therefore do not find any substance in this appeal and no substantial question of law arises out of the order of the Tribunal. The appeal therefore stands dismissed.**"**

7. In view of the above jurisdictional High Court judgment, even though the depreciation and Cenvat credit was availed simultaneously but on filing of revised return, withdrawing the depreciation at a later stage, provide the Cenvat credit entitlement. The ratio of above judgment is applicable in the facts of the present case. On the similar issue, CESTAT Chennai in the case of *Sathyam Auto Engineering* (supra), dealing with the identical facts as in the present case, allowed the Cenvat credit on capital goods. CESTAT Chennai also had occasion to deal with identical issue in the case of *Steelman Rolling Mills* (supra), wherein the facts of the case is that though

the assessee had availed Cenvat credit and claimed depreciation simultaneously, on being pointed out by the Revenue the assessee had foregone the depreciation in question, the Tribunal held that assessee is entitled to avail Cenvat credit.

8. Considering the above judgments, we are of the view that only because the appellant once claimed the depreciation but subsequently returned the said depreciation by filing the revised return, status of non-claiming of depreciation has been maintained. Accordingly, the appellant have complied with the condition of Rule 4(4) of Cenvat Credit Rules, 2004.

9. As regards the judgment cited by Learned Authorised Representative, in the case of *Gujarat Alkalies & Chemicals Limited* (supra), we find that in the facts of the said case, the appellant claimed depreciation but the same was not returned back by filing any revised return. Therefore, the facts of the said case and that of in the present case are entirely different. Hence, the judgment of *Gujarat Alkalies & Chemicals Limited* is clearly distinguished.

10. As regards the another reason for denial by the Adjudicating Authority that appellant have taken 100% credit instead of 50%, we find that the year of receipt of capital goods is 2005-06, whereas the credit was taken in October 2007. As per Rule 4(4), it is clear provision that part of taking 50% credit is applicable only if Cenvat credit is availed in the year of receipt of capital goods. As per proviso to sub-rule, the assessee is entitled for the credit of remaining 50% in the subsequent Financial Years. That means, in the subsequent year of receipt of capital goods, the appellant is entitled for 100% Cenvat credit. Therefore, on this ground, the denial of Cenvat credit

is not correct and legal. This issue has been considered elaborately by CESTAT Bangalore in the case of *Progressive Systems* (supra) and as per the facts of the said case, the entire credit was availed in 2007-08, the year following receipt of goods, it was held that in terms of Rule 4(2) of Cenvat Credit Rules, 2004, assessee can avail credit upto 50% in the year of receipt of goods and balance in the subsequent Financial Years. There is no prescription that credit of any extent to be availed in the year of receipt of capital goods. Accordingly, the Tribunal held that availment is not inconsistence with legal provisions and the appeal was allowed. This very decision of the Tribunal was challenged by the Revenue before the Hon'ble Karnataka High Court (supra) and the Division Bench of the Hon'ble Court maintained the Tribunal order and dismissed the Revenue's appeal. In view of this settled position by the Hon'ble Karnataka High Court, availment of Cenvat credit by the appellant to the extent of 100% in the subsequent year of receipt is absolutely legal and correct.

11. As regards the dispute about Cenvat credit of Rs. 2,72,769/-, we find that the Adjudicating Authority denied the Cenvat credit only for the reason that appellant have claimed depreciation on building. We find that the appellant even though claimed the depreciation on the building which was subsequently returned, the credit was taken in respect of service tax paid on construction of factory building, as submitted by the appellant. Cenvat credit in respect of setting-up of factory building is clearly covered in terms of inclusion clause of definition of Input Services as provided in Rule 2(l) of Cenvat Credit Rules, 2004. Merely because the appellant have availed Cenvat credit showing it of building as capital goods, admissibility of Cenvat credit of service tax paid on construction of building does not get extinguished. It was held in plethora of judgments by this Tribunal that

merely because the credit was taken under wrong head, the same is not sufficient to deny the credit.

12. As per our above discussion and findings, we are of the view that the appellant have rightly availed the Cenvat credit on capital goods and on construction service. Accordingly, the impugned order is set-aside. Appeal is allowed.

(Pronounced in the open court 20.12.2019*)*

(Ramesh Nair)
Member (Judicial)

(Raju)
Member (Technical)

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