

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT AHMEDABAD**

REGIONAL BENCH – COURT NO. 03

EXCISE Appeal No. 12085 of 2016-DB

[Arising out of Order-in-Original/Appeal No VLD-EXCUS-000-COM-021-16-17 dated 24.08.2016 passed by Commissioner of Central Excise-Valsad]

Hindustan Unilever Ltd

...Appellant

Detergent Unit Survey No 151/1/1 Village Dapada
Khanvel Road
Silvassa,
Gujarat

VERSUS

C.C.E & S.T.-Valsad

...Respondent

Third Floor, Adarashdham Building,
Vapi-Daman Road,
Vapi, Gujarat-396191

WITH

EXCISE Appeal No. 12089 of 2016-DB

[Arising out of Order-in-Original/Appeal No VLD-EXCUS-000-COM-021-16-17 dated 24.08.2016 passed by Commissioner of Central Excise, Customs and Service Tax-VAPI]

Indu Home Care Products

...Appellant

Plot No. C-1b,6127/1,
Iv Phase, Vapi Industrial Estate, Gidc,
VAPI,
GUJARAT

VERSUS

C.C.E & S.T.-Valsad

...Respondent

Third Floor, Adarashdham Building,
Vapi-Daman Road, Vapi,
Gujarat-396191

APPEARANCE:

Ms. Manshi Patil, Shri Viraj Reshamwala, Advocates appeared for the Appellant
Shri Ashok Thanvi, Assistant Commissioner (Authorized Representative) for the Respondent

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

FINAL ORDER NO. A /12328-12329 /2023DATE OF HEARING: 12.10.2023
DATE OF DECISION: 19.10.2023**RAMESH NAIR**

The issue involved in the present case is that whether the credit availed by the appellant job worker based on supplementary invoices issued by Hindustan Unilever Ltd paying differential duty on the Bulk Detergent Powder, stock transferred to the appellant M/s. Indu Home Care Product during the period June, 2012 to August, 2013, is deniable on the ground of payment of such additional duty by Hindustan Unilever Ltd allegedly on account of suppression, etc. under Rule 9(1)(b) of CENVAT Credit Rules, 2004.

(b) whether the penalties under Section 11 AC(1)(c) of Central Excise Act upon the appellant and under Rule 26 (2) upon HUL are imposable.

2. Ms. Manshi Patil, Learned Counsel along with Shri Viraj Reshamwala, Advocate appearing on behalf of the appellant submits that restriction on availment of CENVAT Credit in respect of supplementary invoices as provided under Rule 9(1)(b) of Cenvat Credit Rules, 2004 is applicable only in a case where the clearance of goods by the supplier is made by way of sale of goods and not otherwise. In the present case since the appellant being a job worker received the goods not as a purchase, but on returnable basis for job work and no sale is involved. Accordingly, the provision of Rule 9(1)(b) of CENVAT Credit Rules is not applicable. She placed reliance on the following judgments:

- Karnataka Soaps & Detergents- 2005 (192) ELT 892 (T)
- -do- Upheld by Karnataka HC-2010 (258) ELT 62 (Kar.)
- KArnantaka Shops & Detergents- 2009 (237) ELT 485 (T)
- -do- Upheld by Supreme Court- 2010 (254) ELT A-40 (SC)

- Jai Raj Ispat Ltd.- 2007 (217) ELT 272 (T)
- Upheld by AP High Court-2009 (245) ELT 118 (AP)
- Bosch Chassis Sstems India- 2017 (358) ELT 225 (T)
- Jindal Steel & Power Ltd.- 2017 (355) ELT 568 (T)
- United Phosphorous Ltd.-2014 (313) ELT 418 (T)
- Sri Warana Shahakari Dudh Utpadak Prakriya Sangh Ltd.-2017 SCC Online CESTAT 1026

2.1 She further submits that M/s. Hindustan Unilever Ltd issued supplementary invoices for the differential duty due to error in computing the value in terms of Rule 8 of Central Excise Valuation Rules. Therefore, there is no suppression on the part of the Hindustan Unilever Ltd in payment of differential duty. She submits that whatever duty is payable by the Hindustan Unilever Ltd is admissible as CENVAT Credit to the appellant, therefore entire exercise is revenue neutral. Accordingly, no *mala fide* intension is involved in the present case, therefore, the allegation of suppression of fact for denying the CENVAT Credit on supplementary invoice is not correct. She placed reliance on the following judgments:

