CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH - COURT NO. 1

Central Excise Appeal No. 2001 of 2012

[Arising out of Order-in-Original No. 28/2012 dated 26/03/2012 passed by the Commissioner of Central Excise, Bangalore – II Commissionerate]

GRASIM INDUSTRIES LTD.
Kumarapatnam – 581 123,
Ranebennur Tq., Dist. Haveri

Appellant(s)

VERSUS

C.C.E.-Bangalore-II
PB 5400, CR Building, Queens Road,
Bangalore - 560 001
Karnataka

Respondent(s)

Appearance:

Mr. M.S. Nagaraja, Advocate
T. Rajeswara Sastry & Associates
No.1010, 2nd Floor,
Above Corp. Bank, 26th Main,
4th T Block, Jayanagar
Bangalore - 560 041
Karnataka

For the Appellant

Mr. M.K. Davindran, Supdt. (AR) — For the Respondent

Date of Hearing: 27/02/2020
Date of Decision: 03/06/2020

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

Final Order No. 20353 / 2020

Per : S.S GARG

The present appeal is directed against the impugned order dated 26/03/2012 passed by the Commissioner of Central Excise whereby the Commissioner has confirmed the demand totally amounting to

Rs. 1,47,89,503/- (Rupees One Crore Forty Seven Lakhs Eighty Nine Thousand Five Hundred and Three only) being the inadmissible cenvat credit availed by the appellant in respect of duty paid on furnace oil as demanded in various show-cause notices and also appropriated the entire amount of duty paid by the appellant. The adjudicating authority has also imposed penalty as well as demanded interest on the confirmed demand in terms of Rule 12/14 of the Cenvat Credit Rules, 2002/2004 read with Section 11AB of the Central Excise Act, 1944.

2. Briefly the facts of the present case are that the appellant is a manufacturer of Viscose Staple Fibre (BSF). The appellant was taking cenvat credit on Furnace Oil used as "fuel" in the manufacture of Wood Pulp, partly captively consumed in the same factory for manufacture of dutiable VSF and partly cleared at Nil rate of duty to Sister Unit at Nagda (MP) for manufacture and clearance of dutiable VSF.

The Department entertained the view that the re-credit of cenvat taken by the appellant on its own which was earlier reversed was in violation of Rule 6(1) of Cenvat Credit Rules, 2002. A show-cause notice was issued demanding the cenvat credit of Rs. 54,35,476/- (Rupees Fifty Four Lakhs Thirty Five Thousand Four Hundred and Seventy Six only) relating to the period from 01/03/2002 to 28/02/2003 which was also reversed by them. Subsequently, four show-cause notices were also issued for subsequent period. After following the due process, the Commissioner of Central Excise confirmed the demand along with interest and also imposed penalties.

3. Heard both the parties and perused the records.

4. Learned counsel for the appellant submitted that the only issue to be decided in the present case is whether the "inputs intended to be

used as fuel" in the manufacture of both dutiable and exempted goods were eligible for credit was the subject matter of large number of disputes. The High Courts and the Tribunals consistently held that sub-rule (2) of Rule 6 of the Cenvat Credit Rules, 2002 during the relevant period carved out an exception in respect of "inputs intended to be used as fuel" and there was no requirement to reverse credit on fuel attributable to exempted goods. He further submitted that this issue was finally decided by the Hon'ble Supreme Court in the case of ***CCE Vs. Gujarat Narmada Fertilizer Company Ltd. – 2009 (240) E.L.T. 661 (SC)*** whereby the Hon'ble Apex Court reversed the judgment of the High Courts and the Tribunal and held that the legal effect of sub-rule (1) has to be applied to all inputs including fuel inputs, only exception being non-fuel-inputs, for which one has to maintain separate accounts or in its absence pay 8%/10% of the total price of the exempted final products. Therefore, sub-rule (1) shall apply in respect of goods used as "fuel" and on such application, the credit will not be permissible on such quantity of fuel which is used in the manufacture of exempted goods. Learned counsel further submitted that after the decision of the Apex Court in the case of **Gujarat Narmada Fertilizer Company Ltd.** cited supra, appellant accordingly deposited cenvat credit of Rs. 1,47,89,504/- (Rupees One Crore Forty Seven Lakhs Eighty Nine Thousand Five Hundred and Four only) vide Challan No. 009 dated 08/12/2011 and the same stands appropriated in the impugned order. Further the details of the payment of cenvat was intimated vide letter dated 08/12/2011. He also submitted that as per the order of the Commissioner, the appellants have deposited Rs. 1,52,39,714/- (Rupees One Crore Fifty Two Lakhs Thirty Nine Thousand Seven Hundred and Fourteen only) towards interest vide Challan No. 1 dated 19/06/2012 under intimation to the Department which was subsequently confirmed to have been deposited by the Department. The learned counsel for the appellant submitted that the appellants were reversing the cenvat credit on furnace oil used as fuel in the manufacture of dutiable VSF and exempted Wood Pulp, a part of which was being stock transferred to Sister Unit at Nagda for the manufacture of dutiable VSF. The High Courts and the Tribunal in a large number of judgments had taken the view that the provision of Rule 6 of the Cenvat Credit Rules, 2002 are not attracted to "inputs intended to be used as fuel". In view of the judgments of the Tribunal and the High Court, the appellant informed the jurisdictional authorities vide their letter dated 28/04/2003 that they intend to take cenvat credit on furnace oil and further vide letter dated 29/08/2003 informed the Department that they had taken credit only partially till 28/02/2003 on furnace oil used as fuel and that they intend to avail the balance credit for the period from 01/04/2000 to 28/02/2003 in the month of September 2003. Further the appellant vide letter dated 16/12/2003 informed the Department that since credit on fuel input was not required to be reversed, they had taken full cenvat credit of Rs. 54,35,476/- (Rupees Fifty Four Lakhs Thirty Five Thousand Four Hundred and Seventy Six only) for the period from 01/04/2000 to 28/02/2003. He further submitted that re-taking of credit wrongly reversed in the Cenvat Account is only an adjustment in the Cenvat Account and does not amount to wrong or irregular credit. In any case, the entire amount including the re-credit amount has been paid along with interest. The learned counsel in the present case has only prayed that since he has paid the confirmed demand along with interest and hence the penalty imposed by the Commissioner should be dropped. He also submitted that re-taking of credit on furnace oil used as inputs was not with a malafide intention but consistent with the previous judicial precedent in favour of the assessee. He also referred to the observation of the Hon'ble Apex Court in the case of **Gujarat Narmada Fertilizer Company Ltd**. wherein the Hon'ble Apex Court has observed that in such cases penalty should not be imposed. He also submitted that it is well settled legal position that when there are conflicting judgments and the issue is finally resolved by the Supreme Court, penalty should not be imposed. Appellant relied upon the following decisions:

