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

Application(s) Involved:

E/Additional Evidence/28580/2013 in E/25159/2013-SM

Appeal(s) Involved:

E/25159/2013-SM

[Arising out of No. 577/2012 dated 19/10/2012 passed by the Commissioner of Central Excise, Mangalore]

Mayabandar Doors Pvt. Ltd. Survey No.92/3, 96,97, Bannur Road, Bhugathagahally, Mysore - 570 010 Karnataka	**Appellant(s)**

Versus

C.C.,C.E.& S.T-Mysore S1-S2, Vinaya Marga, Siddhartha Nagar, Mysore - 570 011 Karnataka	**Respondent(s)**

Appearance:

Shri Arun Kurian Joseph, Advocate No.3, Subbaraya Avenue, Abhiramapuram, Chennai - 600 018	For the Appellant
Shri Madhupsharan, Assistant Commissioner & Smt. Kavitha Poduwal, AR	For the Respondent

Date of Hearing: 27/03/2018
Date of Decision:03/04/2018

CORAM:
HON'BLE SHRI S.S GARG, JUDICIAL MEMBER

Final Order No. 20517/2018

Per: S.S GARG

The present appeal is directed against the impugned order dated 19.10.2012 passed by the Commissioner (Appeals) whereby the Commissioner (Appeals) has rejected the appeal of the appellant. Briefly the facts of the present case are that the appellant is a manufacturer of Flush Doors, Window Frames/Door Frames, Door Shutter. During the course of business appellant availed cenvat credit on various capital goods purchased during the years 2004-05, 2006-07 and 2007-08 as per the Cenvat Credit Rules 2004. They have also availed depreciation on the value of capital goods which represented the 50% of the cenvat credit during the said financial year in terms of Section 32 of the Income Tax Act. As per Rule 4(4) of the Cenvat Credit Rules, appellant is not eligible to avail the benefit of cenvat credit on capital goods in respect of that part of the value of capital goods which represents the amount of duty on such capital goods, which the manufacturer claims as depreciation under Section 32 of the Income Tax Act, 1961. Department alleged that the appellant had neither disclosed/intimated the said fact of claiming depreciation under Income Tax Act nor reversed the 50% of cenvat credit irregularly availed by them, till the internal audit party noticed the same. Therefore, a show-cause notice was issued demanding irregularly availed cenvat credit on capital goods along with interest and also with a proposal to impose penalties.

The original authority after following the due process of law confirmed the demand of irregularly availed cenvat credit on capital goods under Rule

14 of the Cenvat Credit Rules, 2004 read with proviso to Section 11A (1) of the Central Excise Act, 1944 and the demand of interest thereon. The original authority has also imposed a penalty. Aggrieved by the said order, appellant filed appeal before the Commissioner (Appeals) who also rejected the appeal. Hence the present appeal.

2. Heard both the parties and perused the records.

3. The learned counsel for the appellant submitted that the impugned order is not sustainable in law as the entire demand is barred by limitation. He further submitted that on merit, he is not contesting the case in view of the judgment of the ***Karnataka High Court in the case of CCE & ST, Bangalore Vs. Suprajit Engineering Ltd.*** reported in ***2010 (253) E.L.T. 369 (Kar.)*** wherein the Hon'ble Karnataka High Court had held that assessee cannot simultaneously avail cenvat credit and depreciation under the Income Tax Act 1961. Learned counsel further submitted that the Internal Audit Party of the Department visited the factory of the appellant in October 2005 and raised the objection but the proceedings upon that issue was dropped consequent to the reply filed by them. Further a second audit party of the Department also visited the unit in 2009 and the same audit objection vide Audit Note No. 121/2009 dated 08.04.2010. He further submitted that despite awareness of the methodology employed by the appellants and having all of the relevant information since the original audit in 2005, a show-cause notice was finally issued by the Assistant Commissioner only in 04.11.2010 invoking the longer period of limitation

which is completely barred by limitation. In support of this submission, he relied upon the decision in the case of ***Terene Fibres India Pvt. Ltd. Vs. CCE 2001 (138) E.L.T. 889*** where the Tribunal held that in the light of the knowledge of the Department, the allegation that the facts were suppressed by the assessee lacks force. Further in the case of ***GAC Shipping India Pvt. Ltd. – 2017 (49) STR 242 (Tri.-Bang.)*** the Hon'ble Tribunal has held that the entire demand made in the show-cause notice is based on the details found in the books of accounts maintained by the assessee and that no specific grounds have been made in the show-cause notice regarding how the assessee has indulged in suppression with intent to evade payment of service tax. Further in the case of ***CCE Vs. Softex reported in 2007 (209) ELT 9 (S.C)*** it has been held that it was evident from the reading of the same that the facts were already in the knowledge of the Revenue and in those circumstances, the Revenue cannot invoke the extended period of limitation under Section 11A of the Act. The learned counsel further submitted that the method adopted by the appellant during the relevant time was in accordance with the orders of the Tribunal prevalent during the relevant period showing that the appellant acted under a bona fide belief and is not guilty of suppression. Learned counsel referred to the decision of the Tribunal in the case of ***Suprajit Engineering Ltd. Vs. CCE*** reported in ***2007 (212) E.L.T. 394*** and ***Roots Cast Private Ltd. Vs. CCE*** reported in ***2007 (216) E.L.T. 448.*** He also submitted that the show-cause notice was issued by the Department on 04.11.2010 only after the decision rendered by the High Court of Karnataka in the case of **CCE Vs. Suprajit Engineering Ltd.** (supra) holding that the assessee cannot claim depreciation under

Section 32 of the Income Tax Act in respect of non-utilized cenvat credit and claiming benefit of depreciation under the Income Tax Act.

4. On the other hand the learned AR defended the impugned order.

5. After considering the submissions of both the parties and perusal of the material on record, I find that as far as merit is concerned, the case is covered against the appellant in view of the judgment of the Karnataka High Court in the case of **Suprajit Engineering Ltd.** cited supra. Now coming to the question of limitation, I find that this issue has been raised during the internal audit conducted by the Department from time to time but in spite of that show-cause notice for the first time was issued on 04.11.2010 for the capital goods purchased during 2004-2007. Further I also find that during the relevant time, the decisions were in favour of the appellant where the Tribunal held that there is no need in the Rules which deprive the appellant from availing the depreciation on the balance 50% of the duty which is not availed as cenvat credit and the appellant had a bona fide belief that he is entitled to take the cenvat credit as well as depreciation. Further finally the Karnataka High Court in the case of **Suprajit Engineering** (supra) held that the appellant cannot take cenvat credit as well as depreciation. Further I find in view of the judgment of the Tribunal in the case of **Terene Fibres India Pvt. Ltd.** and **GAC Shipping India Pvt. Ltd.** cited supra wherein it has been held that when the facts are in the knowledge of the Department then suppression cannot be alleged. In the present case also I find that the methodology followed by the assessee was in the knowledge of the

Department but in spite of that Department did not issue the show-cause notice which was finally issued on 04.11.2010 for the period 2004 to 2007. Therefore, in view of the various decisions cited supra, I am of the view that the entire demand is barred by limitation and therefore, I set aside the impugned order by allowing the appeal of the appellant.

(Order pronounced in Open Court on **/ /2018**)

(S.S GARG)
JUDICIAL MEMBER

...iss