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

Appeal(s) Involved:

E/573-578/2009-DB

[Arising out of No. Order-in-Original No.20-25/2009 all dated 26/02/2009 passed by Commissioner of Central Excise & Service Tax, Large Taxpayer Unit, Bangalore]

VOLVO INDIA PVT LTD
YALACHAHALLY,TAVAREKERE
POST,HOSAKOTE,
BANGALORE-562122

Appellant(s)

Versus

C.C.E. & S.T.-BANGALORE-LTU
100 FT RING ROAD JSS TOWERS,
BANASHANKARI-III STAGE,
BANGALORE,
KARNATAKA
560085

Respondent(s)

Appearance:

Shri G. Shivadass, Advocate
LAKSHMI KUMARAN & SRIDHARAN
WORLD TRADE CENTRE NO.404-406, 4TH
FLOOR, SOUTH WING BRIGADE GATEWAY
CAMPUS NO.26/1, DR. RAJKUMAR ROAD,
BANGALORE
KARNATAKA
560 055

For the Appellant

Mr. Madhup Sharan, AR

For the Respondent

Date of Hearing: 10/08/2018

Date of Decision:16/08/2018

CORAM:
HON'BLE SHRI S.S GARG, JUDICIAL MEMBER
HON'BLE SHRI P.ANJANI KUMAR, TECHNICAL MEMBER

Final Order No21159-21164/2018

Per : P.ANJANI KUMAR

M/s. Volvo India Ltd. (the appellants) are manufacturers and sellers of automobiles; they import the spare parts and keep them, store them at Central Warehouse (CWH), Hoskote and utilize the same for servicing or sales at their respective service centres at Bhiwandi, Jangalpur, Nagpur, Ramagundam, Bhubaneshwar, Gurgoan w.e.f. 01.06.2006 re-packing and relabelling of automobile parts amounted to manufacture in terms of Section 2(f)(iii) of Central Excise Act, 1944. The appellants have paid the duty liability pertaining to the impugned period i.e. June 2006 to April 2007 on 04.05.2007 with interest by utilizing the credit of duty paid on goods received which were inputs lying in stock as on 01.06.2006 and duty paid on inputs received after 01.06.2006. The appellants have taken registration on 04.05.2007 belatedly claiming that they had a bonafide belief that Section 2(f)(iii) would not cover a situation where goods are already marketable and subject to payment of duty. The Department has served 6 SCNs to different service centre locations and all the SCNs were confirmed by Commissioner LTU vide orders 20-25 all dated 26.02.2009 confirming the duties as mentioned below and imposing penalty of Rs.5,00,000/- on each of them.

Appeal NO.s	Service Centre	Date of SCN	Duty Demanded	OIO No.	Duty Confirmed
E/574/2009	Bhiwandi	09.04.2008	Rs.1,53,34,772/-	20/2009-Commr. LTU	Rs.36,67,278/-
E/576/2009	Jangalpur	23.04.2008	Rs.1,75,03,478/-	21/2009-Commr. LTU	Rs.35,82,176/-
E/575/2009	Nagpur	23.04.2008	Rs.2,77,29,218/-	22/2009-Commr. LTU	Rs.47,98,991/-
E/573/2009	Ramagundam	23.04.2008	Rs.5,89,43,852/-	23/2009-Commr. LTU	Rs.1,03,99,712/-
E/577/2009	Bhubaneshwar	23.04.2008	Rs.58,03,486/-	24/2009-Commr. LTU	Rs.13,53,848/-
E/578/2009	Gurgoan	23.04.2008	Rs.1,55,26,278/-	25/2009-Commr. LTU	Rs.37,72,295/-

Hence, the above cited 6 appeals were filed.

