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

REGIONAL BENCH- COURT NO.3

Excise Appeal No. 12330 of 2019

(Arising out of OIA-VAD-EXCUS-001-APP-243-2019-20 dated 25/07/2019 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-VADODARA-I)

Xl Plastic **.........Appellant**
Plot No. 303/2, G.I.D.C. Ind. Estate, Makarpura
Vadodara, Gujarat

VERSUS

C.C.E. & S.T.-Vadodara-i **......Respondent**
1st Floor...Central Excise Building,
Race Course Circle,
Vadodara, Gujarat - 390007

APPEARANCE:
Shri Vivek Bapat, Advocate for the Appellant
Shri Vinod Lukose, Superintendent (AR) for the Respondent

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

Final Order No. A/ 10732 /2022

DATE OF HEARING: 14.06.2022
DATE OF DECISION: 24.06.2022

RAMESH NAIR

The brief facts of the case are that based on year 2000 audit objection the SCN dated 13.07.2010 came to be issued to the appellant for wrong availment of cenvat credit on various input services for the period November 2007- June 2009 which was followed by subsequent SCN dated 06.06.2011 for the period July 2009 to July 2010 amounting to Rs 11,37,444/-. In the first round of litigation the demand of cenvat credit was dropped except for the confirmation of amount which was already reversed by the appellant and imposition of equal penalty under Rule 15(4) of CCR, 2004 read with section 78 of the Finance Act, 1994 equal to the reversal made voluntarily vide OIO dated 29.11.2018. The appellant being aggrieved by the order dated 29.11.2018 filed an appeal before Commissioner (Appeals) on the ground that there is no suppression of fact and amount was voluntarily reversed, also that penalty under Rule 15(4) of CCR, 2004 was not imposable for the fact that the same is applicable to output service provider whereas the SCN was issued in the Appellants role as a manufacturer. The commissioner (Appeals) remanded the matter back to the Adjudication Authority vide OIA dated 27.02.2019 for deciding the penalties afresh. After hearing the appellant in denovo adjudication the adjudicating authority confirmed the penalty under section 11 AC of the Central Excise

Act, 1944 vide order in original dated 28.05.2019. The appellant again approached Commissioner (Appeals) Vadodara challenging the imposition of penalty under section 11 AC. The Learned Commissioner (Appeals) rejected the appeal and confirmed the OIO dated 28.05.2019 vide his OIA dated 25.07.2019. Therefore, the present appeal.

2. Shri Vivek Bapat, Learned Counsel appearing on behalf of the appellant submits that the SCN was issued proposing penalty under section 15 of CCR, 2004 read with section 11 AC of Central Excise Act, 1944 therefore, in the impugned order imposition of penalty under section 11 AC(1) (c) of Central Excise Act, 1944 as it stood after 14.05.2015 is not legal and correct as the period involved in the present case is admittedly July 2009 - July 2010. He further submits that penalty cannot be imposed either under Rule 15 of CCR , 2004 or under section 11 AC of Central Excise Act, 1944. He submits that during the relevant time penalty could not have been imposed under Rule 15 (1) and Rule 15 (2) of CCR, 2004 as in these rules there was no provision for penalty in respect of wrong availment of cenvat credit on input services. The words " Input service" were inserted in the said sub rule 15 (1) and 15(2) w.e.f 27.02.2010 vide notification No. 06/2010 –CE (NT) therefore, penalty under rule 15 of the CCR, 2004 cannot be imposed directly hence, the same also cannot be confirmed indirectly by imposing penalty under section 11 AC Central Excise Act, 1944. He further submits that penalty is also not imposable under Rules 15 (4) of CCR, 2004 for the fact that the said rule applicable to service provider only and not to the manufacturers hence, penalty imposed under Rules 15 (4) of CCR, 2004 is not sustainable. He placed reliance on the following judgments:

- 2008(12) STR 468 (Tri-LB)-Commr. of CEX Mumbai IV v/s GTC Industries Ltd delivered on 25.09.2008.
- 2009(242) ELT 168 (Bom.) Coca cola India Pvt Ltd v/s Commr of CX Pune III issued on 26.08.2009.
- 2009 (92) RLT 665 (Cestat-LB)- ABB Ltd & ORS v/s CCE & ST Banglore & Ors.
- 2011(22) STR 278 (Tri-Ahmd) Ultra tech Cement Ltd v/s Commr of CEX Bhavnagar dated 29.06.2010
- 2010(260) ELT 369 (Bom) dated 25.10.2010 -Commr of CEX Nagpur v/s Ultratech cement Ltd. 2010 (260) ELT 369 (Bom)

2.1 He also submits demand was raised by invoking extended period where there is no suppression of fact on the part of the appellant as availment of credit was duly reflected in ER-1 return. He further submits that the SCN in present case was issued subsequent to the earlier SCN which was for the period November 2007 to June 2009. The Present SCN was issued which was for the period July 2009- July 2010 and it is now settled position of law that suppression of facts or mis-statement etc cannot be alleged in such cases and that too solely in order to confirm the penalty. He also placed reliance on the following judgments:-

- 2011 (267) ELT 384(CESTAT- Bang) – Davangere Sugar Company
- 2013 (31) STR 214 (CESTAT- Mum)- Oil and Natural Gas Corporation Ltd
- 2015 (320) ELT 794 (GUJ-HC)- Jitendra Synthetics
- 2016 (45) STR 523 (CESTAT –KOL)- Crescent Manufacturing Pvt. Ltd
- 2009 (238) ELT 3 (SC)- Union of India Vs. Rajasthan Spinning & Weaving Mills.

3. Shri Vinod Lukose, Learned Superintendent (AR) reiterates the finding of the impugned order.

4. I have carefully considered the submission made by both sides and perused the records. In the present case the dispute is only imposition of penalty on wrong availment of cenvat credit during the period July 2009 - July2010. I find that the Adjudicating Authority imposed a penalty under section 11 AC on the basis of a proposal made in the SCN under Rule 15 read with section 11 AC. I find that during the relevant period there was no such provision for penalty in respect of wrong availment of cenvat credit on input services. Therefore, during the relevant period the penalty was not imposable either under Rule 15 (1), 15(2) or 15 (4). Rule 15(4) was made for service providers whereas the appellant is the manufacturer.

5. In view of the above fact since the penalty under Rule 15 (4) was not imposable the judgment cited by the appellant supports their case. Accordingly I set aside the penalty and allow the appeal.

(Pronounced in the open court on 24.06.2022)

RAMESH NAIR
MEMBER (JUDICIAL)

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