- Coca-Cola India Pvt Ltd.-2007 (213) ELT 490 (SC)
- Jamshedpur Beverages-2007 (214) ELT 321 (SC)
- Narayan Polyplast- 2005 (179) ELT 20 (SC)
- Narmada Chematur-2005 (179) ELT 276 (SC)

2.2 She further submits that when credit of duty paid by principal manufacture is available as credit to their own sister unit and/ or job worker, extended period is not invokable. In support of which she placed reliance on the following judgments:

- Jay Yuhshin Ltd-2000(119)ELT 718 (T-LB)

- Nirlon Ltd-2015 (320) ELT 22 (SC)
- Indeos ABS Limited- 2010 (254) ELT 628 (Guj.)
- -do- Upheld by Supreme Court- 2011 (267) ELT A-155 (SC)
- Tenneco RC India P Ltd- 2015 (323) ELT 299 (Mad)

2.3 She further submits that in the present case, the SCN dated 21.07.2015 was issued for the period June, 2012 to August 2013, which is clearly time bar as there is no suppression fact on the part of the appellant. She submits that appellant job worker was filing their monthly returns, wherein all the information were furnished and, hence, there was no suppression and, in consequence thereof, extended period was not invocable In support, she placed reliance on the following judgments:

- Pahwa Chemicals- 2005(189) ELT 257 (S.C)
- ZYG Pharma Pvt Ltd-2017 (358) ELT 101 (M.P)
- Tinplate Cpmpany of India Ltd-2013 (289) ELT 414 (Jhar.)

2.4 She submits that for invocation of extended period there should be some positive act on the part of the assessee, in absence of which extended period is not invocable. In support of which reliance was placed on the following judgments :

- Karnataka Soaps & Detergents- 2005 (192) ELT 892 (T)
- -do- Upheld by Karnataka HC-2010 (258) ELT 62 (Kar.)
- KARNANTAKA SHOPS & DETERGENTS- 2009 (237) ELT 485 (T)
- -do- Upheld by Supreme Court- 2010 (254) ELT A-40 (SC)
- Jai Raj Ispat Ltd.- 2007 (217) ELT 272 (T)
- Upheld by AP High Court-2009 (245) ELT 118 (AP)
- Bosch Chassis Sstems India- 2017 (358) ELT 225 (T)
- Jindal Steel & Power Ltd.- 2017 (355) ELT 568 (T)

- United Phosphorous Ltd.-2014 (313) ELT 418 (T)
- Sri Warana Shahakari Dudh Utpadak Prakriya Sangh Ltd.-2017 SCC Online CESTAT 1026

2.5 As regard the appeal of Hindustan Unilever Ltd, she submits that since the demand of CENVAT Credit itself is not sustainable, no consequential penalty can be imposed. She further submits that Hindustan Unilever have not aided or abetted the appellant job worker for availing any wrong credit. Therefore no penalty upon Hindustan Unilever Ltd is imposable.

3. Shri Ashok Thanvi, learned Assistant Commissioner (Authorized Representative) appearing on behalf of the revenue reiterates the findings of the impugned order.

4. We have carefully considered the submissions made by both the sides and perused the records. We find that in the impugned order the CENVAT Credit was denied to the appellant invoking Rule 9 (1) (b) of CENVAT Credit Rules 2004, which reads as under:

"RULE 9. Documents and accounts.-(1) *The CENVAT credit shall be taken by the manufacturer or the provider of output service or input service distributor, as the case may be, on the basis of any of the following documents, namely:-*

(a) -----

(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 mis-statement 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 thereunder with intent to evade payment of duty.

Explanation.-For removal of doubts, it is clarified that supplementary invoice shall also include challan or any other similar document evidencing payment of additional amount of additional duty leviable under Section 3 of the Customs Tariff Act; or

From the above Rule, it can be seen that the restriction of availment of credit on supplementary invoice is applicable in a case where the manufacturer supplier of inputs or capital goods not paid the duty or short paid the duty by reason of fraud, collusion or any wilful mis-statement or suppression of facts or contravention of any provision of the Excise Act or of the Customs Act or the Rules made thereunder with intend to evade payment of duty only when such clearance is in the nature of sale of goods. In the present case the appellant is a job worker and they have received the goods on which CENVAT Credit was taken as a job worker, for the purpose of job work on behalf of M/s Hindustan Unilever Ltd. In this fact, the goods were received on returnable basis which does not involve the sale of goods as defined under Section 2(h) of Central Excise Act as under:

"Sale" and "purchase", with their grammatical variations and cognate expressions, mean any transfer of the possession of goods by one person to another in the ordinary course of trade or business for cash or deferred payment or other valuable consideration."

