IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
REGIONAL BENCH : ALLAHABAD

E/2644/2011-EX[DB]

(Arising out of Order-in-Original No.11/Commr/Lko./CX/2011-12 dated 09.08.2011 passed by Commissioner of Central Excise & Service Tax, Lucknow.)

M/s. U.P.Asbestos Ltd.

…APPELLANT(S)

VERSUS

Commr. of Central Excise, Lucknow

RESPONDENT (S)

APPEARANCE

Shri Kamal Jeet Singh (Advocate) for the Appellant (s)
Shri Mohd.Altaf (Asstt.Commr.) (A.R.) for the Revenue

CORAM:

SHRI ANIL CHOUDHARY, HON'BLE(JUDICIAL)
SHRI ANIL G. SHAKKARWAR, MEMBER(TECHNICAL)

DATE OF HEARING/DATE OF DECISION : 02.04.2018

FINAL ORDER NO.70869/2018

Per Shri ANIL G. SHAKKARWAR :

The present appeal is directed against Order-in-Original No.11/Commr/Lko./CX/2011-12 dated 09.08.2011 passed by Commissioner of Central Excise & Service Tax, Lucknow.

2. Brief facts of the case are that the appellant were clearing the goods manufactured by them to the place of buyer under FOR destination pattern. They paid outward freight and paid Service Tax on the said outward freight. They availed Cenvat credit of Service Tax paid on outward freight as Cenvat Credit on input service. It appeared to Revenue that outward transportation was not input service and therefore in terms of Rule 2(l) of Cenvat Credit Rules, 2004 appellant were not entitled for credit of Service Tax paid on

outward freight. Therefore, appellants were issued with a Show Cause Notice dated 09.06.2010 for the period from 05.05.2005 to 06.03.2006 and 01.04.2006 to 31.05.2010 with a proposal that Cenvat credit of Rs.1,68,02,991/- availed during the aforesaid period on Service Tax paid on outward freight should be recovered under Rule 14 of the Cenvat Credit Rules, 2004 read with proviso to sub-section 1 of section 11A of Central Excise Act, 1944. The issue was adjudicated through impugned Order-in-Original wherein the original authority confirmed the demand and imposed equal penalty under section 11AC of Central Excise Act, 1944 read with Rule 15 of Cenvat Credit Rules, 2004. Aggrieved by the said order appellant is before this Tribunal.

3. Heard the ld.Counsel for the appellant. Ld.Counsel for the appellant has submitted that Hon'ble Karnataka High Court in the case of Ultra Tech Cement Ltd. had held that Cenvat Credit of Service Tax paid on outward transportation was admissible. He has further submitted that the Hon'ble Supreme Court has decided appeal arising out of said ruling of Hon'ble Karnataka High Court. The said civil Appeal No.11261 of 2016 was decided by Hon'ble Supreme Court through its ruling dated 01.02.2018 as reported at 2018-TIOL-42-SC-CX wherein the Hon'ble Supreme Court has ruled that w.e.f. 01.04.2008 in view of the change in the definition of input service Cenvat Credit of Service Tax paid on outward transportation shall not be admissible w.e.f. 01.04.2008. Further he has submitted that during the relevant time the ruling by Hon'ble High Court of Karnataka was prevailing which allowed said credit and therefore there was no *mala fide* intention on the part of the appellant and as a result the proviso to sub-section 1 to section 11A cannot be invoked and therefore the demand confirmed under extended period is not sustainable.

4. Heard the ld.AR who has supported the impugned Order-in-Original and agreed that the said ruling by Hon'ble Supreme Court in said civil appeal is applicable to the present case.

5. Having considered rival contentions we find that the Show Cause Notice covers a period from May, 2005 to 31st March, 2010 and Show Cause Notice was issued on 09.06.2010. As ruled by Hon'ble Supreme Court, Cenvat credit of Service Tax paid on outward transportation is not admissible w.e.f. 01.04.2008. We therefore hold that there was no bar on availing such credit before 31.03.2008. We, therefore, set aside the demand for the period up to 31.03.2008. Further, we find that demand from 01.04.2008 to 09.06.2009 is hit by limitation since during the relevant period there was no intention of appellant to evade payment of duty or avail irregular Cenvat credit since during the relevant time such Cenvat credit was held to be admissible. Therefore, we remand the matter back to the original authority by setting aside the impugned Order-in-Original to re-calculate Cenvat credit for the period from 10.06.2009 to 31.03.2010 and disallow the same. Since the extended period is found to be not invocable we set aside the penalty imposed under section 11AC. In above terms the matter is remanded back to the original authority. Appeal is allowed by way of remand.

(Dictated and pronounced in the court.)

SD/
(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

SD/
(ANIL G. SHAKKARWAR)
MEMBER(TECHNICAL)

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