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

REGIONAL BENCH- COURT NO. 3

Excise Appeal No. 10049 of 2017-DB

(Arising out of OIO-BHR-EXCUS-000-COM-80-2016-17 dated 30/09/2016 passed by Principle Commissioner Customs, Excise and Service Tax-Bharuch)

PGP GLASS PRIVATE LIMITED **.....Appellant**
ONGC Road,Tarsadi,
Surat
Surat, Gujarat

VERSUS

C.C.E-Bharuch **.....Respondent**
Vadodara-II,GST Bhavan,
Subhanpura,Vadodara
Vadodara
Gujarat - 390023

WITH

Excise Appeal No. 10655 of 2019- PGP GLASS PRIVATE LIMITED

Excise Appeal No. 12101 of 2019 - PGP GLASS PRIVATE LIMITED

APPEARANCE:
Shri S.S Gupta & Shri Mehul Jiwani, Chartered Accountant for the Appellant
Shri Rajesh K Agarwal, Superintendent (AR) for the Respondent

CORAM: HON'BLE MEMBER (TECHNICAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. C.L.MAHAR

Final Order No. A/ 11435 -11437/2023

DATE OF HEARING: 05.04.2023
DATE OF DECISION: 28.06.2023

C.L. MAHAR

The brief facts of the matter are that the appellant is manufacturer of Glass Bottles falling under chapter heading 70109000 of Central Excise Tariff Act, 1985. As a practice some category of the Glass Bottles are manufactured and cleared by the manufacturer on payment of duty. However, certain category of bottles are also sent for the job work following the provision of Rule 4 (5) of the Cenvat Credit Rules, 2004 read with Notification No. 214/86 –CE dated 25.03.1986.It is the matter of record that certain quantity of glass bottles duly accounted in the daily

stock register (RG-1) got damaged during loading and handling in the factory. However, some of bottles (out of stock shown in the RG-1) were sent to the job worker under job work challan for further processing and during the process undertaken at the job worker's end some quantity of the bottles got damaged/ broken. After receipt of goods from job worker the total quantity of bottles which was sent to the job worker were accounted for by the appellant in their daily stock account as fully finished goods instead of accounting the same as damaged/broken bottles as waste and scrap. The appellant has gone to the extent that for such waste i.e. broken/ damaged bottles invoices were issued in the name of the appellant themselves by showing the value applicable to fully finished unbroken/ undamaged bottles and payment of duty thereon. Duty paid on such goods were taken as cenvat credit by them on the basis of their own invoice. It is the matter of record that the damaged/broken bottles were not reused or manufactured of the bottles and same were sold as scrap on payment of duty on nominal value ranging between Rs 0.44 per Kg to Rs.2.54 per Kg.

1.2 It has been contention of the department that the duty paid by them on broken/ damaged bottles as finished glass bottle were being shown cleared by them in spite of the fact that no clearances were affected under the invoices but it was a mere settlement of the daily stock adjustment undertaken by the appellant without authority of law. The cenvat credit availed and utilized on the basis of the duty paid without clearance of any goods is in violation to provision Rule 3 (1) of Cenvat Credit Rules, 2004 and therefore the appellant have availed cenvat credit in violation of the provision of Cenvat Credit Rules, 2004,

1.3 Further, as per Rule 16 of CER, 2002 if any goods on which the duty has been paid at the time of removal and same are brought back to the factory for re-making, re-defining or re-commissioning in that situation the assessee need to give a notice to the department for making themselves

entitle for taking cenvat credit of duty paid on such goods. The appellant is required to maintain separate records to prove that the broken/damaged glass bottles were used in manufacture of glass bottles by re cycling the same. It has been the contention of the department that the appellant could not produce any record to establish that said broken/damaged glass bottle were actually used in the manufacture of finished glass bottles.

1.4 It has also been noticed by the department that broken/damaged glass bottles were sold and cleared by the appellant to the traders as scrap coloured bottled classifying the same under Central Excise Tariff Heading 70010900 on payment of the duty on nominal value.

