

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

REGIONAL BENCH- COURT NO.3

Excise Appeal No.10020 of 2019-SM

(Arising out of OIA-VAD-EXCUS-001-APP-368-2018-19 dated 14/09/2018 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-VADODARA-I)

Alembic Ltd

Alembic Road,
Vadodara, Gujarat

.....Appellant

VERSUS

C.C.E. & S.T.-Vadodara-i

1st Floor...Central Excise Building,
Race Course Circle,
Vadodara, Gujarat-390007

.....Respondent

APPEARANCE:

Shri Saurabh Dixit, Advocate for the Appellant

Shri R K Bhashkar, Authorized Representative for the Respondent

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

Final Order No. A/ 10477 /2021

DATE OF HEARING: 21.01.2021

DATE OF DECISION: 08.02.2021

RAMESH NAIR

The brief facts of the case are that M/s Nirayu Pvt. Ltd. had paid Excise duty /reversed cenvat credit pursuant to CESTAT Final vide order No. A-594-600/WZB/05/C-II dated 12.07.2005 wherein the tribunal held that since goods were cleared by the appellant on loan basis to various group entities and there was no proof of the same being returned, the credit/ duty liability was required to be confirmed. However, since the said transaction was recorded in private records, a token penalty was imposed on them. At the same time it was held that if there was proof of receipt and use of such goods by recipient group entities the credit of such duty so paid will be allowed to recipient in accordance with law. The appellant had availed such cenvat credit which was paid by M/s Nirayu Pvt Ltd. The department however denied such credit, on the ground that since such credit was to be allowed in accordance with law, however, there was intention to evade duty the credit is not eligible to the appellant under Rule 9(1) (b) of CENVAT Credit Rules, 2004.

2. Shri. Saurabh Dixit, Learned Counsel appearing on behalf of the appellant submits that the CESTAT Order No. A-594-600/WZB/05/C-II dated 12.07.2005 in the case of M/s Nirayu Pvt Ltd. was appealed against by the

revenue before the Hon'ble Gujarat High Court vide Tax Appeal No. 89/2006 challenging allowing of credit to recipient as per Rule 9 (1) (b) of Cenvat Credit Rules, 2004 as well as reduction of mandatory penalty under Section 11 AC of Central Excise Act, 1944. The Hon'ble High Court admitted the tax appeal only on the issue of reduction of penalty and did not admit the appeal on the issue of allowing credit to recipient. Further, vide its judgment dated 24.08.2017 the Hon'ble High Court held that penalty equal to duty amount was required to be imposed under Section 11AC of Central Excise Act, 1944, since Section was not held as inapplicable by tribunal. The said judgment was challenged by M/s Nirayu Pvt Ltd. before the Hon'ble Apex Court, however, in the meanwhile, since SVLDR Scheme was announced the issue is settled there under and penalty stood waived. He submits that in these circumstances, it cannot be said that the issue of penalty has achieved finality. Shri Saurabh Dixit, further submits that as regard the interest liability arising of M/s Nirayu Pvt Ltd the tribunal vide the decision reported at 2014 (308) ELT 535 (Tri. Ahmedabad) as further modified vide Order No. M/14161-14162/2014 dated 23.09.2014 has concluded that there was no fraud, suppression etc. with intent to evade payment of duty at all. Hence interest under Section 11AB for the period up to 11.05.2001 was not imposable. He submitted that this is sufficient to show that there was no intent to evade duty on the part of M/s Nirayu Pvt Ltd and hence Rule 9(1) (b) of Cenvat Credit Rules, 2004 cannot be invoked against the appellant. He further submits that even if intent to evade duty is assumed on the part of M/s Nirayu Pvt Ltd there was no sale made by them to the appellant and in such circumstances embargo of Rule 9 (1) (b) of the said Rules does not get attracted. He relied upon the following case laws in support of this contention:-

- Karnataka Soaps & Detergents Ltd-2005 (192) ELT 862 (Tri. Bang.)
- Karnataka Soaps & Detergents Ltd-2010 (258)ELT 62 (Kar)
- Godrej Industries Ltd-2008 (232) ELT 108 (Tribunal-Mum)
- Jai Raj Ispat Ltd-2007 (2017)ELT 272 (Tribunal-Bang.)
- Jai Raj Ispat Ltd-2009 (245)(ELT 118 (A.P.)
- United Phosphorous Ltd.-2014 (313) ELT 418 (Ti.-Ahmd.)
- Jindal Steel & Power Ltd-2017 (355) ELT 568 (Ti. Del)
- Creative Products P. Ltd-2018 (12) TMI 1782-CESTAT KOLKATA
- Jai Balaji Industries Ltd-2018 (11) TMI 1198-CESTAT KOLKATA
- M/s Nirayu Pvt. Ltd-2017 (7) GSTL 14 (Guj.)
- Jet Airways (I) Ltd-2016 (44) STR 465 (Tri)

- Jet Airways (India) Ltd.-2017 (7) GSTL J35 (SC)
- Mahindra & Mahindra Ltd.-2019 (368) ELT 105 (Tri.-Mumbai)
- Mahindra & Mahindra Ltd-2019 (368) ELT A41 (S.C.)

