

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE**

REGIONAL BENCH - COURT NO. 2

Central Excise Appeal No. 20250 of 2021 [SM]

[Arising out of Order-in-Appeal No. MLR-EXCUS-000-APP-MS-049-20-21 dated 01/01/2021 passed by Commissioner of Central Tax, BELAGAVI APPEALS]

**M/s Mangalore Refinery And
Petrochemicals Ltd**

Bala Village Kuthethoor PO Via Katipalla
MANGALORE
KARNATAKA
575030

Appellant(s)

VERSUS

**Commissioner Of Central Excise &
Central Tax, Mangalore
Commissionerate**

7th Floor, Trade Center, Bunts Hostel Road
Mangalore
Karnataka
575003

Respondent(s)

Appearance:

Ms. Neethu James and Ms Shradha Pandey, Advocates for the Appellant

Mr. P.Saravana Perumal , Authorised Representative for the Respondent

CORAM: HON'BLE MR. P.A. AUGUSTIAN, JUDICIAL MEMBER

Final Order No.20049/2023

Date of Hearing: 31/01/2023

Date of Decision:15/02/2023

Per : P.A. AUGUSTIAN

The appellant is an oil refinery and subsidiary of Oil and Natural Gas Corporation (ONGC), the Public Sector Undertaking of the Government of India. The background of the case is that the appellant's books of accounts was audited by the Assistant Commissioner, Audit in March/April 2015 for the period from November 2013-15 and raised an Audit objection dated 27.04.2015 regarding wrong availment of credit of Rs.30,88,313/- on input services by the appellant on said period. During the course of

investigation, the appellant reversed the credit availed against the disputed invoice to the extent of Rs.19,58,960/- in April-May 2015. However, a Show Cause Notice dated 27.04.2016 was issued to the appellant by invoking the extended period of limitation proposing to disallow and recover credit amounting to Rs.30,88,313/- in terms of Rule 14 of CENVAT Credit Rules, 2004. The appellant while submitting the reply to Show Cause Notice raised preliminary objections regarding limitation and submitted that entire demand has been time barred since it is raised under Rule 14 of CENVAT Credit Rules, 2004 read with Section 11A(4) of the Central Excise Act, 1944. Further submitted that since there is no allegation of fraud, collusion, wilful mis-statement and suppression of fact etc., invoking provisions of Section 11A(4) of the Act for extended period of limitation is not applicable. Appellant also referred the judgment of Hon'ble Supreme Court reported in 1994 (74) ELT 9 (SC) in the case of *Tamilnadu Housing Board Vs CCE, Madras* and other case laws where the Appellate Authority has held that invoking the extended period of limitation is not applicable when there is no allegation of fraud or suppression of fact etc.

2. After considering the submissions made by the appellant, Adjudicating Authority vide Order-in-Original dated 31.03.2017 has held as under:

1. *I hold that the CENVAT credit amounting to Rs.21,14,385/- availed and utilized during the period from September 2014 to January 2015 should be disallowed and recovered from the assessee under Rule 14 of CENVAT Credit Rules, 2004 read with Section 11A(4) of the Central Excise Act, 1944.*

2. *I hold that the interest as applicable on the total ineligible credit availed of Rs.21,14,385/- and Rs.9,73,928/- for the respective applicable periods should be recovered from them under Rule 14 of the CENVAT Credit Rules, 2004 read with Section 11AA of the Central Excise Act, 1944.*

3. *I impose a penalty of Rs.10,57,193/- on them under the provisions of Rule 15(1) & Rule 15(2) of the CENVAT Credit Rules, 2004 read with Section 11AC (1) of the Central Excise Act, 1944.*

3. Aggrieved by the said order, the appellant filed appeal and Commissioner (Appeals) vide Order-in-Appeal dated 21.08.2018 held that "it

is a fit case to remand to Original Adjudicating Authority keeping all options open". Thereafter, the Adjudicating Authority considered the matter in *de novo* adjudication and vide Order-in-Original dated 21.11.2019 held as under:

i. I hold that out of the total CENVAT Credit amounting to Rs.21,14,385/- in respect of Sl. Nos. 9, 10, 14, 17, 18, 25, 26, 27, 28, 29, 30, 31, 32 and 33 of Annexure A to SCN availed during the period from September 2014 to January 2015, a credit of Rs.10,92,688/- is allowed in terms of Rule 4(7) of CENVAT Credit Rules, 2004.