2. The learned counsel for the appellants contended that while the SCN was issued on the ground that credit is not available prior to registration at service centres. The learned Commissioner has traversed beyond the SCN and confirmed the demands holding that the stock transfer notes issued by the appellants do not satisfy the requirements of proper documents to take credit and that there is no link between the inputs lying in stock and the duty paying documents. The learned counsel submitted that the impugned order is completely travelled beyond the SCN in as much as the only allegations in the SCN

was with receipt of non-eligibility of credit on account of availment of credit prior to registration of service centres. In this regard, they relied upon the following case laws:

(i) CC Vs. Toyo Engg. India Ltd. reported in 2006 (201) ELT 513 (SC).

(ii) Caprihans India Ltd. Vs. CCE 2017 (51) STR 239 (SC).

(iii) Syndicate Bank Vs. Commissioner of Central Excise, Mangalore 2018 (10) GSTL 555 (Tri. Bang.).

2.1 The learned counsel further submitted that the requirement that the person issuing invoice on the basis of which CENVAT Credit is availed should be registered was introduced in the proviso to Rule 9(2) of the CENVAT Credit Rules, 2004 only w.e.f. 09.03.2007; while the impugned order alleges absence of co-relation between inputs lying in stock and the duty paying documents, the order has completely disregarded the details of the duty paid document indicating the opening stock and branch bifurcation of duty paid; in terms of Rule 3(2) of the CENVAT Credit Rules, 2004 the date on which the goods manufactured by the manufacturer become dutiable/excisable, the manufacturer would be eligible to avail credit on the inputs lying in stock based on the documents which evidence the payment of duty. In terms of Rule 9 of the CENVAT Credit Rules, 2004, the basic input document for the purpose of availment of CENVAT Credit in respect of imported goods is the Bill of Entry; proviso to Rule 9(2) provides that even if all the particulars required to be contained in the documents are not mentioned, CENVAT Credit should not be denied if the details with respect to payment of duty, description of the goods, assessable value, name and address of factory/warehouse is mentioned in the documents. It is not the case of the Department that the goods were cleared from the Central Warehouses to any other places other than the service centres; therefore once the source of the goods is identified, the credit cannot be denied to the goods in question.

2.2. The learned counsel has also submitted that the audit of the appellants was conducted by the departmental officers on various dates from January 2007 to May 2007 and have issued audit notes; one of the objections was pertaining to the issue i.e. non-payment duty on goods clear from the service centres consequent to introduction of Notification No. 12/2006 dated 29.05.2006 wherein the Department concluded that since the unit has paid duty along with interest before the issue of SCN no further action is proposed as envisaged under Section 11(2B) of the Central Excise Act, 1944 whereas the audit note dated 11.09.2007 has concluded as above, the Department has proceeded with issuing SCNs in April 2008, there was nothing contumacious on the part of the appellants to be ineligible for the provisions of Section 11(2B) of the Central Excise Act, 1944. In view of the fact that the Commissioner in the impugned order has categorically held that there is no suppression etc. on the part of the appellants; therefore, he submitted that a major portion of the demand is barred by limitation as the appellants themselves have communicated to the 3rd Schedule of Central Excise Tariff Act, 1985 pursuant to which the Department had granted registration to their Central Warehouses. It is confirmed both by the SCN and OIO that the appellants have, vide their letter dated 17.11.2006, informed the Department that occasionally the service centres would have an activity of re-packing/re-labeling which would amount to manufacture in terms of Section 2(f)(iii); the audit party visited in June 2007 and have recorded that the service centre had made payments of the duty belatedly along with interest and therefore, SCN was not warranted in terms of Section 11A(2B) of the Central Excise Act, 1944.

3. The learned DR has reiterated the findings in the OIO and has vehemently opposed the contentions of the learned counsel. He has submitted inter alia that:

(i) The document for availment of credit is not the Stock Transfer Invoice; Bill of Entry for the purpose of availing CENVAT Credit is applicable only to the CWH.

(ii) The CWH should have been registered in terms of Central Excise Rules, 2002 to pass on the credit.

(iii) Only after the visit of the audit officers, they have taken registration therefore they were eligible to avail credit on the stock lying in the premises only as on 04.05.2007.

(iv) The relevant date for issuing of SCN is within one year from 04.05.2007.

