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

REGIONAL BENCH-COURT NO. 3

EXCISE Appeal No. 12440 of 2019 - SM

(Arising out of OIA-CCESA-SRT-APPEAL-PS-231-2019-20 dated 25/07/2019 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-SURAT-I)

NICO EXTRUSIONS LTD **........Appellant**
SURVEY NO. 678/1/3 PLOT NO. 4,
BHILLAD SILVASSA ROAD, SILVASSA NAROLI
SILVASSA, DADRA AND NAGAR HAVELI

VERSUS

COMMISSIONER of C.E. & S.T.-DAMAN **......Respondent**
3RD FLOOR...ADARSH DHAM BUILDING,
VAPI-DAMAN ROAD, VAPI
OPP.VAPI TOWN POLICE STATION,
VAPI, GUJARAT- 396191

APPEARANCE:
Shri Harishankar Panday legal Manger, Advocate for the Appellant
Shri A K Mudvel, Superintendent (AR) for the Respondent

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

Final Order No.10587/2024

DATE OF HEARING: 26.02.2024
DATE OF DECISION: 15.03.2024

RAMESH NAIR

The brief facts of the case are that on the insistence of the audit party the appellant had paid the service tax on the ocean freight on 25.01.2018 for the period January, 2017 to June, 2017. Since the appellant was entitled for the Cenvat credit of the service tax paid on the ocean freight on the reverse charge mechanism, they have claimed the refund under Section 142(3) of the CGST Act, 2017 which was rejected by the Adjudicating Authority on the ground that since the amount of service tax was paid on insistence of the audit party, there is suppression of fact and in terms of Rule 9 (1) (bb) of Cenvat Credit Rules, 2004, the appellant is neither entitled for the Cenvat credit nor for the refund of the said amount. Being aggrieved by the Order-In-

Original, the appellant filed an appeal before the Commissioner (Appeals) which came to be rejected by concurring with the view taken by the Adjudicating Authority. Therefore, the present appeal.

2. Shri Harishankar Pandya, Legal Manager of the appellant's company appeared and submits that firstly, there was dispute about the payment of service tax on ocean freight and despite that the appellant had paid the amount along with interest, therefore, there is no suppression of fact on the part of the appellant, hence, the refund could not have been rejected by invoking Rule 9 (1) (bb) of Cenvat Credit Rules, 2004. He placed reliance on the decision of this Tribunal in the case of Pacific Harish Industries vide Final Order No. A/ 11904/2019 dated 10.10.2019.

3. Shri Anoop Kumar Mudvel, Learned Superintendent (AR) appearing on behalf of the Revenue reiterates the finding of the impugned order.

4. I have carefully considered the submission made by both sides and perused the records. I find that the refund claim was rejected by both the lower authorities on the ground that the payment of service tax on ocean freight is by way of suppression of fact and therefore, in terms of Rule 9 (1) (bb) of Cenvat Credit Rules, 2004, the appellant is neither entitled for Cenvat credit and consequently also not entitled for refund thereof. I find that the service tax on ocean freight was paid by the appellant only on insistence by the audit party whereas levy of service tax on the ocean freight was debatable and various litigation were going on and finally it was held that ocean freight is not liable to service tax, despite this the appellant have paid the service tax on the ocean freight alongwith interest.

4.1 Moreover, the appellant was not issued any show cause notice invoking the extended period for demand of service tax, interest and equal amount of penalty, this itself shows that there is no suppression of fact on the part of the appellant in payment of service tax on the ocean freight. I also observed that unless until the issue of suppression of fact is adjudicated in a demand case, the allegation of suppression of fact is based on assumptions and presumptions only. Accordingly, it cannot be said that there is suppression of fact in payment of service tax on ocean freight in the present case.

4.2. The identical situation has been considered by this Tribunal in the case of Pacific Harish Industries (Supra) wherein the following order was passed :-

> *4. Heard both sides and perused the record. I find that there is no dispute to the fact that appellant has paid service tax, even though pointing out by the auditors subsequently, but under reverse charge mechanism on receipt of services namely, security agency service and man power recruitment service. They have availed Cenvat credit on the basis of bank challans as proof of payment of service tax. The provisions of taking credit on such challans, is provided under Rule 9(e) of Cenvat Credit Rules, 2004. In the present case, credit was not taken on supplementary invoices, bills challans and therefore, the provisions of Rule 9(1)(bb) is not applicable. The very same issue has been considered by the Tribunal in the case of Nissan Motor India Pvt. Limited (supra) and held as under:-*
>
> > *"10. In Appeal E/42153/2014 the dispute relates to denial of cenvat credit invoking Rule (9) (1) (bb) and concerns alleged availment of ineligible input service of Rs.6,12,42,362/- wherein IPR become recoverable from appellants on account of SCN dt. 13.01.2012 issued to them demanding the equal service tax under Section 73 (1) ibid. The adjudicating authority in the impugned order has confirmed demand of the said amount availed by the appellants as being ineligible input service tax credit taken by them. We find that entire demand relates to Rule 9 (bb) of the CCR 2004 which reads as under :*
> >
> > > *"A supplementary invoice, bill or challan issued by a provider of output service, in terms of provisions of service tax rules, 1994 except where the additional amount of tax became recoverable from the provider of service on account of non-levy or non-payment or short-levy or short-payment by reason of fraud or collusion or wilful mis-statement or suppression of facts or*

contravention of any of the provisions of the finance act or the rules made there under with the intent to evade payment of tax."

