CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL BANGALORE

REGIONAL BENCH, COURT NO. 2

Central Excise Appeal No. 169 of 2012

(Arising out of Order-in-Original No. 18/2011 dated 14.10.2011 passed by the Commissioner of Central Excise, Bangalore II Commissionerate, Bangalore.)

M/s. Mapal India Pvt. Ltd.
No. 307 & 308, 5th Main,
4th Phase, Peenya Industrial Area,
Bangalore – 560 058. ……….**Appellant(s)**

VERSUS

The Commissioner of Central Excise
Bangalore II Commissionerate,
P.B. No. 5400, C.R. Building,
Queen's Road,
Bangalore – 560 001. ………..**Respondent(s)**

WITH

Central Excise Appeal No. 170 of 2012

(Arising out of Order-in-Original No. 18/2011 dated 14.10.2011 passed by the Commissioner of Central Excise, Bangalore II Commissionerate, Bangalore.)

Shri. Sripathy, Managing Director,
M/s. Mapal India Pvt. Ltd.
No. 307 & 308, 5th Main,
4th Phase, Peenya Industrial Area,
Bangalore – 560 058. ……….**Appellant(s)**

VERSUS

The Commissioner of Central Excise
Bangalore II Commissionerate,
Bangalore – 560 001. ………..**Respondent(s)**

AND

Central Excise Appeal No. 171 of 2012

(Arising out of Order-in-Original No. 18/2011 dated 14.10.2011 passed by the Commissioner of Central Excise, Bangalore II Commissionerate, Bangalore.)

Shri. Srinivasan. M, Assisstant Manager(Accounts),
M/s. Mapal India Pvt. Ltd.
No. 307 & 308, 5th Main, ...**Appellant(s)**
4th Phase, Peenya Industrial Area,
Bangalore – 560 058.

VERSUS

The Commissioner of Central Excise
Bangalore II Commissionerate,
Bangalore – 560 001. ....**Respondent(s)**

Appearance:

Mr. Akbar Basha, Advocate for the Appellant.
Mr. P. Saravana Perumal, Addl. Commissioner (AR) for the Respondent.

Coram:
Hon'ble Mr. P.A. Augustian, Member (Judicial)
Hon'ble Mr. Pullela Nageswara Rao, Member (Technical)

Final Order Nos. 20015 - 20017 /2025

Date of Hearing: 09.07.2024
Date of Decision: 08.01.2025

Per: P.A. Augustian

The issue in the present appeal is whether the CENVAT credit of additional duty of customs (SAD) availed by the Appellant can be demanded due to failure on the part of the Appellant to comply with Rule 3(5) of Cenvat Credit Rules, 2004. Appellant is registered as manufacturer of parts and accessories of machine tools and tools for milling machines classified under Central Excise Tariff heading 84669310 and 82077090, respectively. Appellant imported various inputs for manufacturing of said products and availed CENVAT credit of the countervailing duty, education cess, secondary higher education cess and additional duty of customs (SAD) paid at the time of import of the said inputs. During Audit for the period from November 2005 to November 2008, it is observed that Appellant was clearing imported inputs 'as such' and selling the same to various customers and it is also observed that Appellant had not paid the amount equivalent to the CENVAT credit availed in respect of additional duty of customs (SAD) paid on the imported inputs, whenever the same were removed 'as such' from their factory. As a result of investigation, proceedings were initiated and Adjudication authority as per the Order-in-Original dated 14.10.2011 confirmed payment of duty (SAD) amounting to Rs. 64,20,716/- in respect of 'as such' clearances under Rule 3(5) Cenvat Credit Rules, 2004 pertaining to the period from October 2005 to November 2008 in terms of proviso to Section 11A of the Central Excise Act, 1944 read with Rule 14 of the CENVAT Credit Rules, 2004 along with interest and also imposed equal amount of penalty under Section 11AC of the Central Excise Act, 1994, read with Rule 15 of Cenvat Credit Rules, 2004. The Adjudication authority also imposed penalty of Rs. 16,05,000/- on Shri T. Sripathy, Managing Director, and Rs.16,05,000/- on Shri. M. Srinivasan, Asst. Manager (Accounts), co-appellants under Rule 26 of Central Excise Rules, 2002 also. Aggrieved by said order present appeals are filed by the appellants before this Tribunal.

