

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

REGIONAL BENCH - COURT NO. 3

EXCISE Appeal No. of 10979 of 2019-DB

[Arising out of Order-in-Original/Appeal No RAJ-EXCUS-000-COM-11-18-19 dated 27.02.2019 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-RAJKOT]

Nayara Energy Limited

.... Appellant

Formerly Know As Essar Oil Ltd
Po Box No 24 Head Post Office Khambhalia Dist
Devbhumi Dwarka, DWARKA, GUJARAT-361305

VERSUS

Commissioner of Central Excise & ST, Rajkot

.... Respondent

Central Excise Bhavan, Race Course Ring Road,
Income Tax Office, Rajkot, Gujarat-360001

APPEARANCE :

Shri Vishal Agarwal & Ms. Dimple Gohil, Advocates for the Appellant
Shri Tara Prakash, Assistant Commissioner (AR) for the Revenue.

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

DATE OF HEARING : 30.08.2022

DATE OF DECISION: 15.12.2022

FINAL ORDER NO. A/12201 / 2022

RAMESH NAIR :

This appeal is directed against the Order-In-Original No. RAJ-EXCUS-000-COM-11-18-19 dated 27.02.2019 passed by the Commissioner of Central GST and Central Excise, Rajkot.

2. Facts of the case are that, the appellant are manufacturers of Motor Sprits, High Speed Diesel, Liquefied Petroleum Gas (LPG), etc. Appellant had imported capital goods which were cleared under Notification No. 54/2003-Cus. dated 01.04.2003 by debiting the countervailing duty (CVD) amounting to Rs. 18,37,92,521/-. The payments of these duties are made by way of debits in SFIS (Service from India Scrip). Appellant availed the Cenvat Credit of such CVD in terms of Rule 3 of Cenvat Credit Rules, 2004. The department objected to the availment of credit and issued show cause

notice alleging that since the Capital Goods had been cleared under the said Notification, the goods were exempted goods and as a consequence, the Cenvat Credit of CVD debited in the SFIS scrip was not admissible. Further, it was also alleged that since the Foreign Trade Policy allowed Cenvat Credit of such duty paid through the scrip in respect of schemes like Focus Products Schemes, VKGUY etc., no provision was made for SFIS in view of para 3.17.6 inserted in FTP from 2009-10. In adjudication, Ld. Commissioner vide impugned order-in-original confirmed the recovery of the above credit from the appellant under Rule 14 of the CCR 2004 read with Section 11A(10) of the Central Excise Act and ordered for appropriation of Cenvat Credit reversed by appellant under protest. He did not impose any penalty. Aggrieved by such an order, the appellant is before us.

3. Shri Vishal Agarwal and Ms. Dimple Gohil appearing on behalf of the appellant submits that Cenvat Credit was required to be taken in terms of Rule 4 of the Cenvat Credit Rules 2004 which provided for availment of Cenvat Credit in respect of Capital Goods received in the Factory to be taken at any time after such receipts in the same financial year, for an amount not exceeding 50% of the CVD paid and the remaining 50% to be taken on or after 1st April in the subsequent financial year. In other words, the entire amount of Cenvat Credit accrued to the Appellant much before the said para came to be introduced in the FTP. Once the credit had accrued to the appellant in terms of the Cenvat Credit Rules, which, during the relevant time, did not contain any time limit for availment thereof, the such credit cannot be denied in terms a provisions in the FTP which did not exist during the material time. The admissibility of the credit, therefore, has to be determined in terms of the legal provisions existing as on date of accrual of the Credit. He placed reliance on following decisions.

(i) Spenta International vs. CCE- 2007(216) ELT 133(T-LB)

(ii) CCE vs. Surya Roshni - 2003(155) ELT 481

4. He also submits that the Circular relied upon by the Revenue are equally inapplicable inasmuch as the mere non mention about cenvat credit being available of duty debited in the SFIS scrip does not imply that such credit were not allowed.

5. He further submits that department has failed to appreciate the settled law that once the appropriate duty is paid by debit to the SFIS scrips on the import of capital goods, they are not exempted goods but are goods on which appropriate duty leviable has been paid. Consequently, no payment /reversal in terms of the CCR was required to be made. He placed reliance on the following decisions.

(i) Universal Power Transformer Pvt. Ltd. vs. CCE – 2010(256) ELT 244 (Tri. Bang)

(ii) Essar Oil Ltd. vs. CCE, Rajkot – 2010-TIOL-1647-CESTAT-AHM

(iii) Commissioner vs. Voltamp Transformer Limited–2013(296)ELT A16 (Guj)

(iv) CCE vs. Kirloskar Chillers Pvt. Ltd. – 2017-TIOL-3642-CESTAT-MUM.

5. Shri Tara Prakash, Assistant Commissioner(Authorised Representative) on the other hand reiterates the finding in the impugned order. He further submits that as a policy matter Board clarified vide Circular No.27/2006 dated 13.10.2006 that the Government would go scheme-specific regarding availment of Cenvat Credit by mentioning about it in respective customs notification issued for operationalizing the scheme. In other words, it would be specifically mentioned in respective customs notification, whether the facility of cenvat credit availment was available. If not mentioned, it meant facility of Cenvat Credit was not allowed. The policy to mention availability

of facility of Cenvat Credit is reflected in Notification No. 32/2005 related to target plus scheme and Notification No. 41/2005 related to Vishesh Krishi Upaj Scheme. It was also clearly mentioned that the facility of cenvat credit was available against payment of additional duty of Customs/ Excise by debiting duty scrip issued under these schemes. However the same was not mentioned in Notification No. 54/2003 and 92/2005 related to Served from India Scrip (SFIS) as the Government's policy was against extending the facility of Cenvat Credit under this scheme. Therefore, same was not mentioned in these two Notifications. Accordingly, Board has issued customs Notification No. 97/2005 to extend the facility of Cenvat Credit in respect of customs Notification No. 53/2004 related to old version of target plus scheme stating that under Notification No. 53/2003 the facility of Cenvat Credit would be available, which had not been mentioned initially when the said Notification No. 53/2003 was issued.