1.5 On the basis of the above grounds three show cause notices came to be issued. The details of which are given in the table below:-

Appeal No.	OIA NO.	OIO No.	Period	Duty Demand
E/10049/2017-DB		BHR-EXCUS- 000-COM-80-2016-17 dated 30.09.2016	August 2010 to February 2015	Rs. 2,32,56,822/-
E/10655/2019-DB	CCESA-SRT(APPEALS)PS-704/2018-19 dated 20.12.2018		March 2015 to November 2015	Rs. 81,76,369/-
E/12101/2019-DB	CCESA-SRT(APPEALS)PS-117/2019-20 dated 31.05.2019		December 2015 to May 2017	Rs. 65,95,624/-

2. The Learned Advocate appearing on behalf of the appellant has submitted that in the present case the entire situation has become Revenue neutral as duty has been paid by them and then cenvat credit of the same has been taken in the cenvat credit account. It has been contended that at the time of the removal of scrap/ waste of coloured bottles, the

appellant has paid duty on transaction value of waste and scrap. Therefore, considering the transaction in totality it will amount that ultimately the appellant has paid duty on scrap/ damaged bottles. The learned advocate relied upon the following judgments to claim that even if duty was not payable, the credit of the duty paid by them shall be available.

- Ajinkya Enterprises 2013 (294) E.L.T. 203 (Bom.)
- UTTAM GALVA STEELS LTD. 2016 (336) E.L.T. 81 (Tri. Mumbai)
- M/s. Bajaj Allianz General Insurance Company Limited 2014-TIOL-1540-CESTAT- Mum
- SUNDARAM CLAYTON LTD. 2014 (33) S.T.R. 414 (Tri. - Chennai)

2.1 The learned advocate has also vehemently contended that the situation is revenue neutral and therefore the entire proceeding need to be withdrawn. The learned advocate has relied on following judgment to support his argument.

- Coca- Cola India Pvt Ltd – 2007 (213) ELT 490 (SC)
- Ineos Abs Limited - 2010 (254) ELT 628 (Guj.)

2.2 It has also been contended by the learned advocate that provisions of Rule 3 (5) of CCR, 04 does not apply in this situation because it is not the case of the appellant that inputs purchased by the appellant for use in the manufacture of the final product, have been cleared as such by them.

2.3 The learned advocate has also argued that demand in the show cause notice covering the period August, 2010 to February, 2015 is time barred as elements of fraud or suppression of facts are not available in their case.

3. We have also heard Learned Departmental Representative, Shri Tara Prakash, Deputy Commissioner who has reiterated findings as given in the impugned order.

4. We have heard both sides. It transpires from the facts narrated by the learned advocate and from the records of the appeal that the appellant sent glass bottles to the job worker for further processing and during the process undertaken by the job worker certain quantities of the bottles got broken. The job worker sent back the finished bottles as well as the broken pieces of the finished bottles to the appellant's premises. The appellant on receipt of both finished bottles as well as the damaged bottles accounted the same in the daily stock register only as the finished goods instead of making separate entries under the category of finished bottles and under the category of waste and scrap. This is also been the practice followed by them with regard to finished bottles manufactured by the appellant himself in the daily stock register. the appellant while debiting the quantity of waste and scrap from the stock register duty was paid on price applicable on finished goods by issuing invoices in the name of the appellant themselves and duty paid on such goods were again taken as cenvat credit.

4.1 With the above matrix of the facts we find that the provision of the section 3 of the central excise act 1944 read with Rule 4 and Rule 8 of the central excise rules 2002 a manufacture assessee is required to pay central excise duty on the goods manufactured and cleared by him. From the facts as appear above it appears that the goods namely waste and scrap which got generated along with the finished goods have been cleared separately on nominal price to various traders and therefore the invoices issued by the appellant themselves for making the balance of the finished goods compare with the total quantity manufactured by them was primarily without any basis i.e. no goods no goods finished or waste or scrap were actually available against the invoices issued by them on which central excise duty was paid. The central excise law requires that the assessee has to pay central excise duty on clearances of finished goods or waste and scrap as the case may be. in this case since there is no clearance of the goods, there

was no necessity for payment of the duty. An assessee cannot make payment of central excise duty on his own whims and conveniences. From the facts of this matter, we also note that creation of invoice in the appellant's own name and payment of the duty was not a mistake but it was a conscious decision taken by them to make good of the total of all finished bottles.

