CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT No. I

Excise Appeal No.70451 of 2021

(Arising out of Order-in-Appeal No.NOI-EXCUS-002-APP-348-21-22 dated 22/07/2021 passed by Commissioner (Appeals) Central Goods & Services Tax, Noida)

M/s Veena Enterprises, **.....Appellant**

(Site-5, H-48, Kasna Industrial Area, Noida)

VERSUS

Commissioner of Central Excise &

CGST, Noida **....Respondent**

(G.B. Nagar, Noida)

APPEARANCE:

Shri Pravin Sharma, Advocate for the Appellant
Shri Sandeep Pandey, Authorised Representative for the Respondent

CORAM: **HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)**

FINAL ORDER NO. 70327/2024

DATE OF HEARING : 29 May, 2024
DATE OF DECISION : 29 May, 2024

SANJIV SRIVASTAVA:

This appeal is directed against Order-in-Appeal No.NOI-EXCUS-002-APP-348-21-22 dated 22/07/2021 passed by Commissioner (Appeals) Central Goods & Services Tax, Noida. By the impugned order, Commissioner (Appeals) has held as follows:-

"ORDER

> *I uphold the confirmation of demand of Rs.3,06,692/- with interest and imposition of equal amount of penalty on the appellant by the adjudication authority in the impugned order.*

I set aside the demand of Rs.4,863/- with interest and penalty of the same amount imposed on the appellant.

The impugned order is modified to the above extent and appeal is disposed of accordingly."

2.1 Appellant is engaged in the manufacture of Tiles of Aluminium and Tiles of iron & Steel. They were also registered with the Service Tax Department for payment of service tax under the category of Transport of Goods by Road/Goods, Transport Agency Services. They are availing the benefit of Cenvat credit as provided under Cenvat Credit Rules, 2004.

2.2 During the course of audit it was noticed that appellant has wrongly availed Cenvat credit to the extent of Rs.3,06,692/- as service tax (including cess) during the month of July, 2016 as per details shown in ER-1 return and appellant was not able to produce any proper documents/invoices for the same.

2.3 Certain other objections were also noted and show cause notice dated 31.01.2020 was issued to the appellant asking them to show cause as to why:-

(i) The credit of Rs.3,18,906/- (Rupees Three Lakhs Eighteen Thousand Nine Hundred and Six only) [Service Tax: Rs.3,06,692/- + 12,214/- Central Excise] including Cess availed and utilized wrongly by the assessee, should not be demanded and recovered from them under Rule 14 of the CENVAT Credit Rules, 2004 read with Section 11A(4) of Central Excise Act, 1944;

ii) The differential amount of Central Excise duty of ***Rs.9,819/-(Rupees Nine Thousand Eight Hundred and Nineteen Only)*** *short paid/not paid by them on clearance of dutiable goods valued of Rs. 78,558/- should not be demanded and recovered from them under the provisions of Section 11A(4) of Central Excise Act, 1944;*

iii) Interest of ***Rs.5,194/- (Rupees Five Thousand One Hundred and Ninety Four Only)*** *[on Cenvat Credit reversed during Dec, 2014 & Sept, 2015 and on 50%*

amount on Capital Goods i.e. Rs. 21,763/-] on the amount mentioned above at point no. 3.3, should not be demanded and recovered from them under the provisions of Rule 14 of the CENVAT credit Rules, 2004;

iv) The appropriate interest on above (i) and (ii), should not be demanded and recovered from them under the provisions of Rule 14 of the CENVAT credit Rules, 2004, read with Section 11 AA of the Central Excise Act, 1944;

v) Penalty equal to the amount mentioned on above (i) and (ii), should not be imposed under Rule 15(2) of the Cenvat Credit Rules, 2004 read with Section 11 AC of Central Excise Act, 1994."

2.4 This show cause notice has been adjudicated as per the Order-in-Original dated 31.08.2020 by holding as follows:-

"ORDER

[1] I order for recovery of Cenvat Credit amounting to Rs.3,18,906/- [Rupees three lakh eighteen thousand nine hundred six only] [Service Tax - Rs.3,06,6921/- + 12,214/- Central Excise] under Rule 14 of the CENVAT Credit Rules, 2004 read with Section 11A of Central Excise Act, 1944 and Section 174 of the Central Goods & Services Act, 2017. Since the party has already deposited Rs.7,351/- [Rupees seven thousand three hundred fifty one only], the same is appropriated.

