

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

REGIONAL BENCH- COURT NO.3

Excise Appeal No.12630 of 2018

(Arising out of OIO-DMN-EXCUS-000-COM-002-18-19 dated 28/05/2018 passed by Commissioner of Central Excise, Customs and Service Tax-DAMAN)

Vedanta Limited

.....Appellant

(Formerly Known As M/S. Sterlite Industries India Ltd),
Survey No.1/1/2, Copper Division, Chinchpada,
SILVASSA, DADRA & NAGAR HAVELI

VERSUS

C.C.E. & S.T.-Daman

.....Respondent

3rd Floor...Adarsh Dham Building, Vapi-Daman Road, Vapi
Opp.Vapi Town Police Station,
Vapi, Gujarat-396191

WITH

Excise Appeal No.12631 of 2018

(Arising out of OIO-DMN-EXCUS-000-COM-002-18-19 dated 28/05/2018 passed by Commissioner of Central Excise, Customs and Service Tax-DAMAN)

Kv Rao

.....Appellant

Vedanta Ltd.(Formerly Known As M/S Sterlite Industries India Ltd.),
1/1/2, Copper Division, Chinchpada,
SILVASSA, DADRA & NAGAR HAVELI

VERSUS

C.C.E. & S.T.-Daman

.....Respondent

3rd Floor...Adarsh Dham Building, Vapi-Daman Road, Vapi
Opp.Vapi Town Police Station,
Vapi, Gujarat-396191

AND

Excise Appeal No.12632 of 2018

(Arising out of OIO-DMN-EXCUS-000-COM-002-18-19 dated 28/05/2018 passed by Commissioner of Central Excise, Customs and Service Tax-DAMAN)

Ramesh Nair

.....Appellant

M/S. Vedanta Ltd. (Formerly Known As M/S Sterlite Industries India Ltd),
1/1/2, Copper Division, Chinchpada,
SILVASSA, DADRA & NAGAR HAVELI

VERSUS

C.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 Vishal Jain & Ms. Dimple Gohil, Advocates for the Appellant
Shri Ghanasyam Soni, Joint Commissioner (AR) for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. RAJU
Final Order No. A/12226-12228 /2022

DATE OF HEARING: 30.08.2022
DATE OF DECISION: 21.12.2022

RAMESH NAIR

The present appeals are directed against the impugned order-in-original No. DMN-EXCUS-000-COM-002-18-19 dated 28-05-2019 passed by the Commissioner, Central GST & Central Excise, Daman.

1.1 Briefly the facts of the present case are that in pursuance to an intelligence that M/s. Sterlite Industries (India) Ltd., Tuticorin has raised supplementary invoices in favour of Appellant i.e. M/s Sterlite, Silvasa (Now known as M/s Vedanta Ltd.) for differential duty paid by them on account of short payment of Central Excise Duty on clearance of 'Copper Anode' during May,1997, to June, 2000, after issuance of show cause notice for under-valuation of 'Copper Anode' and suppression of actual cost of production. On scrutiny of the invoices produced by the assessee, it was observed by the department that during April, 2001, M/s Sterlite, Silvasa has availed Cenvat Credit amounting to Rs. 15,06,93,732/- on the strength of supplementary Invoices issued by M/s. Sterlite, Tuticorin. It was also observed that for short payment of duty proceedings were initiated against the M/s Sterlite, Tuticorin by issuing periodical show cause notices proposing demand of Central Excise Duty covering the period from May 1997 to June 2000. The said show cause notices were adjudicated and the demand was confirmed under Section 11A(2) of the Act. After the issuance of SCNs and few days before the adjudication order, M/s Sterlite, Tuticorin paid the amount of duty in the month of March, 2001 and issued supplementary invoices in favour of

the appellant's unit M/s Sterlite, Silvasa unit (Appellant) who in turn took credit of the duty in their cenvat credit account.

1.2 Appellant was issued show cause notice for denial of cenvat credit on the ground that the in terms of erstwhile Rule 57AE of Central Excise Rules, 1944, Cenvat Credit is not admissible on supplementary invoices where additional amount of duty become recoverable from manufacturer or importer of inputs or capital on account of any non-levy or short levy by reason of fraud-collusion or any willful mis-statement or suppression of facts or contravention of any provisions of Central Excise Act, 1944 or rule made thereunder with an intent to evade payment of Central Excise Duty. The adjudicating authority vide order dated 14.09.2006 confirmed the cenvat demand, interest and imposed penalty. The said order was challenged by Appellant before the Tribunal and vide Final Order dated 16.04.2009 matter was remanded to the adjudicating authority for *denovo* adjudication.