Since the tax amount of Rs.6,21,24,362/- has been paid by them under reverse charge mechanism which specifically fits under Section 9 (e) ibid, the credit has therefore been availed by the appellants not under Rule 9 (bb) but under Rule 9 (e) of the CCR 2004. We find this contention to be correct in law. There is no doubt that the demand of Rs.6,21,24,362/- was made under the premise that the same was required to be paid under reverse charge basis. This being so, such payment will only within the ambit of Rule 9(e) ibid and not Rule 9 (bb) of the CCR 2004. We also find that the decision relied upon in Essar Oil Ltd. Vs CCE Rajkot - 2014 (303) ELT 255 (Tri.-Ahmd.) is applicable on all fours to the issue at hand. The relevant portion of the said decision is reproduced as under :

5.3 From the above prescription, it is evident that for the preparation of an invoice, there has to be a buyer to whom goods are sold. Further, Rule 11(7) of the Central Excise Rules, 2002 prescribe the following :

Goods to be "Rule 11. removed on invoice.-

The provisions of this rule (7) shall apply mutatis mutandis to goods supplied by a first stage dealer or a second stage dealer : Provided that in case of the first stage dealer receiving imported goods under an invoice bearing an indication that the credit of additional duty of customs levied on the said goods under sub-section (5) of Section 3 of the Customs Tariff Act, 1975 (51 of 1975) shall not be admissible, the said dealer shall on the resale of the said imported goods, indicate on the invoice issued by him that no credit of the additional duty levied under sub-section (5) of Section 3 of the Customs Tariff Act, 1975 shall be admissible;

Provided further that in case of the second stage dealer receiving imported goods under an invoice bearing an indication that the credit of additional duty of customs levied on the said goods under sub-section (5) of Section 3 of the Customs Tariff Act, 1975 (51 of 1975) shall not be admissible, the said dealer shall on the resale of such imported goods, indicate on the invoice issued by him that no credit of the additional duty levied under sub-section (5) of Section 3 of the Customs Tariff Act, 1975 shall be admissible.

Explanation. - For the purposes of this rule, "first stage dealer" and "second stage dealer" shall have the meanings assigned to them in Cenvat Credit Rules, 2002."

A combined reading of Rule 11(3), Rule 11(7) of Central Excise Rules, 2002 and Rule 9(a)(ii) of the Cenvat Credit Rules, 2004 will convey that in case of sale of imported goods by a first stage dealer or second stage dealer also the credit is admissible on the basis of such a sale invoice. A similar situation will exist for supplementary invoice issued by a first stage dealer/second stage dealer under Rule 9(1)(b) of Cenvat Credit Rules, 2004. The word "Challan" and "any other similar document" evidencing payment of additional CVD, mentioned in Explanation to Rule 9(1)(B), will thus mean these situations where duty is paid under a "challan?"by an importer/dealer of imported goods who has sold the cenvatable goods. This provision relating to issue of supplementary invoice will not be applicable to the goods imported by the appellant which are not sold. This interpretation has been upheld by Karnataka High Court in the case of Karnataka Soaps & Detergent Ltd. v. CCE, Mysore [2010 (258) E.L.T. 62 (Kar.)]. The argument of the ld. A.R. that the "Explanation" added to Rule 9(1)(b) of the Cenvat Credit Rules, 2004 was not existing when Karnataka High Court delivered the above judgment is not tenable because an "Explanation" introduced in the Rule can only clarify the provisions of Rule 9(1)(b), which involve sale of goods and cannot elaborate the scope of Rule 9(1)(b) of the Cenvat Credit Rules, 2004. In the case of import, assessment of duty is always paid by an importer under the challans and endorsement to that effect is made on the body of Bill of Entry. In the present facts and conditions of the case, it has to be held that payment of differential duty was paid as a result of re-assessments with respect to imported capital goods as per law laid down by Delhi CESTAT in the case of Birla Jute Manufacturing Co. Ltd. v. CC, Calcutta (supra). In Para 7 of this judgment, inter alia, it was held that refund claims and demands under Section 27 & Section 28 of the Customs Act, 1962 do involve re-assessment of the duty originally assessed. Further, as per the judgment of CCE, Raipur v. Ambuja Cement Eastern Ltd. (supra) Cenvat credit will be admissible on duty paying TR-6 challan when it is not disputed that goods were used in the manufacture of excisable goods to be cleared on payment of duty. Further, in Para 40 of the judgment of Karnataka High Court in the case of Karnataka Soaps & Detergent Ltd. v. CCE, Mysore (supra) it is held that documents specified in Rule 7 (present Rule 9 of Cenvat Credit Rules, 2004) of the earlier Cenvat Credit Rules is only illustrative in nature and cannot bar taking of Cenvat credit under Rule 3 of Cenvat Credit Rules. When additional duty is paid under reassessment or on being pointed out by the Revenue then the credit of such duty paid will be admissible as Cenvat credit to the appellant under Rule 9(1)(c) of the Cenvat Credit Rules, 2004. In view of the above settled position of law, the credit was rightly availed by the appellant and accordingly the appeal filed by the appellant is required to be allowed. Once on merits the issue is decided in favour of the appellant, there is no *question of imposing penalty and confiscation of capital goods as adjudicated by the lower authority."*