[2] I confirm the demand of differential amount of Central Excise duty of Rs.9,819/- [rupees nine thousand eight hundred nineteen only] short paid by them on clearance of dutiable goods valued Rs.78,558/- under the provisions of Section 11A of Central Excise Act, 1944 read with Section 174 of the Central Goods & Services Act, 2017. Since the party has already deposited the entire amount, the same is appropriated.

[3] I order for recovery of interest of Rs.5,194/- [on Cenvat Credit reversed during Dec, 2014 & Sept, 2015 and

on 50% amount on Capital Goods i.e. R.s. 21,764/-] under the provisions of Rule 14 of the CENVAT Credit Rules, 2004 read with Section 11AA of the Central Excise Act, 1944 and Section 174 of the Central Goods & Services Act, 2017. Since the entire amount has been deposited by the party, the same is appropriated.

[4] I order for recovery of interest on the amount as adjudged at Point No. [1] and [2] above, under the provisions of Rule 14 of the CENVAT Credit Rules, 2004, read with Section 11 AA of the Central Excise Act, 1944 and Section 174 of the Central Goods & Services Act, 2017. Since the party has already deposited Rs.11,515/- [Total interest - Rs. 16,709/- - Rs.5,194/- already appropriated in Point [3]], the same is appropriated;

[5] I impose a penalty of Rs.3,18,906/- [Rupees three lakh eighteen thousand nine hundred six only].under Rule 15 of the Cenvat Credit Rules, 2004 read with Section 11 AC of Central Excise Act, 1994 and Section 174 of the Central Goods & Services Act, 2017."

2.5 Aggrieved appellant have filed appeal before Commissioner (Appeals), who have decided the appeal as per the impugned order referred in para-1 above.

2.6 Aggrieved appellant have filed this appeal.

3.1 I have heard Shri Praveen Sharma learned Counsel for the appellant and Shri Sandeep Pandey learned Authorised Representative appearing for the revenue.

4.1 I have considered the impugned orders along with the submissions made in appeal and during the course of argument.

4.2 In the present case, though the show cause notice had issued on number of grounds. The issue before me is only in respect of denial of Cenvat credit of Rs.3,06,692/-. In para no.12 of the Order-in-Original following has been recorded for denial of this credit:-

"12. I observe that the party has taken credit of Rs.3,06,692/- on the strength of Challan No. 50318 dated 01.04.2016 which was meant for payment of Service Tax on services provided in relation to execution of a works contract and as such, it cannot said to be a proper challan/document for claiming Cenvat credit as per the provisions contained in Rule 9 of the Cenvat Credit Rules, 2004. Therefore, the party has wrongly availed Cenvat Credit of Rs.3,06,692/-, which is liable to be recovered from them along with interest. Further, the party contended that they were entitled for the refund of the said amount. In this regard, it is well settled that there is no provision to change the head of payment in the statute. It would have been better course of action on the part of the party that they paid Central Excise duty and claimed refund of the amount deposited in wrong head in the manner and within the time prescribed for claiming refund. In view of this, I am constrained to accept the defence plea putforth in this regard and hold that the party is liable to deposit wrongly availed Cenvat Credit of Rs.3,06,692/-."

4.3 Impugned order records as follows for holding against the appellant

"10.1 I find that the Adjudicating Authority has confirmed the demand of Rs. 3,06,692/- holding that the Appellant should have filed refund Service Tax which was deposited vide Challan dated 01.04.2016 instead of taking credit of same in the Cenvat Credit Account and utilising the same for payment of Central Excise duty. Such challan under which an assessee himself had deposited Service Tax, was not specified document for availing credit in terms of the provisions of Rule 9 of the CENVAT Credit Rules, 2004. The Appellant has not come up with any provision of law justifying the admissibility of Cenvat credit in such cases. Section 11B of the Central Excise Act, 1944, which was made applicable to the Service Tax matters by virtue of

Section 83 of the Finance Act, 1994, explicitly prescribed refund of Service Tax / duty paid in excess or inadvertently. There was no provision under CENVAT Credit Rules, 2004, which allowed an assessee to take Cenvat credit of Service Tax paid by himself suo moto.