4.2 The assessee after making payment of the central excise duty on the basis of invoice issued by them to themselves they have taken Cenvat credit of the equal amount in the books of accounts as per provision of rules 3 of the Cenvat Credit Rules, 2004. It will be relevant to have a look at the provision of rule3 of the Cenvat Credit Rules, 2004 before proceeding further.

> ***"RULE 3. CENVAT Credit.*** *— (1) A manufacturer or producer of final products or a [provider of output service] shall be allowed to take credit (hereinafter referred to as the CENVAT credit) of –*
>
> *(i) the duty of excise specified in the First Schedule to the Excise Tariff Act, leviable under the Excise Act : [Provided that CENVAT credit of such duty of excise shall not be allowed to be taken when paid on any goods –*
>
> *a) in respect of which the benefit of an exemption under Notification No. 1/2011-C.E., dated the 1st March, 2011 is availed; or*
>
> *(b) specified in serial numbers 67 and 128 in respect of which the benefit of an exemption under Notification No. 12/2012-C.E., dated the 17th March, 2012 is availed;]*
>
> *(ii) the duty of excise specified in the Second Schedule to the Excise Tariff Act, leviable under the Excise Act;*
>
> *(iii) the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Textile and Textile Articles) Act, 1978 (40 of 1978);*
>
> *(iv) the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957);*
>
> *(v) the National Calamity Contingent duty leviable under section 136 of the Finance Act, 2001 (14 of 2001);*
>
> *(vi) the Education Cess on excisable goods leviable under section 91 read with section 93 of the Finance (No. 2) Act, 2004 (23 of 2004);*
>
> *[(via) the Secondary and Higher Education Cess on excisable goods leviable under section 136 read with section 138 of the Finance Act, 2007 (22 of 2007);]*

*(vii) the additional duty leviable under section 3 of the Customs Tariff Act, equivalent to the duty of excise specified under clauses (i), (ii), (iii), (iv), (v) [, (vi) and (via)]: [* * *]*

*[(viia) the additional duty leviable under sub-section (5) of section 3 of the Customs Tariff Act [* * *] :*

Provided that a provider of [output] service shall not be eligible to take credit of such additional duty;]

(viii) the additional duty of excise leviable under section 157 of the Finance Act, 2003 (32 of 2003);

(ix) the service tax leviable under section 66 of the Finance Act; [* *]*

[(ixa) the service tax leviable under section 66A of the Finance Act;]

[(ixb) the service tax leviable under section 66B of the Finance Act;]

(x) the Education Cess on taxable services leviable under section 91 read with section 95 of the Finance (No. 2) Act, 2004 (23 of 2004);

[(xa) the Secondary and Higher Education Cess on taxable services leviable under section 136 read with section 140 of the Finance Act, 2007 (22 of 2007); and]

[(xi) the additional duty of excise leviable under [section 85 of Finance Act, 2005 (18 of 2005),]] : paid on –

(i)any input or capital goods received in the factory of manufacture of final product or [by] the provider of output service on or after the 10th day of September, 2004; and
(ii) any input service received by the manufacturer of final product or by the provider of output services on or after the 10th day of September, 2004,

including the said duties, or tax, or cess paid on any input or input service, as the case may be, used in the manufacture of intermediate products, by a job-worker availing the benefit of exemption specified in the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 214/86-Central Excise, dated the 25th March, 1986, published in the Gazette of India vide number G.S.R. 547(E), dated the 25th March, 1986, and received by the manufacturer for use in, or in relation to, the manufacture of final product, on or after the 10th day of September, 2004 :

[Provided that the CENVAT credit shall be allowed to be taken of the amount equal to central excise duty paid on the capital goods at the time of debonding of the unit in terms of the para 8 of Notification No. 22/2003- Central Excise, published in the Gazette of India, part II, Section 3, sub-section (i), vide number G.S.R. 265(E), dated, the 31st March, 2003.]