From the above definition of sale in sale and purchase there are following criteria to cover the transaction as sale or purchase (i) transfer of the possession of goods by one person to another in the ordinary course of trade or business (ii) such transfer must be against consideration in cash or deferred payment or other valuable consideration. In the facts of the present case,

since the goods were received by the appellant on returnable basis for job work. The ownership of goods remained with supplier M/s. Hindustan Unilever Ltd. As against the supply of goods there is no consideration paid by the appellant to M/s. Hindustan Unilever Ltd. Therefore, the transaction is clearly not covered under 'sale' of goods by M/s. Hindustan Unilever Ltd to the appellant. Therefore the combined reading of Rule 9 (1)(b) and Section 2(h), it is clear that only in a case of sale of goods, the restriction of CENVAT Credit on supplementary invoice is applicable. In the present case, the transaction being not a sale transaction the restriction shall not apply. This issue has been considered time and again in the various judgments, in the case of Jai Ispat Ltd-2007 (217) ELT 272 (T) has passed the following order:

"4. Heard both sides. We find that when the DGCI officers detected the under-valuation and persuaded the appellants to pay the differential duty of Rs. 3,37,989/- the same was promptly paid on 4-3-2003 even before issue of any show cause notice. Since the goods are captively consumed in the second unit, the appellants took Cenvat credit. After one year, the show cause notice dated 21-2-2004 was issued on the ground that the credit was wrongly taken in violation of Rule 7(1)(b) of Cenvat Credit Rules, 2002. We find that similar issue cropped up in the appeal before this Bench in the case of Karnataka Soaps and Detergents Ltd. v. CCE Mysore/Bangalore [2005 (192) ELT 892 (Tri-Bangi)] wherein it was held that in the case of stock transfer, prohibit off under Rule 7(1)(b) of Cenvat Credit Rules is not applicable even if additional amount of duty becomes recoverable from one unit on account of fraud, suppression of fact etc. It should also be appreciated that the entire exercise is revenue neutral and there is no substance in the allegation of intention to evade Central Excise duty, in these circumstances the penalty imposed is not justified. Hence, we allow the appeal, by following the ratio of the above decision, with consequential relief, if any."

The above judgment was given with reference to Rule 7(b) of CENVAT Credit Rules which is *pari materia* to Rule 9 1(b), relevant to the present case. Therefore the ratio of the above judgment is applicable in the present case.

The above decision of the Tribunal has been upheld by the Hon'ble Andhra Pradesh High Court reported at Jai Raj Ispat Ltd-2009 (245) ELT 118 (AP).

The similar issue was taken up by this Tribunal in the case of Jindal Steel and power Ltd, wherein the following order was passed:

"11. Regarding the appeal by the Raigarh Unit, we find that the issue of availing credit on supplementary invoices is no more relevant as the differential duty demand against the Raipur Unit is set aside. However, we note that the Id. Counsel for the appellant stated that the duty originally paid by Raipur Unit was passed on by supplementary invoices to Raigarh Unit and the credit was accordingly availed. In this background, the appellant/assessee is not proceeding further with any relief by way of claiming refund on this favourable order as the supplementary invoices and the credit thereupon have already been availed and settled. The denial of credit to Raigarh unit is on the ground that the differential duty has been paid by Raipur Unit against detection of evasion of duty involving suppression of facts, etc. with intent to evade the payment of duty and hence the credit on such duty is barred in terms of Rule 9(1)(b) of CCR, 2004. We note that original authority (Raipur Unit), though confirmed differential duty for extended period, observed that the appellant on their own calculated the duty liability and paid the differential duty. Hence, he did not find any substance in imposition of penalty under Section 11AC. In such situation, denial of credit availed by another unit of appellant is not sustainable. In this connection, we also refer to decisions of Tribunal in Karnataka Soaps & Detergents Ltd. - 2005 (192) [E.L.T.](#) 892 (Tribunal-Bang.) as upheld by Hon'ble Karnataka High Court in 2010 (258) E.L.T. 62 (Kar.) and Godrej Industries Ltd. - 2008 (232) E.L.T. 108 (Tribunal-Mum.), Jai Raj Ispat Ltd. - 2007 (217) ELT. 272 (Tribunal-Bang.) as affirmed by Hon'ble Andhra Pradesh High Court in 2009 (245) E.L.T. 118 (A.P.). These decisions dealt with credit flow on supplementary invoices for inter unit transfers of excisable goods. In view of the facts and analysis as above, we find the credit availed by Raipur during the material time on valid documents, cannot be denied invoking the provisions of Rule 9(1)(b). Accordingly, we set aside the impugned order on this ground."