6. He also submits that Notification No. 97/2005 was issued for various issues including availment of cenvat credit, amendment in port of import etc. The said Notification No. 97/2005 also effected some amendments in respect of Notification No. 54/2003 pertaining to old version of served from India scheme. Some amendment as per the said Notification No. 97/2005 were made about port of import in respect of Notification No. 54/2003. As per the said Notification 97/2005 there was no amendment in Notification No. 54/2003 as far as availment of Cenvat Credit was concerned. If the Government's intention had been to extend facility of Cenvat Credit to scheme of service export, the same would have been mentioned against Notification No. 54/2003 in amendment Notification No. 97/2005, as done in respect of Notification No. 53/2003. The same stand of not extending benefit of Cenvat Credit was maintained when served from India Scheme was

announced vide Customs Notification No. 92/2004 issued operationalizing this scheme wherein there was no mention of availment of Cenvat Credit.

7. He also argued that denial of cenvat credit to scheme of service provider exporter was also mentioned in para 3.17.6 of Foreign Trade Policy 2009-10. However, the appellant wrongly interpreted that the said para was applicable prospectively, not retrospectively. Therefore, the appellant have wrongly understood that they were eligible for cenvat credit as their imports were made prior to this para during 2004-2007. However this interpretation of the appellant was wrong since the government's intention was never to extend facility of the Cenvat Credit related to export of service, right from the inception of this scheme in 2003. There was nothing new in this para except to reiterate the earlier stand of the Government that the facility of Cenvat credit would not be available to serve from India Scheme. So, there is no question of applicability of this para prospectively, as wrongly understood by the Appellant.

8. He further submits, as per the Rule 4(1) of Cenvat Credit Rules, 2004, the Appellant should have taken cenvat credit immediately on receipts of the goods. However, in the present case the Appellant informed in March 2011 that they want to take cenvat credit against the goods imported by them during 2004-2007 under the Serve from India Scheme. The availment of cenvat credit by the appellant after 6-7 years of receipt of the goods is clearly time-barred as per the said rule. There cannot be any justification for availment of cenvat credit after such a long gap. The appellant is silent about whether they had claimed depreciation under section 32 of the Income tax Act, 1962 as per sub rule (4) of 6 of the Cenvat Credit Rules 2004. This aspect is also required to be examined.

9. We have considered the submissions made by both sides and perused the records. The issue involved in this case is regarding the eligibility to avail Cenvat credit of the amount of CVD paid as debit in Served From India Scheme (SFIS). It is undisputed that as per Rule 3 of the Cenvat Credit Rules, any duty paid under Section 3 of the Customs Tariff Act is eligible to an assessee as Cenvat credit. It is also undisputed that the appellant in this case has paid the CVD by a debit in the SFIS. We find that Appellant had imported capital goods under Notification No. 54/2003-Cus dated 01.04.2003 and Notification No. 94/2004-Cus dated 11.09.2004. These imports took place in 2005, 2006 and 2007. During the period 2004-05 to 2006-07. In the Foreign Trade Policy there is specific provision to allow Cenvat Credit in respect of scheme like VKGUY, Target Plus, Focus Products Scheme but no such provisions was made for SFIS and during the period from 2007-08 onwards, a general provisions at para 3.12.1 (2007-08 to 2008-09) and para 3.17.6 (2009-10 onwards) was made in this context which reads as under:

“CENVAT/ Drawback : 3.17.6 / 3.12.1: Additional Customs Duty / Excise Duty paid in cash or through debit under Duty Credit scrip shall be adjusted as Cenvat Credit or Duty Drawback as per DoR rules, except under SFIS”

However, the appellant claimed that as per the above para of FTP, the credit of duty paid by debit to SFIS scrip was not allowed implies that before the introduction of the said para, it was allowed because if it was not allowed before that also, then there was no need to insert the said para which only has prospective applicability. Whereas revenue contended that this interpretation of the appellant was wrong since the Government's intention was never to extend facility of the Cenvat Credit related to export of service, right from the inception of this scheme in 2003, as per the said para, the continuity of denial of cenvat credit was maintained. However, we cannot hold that this change has got retrospective effect. We do not agree with the

argument of revenue that the change in the policy should be with retrospective effect. If such an interpretation is taken, it would definitely upset all the earlier assessments, which we do not incline. The change in the Policy is only with prospective effect.

10. On a very careful consideration of the issue, we find that during the relevant disputed period, in the Foreign Trade Policy, there was neither an express provision to allow Cenvat credit of the CVD paid through debit in the SFIS scrip nor to disallow the Cenvat Credit of the CVD paid through SFIS. In such situation in our view admissibility of Cenvat Credit should be decided as per the provisions of Cenvat Credit Rules 2004, applicable during the relevant period. Cenvat Credit Scheme is a special scheme where an assessee can avail credit of the duty paid on the inputs /capital goods/ input services as CENVAT credit under certain conditions. Therefore in our opinion this issue requires re-adjudication. Accordingly, we set aside the impugned order. The case is remitted to the Adjudicating authority with the direction to decide the admissibility of cenvat credit on disputed imported Capital Goods afresh in accordance with provisions of Cenvat Credit Rules, 2004 and pass a speaking order after giving the assessee a reasonable opportunity of being heard. Appeal is allowed by way of remand to the Adjudicating Authority.

(Pronounced in the open court on 15.12.2022)

(Ramesh Nair)
Member (Judicial)

(Raju)
Member (Technical)