2. Since the issue involved is common in all the 3(three) Appeals they are being disposed by this order.

3. When the appeals came up for hearing, the Ld. Counsel for the Appellant submits that the entire proceedings are barred by limitation, since the show cause notice for the period October 2005 to November 2008 was issued on 28.10.2010. Further, there is on allegation of any

willful suppression or misstatement fact on the part of the Appellant in payment of duty. Further the Appellant submits that it is a revenue neutral, and the Appellant had paid more excise duty than what was claimed as CENVAT credit. The Ld. Counsel for the Appellant also draws our attention to the finding in the impugned order where the Appellate authority held that:-

> *"26.1 In this regard the investigation has placed on record specimen copies of the invoices, and it is seen from the invoices that these are sale invoices marked as Note: Material Cleared under as such clearance. Further, it is seen that the said invoices indicate the description of the items cleared as such, have been cleared on payment of central excise and education cess separately at the appropriate rate of duty in terms of the Central Excise Tariff Act. This is clearly an indication in the said invoice that the said items are cleared as manufactured products of the assessee. However, the other evidences such as the markings indicating that the items are materials cleared as such, which are corroborated by evidences such as admissions and submissions of the assessee as discussed in detail at paras 24 and 25 above as well as other relevant paras establish that the said items cleared under the said invoices are nothing short of the inputs cleared as such. Therefore, the said invoices should have reflected payment of amount equivalent to the cenvat credit availed that should have included the amount equal to the cenvat credit availed towards SAD, which is not seen to have been paid in the invoices."*

4. The Ld. Counsel for the Appellant also draws our attention to the reply to show cause notice dated 27.12.2010. The Ld. Counsel further submits that the entire proceedings were initiated without considering the fact that the goods were removed from the factory even 'as such' only on payment of excise duty on selling price resulting in payment of an amount more than the amount of total credit availed including the SAD, hence no loss whatever to the exchequer. Therefore, none of the proceedings stand the scrutiny of law and proceedings were prima facie unsustainable. The Ld. Counsel also draws our attention to the relevant provision of Rule 3(5) of CENVAT Credit Rules, 2004 where it is specifically stated that:-

> *"(5) When inputs or capital goods, on which CENVAT credit has been taken, are removed as such from the factory, or premises of the provider of output service, the manufacturer of the final products or provider of output service, as the case may be, shall pay an amount equal to the credit availed in respect of such inputs or capital goods and such removal shall be made under the cover of an invoice referred to in rule 9 ".*

5. The Ld. Counsel further submits that in compliance with the above, the Appellant had removed the goods under the cover of the invoice referred to Rule 9 and amount also paid in excess than what is availed by the Appellant as CENVAT credit. The only allegation in the present show cause notice is that Appellant had availed SAD credit but not paid at the time of removal. However, the above said provision only directs the Appellant to pay an amount equal to the credit availed and does not prescribe as to how the amounts should be reflected in the invoices. Even as per Rule 3(4)(b), such payment can be made utilizing

the CENVAT credit availed without restriction of utilization of duty paid as SAD on import. The Ld. Counsel further submits that vide letter dated 03.12.2009 and confirmed by the Department vide letter dated 11.12.2009, the overall value added, statement was prepared and submitted to prove that the Appellant have paid more duty than the credit that was availed on import in totality as it was difficult for them to correlate each and every invoice. Therefore, the Appellant complied with provisions of Rule 3(5) and there is no violation as alleged. However, the proceedings were initiated under Rule 14 of CENVAT Credit Rules, 2004 which read as follows:

> *"Where the CENVAT credit has been taken or utilized wrongly or has been erroneously refunded, the same along with interest shall be recovered from manufacturer or the provider of the output services and the provisions of Sections 11A and 11AB of the Excise Act or Sections 73 and 75 of the Finance Act, shall apply mutatis mutandis for effecting such recoveries. Demand is as to the amount and not duty."*

6. From the above provision, it is evident that recovery can be made only of the CENVAT credit which has been taken or utilized wrongly. In the instant case, there is no such allegation, therefore the demand in terms of Rule 14 is legally unsustainable and the entire proceedings in the subject show cause notice is illegal and unsustainable. The Ld. Counsel also draws our attention to paragraph 12 of the show cause notice, where the Adjudication authority confirmed that the Appellant had paid entire excise duty with secondary education CESS on the sale value of the inputs, and it appear from the submission and records that the sale value of inputs cleared as such is more than the procurement

value. Having noted the facts that the amount paid was on sale prices, which was on the higher end, the Adjudication authority has not examined whether the amounts so paid are on higher side to suffix the amount credit availed in addition to the duty. Since this aspect was not examined, the entire proceedings are unsustainable. The Ld. Counsel to support the above submission relied on the following decisions;

a. ***CESTAT Final Order No. 20739-20742/2023 in case of M/s. Komet Precision Tools India Pvt. Ltd.***
b. ***CESTAT Final Order No. 22080/2017 in case of M/s. Komet Precision Tools India Pvt. Ltd.***
c. ***CCE & Cus., Surat-III Vs. Creative Enterprises - 2009 (235) E.L.T. 785 [Guj], Department Appeal was dismissed and maintained by Supreme court in case [2009 [243] ELT A 120] [Supreme Court]***
d. ***CCE, Pune-III Vs. Ajinkya Enterprises - 2013 (294) E.L.T. 203 (Bom.)***
e. ***Ajinkya Enterprises Vs. CCE, Pune-III 2013 (288) E.L.T. 247 (Tri.-Mumbai)***
f. ***CCE., Bangalore-V Vs. Vishal Precision Steel Tubes & Strips Pvt. Ltd. - 2017 (349) E.L.T. 686 (Kar.)***
g. ***Vickers Systems International Ltd Vs. CCE., Pune-1-2008 (229) E.L.T. 298 (Tri. Mumbai)***
h. ***Crompton Greaves Ltd Vs. CCE., Mumbai-III - 2008 (230) E.L.T. 488 (Tri.-Mumbai)***

6. As per the decision of Tribunal in the matter of **M/s Komet Precision Tools** (supra) and the Hon'ble Bombay High Court in the matter of **M/s Anjinkiya Enterprises** it is held that:-

"once duty on final product has been accepted by the Department, credit cannot be denied by holding that the process does not amounts to manufacture."

7. It is further submitted that the duty paid should be treated as reversal of CENVAT credit. The Ld. Counsel also draws our attention to the judgment of the Hon'ble High Court of Karnataka in the matter of **CCE Vs. M/s Vishal Precision Steel Tubes and Strips,** wherein it is held that:-

"7. It is an undisputed position that the final product is treated as dutiable and duty is paid by the assessee. When once duty is paid by the assessee treating the activity as manufacturing activity by the Department, Cenvat credit is available and there is no question of reversion of Cenvat credit. As such, in view of the aforesaid two decisions of the High Court namely, Bombay High Court and Gujarat High Court, we do not find any question of law would arise for consideration as sought to be canvassed".

