CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH - COURT NO. 1

Central Excise Appeal No. 747 of 2011

(Arising out of Order-in-Original No.42 & 43/2010 dated 30.12.2010 passed by the Commissioner of Central Excise, Bangalore-III Commissionerate, Bangalore.)

M/s. Biesse Manufacturing Co Pvt Ltd
Survey No.32, No.469,
Jakkasandra Village,
Sondekoppa Roa,
Nelamangala Taluk,
Bangalore – 562 123.

Appellant(s)

Versus

Commissioner of Central Excise
Bangalore-III Commissionerate
P. B. No.5400, C. R. Building,
Queen's Road,
Bangalore – 560 001.

Respondent(s)

AND

Central Excise Appeal No. 748 of 2011

(Arising out of Order-in-Original No.42 & 43/2010 dated 30.12.2010 passed by the Commissioner of Central Excise, Bangalore-III Commissionerate, Bangalore.)

M/s. Biesse Manufacturing Co Pvt Ltd
Survey No.32, No.469,
Jakkasandra Village,
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Appellant(s)

Versus

Commissioner of Central Excise
Bangalore-III Commissionerate
P. B. No.5400, C. R. Building,
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Respondent(s)

Appearance:

Shri V. Raghuraman, Sr. Advocate — For the Appellant
Shri Bhanu Murthy, Advocate

Shri K. Vishwanath, AR — For the Respondent

CORAM:

HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)
HON'BLE MRS. R. BHAGYA DEVI, MEMBER (TECHNICAL)

Final Order No. 21396 - 21397 /2023

Date of Hearing: 27/10/2023
Date of Decision: 27/10/2023

Per : R. BHAGYA DEVI

The appellant, M/s. Biesse India Pvt. Ltd., are engaged in the manufacture of wood working machines. The unit when converted into an 100% Export Oriented Unit (EOU) from Domestic Tariff Area (DTA), there was a demand of unutilised cenvat credit of Rs.1,70,74,018/- in addition to Rs.22,37,211/- which was utilised for payment of DTA clearances and an Cenvat Credit amount of Rs.33,24,324/-.

2. The learned counsel on behalf of the appellant submitted that these demands were without any legal basis because there is no provision under Cenvat Credit Rules, 2004 which requires reversal of credit on conversion from DTA to EOU or which restricts availment or utilisation of credit by an 100% EOU. They further submitted that neither the Central Excise Act, 1944 nor the Central Excise Rules, 2002/Cenvat Credit Rules, 2004, provide for expunging the cenvat credit on conversion from a DTA unit to a 100% EOU. It is also claimed that in terms of Rule 3 of Cenvat Credit Rules, every manufacturer is eligible to avail credit of duty paid on input and capital goods and tax paid on input services. Rule 17 of Central Excise Rules 2002 which is meant for 100% EOU categorically states that the duty on

removal of goods from EOU could be remitted by utilising cenvat credit. Referring to the Circular No.799/32/2004 dated 23.9.2004, it is submitted that EOUs are entitled to avail cenvat credit scheme from 6.9.2004. It is further claimed that the entire demand is based on Circular No.77/99-Cus. dated 18.11.1999 which is contrary to the legal provisions and against the provisions of the Notification. To substantiate their argument, they relied on the following judgements:

- Commissioner vs. ANZ International: 2009 (233) ELT 40 (Kar.) – SLP dismissed as reported in Commissioner vs. ANZ International: 2009 (240) ELT A16 (SC)
- Woco Motherson Elastomers Ltd. vs. Commissioner: 2008 (228) ELT 107 (Tribunal)
- Sun Pharmaceuticals Industries Ltd. vs. Commissioner: 2010 (251) ELT 312 (Tribunal)
- GTN Exports Ltd. vs. Commissioner of Central Excise, Coimbatore: 2009 (240) ELT 53 (Tri.-Chennai)
- Commissioner vs. Sandoz Pvt. Ltd.: 2013 (291) ELT 325 (Bom.)
- Medriech Ltd., EOU-II vs. CCE: 2016 (340) ELT 517 (Tri.-Bang.)

3. The learned Authorised Representative reiterated the findings of the lower authorities.

4. Heard both sides. The issues before us (i) whether on conversion from DTA unit to EOU, unutilised cenvat credit available in the books of account needs to be expunged; (ii) whether the unutilised cenvat credit could be utilised for payment of duty on DTA clearances after conversion. Relevant

portion of Rule 17 of Central Excise Rules, 2002 is reproduced herein below:

> **"RULE 17: Removal of goods by a Hundred per cent. Export-Oriented Undertaking for Domestic Tariff Area. —** [(1) Where any goods are removed from a hundred per cent. export-oriented undertaking to domestic tariff area, such removal shall be made under an invoice by following the procedure specified in rule 11, [and the duty leviable on such goods shall be paid by utilizing the CENVAT credit or by crediting the duty payable to the account of the Central Government in the manner specified in rule 8.]"