Explanation. - For the removal of doubts it is clarified that the manufacturer of the final products and the provider of output service shall be allowed CENVAT credit of additional duty leviable under section 3 of the Customs Tariff Act on goods falling under heading 9801 of the First Schedule to the Customs Tariff Act."

4.3 It can be seen from the above that the manufacturer or provider of the output service is entitled to take credit of central excise duty paid by them on any input or capital goods received in the factory of manufacturer of final product or by the provider of the out service and any input service received by the manufacturer of final product or by the provider of the output service.

4.4 We find that the entire transaction on basis of which the cenvat credit has been availed by the appellant is only on paper. Firstly, the goods which are purported to be shown as cleared have not been cleared and invoices were issued on which central excise duty has been shown as paid. The products which have been mentioned on the invoices is primarily a finished goods of the appellant and therefore otherwise also cannot be an input for manufacturer of the finished product. We feel that the provisions of the law are sacrosanct and need to be complied with in its letter and spirit. The appellant has behaved beyond the provisions of the law. We therefore are of the view that the cenvat credit availed by the appellant on the basis of their own invoices is not permissible as per the provisions of the law and therefore, we are in agreement with the finding given in the impugned orders which are here in appeal and therefore we deny the cenvat credit availed by the appellant on the basis of invoices issued in their own name for finished goods which otherwise cannot be a input for them.

4.5 The learned advocate during the course of hearing has vehemently contended that the situation is revenue neutral. We are of the view that revenue neutrality being a question of fact and apparently they should not be foul. The facts of the matter does not absolved the appellant of consciously by passing the law and working with their own whims and convenience. The case law cited by the appellant have also been considered by us and we find that in the cases cited by the appellant the facts were very

different and therefore the case laws relied upon by the counsel for the appellant are not applicable to the facts of the present case.

4.6 We take the shelter of the decision of the larger bench of this tribunal in the case of JAY YUHSHIN LTD. Vs. COMMISSIONER OF CENTRAL EXCISE, NEW DELHI reported under 2000 (119) ELT 718 (Tri. Delhi) the relevant para is reproduced below :-

> ***"13.*** *In the light of the above discussion, we answer the reference as under:*
>
> *(a) Revenue neutrality being a question of fact, the same is to be established in the facts of each case and not merely by showing the availability of an alternate scheme;*
>
> *(b) Where the scheme opted for by the assessee is found to have been misused (in contradistinction to mere deviation or failure to observe all the conditions) the existence of an alternate scheme would not be an acceptable defence;*
>
> *(c) With particular reference to Modvat scheme (which has occasioned this reference) it has to be shown that the Revenue neutral situation comes about in relation to the credit available to the assessee himself and not by way of availability of credit to the buyer of the assessee's manufactured goods;*
>
> *(d) We express our opinion in favour of the view taken in the case of M/s. International Auto Products (P) Ltd. (supra) and endorse the proposition that once an assessee has chosen to pay duty, he has to take all the consequences of payment of duty."*

4.8 With regard to the contention of the appellant that the demand under first show cause notice hit by time bar is also not acceptable. In the era of self assessment of central excise the government has imposed a lot of faith in the assessee to comply with the provisions of central excise law. In this case, we find that the appellant has availed cenvat credit as per their own convenience which otherwise not as per the provisions of Rule 3 of Cenvat Credit Rules, 2004. It was only during the course of audit from the record of the appellant that the department came to know the practice being followed by the assessee. In view of this we find that the provisions of invoking extended time period is justifiable on the part of the department

5. In view of the above we hold that the appeals are without any merits and same are dismissed.

(Pronounced in the open court 28.06.2023)

RAMESH NAIR
MEMBER (JUDICIAL)

C.L. MAHAR
MEMBER (TECHNICAL)

geeta