8. The Learned Authorised Representative (AR) for the Revenue reiterated the finding in the impugned order and submits that the issue was also considered by the Tribunal in the matter of **M/s Monarch Catalyst Pvt Ltd vs CC, Mumbai (2016 (12) TMI 195 CESTAT, Mumbai**), wherein it is held that **:-**

"2. Brief facts of the case are that M/s Monarch Catalyst Pvt. Ltd., Phase-l, Dombivli, are engaged in manufacture of various types of catalysts and other items falling in Chapter 75 of Central Excise Tariff. During the course of Audit, it came to notice that the assessee had cleared their inputs namely Nickel Cathodes and Nickel HP Squares as such to their sister concern located at D-26,

Phase-II, MIDC, Dombivli (E). As per Rule 3(5) of Cenvat Credit Rules, 2004, when inputs or capital goods, on which CENVAT credit has been taken, are removed as such from the factory the manufacturer of the final products shall pay an amount equal to the credit availed in respect of such inputs or capital goods and such removal shall be made under the cover of an invoice referred to in Rule 9 of Cenvat Credit Rules, 2004. It was noticed that though the assessee has paid/ reversed amount equal to the credit taken on Basic duty, Education Cess & Secondary & Higher Education Cess in respect of the inputs cleared as such to their unit No. II, they did not pay/reverse the credit of 4% Additional Duty of Customs in respect of the said Inputs. It was observed that the assessee had also cleared their inputs namely Nickel Metal as such to their customers on payment/reversal of amount equal to the Cenvat credit availed by them including the 4% Additional duty of Customs."

"3. In his statement dated 26.05.2009, Sh. Hitesh Vadalia, Managing Director of M/s Monarch Catalyst Pvt. Ltd. stated that he was aware of the fact that certain inputs were cleared as such without payment of 4% Additional duty of Customs from their unit No. I situated at A-94 & F-1/2, Phase-I, MIDC, Dombivli (E) to unit No. II situated at D-26, MIDC, Phase-ii, Dombivli (E), since he believed that the said clearances were not sale of goods but transfer of goods; that they have not paid an amount equal to Cenvat Credit availed of 4% Additional duty of Customs in respect of inputs cleared as such to their other unit i.e. unit No. II, during the period from May 2006 to August 2006. He accepted the

responsibility for the said mistake/flaw as he was looking after Excise and Customs matters of the Factory."

9. Heard both sides perused the records.

10. We have gone through the evidence produced by the Appellant and the Respondent. As per the invoices relied by the Adjudication authority, it is shown that the materials were cleared under 'as such' clearance and goods were sold by charging excise duty as per the selling price of the goods. We had also gone through the ER-1 monthly return for the month of April, 2005, where details of the goods manufactured by the Appellant, cleared 'as such', rejected material cleared after rectification, export clearance against CT-3, etc., are clearly mentioned, while filing ER-1 return. It is also evident that as per the above return, as such clearance, the quantity cleared, assessable value, type of duty, rate of duty and duty payable were clearly mentioned. Facts being so, allegation of willful suppression and misstatement facts are unsustainable. Thus, invoking the extended period of limitation is also unsustainable. The Ld. Counsel also draws our attention to ER-1 returns for the month of May 2007 and October 2006, etc., which also clearly shows the 'as such' clearances.

11. Further, Ld. Counsel for the Appellant submitted that while replying to the show cause notice, it was categorically submitted that it is not possible to correlate directly to the invoices under which the goods being sold with that of the Bills of Entry under which the goods were imported due to the volume of trade and the number of items involved. In order to overcome such difficulty and to avoid allegation in the future of evasion of excise duty, Appellant paid excess duty as

applicable to finished goods. The obligation on the part of Appellant is to comply with Rule 9(5) of CENVAT Credit which is read as under;

> *"The manufacturer of final products or the provider of the output service shall maintain proper records for the receipt, disposal, consumption and inventory of the input and capital goods in which the relevant information regarding the value, duty paid, CENVAT credit taken and utilized, the person from whom the input or capital goods have been procured is recorded and the burden of proof regarding the admissibility of the CENVAT credit shall lie upon the manufacturer or provider of output service taking such credit."*