In the case of United Phosphorus Ltd (supra) the Tribunal has expressed the following view:

"5. Heard both sides and perused the case records. Mainly there are following two issues required to be decided in the present proceedings."

(1) Whether Unit 2 is liable to pay duty as per Rule 8 of the Valuation Rules, 2000 or no differential duty is payable due to revenue neutrality because Central Excise duty payable by the appellant is available as Cenvat credit to Unit 3 and Units situated at Jammu and Haldia.

(ii) Whether Cenvat credit is admissible to the recipient factories with respect to supplementary invoices issued by Unit 2 of the appellant under Rule 9(1)(b) of the Cenvat Credit Rules, 2004, with extended period is attracted.

5.1 Issue framed in para 5(ii) is required to be addressed first in order to appreciate the doctrine of revenue neutrality. Appellant has relied upon, inter alia, the judgment of CESTAT, Bangalore in the case of *Karnataka Soaps and Detergents Ltd. v. CCE Mysore* [2005 (192) [E.L.T.](#) 892 (Tri-Bang.)] where in para 11, following has been held:

11. The relevant portion of Rule 7(1)(b) is reproduced below:

"Rule 7. Documents and accounts. (1) The Cenvat credit shall be taken by the manufacturer on the basis of any of the following documents, namely:-

(a).....

(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 from his 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 of customs 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 Act or of the Customs Act, 1962 or the rules made thereunder with intent to evade payment of duty."

(emphasis supplied)

A very careful reading of the above rules shows that the bar for availment of credit on supplementary invoices would operate only when the additional amount of duty becomes recoverable from the manufacturer on account of non-levy or short levy by reason of

fraud, collusion or any wilful misstatement or suppression of facts etc. Further, prohibition to avail credit on supplementary invoices will operate only in the case of sale. In other words the receiver of the input should have purchased the goods from the manufacturer who had to pay the additional amount of duty after detection of suppression of facts, fraud, etc., on his part. Therefore, when there is simply a stock transfer the prohibition under Rule 7(1)(b) will not be applicable. In other words, when there are two units A and B, and if goods are stock transferred from unit A to unit B and even if the additional amount of duty becomes recoverable from A on account of fraud, suppression of facts, etc, the unit B can take credit. The case laws relied on by the learned advocate are squarely applicable. We are in agreement with the above contentions of the appellant that Rule 7(1Xb) of Cenvat Credit Rules cannot debar availment of Cenvat credit at Bangalore factory for the simple reason that the transaction between the two factories is not one of sale. It should also be borne in mind that both the factories belong to the Government of Karnataka. Although the irregularity committed in Mysore resulted in revenue loss to the Mysore Commissionerate, looking into the totality of the circumstances, there was no revenue loss to the exchequer at all. This fact has been recorded by both the Adjudicating authorities. Whatever duty is paid at Mysore on Sandalwood oil, the same is taken as Cenvat credit at Bangalore. The duty on the finished products namely, toilet soaps is discharged under Section 4A on the basis of MRP. Since the value of soap takes into account the escalated cost of the sandalwood oil there cannot be any short payment of duty on the toilet soaps at Bangalore. In effect, the Government did not suffer any loss. In view of the above reasons there is absolutely no justification to deny Cenvat credit taken by Bangalore factory based on supplementary invoices issued by Mysore factory. Hence, the OIO passed by Commissioner of Central Excise, Bangalore, has no merits. The same is set aside. Hence, we allow the appeal E/277/05.”

