

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

REGIONAL BENCH- COURT NO. 3

Excise Appeal No. 11596 of 2018-DB

(Arising out of OIO-VAD-EXCUS-002-COM-010-20-17-18 dated 26/03/2018 passed by Commissioner of Central Excise, Customs and Service Tax-VADODARA-II)

STYRENIX PERFORMANCE MATERIALS LIMITEDAppellant

(Now IneosStyrolution India Ltd),
Panchamahar,
Panchamahar,
Gujarat

VERSUS

C.C.E. & S.T.-VADODARA-II ...Respondent

1st Floor... Room No.101,
New Central Excise Building,
Vadodara,
Gujarat - 390023

WITH

Excise Appeal No. 12270 of 2018-DB

(Arising out of OIA-MUN-CUSTOM-000-APP-177-180-20-21 dated 22/03/2021 passed by Commissioner of CUSTOMS-AHMEDABAD)

C.C.E. & S.T.-VADODARA-II ...Appellant

1st Floor... Room No.101,
New Central Excise Building,
Vadodara,
Gujarat - 390023

VERSUS

STYRENIX PERFORMANCE MATERIALS LIMITEDRespondent

(Formerly Known AsLanxes Abs Ltd.),
Panchmahals
Panchmahals,
Gujarat

APPEARANCE:

Shri Willingdon Christian, Advocate for the Appellant

Shri S K Mathur, Special Counsel for the Respondent

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

Final Order No. A/ 11134 -11135 /2023

DATE OF HEARING: 15.11.2022
DATE OF DECISION: 03.05.2023

RAMESH NAIR

The issue involved is that whether CVD paid through DEPB Scrip under custom Notification No. 96/2004 dated 17.05.2004 is available as cenvat credit. The case of the department is that as per para 4.3.5 of Exim Policy where CVD is paid through DEPB Scrip no benefit of Cenvat Credit shall be admissible. The CVD payment through DEPB is not duty payment in cash and so the appellant was not eligible to avail cenvat credit debited through DEPB.

1.2 The facts of the case are that during the period from January 2005 to December 2011 the appellant has imported raw material viz. Styrene Monomer and Acrylonitrile and paid customs duty through debit in DEPB in terms of Notification No 96/2004 dated 17.09.2004 and similar such Notification No. 89/2005 – Cus dated 04.10.2005. The said Notification No 96/2004 – Cus dated 17.9.2004 purports to operationalise DEPB Scheme covered by Para 4.3 of the FTP 2004-2009. The said Notification has nothing to do with the erstwhile FTP 2002-07 vide Explanation (i) appended to the said notification. In fact the erstwhile FTP 2002-07 was abandoned midway and it was replaced by the new FTP 2004-09 w.e.f. 31.08.2004. Para 4.3.5 of the FTP 2004-09 expressly provided that CVD paid in cash or through debit under DEPB shall be adjusted as cenvat credit. In fact the erstwhile FTP 2002-07 also came to be amended by DGFT Notification dated 28.01.2004 to provide for allowing cenvat credit of the duty paid through debit under DEPB. However, the appellant were issued various show cause notices all identically worded. The learned Commissioner has dropped the 7 show cause notices whereas remaining 4 show cause notices covering the period from January 2005 to March 2007 (except for the period July 2005 to February 2006) are confirmed for denial of cenvat credit on the ground that the appellant have not submitted any additional evidence which shows that during the relevant period the licences were issued under the new policy. He has further observed that he has no option but to accept the stand of department that the licences were issued under old policy 2002 -07 and therefore , the appellant is not eligible for availment of the cenvat credit of the CVD paid through debit under DEPB.

2. Shri Willingdon Christain, Learned Counsel appearing on behalf of the assessee submits that all the 11 show cause notices contain a categorical admission that the imported goods were cleared under Customs Notification No 96/2004- Cus dated 17.09.2004. The Notification very

categorically provides vide Condition No. (vi) that the importer shall be entitled to avail cenvat credit of the CVD amount debited under DEPB. Consequently, the department cannot interpolate Para 4.3.5 of the EXIM policy 2002-2007 to deny the cenvat credit in sharp contrast with the express enabling Condition no. (vi) of the said Notification. In fact that old FTP 2002-2007 was not even in existence at the time of imports made after January, 2005 as the said old FTP – 2002 -2007 was abolished w.e.f. 31.08.2004.