In the case of Columbia Machine Engineering India Pvt. Limited (supra), this Tribunal held as under:-

"4. I have carefully considered the submissions made by both the sides and perused the records, I find that the dispute to be settled is whether the appellant is entitled for Cenvat Credit in respect of Service Tax paid belatedly on the services received from abroad under Reverse Charge Mechanism. The lower authority denied the credit only by invoking Rule 9(1)(bb) of Cenvat Credit Rule, 2004, which reads as under:

"Rule 99(1) (bb) a supplementary invoice, bill or challan issued by a provider of output service, in terms of the provisions of Service Tax Rules, 1994 except where the additional amount of tax because recoverable from the provider of service on account of non-levy or non-payment or short-levy or short-payment by reason of fraud or collusion or wilful misstatement or suppression of facts or contravention of any of the provisions of the Finance Act or of the rules made thereunder with the intent to evade payment of service tax."

5. From the plain reading of the above Rule 9(1)(bb) it is observed that the credit can be denied only if the short payment or non-payment for the reason of fraud or collusion or willful mis statement or suppression of fact or contravention of any of the provisions of the finance Act or Rules made there under with intent to evade payment of Service Tax. In the facts of the present case the appellant have paid the Service Tax along with l5% penalty and interest in terms of Section 73 (4A) it reads as under:

> *"In case where ingredients of fraud, collusion etc., as per section 73(4) exists, then the assessee can pay the service tax along with interest and penalty equal to 1 percent of the tax for each month for the period which default continues, up to maximum of 25 percent . In case, the assessee have paid service tax, interest and penalty under section 73(4A) and if the assessee recover service tax amount from the service receiver by raising supplementary invoice, then the service receiver is not eligible to avail the cenvat credit of the same as per Rule 9 of the Cenvat Credit Rules, 2004."*

6. From reading of above Section 73 (4A) it is seen that it starts with the terms "not with-standing anything contained under 73 (4A) which deals with situation whether there is a fraud or collusion or willful misstatement or suppression of fact etc, therefore, when the appellant have availed Section 73 (4A) and the case of non-payment of Service Tax stood concluded by making payment of Service Tax along with interest and 15% penalty, it cannot be said that there is suppression of fact on the part of the appellant. Moreover by availing the provision of Section 73 (4A), no adjudication process is required to be carried out. When there is no adjudication, whether there is fraud or collusion or willful misstatement or suppression of fact the same is not established, therefore, after making the payment under Section 73 (4A), the case stand concluded, there cannot be charge of fraud or collusion or willful mis statement or suppression of fact etc. Accordingly, credit on that amount cannot be denied. The same issue has been stated of this Tribunal in the case of Shi Lifters (Supra) wherein the Tribunal held that when the payment under Section 73 (4A) of Finance Act, 1994 was made the provision of Rule 9(1)(bb) of Cenvat Credit Rule, 2004 shall not apply. The impugned order is also not sustainable on the ground that the impugned order relied upon the order of the Shiv Lifters case passed by the Commissioner (Appeals) which stand set aside as per the Tribunals decision cited (Supra).As per our above discussion the denial of Cenvat Credit by the lower authority is not legal and proper. Accordingly, the impugned order is set aside. The appeal is allowed."

5.It can be seen from the above judgments that a very same dispute has been dealt with in the above judgments. Accordingly, it is held that in case of payment of service tax under reverse charge mechanism, Rule 9(1)(bb) will not apply. Therefore, the impugned order is not sustainable. The same is set-aside and appeal is allowed."

4.3 In view of the above decision it is settled law that under the identical circumstances, suppression of fact cannot be alleged. Accordingly, the appellant was entitled for the Cenvat credit and therefore, they were also entitled for the consequential refund of the service tax along with interest paid on ocean freight.

5. As per our above discussion and finding supported by the case law, I am of the view that the appellant is entitled for the Cenvat credit

and refund thereof along with interest paid on such service tax. Since with the present litigation there is delay in giving refund, appellant is also etitled for interest on refund amount in terms of Section 11BB of Central Excise Act, 1944 from three months of filing refund claim till the date of sanction of refund as held by the Hon'ble Apex Court in the case of Ranbaxy Laboratories Vs. Union of India- 2011 AIR SCW 6359. Hence, the impugned order is set aside. Appeal is allowed with consequential relief.

(Pronounced in the open court on 15.03.2024)

(RAMESH NAIR)
MEMBER (JUDICIAL)

Raksha