5.2 The above interpretation made by the Tribunal has been upheld by the Karnataka High Court as per para 37 of the judgment dated 26-2-2010 in the case of Karnataka Soaps and Detergents Ltd. v. CCE, Mysore [2010 (258) [E.L.T.](#) 62 (Kar..)]. The provisions of Rule 7(1)(b) of the earlier Cenvat Credit Rules are identical to the provisions contained in Rule 9(1)(b) of the Cenvat Credit Rules, 2004. In view of the above settled position of law differential duty paid under supplementary invoices even for extended period will be admissible to the recipient factories of the appellant because there is no sale of goods between the sister concerns of the appellant.

5.3 In the light of above observations issue framed at para 5(i) has to be decided in favour of the appellant as per the judgment

of this very Bench in case of *Mafatial Industries Ltd. v. CCE, Daman* [2009 (241) [E.L.T.](#) 153 (Tri.-Ahmd.)] where following law has been laid down in para 4, reproduced below:

"4. After careful consideration the submissions made by both sides, we find that if the appellants would have paid higher duty by adopting higher assessable value at the time of clearance of the fabrics, their unit situated at Nadiar would have taken credit of the same. It is not the case where the goods are being sold by one assessee to another. It is basically taking out money from one pocket and putting the same in other pocket of same trouser. The other unit at Nadiar was appellant's own unit and it was only for the procedural and technical purposes that the duty was required to be paid at the time of clearance from the assessee's unit. Tribunal, in number of cases, has held that where the duty paid by one unit is available as credit to other unit of the same assessee, the entire issue is revenue neutral and the demand should not be confirmed on the said count. Reference in this regard is made to Tribunal decision in case of *M/s. P.T.C. Industries v. CCE, Jaipur* 2003 (159) *E.L.T.* 1046 (Tri-Del.) as also in case of *M/s. MRF Limited v. CCE* 2004 (170) *E.L.T.* 69 (Tri.- Bang.) and in case of *CCE, Daman v. M/s. Rishi Packers*, 2007 (80) *RLT* 181 (CESTAT-Ahmd.). Even Hon'ble Supreme Court in case of *CCE v. M/s. Coca-Cola India Pvt. Ltd.*, 2007 (213) *E.L.T.* 490 (S.C.), has held that Excise duty payable on the beverage bases/concentrates and Modvat credit available to the assessee being identical, consequence of payment of excise duty after availing Modvat credit was revenue neutral, in view of which confirmation of demand was not justified."

5.3.1 The above order passed by this Bench has been upheld by Supreme Court by dismissing the Civil Appeal filed by Commissioner of Central Excise, Daman [2010 (225) *E.L.T.* A77 (S.C.)].

6. In view of the above observation, demands and penalties confirmed/imposed against the appellant, do not survive and appeal filed by the appellant is allowed."

From the above consistent view taken by the Tribunal and the courts it is settled that in a case where there is no sale of goods and only a stock transfer the restriction of availment of CENVAT Credit on supplementary invoice in case of non payment or short payment of duty by the supplier unit shall not apply.

In the present case involving the same facts and legal issue, the ratio of the above judgments are directly applicable.

4.2 Accordingly, we are of the view that the appellants are entitled to the CENVAT Credit on the strength of supplementary invoices issue by M/s. Hindustan Unilever Ltd. consequently the penalties on the appellant as well as on the Hindustan Unilever Ltd shall also not sustain. Moreover, as regard the penalty on Hindustan Unilever Ltd as per the nature of the present case, there is no involvement of M/s. Hindustan Unilever Ltd in alleged wrong availment of CENVAT Credit by the appellant M/s. Indu Home Care Products. M/s. Hindustan Unilever Ltd rightly issued the supplementary invoice towards the payment of differential duty and the said issuance of the supplementary invoice is not illegal or incorrect. It is upto the appellant M/s. Indu Home Care Products, whether to avail CENVAT Credit or otherwise. Therefore, in any case, in the facts of the present case M/s. Hindustan Unilever Ltd cannot be fastened with any penalty under Rule 26 (2) of Central Excise Rules, 2002.

5. In view of the foregoing discussion and findings, the impugned order is not sustainable, hence the same is set aside. The appeals are allowed.

(Pronounced in the open Court on 19.10.2023)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)