(v) The appellants have paid the duty along with interest only after being pointed out by the Department; therefore, the imposition of penalty and demand of interest are sustainable.

4. Heard both sides and perused the records of the case. Questions that require our consideration in the case are as follows.

(i). has the Commissioner traversed beyond the scope of Show Cause Notice

(ii). whether the appellants are entitled for the credit they have availed?

(iii). whether the appellants' case is covered under the provisions of Section 11A (2B) of the Central Excise Act, 1944.

4.1 Coming to the question No.1 we find that the SCN was issued alleging that the appellants have availed credit of duty paid on goods received in their premises as on 01.06.2006 whereas the appellants, having registered themselves on 0405.2007, are only eligible to avail credit of goods received by them on or after 04.05.2007. The utilization of credit by the appellants is in contravention of Central Excise Rules, 2002. The appellants contended that they have, at the Central Warehouse, availed credit of the CVD paid at the time of import of parts lying in stock as on 01.06.2006 and the same was accepted and allowed by the department. Similarly, when the service centres availed credit on the parts which were transferred from central warehouse and were lying in stock as on 01.06.2006. It is pertinent to see that the commissioner in the OIO has settled the issue and observed that (Para 25(iii) a)

'' I find sufficient force in the argument of the assessee (the appellants). I have gone through the relevant provisions of the said Rules. I find that there is no mention anywhere in the Rule that the relevant date is date of registration. To that extent the argument of the assessee (the appellants) is acceptable''.

4.2 As far as this part is concerned it is clear that the Learned Commissioner has accepted the contention of the appellants as far as the admissibility of credit availed by them on the inputs available on the date of coming in to effect of the provisions of deemed manufacture. Further, the Learned

Commissioner has also observed that there is no time limit prescribed under CENVAT Credit Rules for availment of Credit.

4.3 However, the authority further proceeded to decide the eligibility on the factors that were not the part of Show Cause Notice. To this extent, we find that the L Commissioner has certainly traversed beyond the scope of the SCN. On this issue we find that the impugned order is not maintainable as per the ratio of the case laws cited by the appellants.

4.4 Moreover, the Learned Commissioner proceeded to decide the eligibility of the credit saying that credit is governed by the other provisions of the said Rule 9, which specifies the documents and accounts etc. Learned Commissioner held that in terms of Sub-Rule 9(1)(a)(iii) of Rule of the CENVAT Credit Rules, 2004, invoice, issued by an importer from his depot or from the premises of consignment agent of the said importer if the said depot or the premises as the case may be is registered in terms of CENVAT Excise Rules, 2002, is only valid document.

(i). Learned Commissioner denied the Credit availed by the appellants on the parts available as on 01.06.2006 holding that for the period prior to 01.06.2006, as there was no duty liability on the activity undertaken by the Central Ware House, no duty was discharged in respect of the clearances made from CWH for that period. In view of the fact that the assessee has not been able to establish link between the stocks lying as on 01.06.2006 and the duty paying documents.

(ii). Learned Commissioner denied the Credit availed by the appellants on the parts received at different service centre, from Central Ware House, during June 2006 and July 2006 holding that it is not possible to link the amount to any duty paying document

(iii). Learned Commissioner allowed part of the Credit availed by the appellants on the parts Received during 01.08.2006 and 30.04.2007 holding that stock transfer invoice is a specified document and disallowed a part stating that they could not be linked to any invoice.