1.3 In such *denovo* adjudication, the Learned Commissioner *vide* impugned Order-in-Original held that the appellant has wrongly availed credit and confirmed the demand along with interest and imposed equal amount of penalty. A separate penalty of Rs. 5,00,000/- was imposed on Shri Ramesh Nair , Associates General Manager (Commercial) of the Appellant and of Rs. 1,00,000/- on Shri K.V. Rao, Associate Manager (Commercial), Authorized Signatory of the appellant under Rule 209A of the erstwhile Central Excise Rules, 1944. Aggrieved by the said order-in-original, the appellants are before this Tribunal.

02. Shri Vishal Jain & Ms. Dimple Gohil, learned counsels appearing for the appellant submits that there is no allegation of finding of fraud, suppression with an intention to evade payment of duty against the Tuticorin unit and in

the absence of the same, credit cannot be denied at the end of the Appellant unit. He placed reliance of the following judgments:-

- CCE VS. CENTURY RAYON – 2016 (339)ELT 242 (BOM)
- (II) CCE VS. OMICRON ENGINEERING CO. – 2001(134)ELT 389 (TRI-DEL)
- (III) ESSELPROPAC LTD. VS. COMMISSIONER OF CUS&C.EX. – 2004 (167)ELT (TRI. MUMBAI)
- (IV) JINDAL STEEL & POWER LTD. VS. CCE – 2017 (355)ELT 568 (TRI. DEL.)
- (V) SUNBEL ALLOYS COMPANY VS. CCE, BELAPUR – 2005(190)ELT 374 (TRI. –MUMBAI)

2.1 He further submits that the bar in Rule 57AE against availing Credit in cases where duty has been short paid or short levied on account of fraud, suppression etc. applies only in a case where goods are sold by a manufacturer. In the instant case there being no sale the said prohibition does not apply. He placed reliance on the following decisions:-

- KARNATAKA SOAPS & DETERGENTS LTD. VS. CCE – 2005(192)ELT 892 (TRI. –BANG.)
- (II) KARNATAKA SOAPS & DETERGENT LTD. VS. CCE – 2010(258)ELT 62 (KAR)
- (III) GODREJ INDUSTRIES LTD. VS. CCE – 2008(232)ELT 108 (TRI. MUM)

Post-hearing he also submitted the documents pertaining to the closure of demand proceedings opted by Tuticorin unit, under the SVLDRS Scheme.

2.2 He also submits that settlement of a dispute does not tantamount to admission of any guilt or liability on the part of the Tuticorin unit. This position also has been clarified by the CBIC in its circular bearing No. 1071/4/2019-CX.8 dated 28.08.2019.

2.3 He further submits that credit availed by the appellant on the supplementary invoices issued by the Tuticorin units is totally correct and is not hit by the exclusion provided in Rule 57AE(1)(ii) of the erstwhile Central Excise Rules, 1944. That inasmuch as there is no allegation of any fraud, collusion, willful suppression etc., on the part of the Tuticorin unit with any intent to evade payment of duty in any of the 9 show cause notices issued to the Tuticorin unit, covering the period May 1997 to June 2000, in respect of which the Tuticorin unit had paid differential duty, the impugned order denying credit availed by the appellant of such differential duty is, therefore, totally untenable.

2.4 He also submits that department did not allege fraud, collusion, willful suppression of facts with any intention to evade payment of duty on the part of the Tuticorin unit is also evident from the facts that the demand for differential duty of excise in the 9 show cause notices, covering the period May 1997 to June 2000, was not raised by invoking the proviso to Section 11A(1) of the Central Excise Act, 1994, which otherwise contains identical ingredients of fraud, suppression etc, as that of Rule 57AE(1)(i) *ibid*. There is no specific finding arrived by the Commissioner of Central Excise, Tirunelveli in its OIO dated 30.03.2017 holding that there was any fraud, willful suppression etc., on the part of Tuticorin unit. Even otherwise, there can be no finding arrived by an adjudicating authority which is *de hors* to the case made out in the show cause notice. In view thereof, in the absence of any allegation and finding of willful suppression on the part of the Tuticorin

unit, the impugned order denying of credit at the Appellant's end in terms of Rule 57AE (1)(i) *ibid* is totally untenable.

03. Shri Ghanasyam Soni, Joint Commissioner (AR) appearing on behalf of the Revenue reiterates the findings of the impugned order.