2.1 He further submits that when the customs have accepted and assessed the CVD payment through debit in DEPB under Notification No. 96/2004- CUS, the question of applying FTP 2002-07 does not arise because the said Notification No. 96/2004 – CUS is applicable only to the DEPB Licences issued under FTP 2004-09 vide Explanation (i) appended to the said Notification. Condition No. (iii) of the said Notification requires the importer to produce the DEPB licence before the Proper Officer of Customs for making the debit entries in DEPB.

2.2 He further submits that even if one presumes that in spite of the Customs Proper Officer having admitted and assessed the imported goods under Notification No 96/2004- CUS the erstwhile FTP 2002-2007 will apply then also the said erstwhile FTP 2002-07 stood amended w.e.f 28.01.2004 such that para 4.3.5 of the said erstwhile FTP 2002-2007 also allowed availment of cenvat credit of CVD paid through debit in DEPB. Admittedly, all the imports covered by the 11 show cause notices were made after January 2005 i.e. much after 28.01.2004, the date of aforesaid amendment of Para 4.3.5 and also much after abolishment of the said FTP 2002-2007 w.e.f. 31.08.2004.

2.3 He further submits that it is undisputed that all the imported goods were duly assessed by the Proper Officer under Notification No.96/2004. There is till date no demand for short payment of Customs Duty paid through debit in DEPB raised by the Customs authorities. Consequently, when the CVD paid through debit under DEPB is accepted and assessed by the Customs Proper Officer, it is a payment of duty in cash as clarified by the Board in its Circular No.26/2007-Cus dated 20.7.2007. As per Rule 3 of the Cenvat Credit Rules, 2004, any duty paid under Section 3 of the Customs Tariff Act is eligible to the importer as Cenvat Credit. Therefore, denial of the Cenvat Credit is not legal and proper on this ground also. He placed reliance on the following judgments:-

- Seshasayee Paper and Boards Ltd.- 2007 (217) ELT 562 (T)
- Aurobindo Pharma Ltd.- 2010 (261) ELT 594 (T)
- Tecumesh Products India P. Ltd.- 2010 (256) ELT 276 (T)

2.4 He also submits that as per following 3 judgments the Hon'ble High Court and CESTAT have negated the Revenue's contention that since licence is issued under previous policy and since the credit was not admissible on CVD paid through debit in DEPB, cenvat credit is not allowed. The Hon'ble High Court and CESTAT have held that such contention is misplaced as EXIM Policy was amended vide DGFT Notification dated 28.01.2004 and that in the Notification No. 96/2004-CUS there is no such condition that debit made in DEPB Licence issued under new FTP only would be eligible for credit and those licences issued under previous policy would not be eligible for cenvat credit.

- CCE Vs. Neel Kanth Rubber Mills.- 2010 (254) ELT 203 (P&H)
- M/s. Havells India Ltd.- 2015 (7) TMI 380-CESTAT
- M/s. Havells India Ltd.- 2015 (325) ELT 840 (Del.)

3. Shri S. K Mathur, Learned Special Counsel appearing on behalf of the Revenue reiterates the grounds of the appeal in respect of the Revenue's appeal and finding of the impugned order in respect of the assessee's appeal.

04. We have carefully considered the submissions made by both the sides and perused the records. The issue to be decided is that whether the duty debit in DEPB script under customs notification no. 96/2004 dated 17.09.2004 is available as cenvat credit. We find that the period involved in the present case is January 2005 to December 2011 during such period notification no. 96/2004-Cus dated 17.09.2004 was prevailing. The relevant para (vi) of the notification reads as under:-

" vi. that the importer shall be entitled to avail the draw back or cenvat credit of additional duty leviable under Section 3 of the said Custom Tariff Act against the amount debited in the said Duty Entitlement Pass Book."

From the above condition, it is explicitly clear that the importer shall be entitled to avail cenvat credit of additional duty against the amount debited in DEPB. It is undisputed that all the bills of entry have been assessed under Notification No. 96/2004-Cus dated 17.09.2004 therefore, CVD debited in the DEPB under the said notification is available for cenvat credit to the

importer. Moreover, the para 4.3.5 of EXIM Policy 2004-09 as on 31.08.2004 reads as under:-

"Normally, the exports made under the DEPB Scheme shall not be entitled for drawback. However, the additional customs duty/excise duty paid in cash or through debit under DEPB shall be adjusted as Cenvat Credit or Duty Drawback as per rules framed by the Department of Revenue."