a. *ICMC Corporation Ltd. Vs. CESTAT, Chennai – 2014 (302) E.L.T. 45 (Mad.)*
b. *Krishnav Engineering Ltd. Vs. CESTAT – 2016 (331) E.L.T. 391 (All.)*
c. *Gujarat Alkalies & Chemicals Ltd. Vs. CCE, Vadodara II – 2005 (190) E.L.T. 406 (T-Mum.)*

5. On the other hand the learned AR for the Revenue defended the impugned order and submitted that the appellant has violated the provisions of Rule 6(1) of Cenvat Credit Rules, 2002. He further submitted that it is admitted by the appellant that they have taken back the cenvat credit on their own on 15/12/2003 without following the procedure laid down in the Central Excise Law in terms of Section 11B of Central Excise Act, 1944. He further submitted that there is no provision in the Central Excise Law that enables the appellant to take back cenvat credit which was earlier reversed by them suo motto.

6. After considering the submissions of both the parties and perusal of the material on record, we find that in the present case the appellants were reversing the cenvat credit on furnace oil used as fuel in the manufacture of dutiable VSF and exempted Wood Pulp, a part of which was being stock transferred to Sister Unit at Nagda for the manufacture of dutiable VSF. Subsequently, the appellant came to know that the High Courts and the Tribunal in large number of judgments had taken the view that the provisions of Rule 6 of Cenvat Credit Rules, 2002 are not attracted to "inputs intended to be used as fuel". Thereafter, the appellant informed the jurisdictional authorities

vide letter dated 28/04/2003 that they intend to take cenvat credit on furnace oil. Further the appellant vide their letter dated 29/08/2003 which is on record informed the Department that they had taken credit only partially till 28/02/2003 on furnace oil used as fuel and they intend to avail the balance credit for the period from 01/04/2000 to 28/02/2003 in the month of September, 2003. Subsequently, they have also informed the Department that since credit on fuel input was not required to be reversed, they had taken full cenvat credit. Further we find that after the Apex Court decision in the matter of **Gujarat Narmada Fertilizer Company Ltd.** cited supra which finally settled the issue and reversed the judgment of the High Court and the Tribunal. The appellant deposited the entire cenvat credit which was also appropriated in the impugned order. Further we find that the appellants have also deposited Rs. 1,52,39,714/- (Rupees One Crore Fifty Two Lakhs Thirty Nine Thousand Seven Hundred and Fourteen only) towards interest vide Challan No. 1 dated 19/06/2012 under intimation to the Department which fact has also been accepted by the Department. Further we find that re-taking of the credit by the appellant on furnace oil used as input was not with any malafide intention but was consistent with the prevalent judicial precedent in favour of the assessee. Here it is pertinent to reproduce the observation and the direction of the Hon'ble Supreme Court in the case of **Gujarat Narmada Fertilizer Company Ltd**. cited supra with regard to disputes arising on issues relating to cenvat credit and imposition of penalty. The relevant observations are reproduced herein below:

> *"13. It may be noted that litigation on interpretation of Cenvat Credit Rules has arisen on account of various conflicting decisions given by the various Benches of CESTAT, the reason being that the Rules have not been properly drafted. In the circumstances, we are*

of the view that in this batch of cases no penalty is leviable, however, in order to decide the amount of duty payable by each of the assessees, the matters are remitted to the Adjudicating Authority to decide the amount of duty payable without penalty on reversal of credit to the extent of the input being used in the manufacture of exempted final products/ to the extent of the excess electricity being wheeled out to the Grid and to the Township."

Further we find that in view of the decisions relied upon by the appellant cited supra, it is settled legal position that when there are conflicting judgments and the issue is finally resolved by the Supreme Court then in such circumstances, penalty should not be imposed.

7. Hence, by following the ration of the above said decision, we are of the considered view that the imposition of penalty of Rs. 11,00,000/- (Rupees Eleven Lakhs only) on the appellant under Rule 13/15 Clause (1) of Cenvat Credit Rules, 2004 is not sustainable in law and therefore, we set aside the imposition of penalty by allowing the appeal of the appellant.

(Order was pronounced in Open Court on **03/06/2020**)

(S.S GARG)
JUDICIAL MEMBER

(P. ANJANI KUMAR)
TECHNICAL MEMBER

Indira...