04. We have considered the submissions made by both sides. We find that the short question involved in the case is whether the Appellant are entitled to avail input credit on the supplementary invoices issued by their Tuticorin unit or otherwise? It can be noted from the Rule 57AE(1)(i) of Central Excise Rules, 1994 that Cenvat credit on supplementary invoices can be denied only if duty become recoverable from the manufacturer on account of any non-levy or short levy by reason of fraud, collusion or any willful mis-statement or suppression of facts or contravention of any provisions of the Act and Rules made thereunder with intent to evade payment of duty. In the present matter the Learned Commissioner in his impugned order observed that the adjudicating authority having jurisdictional over the supplier unit at Tuticorin, has clearly established that the unit at Tuticorin suppressed facts with intent to evade payment of differential duty before the department conducted Cost Audit and unearthed the evasion. The differential duty was paid by the supplier after the issuance of show cause notice and just a few days before the OIO was issued by the adjudicating authority having jurisdiction over the said unit at Tuticorin. Learned Commissioner also observed in the impugned order that from the contents of the OIO dated 30.03.2007 which was passed in De Novo Adjudication in the matter of Tuticorin units also find *mens rea* on the part of the assessee at Tuticorin.

4.1 As per the above observation of the learned Commissioner, the Tuticorin unit of the appellant had short paid the duty by reason of

suppression of fact, fraud, collusion or wilful mis-statement, etc. As per Rule 57AE, the Cenvat credit on the supplementary invoice was allowed however, an exception is provided that if at the supplier's end the duty paid which was earlier short paid or non-paid by reason of suppression of fact, fraud, collusion or wilful mis-statement, etc, the supplementary invoice issued in respect of that duty shall not be admissible for allowing the credit at the recipient's end. Now, the only fact to be verified is that whether the duty paid by the Tuticorin unit of the appellant was short paid or non-paid due to reason of suppression of fact, fraud, collusion or wilful mis-statment, etc. In our view, the adjudicating authority in the present case who has passed the impugned order is not competent to decide that whether the duty paid by the supplier unit is due to reason of suppression of fact, fraud, collusion or wilful mis-statement, etc. This issue has to be decided by the jurisdictional adjudicating authority of the supplier unit against which the proceedings of demand of short paid duty was initiated therefore, it is necessary to analyze the case of supplier's unit with regard to non-payment or short payment of duty which subsequently paid by the Tuticorin unit and for which the supplementary invoices were issued which are the subject matter in the present case.

4.2 On perusal of the show cause notices issued and the adjudicating order passed by Tuticorin jurisdictional adjudicating authority, it was observed that nine show cause notices were issued for the period May, 1997 to June, 2000, all these show cause notices were issued periodically. In these show cause notices proviso to Section 11A(1) was not invoked, even no penalty under section 11AC was proposed therefore, it is clear that there is no charge of suppression of fact, fraud, collusion or wilful mis-statement, etc. in the show cause notices issued to the Tuticorin unit related to which the Tuticorin unit has paid the amount of Rs.15,06,93,732/- and issued supplementary invoice. Against these nine show cause notices, the

adjudicating authority of Tuticorin unit passed Order-In-Original No.19/CE/COMMR/2017 dated 30.03.2017, the operative portion of the order is reproduced below:-

(i) I hereby confirm an amount of Rs.37,29,52,306/- [Rupees Thirty Seven Crore Twenty Nine Lakh Fifty Two Thousand Three Hundred and Six Only] as differential duty on M/s. Sterlite Industries India Limited, Tuticorin under Section 11A(2) of the Central Excise Act, 1944.

(ii) The amount of Rs.15,20,69,027/- [Rupees Fifteen Crore Twenty Lakh Sixty Nine Thousand and Twenty Seven Only] already paid by M/s Sterlite Industries India Limited, Tuticorin is liable for appropriation towards the demand at Sl.No.(i).

(iii) I Impose on M/s. Sterlite Industries India Limited, Tuticorin an amount of Rs.10,00,00,000/- (Rupees Ten Crore only) as penalty under Rule 173Q of Central Excise Rules, 1944.

From the above order also, it is seen that the demand of duty on the Tuticorin unit was not confirmed by invoking proviso to Section 11A(1). Moreover, though the penal provision of Section 11AC was operative during the period May, 1997 to June, 2000 but the same was neither invoked in the show cause notice nor confirmed in the adjudication order dated 30.03.2017. With this undisputed fact, it is absolutely clear that the duty paid by the appellant is against the duty demand made from the Tuticorin unit for which there is no charge of suppression of fact, fraud, collusion or wilful mis-statement, etc. exist and there was no adjudication on the same. With this fact, it is clear that the duty of Rs.15,06,93,732/- paid by the appellant's Tuticorin unit which was passed on to the appellant's unit by issuing the supplementary invoice is not due to reason of suppression of fact, fraud, collusion or wilful mis-statement, etc. accordingly, the bar provided in Rule 57AE is not applicable in the facts of the present case. Therefore, the appellant is legally entitled for the cenvat credit on the supplementary invoices. Since we decide the matter on merit, we are not going into other issues of limitation, etc.

05. As per above discussion and finding, the impugned order is set aside.
Appeals are allowed.

(Pronounced in the open court on 21.12.2022)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Mehul