From the above para 4.3.5 of FTP 2004-09 which was in force during the relevant period of this case i.e. January 2005 to December 2011. The importer is eligible for cenvat credit in respect of additional customs duty paid either in cash or through debit under DEPB therefore, in view of the statutory provision the appellant are entitled for the cenvat credit.

4.1 The Adjudicating Authority contended that the dispute by the revenue that it is not clear that the license were issued under old EXIM Policy of 2000-07 or thereafter, therefore, the cenvat credit cannot be allowed. In this regard, we find that admittedly the import clearances were made during the policy of FTP 2004-09 and under Notification No.96/2004-Cus therefore, irrespective of that fact that the licences were issued prior to introduction of new policy 2004-09 or thereafter it will not make adverse effect about admissibility of the cenvatcredit,so long all the clearances were made after the FTP 2004-09 came into effect.This issue has been considered in the following judgments:-

- CCE Vs. Neel Kanth Rubber Mills.- 2010 (254) ELT 203 (P&H)

"4.In pursuance of the show cause notice, the assessee filed the reply, inter alia, explaining that as per the amended EXIM Policy, vide Notification dated 28-1-2004, the Cenvat credit was admissible to the assessee on the additional duty paid in cash or through debit under the DEPB. According to the assessee, as per Notification No. 96 dated 17-9-2004, the importer shall be entitled to avail the Cenvat credit of additional duty leviable under Section 3 of the Customs Tariff Act (hereinafter to be referred as "the Act") against the amount debited in DEPB. It will not be out of place to mention here that the assessee has stoutly denied all other allegations contained in the show cause notice (Annexure A1), pleaded that they have legally availed the Cenvat credit and prayed for withdrawal of the said notice.

5. The explanation put forth by the assessee did not find favour and the Adjudicating Authority disallowed the Cenvat credit, ordered its recovery alongwith interest and imposed a penalty of Rs. 1 lac, vide order dated 21-2-2006 (Annexure A2). The perusal of the record would reveal that the Assistant Commissioner dropped the proceedings, initiated under the show cause notice and sanctioned the refund claim, vide order dated 31-

5-2006 (Annexure A2/1), the operative part of which is, reproduced as under :-

"1. I drop the show cause notice proceedings initialed against the noticee vide C. No. V(30) D/NK/72/05/13876-77, dated 2-12-2005.

2. I sanction refund claim of Cenvat Credit of Rs. 1,55,599/- (Rs. 1,52,548/- CVD + Rs. 3,051/- Education Cess) to the noticee by way of credit in their Cenvat Credit account.

3. I sanction refund claim of Rs. 15,200/- by way of Cheque on account of interest deposited by the noticee on 20-8-2005."

6. Aggrieved by the order (Annexure A2), the assessee filed the appeal, which was accepted by the Commissioner (Appeals), vide order dated 9-6-2006 (Annexure A3) and set aside the duty of demand and penalty. However, the appeal filed by the revenue against the order of Assistant Commissioner (Annexure A2/1), was rejected, vide order dated 1-11-2007 (Annexure A3/1).

7. Again aggrieved by the orders (Annexure A3 and A3/1), the revenue filed the appeals, which were rejected as well, by the Appellate Tribunal, vide order (Annexure A4).

8. The revenue still did not feel satisfied with the impugned orders (Annexure A4) and filed the present appeal.

9. We have heard the learned counsel for the revenue and have gone through the record with his valuable help.

10. The main argument of the learned counsel for the revenue that since the licence in the present case was issued under the previous policy and during that period, the Cenvat credit was not admissible in CVD paid, otherwise than in cash, so, the assessee is not entitled to avail the Cenvat credit, is not only devoid of merit but misplaced as well, because the EXIM Policy amended, vide Notification dated 28-1-2004 and Notification No. 96 dated 17-9-2004, postulate that "an importer shall be entitled to avail the Cenvat credit of additional duty leviable under Section 3 of the Act against the amount debited in DEPB. There is no such condition in the indicated notifications that the debits made in DEPB, the licenses issued under the Foreign Trade Policy only would be eligible for credit and the debits made in DEPB issued under the previous policy will not be eligible for credit. It means, the assessee was entitled to claim the benefit in this relevant connection.