12. The Ld. Counsel also submitted that in response to the Audit objection, a detailed reply was filed by the Appellant vide letter No. MILCEXRPLY2008-09 dated 28.01.2009, where it is clearly stated that as regards the objection on Special Additional Duty of customs on 'as such' clearance, it is stated that the Appellant have been clearing the same on transaction value, the duty finally paid would be substantially higher and the Cenvat credit debit equivalent would be less than the duty actually discharged. Therefore, there is no revenue implication. The Appellant also enclosed working of 25 consecutive Bills of Entries with analysis of the transactions which indicates that much higher duty has been discharged compared to the credit availed. The credit availed is Rs. 17.32 lakhs and duty debited is Rs. 25 lakhs. Thus, the Appellant has paid excess duty of Rs.7.67 lakhs. Inspite of giving such specific data, no attempt was made by the Adjudication authority to correlate the duty paid by the Appellant and the CENVAT credit availed by them

and the SAD allegedly not paid. However, in this regard, Adjudication authority has considered and given the following finding:

> *"In paragraph 26.1 it is held that "the amount to be paid cannot be equivalent to the duty of excise/educational Cess. Therefore, this contention is untenable and improper in Excise law. Nevertheless, the proper course in such situation is to discharge the liability of payment of amount in terms of provision laid down in Rule 3(5) of the CENVAT Credit Rules towards equal amount of and simultaneously apply of refund in terms of Rule 11B with respect to any payment of duty of excise/education Cess, if claimed to have been made in excess by the Appellant".*

13. The Ld. AR further submitted that as held by the Adjudication authority, the Appellant had adopted a strategy to misdirect the investigation from issue of non-payment of amount payable in terms of Rule 3(5) of the CENVAT Credit Rules. In the first place, the assessee has stated in their letter dated 28.01.2009, they agreed to the point that the reversal in such cases should include the SAD of 4%. However, during the investigation, they have deliberately furnished the details of SAD involved on such clearance made by them on the ground that correlation between the imported inputs and 'as such' clearances were not possible as per their records. Further on one hand, the Appellant indicated on the invoices that the said goods are indeed the inputs cleared as such, whereas on being pointed out that the SAD availed as CENVAT credit has not been paid, they have submitted that the items have undergone manufacturing process. The fact that the said items were imported inputs cleared 'as such' as established by the investigation by correlating the part number indicated in the invoices

with those reflected in the Bills of Entry under which the said items were imported. Therefore, there has been a continuous attempt on the part of assessee to misrepresent and suppress the facts deliberately with the intention to avoid payment of the amount availed as CENVAT Credit at the time of 'as such' clearances. Thus, Appellant is liable to be imposed with penalty as held by the Adjudication authority.

14. As regarding suppression of facts, as per the finding in the impugned order, the Adjudication authority held that the facts regarding inputs cleared 'as such' was established by investigation. However as evident from the ER-1 return submitted by the Appellant and as per the invoices relied in the impugned order, Appellant had clearly mentioned in the invoice that the goods are cleared 'as such'. Facts being so, there is no reason to allege that the Appellant has suppressed the facts regarding removal of inputs 'as such' and it was not established by way of investigation by the Department. Hence, we find that the impugned order is not tenable on limitation.

15. Further, we find that the appellant has paid duty on 'as such' clearances on the transaction value, which is higher than the Cenvat credit to be reversed on 'as such' clearances. We find that the case of the department is that they have not reversed the Cenvat credit taken of the SAD amounts, on their 'as such' clearances. However as per Rule 3(5) of Cenvat Credit Rules, 2004 when the goods are cleared as such they have to either reverse the Cenvat credit availed on such goods or pay duty equivalent to the Cenvat credit availed on such goods. We find that in this case the appellant paid duty which was higher than the reversable Cenvat credit. Hence, we find that there is no Revenue loss.

16. In view of the above discussion and in the facts and circumstances and the decisions of. Tribunal the impugned order is unsustainable on limitation as well on merits and needs to be set aside. Consequently, the penalties imposed on co-appellants are also not sustainable and are to be set aside.

17. Accordingly, the Appeals are allowed with consequential relief, if any as per law.

(Order pronounced in Open Court on 08.01.2025)

(P.A. Augustian)
Member (Judicial)

(Pullela Nageswara Rao)
Member (Technical)

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