2.1 He finally submits that since the situation was revenue neutral there cannot have been any intention to evade the duty on the part of the M/s Nirayu Pvt Ltd. anyway and hence Rule 9 (1) (b) of CENVAT Credit Rule, 2004 cannot be invoked in such circumstances as well.

3. Shri. R K Bhashkar, Learned Superintendent (Authorized Representative) appearing on behalf of the revenue on the other hand submits that once Hon'ble Gujarat High court imposed penalty equal to duty under Section 11AC of the Central Excise Act, 1944 on M/s Nirayu Pvt Ltd. it is clear that there was intention to evade duty on their part and Rule 9 (1) (b) of Cenvat Credit Rules, 2004 gets attracted. He placed reliance on the following judgments:-

- HAWKINS COOKERS LTD. Vs. CC & C.EX/ MUMBAI-II-2007 (220)E.L.T. 455 (Tri. -Mumbai)
- TOSHI AUTO INDIA LTD. Vs. CC. Ex., DELHI-IV-2009 (247) E.L.T. 337 (Tri. -Del)
- CC.EX.,MUMBAI-III Vs. VIDYUT METALLICS P. LTD.-2014 (311) E.L.T. 748 (Tri. -Mumbai)

4. I have heard both the sides and perused the record. There is no doubt that M/s Nirayu Pvt Ltd. had cleared goods to the appellant and on which appropriate duty stands paid later on. Both the lower authorities are not disputed and receipts and uses of such goods within the factory premises of the appellant and as per the contents of the show cause notice itself. The appellant also produced C.A certificate in support of this fact. While the issue may have been revenue neutral, it is fact that the penalty under section 11AC stands imposed on M/s Nirayu Pvt Ltd. by the Hon'ble Gujarat High Court. The departments sought to deny the Cenvat Credit on the ground that there is a suppression of fact on the part of M/s Nirayu Pvt Ltd. in payment of duty, therefore, for availing Cenvat Credit by the appellant Rule 9 (1) (b) of Cenvat Credit Rules, 2004 gets attracted. The said Rule is reproduced below.

"Rule 9(1)(b)-a supplementary invoice, issued by a manufacturer or importer of inputs or capital goods in terms of the provisions of Central Excise Rules, 2002 from his factory or depot or from the premises of the consignment agent of the said manufacturer or importer or from any other premises from where the goods are sold by, or on behalf of, the said manufacturer or importer, in case additional amount of excise duties or additional duty leviable under section 3 of the Customs Tariff Act, has been paid, except where the additional amount of duty became recoverable from the manufacturer or importer of inputs or capital goods on account of any non-levy or short-levy by reason of fraud, collusion or any wilful misstatement or suppression of facts or contravention of any provisions of the Excise Act, or of the Customs Act, 1962 (52 of 1962) or the rules made there under with intent to evade payment of duty."

4.1 From the careful reading of the above Rule 9 (1) (b). I have observed that in case where the supplementary invoice is issued by the manufacturer in respect of the additional amount of Excise Duty which has been paid which became recoverable on account of any non-levy or short levy by reason of fraud, collusion or any wilful misstatement or suppression of fact or contravention of any provision of the Excise Act or rule made there under with intent to evade payment of duty, the Cenvat Credit is not allowed of such supplementary invoice. However, I find that there is merit in the submission made by the appellant that in case where goods are not sold and supplementary invoice is raised above Rule 9 (1) (b) of Cenvat Credit Rules, 2004 cannot be invoked in such circumstances. I also find that the issue is squarely covered by case law as relied upon by the appellant on this ground and as referred (supra). In fact, in the decision in the case of Karnataka Soaps & Detergents Ltd (Supra) as well as Jai Raj Ispat Ltd (Supra) it was held that even if differential duty was paid on account of intention to evade duty the credit cannot be denied to recipients when the goods were not sold to them but only stock transferred. There is no allegation or finding in the impugned order that such goods were sold to the appellant by M/s Nirayu Pvt Ltd on which the disputed credit was availed. I also noted that such view is also approved by Hon'ble High Court in above referred cases.

5. As per my above discussion and finding, since the issue is squarely covered by the above decision relied upon by the appellant. The impugned order is set aside, the appeal is allowed.

(Pronounce in the open court on 08.02.2021)

(RAMESH NAIR)
MEMBER (JUDICIAL)

Prachi