5. A careful perusal of the impugned order reveals that the learned commissioner has taken a different stand for different periods. While in respect of credit for the periods mentioned at (i) and (ii) above the Learned Commissioner took the stand that no duty could be discharged before 01.06.2006 before 01.06.2006; Stock Transfer Invoice is not a valid document in terms of Rule 9 of the CENVAT Credit Rules and that proper correlation between credit taken and duty payment document was not available. However, the same authority has come to the conclusion that Stock Transfer Invoice is a valid document; filing of declaration under Rule 57G and that registration by dealers were only a

procedural requirement. He has relied on Supreme Court's decision in the case of ***Dai Ichi Karkaria 1999(112) ELT 353(SC)***; Judgment of CESTAT in ***Nagammai Cotton Mills 2002(147) ELT 1245(T-Chennai)*** and decision of tribunal in ***Shivalik Agro Poly Products 2001(130) ELT 736(Tri-Delhi)***. It is pertinent to note that all the periods discussed by commissioner in the impugned order are prior to the obtaining of registration by the Appellants. We also find that Tribunal in the case of ***Rohit Surfactants Pvt. Ltd. 2018 (13) GSTL 175 (Tri. Allahabad)*** had held that credit if available prior to the registration needs to be allowed; question to be seen is as to whether the said credit was otherwise available to the assessee prior to their registration. It is not understood as to how learned commissioner concluded that the parts lying in stock as on 01.06.2006. Learned Counsel for the appellants submitted that all the parts are imported by them and no part has been procured domestically. Therefore, all the parts that were received in the CWH and later distributed to Service Centres are arguably duty (CVD) paid. The appellants being a well-established multinational have an elaborate and fool proof method of accounting goods. All the service centres receive parts only from CWH. It is not the case of the Department that parts are dispatched or sold from CWH to places other than service centres or that Service Centres procure parts from other sources. In such a case, it is incomprehensible as to how some parts could not be held to be not correlated to be duty paid. Having dealt the issue from the issue of substantial compliance, having held that the registration itself is a procedural requirement and stock transfer invoice a duty paying document the learned Commissioner could have got the issue examined in totality from CWH and further transfer to various service centres before denying the credit. On this count also we find that the appellant's submission does survive on merits. However, for a proper appreciation of the issue and for qualification of credit admissible, the issue requires to go to the jurisdictional authority who shall allow the credit on verifying the records at CWH and transfer to various service centres in totality, within 3 months of submission of records and evidence to that effect by the appellants. Under such circumstances, we find that the penalties levied therein are not maintainable; therefore, they are liable to set aside.

6. Coming to the third issue of whether the appellant's case is fit to be considered under the provisions of Section 11(2B), we find that Central Excise Audit team has visited the premises of the appellant and have conducted audit from Jan-May 2007. At the end of the Audit they have issued an audit note dated 2/2007. One of the issues raised therein was pertaining to non-

payment of duty on goods cleared from service centres consequent to the issue of Notification No 12/2006 dated 29.05.2006-CE(NT). The conclusion drawn on the objection was that since the appellants have paid the duty along with interest before issue of SCN No further action is proposed as envisaged under Section 11(2B) of Central Excise Act, 1944. The department has given the proposition being fully aware about the credit availed by the appellants and the payment of duty by them. The audit note in fact has raised some issues relating to irregular availment of CENVAT Credit. The only condition under which the provision of this section could be denied to the appellants was non-payment of duty by reason of fraud collusion suppression of fact, wilful misstatement etc. These ingredients were not established either in the SCN or the impugned order. Moreover, the appellants appear to have submitted that consequent upon the change in legal position, they examined as to whether the activity undertaken by them at the CWH and Service Centres amounted to manufacture; simultaneously, the mammoth task of identifying the activity undertaken in respect of each of the 5-6000 number of parts was taken up and could be completed only by August 2006; Thereafter the appellants voluntarily approached Jurisdictional Central Excise Authorities on 18-8-2006 and filed a letter bringing out the consequences and effect of the amendments made to Section 2(f) (iii). Therefore, it was not open to the department to go beyond the proposition in the Audit Note.

7. In view of the above, we allow the appeals by way of remand to the jurisdictional authorities to allow credit after verifying the records and documents pertaining to receipt (Import) storage and distribution of parts to various service centres within 3 months of submission of necessary evidence in the form of documents/records by the appellants. However, the penalties imposed are set aside.

(Order was pronounced
in Open Court on **16/08/2018**)

P.ANJANI KUMAR
TECHNICAL MEMBER

S.S GARG
JUDICIAL MEMBER

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