As per the above Rule 17, the appellant is eligible to avail cenvat credit for payment of duty on the DTA clearances. The reference by the adjudicating authority to the Circular No.77/99-Cus. dated 18.11.1999 which was issued prior to these amendments will be irrelevant, since the period of dispute in the present appeal is June 2009 which is much after the amendments in 2004.

4.1 It is pertinent to reproduce Para 6.37.1 of the Handbook of Procedure of FTP 2004-2009 reads as follows:

> "Existing DTA units may also apply for conversion into an EOU / EHTP/..... but no concession in duties and taxes would be available under the scheme for plant, machinery and equipment already installed. On conversion, they would get income tax concession ...."

Thus, there is no mention of restricting of cenvat credit when a DTA unit converts into an EOU.

4.2 And also, it can be seen from the Circular No. 799/32/2004-CX., dated 23-9-2004 reproduced below, it is clear from the Paragraph 2 that EOUs are entitled to avail cenvat credit scheme with effect from 6-9-2004 vide Notification No.18/2004-CE (NT) dated 6.9.2004.

> **"Circular No. 799/32/2004-CX., dated 23-9-2004**
> **F. No. 261/27/3/2001-CX-8**
>
> Government of India
> Ministry of Finance (Department of Revenue)
> Central Board of Excise & Customs, New Delhi
>
> **Subject : Withdrawal of warehousing facility for removal of petroleum products without payment of duty from the refineries - Supplies to Export Oriented Units - Regarding.**
>
> I am directed to state that references have been received on the issue relating to removal of petroleum products without payment of duty to Export Oriented Units consequent on withdrawal of the warehousing facility for petroleum products.
>
> **2. The matter has been examined. It has been observed that EOUs are entitled to avail CENVAT Credit Scheme w.e.f. 6-9-2004 vide Notification No. 18/2004-C.E. (N.T.), dated 6-9-2004. Thus, the EOUs who receive duty paid goods can avail input credit for the duty paid on such goods and utilize the credit for payment of duty on DTA clearances and if for some reasons, the credit cannot be utilized, the same can be claimed as refund under Rule 5 of CENVAT Credit Rules. In addition, as per para 8.3 of Foreign Trade Policy, the supplies to EOUs are treated as "Deemed Export". Thus, the manufacturers have the additional facility to claim the benefit of refund of Terminal Excise Duty and deemed Export drawback on such supplies to EOUs.**
>
> 3. In view of the fact that numbers of mechanisms have already been provided to give excise duty relief on excisable goods supplied to EOUs, it has been decided that there is no justification to consider any further procedure in the matter.
>
> 4. Trade and field formations may please be informed suitably.
>
> 5. Receipt of the Circular may be acknowledged.
>
> 6. Hindi version will follow."

4.3 In a similar set of facts and circumstances, the Tribunal in the case of **Sun Pharmaceuticals Indus. Ltd.** (supra) has held that:

> **"1.............** They availed the cenvat scheme in respect of inputs, packing materials etc. On 22-4-2004, Sun was converted into a 100% Export Oriented Unit (EOU). Following a visit to the EOU, the officers of the department noticed that the EOU had received the entire balance of stock of inputs with Sun, at the time of its conversion to EOU without payment of duty equal to the credit availed at the time of receipt of the inputs. ...."
>
> **4.** In the appeal before the Tribunal, Sun has challenged the impugned order on the grounds that CBEC Circular No. 77/99-Cus., dated 18-11-99, was no longer applicable when the erstwhile Central Excise Rules'44 were rescinded; Rule 100H of CER'44 which made Rule 57A to 57U inapplicable to a 100% EOU was not on the statute. CER in force during the material period did not contain any rule which barred entitlement of an EOU to cenvat credit. Therefore, order for recovery of the cenvat credit balance was not in accordance with law. ...."
>
> **7.** In CCR'02, or CCR'04, there exist no provisions barring an EOU from availing cenvat credit of excise duty paid on inputs it received. Rule 100H of CER'44 made various rules including Rule 57A to Rule 57U of CER'44 inapplicable to an EOU. CER'44 have been rescinded. There is also no corresponding rule/provision in CCR'01 or CCR'02. CER'01 and CER'02 contain transitional provisions to the effect that any circulars, instructions, orders, trading notices or other orders issued under the CER'44 superseded by CER'01, or such orders etc issued under CER'01 superseded by CER'02, by the Board, and in force on the date the erstwhile rules were rescinded shall, to the extent they are relevant and consistent with the new set of rules shall be deemed to be valid. CBEC Circular No. 77/99-Cus., dated 18-11-99 is reproduced below :-
>
>> "Paragraph 9.28 of the EXIM Policy, 1997-2002 provides that existing DTA units may also apply for conversion into an, EOU/EHTP/STP but no concession in duties and taxes would be available under the scheme for plant, machinery and equipment already installed. In this connection, instances have come to the notice of the Board that such units on their conversion into EOUs have been asked to reverse the Modvat Credit already availed of, on plant and machinery procured by them prior to their conversion into EOUs.