11. It is not a matter of dispute that the assessee fulfills all other conditions to avail the Cenvat credit. Once the Notification has been amended on 17-9-2004 to extend the benefit of availment of credit of CVD debited through DEPB account, in that eventuality, the revenue cannot deny the benefit of Cenvat credit to the assessee, in the obtaining circumstances of the case. We are of the considered opinion that the Adjudicating Authority has rightly dropped the proceedings and refunded the amount of Cenvat credit to the assessee, vide order (Annexure A2/1), which was upheld by the Commissioner (Appeals) as well as the Appellate Tribunal.

12. No other legal infirmity in the impugned order has been pointed out by the learned counsel for the revenue.

13. In the light of the aforesaid reasons, the present appeal is hereby dismissed with no order as to costs."

- The Hon'ble Delhi High Court has passed the following order in the case of M/s. Havells India Ltd.- 2015 (325) ELT 840 (Del.):-

"3. The Respondents imported raw materials by availing exemption under Notification No. 96/2004-Cus., dated 17th September, 2004. The customs duty as well as additional customs duty were paid using Duty Entitlement Pass Book (DEPB) scrips issued in terms of the 2002-07 Foreign Trade Policy (FTP). The Respondents availed of Cenvat credit for the additional customs duty paid through DEPB scrips. In terms of the Notification No. 34/97-Customs, dated 7th April, 1997 goods specified in Schedule I to the Customs Tariff Act, 1975 (CTA) imported would be exempted from payment of the whole of the duty of customs as well as additional duty subject to importer having DEPB with sufficient credit.

4. Notification No. 96/2004-Cus. provided that the importer using the DEPB would be "entitled to drawback or CENVAT credit of additional duty leviable under Section 3 of the CTA against the amount debited i the DEPB issued in terms of Para 4.3 or 7.9 of the FTP 2004-09.

5. The case of the Department was that the Assessee had paid the additional customs duty using the DEPB issued under the FTP of 2002-07 while the benefit of CENVAT credit could be availed in terms of the Notification No. 96/2004-Cus. only when the payment of import duty or additional customs duty had been made using the DEPB issued under the FTP of 2004-09.

6. The Division Bench of Punjab and Haryana High Court in its order dated 22nd April, 2010 in CEA No. 37 of 2010 (Commissioner of Central Excise v. M/s. Neel Kanth Rubber Mills) [[2010 \(254\) E.L.T. 203](#) (P&H)] referred to the EXIM Policy which was amended by the Notifications dated 28th January, 2004 and 17th September, 2004 which entitled an importer to avail Cenvat credit of additional customs duty against the amount debited in the DEPB scrips. It was noted by the High Court that there was no condition in the said notifications that the debits made in the DEPB issued under a particular FTP alone would be eligible for CENVAT credit and that debits in a DEPB issued under a previous FTP would not be eligible for credit.

7. Ms. Sonia Sharma, learned counsel for the Appellant states, on instructions, that to the best of the knowledge of the Appellant, no appeal has been filed as of date against the aforementioned order of the Punjab and Haryana High Court in Commissioner of Central Excise v. M/s. Neel Kanth Rubber Mills (*supra*) which decides the issue in favour of the Assessee and against the Department.

8. The Court finds that the said decision indeed covers the issue against the Department on all fours. The Appellant has not been to show any notification by which the benefit of CENVAT credit has been expressly denied where the payment of customs duty or additional customs duty is made using DEPB scrips issued in terms of the [FTP 2002-07](#).

9. *No substantial question of law arises for consideration by the Court.*

10. *The appeals are dismissed."*

In view of the above judgments, it is settled that even if the licences were issued under FTP 2000-07 then also the credit cannot be denied, so long the imports were made under notification no. 96/2004-Cus which is issued under FTP 2004-09. Moreover, in the present case, department could not establish that the licenses were issued under FTP 2000-07, for this reason also the proposal for denial of cenvat credit by the revenue is not sustainable.

05. Considering our above observations, we are of the view that the appellant is entitled for cenvat credit hence, the assessee's appeal is allowed and revenue's appeal is dismissed.

(Pronounced in the open court on 03.05.2023)

RAMESH NAIR
MEMBER (JUDICIAL)

RAJU
MEMBER (TECHNICAL)

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