10.2 The contention of the appellant that the credit of Rs. 3,06,692/- taken by thern may be treated as refund, cannot be accepted as the procedure for claiming and grant of refund prescribed under Section 11B of the Central Excise Act, 1944 has not been followed by them. In absence of any such provision under Central Excise Act. 1944, I uphold the impugned Order-in-Original confirming demand of amount of Rs. 3,06,692/- under Rule 14 of the CENVAT Credit Rules, 2004 read with Section 11A of the Central Excise Act, 1944 with interest on delayed payment thereof under Rule 14 of the CENVAT Credit Rules, 2004 read with Section 11AA of the Central Excise Act, 1944.

10.3 The appellant has also contended that the demand is time barred having been confirmed invoking extended period of limitation. The appellant has submitted that since the credit taken by them was duly reflected in the ER-1 return filed for the month of July, 2016 (copy submitted). Thus there was no suppression on their part and hence extended period could not be invoked. In this regard I have gone through the ER-1 return for the relevant month submitted by the appellant and find that at S. No. 5 of the said ER-1 (Details of Cenvat Credit availed), the appellant mentioned having taken credit of Rs. 3,06,692/- on input services, whereas in fact they had taken credit against challan under which they deposited service tax. This itself constitutes mis-declaration/suppression of facts, more so when in the entire ER-1 return I do not find any mention regarding the challan in question. Further, the appellant has failed to bring on record anything on record in support of their submission that this fact was brought by them to *the notice of the jurisdictional officers of the department at any point of time before audit of their records. Thus I uphold invocation of extended period for confirmation of demand by the adjudicating authority. For the same reason I uphold imposition of equal amount of penalty on the appellant under Rule 15 of the CENVAT Credit Rules, 2004 read with Section 11AC of the Central Excise Act, 1944."*

4.4 There is no dispute above the fact that appellant was entitled to the refund of Rs.3,06,692/- deposited by them vide challan dated 01.04.2016. The only reason for denial is that instead of claiming refund appellant took this amount as credit in their cenvat credit account and utilized the same for payment of central excise duty, as this challan was not a prescribed document for availing the credit in terms of provisions of Rule 9 of Cenvat Credit Rules, this credit was not admissible. Further this demand has not invoked the extended period of limitation.

4.5 There is no dispute about the fact that this amount was paid by the appellant and was due to them for which a proper procedure should have been followed by way of refund claim under Section 11B, instead appellant has suo moto taken this amount in their Cenvat credit. Once this credit was taken, it got duly reflected in the ER-1 return filed by the appellant.

4.6 There cannot have been any malafide intention attributable to the appellant in this case for invoking extended period of limitation as both the authorities bellow have concluded that this amount was admissible as refund under Section 11B as made applicable to service tax by Section 83 of the Finance Act, 1994. That being so, invocation of extended period for making this demand cannot be justified. It is also settled position in law that once appellant has made declaration for credit in their returns they cannot be charged with the suppression, mis-statement, …… for invocation of extended period for making this demand. The fact that appellant have declared the said credit in their ER-1 return has been recorded in the orders of the lower authorities and in para no.10.3 reproduced above, Commissioner (Appeals) specifically records with regard to availment of this credit. Accordingly, I do not find any merits for invoking the extended period of limitation in this case.

4.7 I also note that Rule 9 of Cenvat Credit Rules prescribes following documents for the purpose of the said rules:-

> *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)-(d).* -------------------
>
> *(e) a challan evidencing payment of service tax, by the service recipient as the person liable to pay service tax;"*

4.8 Challan evidencing payment of service tax by the service recipients as person liable to pay service tax has been prescribed document for the purpose of availment of Cenvat credit. Undisputedly, the credit has been taken by the appellant against the challan evidencing payment of service tax.

4.9 In view of the above discussions and findings, I do not find any merits in the impugned order and the same is set aside.

5.1 Appeal is allowed.

(Operative part of the order pronounced in open court)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

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