> The matter has been examined. It is clarified that if the DTA unit has availed of the modvat credit on plant, machinery and equipment and also utilized such credit for payment of duty on goods manufactured and cleared before its conversion into EOU/EHTP/STP, the same is not required to be demanded on its conversion into EOU/EHTP/STP. However, if the Modvat credit so availed of is lying in balance as unutilized on the date of conversion into EOU/EHTP/STP, it would lapse on conversion of DTA unit into EOU/EHTP/STP unit and cannot be utilized after such conversion."

This circular was issued during the currency of CER, 1944, which contained Rule 100H which disentitled an EOU to the Cenvat scheme. The CER, 1944 have been rescinded. Therefore, Circular No. 77/99 dated 18-11-99 has to be held to be no longer in force, in view of the transitional provisions contained in Rule 32 of CER, 2001.

8. We find that at the material time the CER or CCR did not contain any provision barring the 100% EOUs from availing cenvat credit or utilizing the same for payment of duty on excisable goods removed to the DTA or for payment of duty on goods exported under claim for rebate. Also there exists no bar for a DTA unit carrying over inputs and the cenvat credit balance in its accounts when it got converted into an EOU. …….

xxxxxx

The CBEC has since made good the deficiency in the rules noted by the Tribunal by providing for the EOUs to utilize the cenvat credit. In *CCE, Rajkot* v. *Ashok Iron and Steel Fabricators* reported in 2002 (140) E.L.T. 277 (Tri. - L.B.) cited by the Ld. Counsel for the appellants, this Tribunal held as follows :-

> "A manufacturer obtains credit for the excise duty paid on raw material to be used by him in the production of an excisable product immediately it makes the requisite declaration and obtains an acknowledgement thereof. It is entitled to use the credit at any time thereafter when making payment of excise duty on the excisable product. There is no provision in the Rules which provides for a reversal of credit by the excise authorities except where it has been illegally or irregularly taken, in which event it stands cancelled or, if utilised, has to be paid for. Here, the credit has been validly taken and its benefit is available to the manufacturer without any limitation in time or otherwise unless the manufacturer itself chooses not to use the raw material in its excisable product."

> **9.** In the absence of provisions requiring the DTA unit to reverse the credit balance at the time of its conversion into an EOU, the above observations of the Tribunal apply. Therefore, the impugned demand and penalties are not sustainable….”

4.4 The decision of the Tribunal in the case of **Sun Pharmaceuticals Industries Ltd.** referred above was upheld by the Hon’ble Bombay High Court in a similar set of facts in the case of **CCE vs. Sandoz Pvt. Ltd.** (supra), the relevant paragraphs are reproduced herein below:

> “Whether the CESTAT was justified in holding that the respondent-assessee, a DTA unit converted into a 100% Export Oriented Unit with effect from 14-7-2004 was not required to reverse the balance CENVAT credit available in the books of accounts of the assessee on the date of conversion and utilize the said credit in respect of the clearances effected from the 100% Export Oriented Unit is the question of law in this appeal.
>
> **2.** The Tribunal has held that the assessee is entitled to avail the credit in balance as on the date of conversion by relying upon the decisions by the Tribunal in ***Sun Pharmaceuticals Industries Ltd.* v. *Commissioner of Central Excise, Pondicherry* - 2010 (251) 312 (Tri.-Chennai); *GTN Exports Ltd.* v. *Commissioner of Central Excise, Coimbatore* - 2009 (240) E.L.T. 53 (Tri.-Chennai) and *Commissioner of Central Excise, Rajkot* v. *Ashok Iron & Steel Fabricators* - 2002 (140) E.L.T. 277 (Tri.-LB**). It is not in dispute that the decision of the Tribunal in the case of *Sun Pharmaceuticals Industries* (supra) and *GTN Exports Ltd.* (supra) have been accepted by the Revenue. It is also not in dispute that appeal filed by the Revenue against the decision of the CESTAT in the case of *Ashok Iron & Steel Fabricators* (supra) has been dismissed by the Apex Court. In this view of the matter, in our opinion, no fault can be found with the decision of the CESTAT. Hence, the appeal is dismissed with no order as to costs.”

5. In view of the relevant amendments in the Rules and the latest Circulars and following the ratio of the judgments rendered in the cases referred above, we find that the appellant

is eligible for availing the cenvat credit after conversion from DTA to an 100% EOU. Accordingly, the appeals are allowed.

(Operative portion of the Order was pronounced in Open Court)

(D.M. MISRA)
MEMBER (JUDICIAL)

(R. BHAGYA DEVI)
MEMBER (TECHNICAL)

rv