

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
BANGALORE**

Appeal(s) Involved:

E/20807/2016-SM

[Arising out of Order-in-Appeal No. CAL-EXCUS-000-APP-501-15-16 dated 29/02/2016 passed by Commissioner of Central Excise, Customs & Service Tax (Appeals-II), COCHIN.]

**M/s. Arya Vaidya Pharmacy
(Coimbatore) Ltd**

Kanjikode (Factory), Kanjikode Post,
PALAKKAD - 678621
KERALA

Appellant(s)

Versus

**Commissioner of Central Excise,
Customs and Service Tax Calicut**

CENTRAL REVENUE BUILDING,
MANANCHIRA, CALICUT,
KOZHIKODE, - 673001
KERALA

Respondent(s)

Appearance:

Mr. S.DURAIRAJ, Advocate

M/S. THE EXPERTS -INDIRECT TAXES,
176/84, WEST SAMBANDAM ROAD, RS
PURAM, COIMBATORE.
COIMBATORE - 641002
TN

For the Appellant

Mr. Pakshirajan, AR

For the Respondent

Date of Hearing: 28/03/2018

Date of Decision: 28/03/2018

CORAM:

HON'BLE MR. S.S GARG, JUDICIAL MEMBER

Final Order No. 20505 / 2018

Per : S.S GARG

The present appeal is directed against the impugned order dated 29.2.2016 passed by the Commissioner (A) whereby

the Commissioner (A) has confirmed the demand along with interest but dropped the total penalties.

2. Briefly the facts of the present case are that the appellants are manufacturers of Ayurvedic medicines. They manufacture both dutiable and exempted Ayurvedic medicines and availed CENVAT credit of excise duty paid on inputs under Rule 6(1) of CENVAT Credit Rules, 2001, 2002 and 2004. In the case of fuel used in generation of steam, they were taking credit for the entire quantity received, which were used for manufacture of dutiable and exempted goods. It was alleged that as per Rule 6(1) of CENVAT Credit Rules, 2001, 2002 and 2004 the appellant was not eligible to avail CENVAT credit on such quantity of inputs (furnace oil), used as fuel for generation of steam in the manufacture of non-dutiable products. They did not reverse the credit of duty availed on fuel used in the manufacture of exempted goods for the period 30.1.2002 to 28.2.2006 and 1.3.2006 to 31.10.2006. Therefore, two show-cause notices were issued to the appellant proposing to disallow the wrong credit so availed and recovered from them along with interest under Rule 14 of CENVAT Credit Rules, 2002 read with Section 11A and 11AB of Central Excise Act, 1944. The demand issued was confirmed along with interest and penalties. Aggrieved by the Order-in-

Original, the appellant filed appeal before the Commissioner who rejected the appeal but dropped the penalties imposed under Section 11AC under the Central Excise Act.

3. Heard both the parties and perused the records.

4. Learned counsel for the appellant submitted that the impugned order passed by the Commissioner (A) dropping the penalty under Section 11AC finding that there is no suppression. He further submitted that once the penalty under Section 11AC is dropped, extended period of limitation cannot be invoked. He also submitted that during the period 30.1.2002 to 31.10.2006, CENVAT credit is taken on furnace oil which was used both for exempted and dutiable products and the Revenue's contention is that proportionate credit for the exempted products is required to be reversed along with interest in terms of Rule 6 of CENVAT Credit Rules, 2004. This issue is pending before the Larger Bench of the Hon'ble Supreme Court as reported in *2012 (286) ELT 481 (SC)* in the case of *CCE Gujarat Narmada Valley Fertilizers Co. Ltd.* Learned counsel further submitted that he is not contesting on the merit of the case, since the issue is still subjudice before the Hon'ble apex court but on limitation, substantial demand is time barred. It is his submission that the Commissioner (A) has

set aside all the penalties including the penalty imposed under Section 11AC, by holding that there was confusion regarding the availability of CENVAT credit on fuel used in the manufacture of dutiable and exempted goods. No appeal was preferred by the Revenue against this finding of the Commissioner (A). Further, no finding was also made by the Commissioner (A) to uphold the demand for the extended period. In such circumstances, he submitted that the demand for the period up to November 2005 is hit by limitation. For this, he relied upon the decision of the Supreme Court in the case of *CCE vs. S. Narendrakumar & Co. reported in 2011 (267) ELT 577 (SC)* wherein it was held that extended period cannot be invoked when there is confusion regarding the interpretation of an issue. The learned counsel further relied upon the following decisions, wherein it has been held that extended period cannot be invoked when penalty is set aside.

- *CCE, Raipur vs. Vishal Agencies: 2009 (15) STR 195 (Tri.)*
- *BPL Telecom Ltd. vs. CCE, Calicut: 2016 (46) STR 775 (Tri.)*
- *Mahesh Kumar Sharma vs. CCE, Raipur: 2017 (49) STR 239 (Tri.)*

5. On the other hand, the learned AR defended the impugned order and submitted that the Hon'ble High Court of Gujarat in the case of *CCE vs. Deeyakar Aluminium Pvt. Ltd.:*

2016 (344) ELT 76 (Guj.) has held that CENVAT credit on furnace oil is not admissible.

6. After considering the submissions of both the parties and perusal of the material on records and decisions relied upon by both the sides, I find that the appellant has no case on merit in view of the judgment of the Hon'ble Gujarat High Court in the case of *CCE vs. Deeyakar Aluminium Pvt. Ltd.* cited supra. As far as limitation is concerned, I find that the Commissioner (A) has set aside the penalty imposed under Section 11AC and the Revenue has not preferred an appeal against the dropping of the penalty. Further, I find that the Commissioner (A) has also not given any finding with regard to the extended period. In the decisions relied upon by the appellant cited supra, it has been consistently held by the Tribunal that the extended period cannot be invoked when penalty is dropped under Section 11AC. By following the ratios of the said decisions, I hold that the demand for the period from 30.1.2002 to 30.11.2005 is time barred and set aside the same and the appellant is liable to pay the duty for the period from December 2005 to October 2006 and for the purpose of quantification of duty for the normal period, the case is remanded back to the original authority to re-quantify the

demand for the normal period along with interest. Accordingly, the appeal is partially allowed and the demand for the extended period is set aside and the appeal is allowed by way of remand. Needless to say that the original authority shall comply with the principles of natural justice.

(Order was pronounced and dictated
in Open Court on **28/03/2018.**)

S.S GARG
JUDICIAL MEMBER

rv...