ii. I hold that out of the total CENVAT Credit amounting to Rs.21,14,385/- in respect of Sl.Nos.9, 10, 14, 17, 18, 25, 26, 27, 28, 29, 30, 31, 32 and 33 availed during the period from September 2014 to January 2015, credit of Rs.10,21,697/- (pertaining to Sl.No.18 part amount) is disallowed in terms of Rule 4(7) of CENVAT Credit Rules, 2004. However, as the same has already been reversed by the assessee, I do not propose to demand the same again under Rule 14 of CENVAT Credit Rules, 2004 read with Section 11A(4) of Central Excise Act, 1944.

ii. I drop the proceedings with reference to demand of interest under Rule 14 of CENVAT Credit Rules, 2004 read with Section 11AA of Central Excise Act, 1944.

iv. I drop the proceedings of penalty under Rule 15(1) & 15 (2) of CENVAT Credit Rules, 2004 read with Section 11AC (1) of Central Excise Act, 1944.

4. From the above, it is evident that the Adjudicating Authority itself upheld the objection made by the appellant regarding invoking the extended period of limitation and considering the same, dropped the proposal for penalty. Aggrieved by the said Order-in-Original, the appellant submitted an appeal by raising the various contentions including the objection regarding invoking the extended period of limitation. However, the Commissioner (Appeals) vide impugned order dated 01.01.2021 rejected the appeal and aggrieved by the said order, the present appeal filed before this Tribunal.

5. Learned AR for the Department has reiterated the findings of the impugned order and submitted that issue of refund is not subject matter in *de-novo* adjudication.

6. After considering the submissions of both the parties and on perusal of

the material on record, it is found that the preliminary objection raised by the appellant from the very beginning of the proceedings is regarding invoking extended period of limitation and in spite of repeated proceedings before adjudication and Appellate Authorities, there is no finding to said aspect. Though, the Adjudicating Authority in *de novo* adjudication held that the present *de novo* proceedings are being taken up on specific remand and directing the Original Authority to examine only those issues which have been subjected to the matter of original demand hence the issue of refund is neither the subject matter of SCN dated 27.04.2016 nor subject to remand order of Commissioner (Appeals). Therefore raising the refund issue at this stage and also examining the said contentions in this order are travel beyond the scope of remand directions of the Appellate Authority. However, on perusal of the Order-in-Appeal at Para 11, the Commissioner (Appeals) held that the present case is fit to remand to Original Adjudicating Authority keeping all options open. Thus, the Adjudicating Authority ought to have considered the issue in detail including preliminary objections raised by the assessee/appellant regarding invoking the extended period of limitation. Moreover, by dropping the penalty by Original Authority in *de novo* proceedings shows that there is no suppression of fact or fraud to invoke the extended period of limitation. The learned Counsel appearing for the appellant has relied upon the following decisions:

- *Commissioner of ST, Mumbai IV Vs Rochem Separation Systems (I) Pvt. Ltd., 2019 (23) GSTL 446 (Bom.) [Para No. 3 (iii)].*
- *Noharlal Verma Vs Distt. Coop. Central Bank Ltd., (2008) 14 SCC 445, [Para No. 32 and 33].*

7. As per the law laid down by the Hon'ble Apex Court in the matter of *Commissioner of Customs Vs J.B. V Jewels, 2004 (172) ELT 3 (SC),*

34. We find that reference was made by departmental authorities to the proviso appended to sub-section (2) of Section 28 of the Act. No plea about its non-applicability was taken in the grounds of appeal before the CEGAT and though it was vehemently urged that the point was specifically taken before the Tribunal, we find no mention thereof in the CEGAT's order. The matter can be looked at from another angle. If in reality, the CEGAT found that the action taken by the departmental authorities was beyond the period of limitation, it could have disposed of the appeals before it only on that ground without examining the merits. On the contrary, in the absence

of any specific plea in the grounds of appeal, the point does not seem to have been urged before the CEGAT, particularly, in view of the consideration of the merits and non-consideration of the question of limitation. That being so we find no substance in the plea of learned Counsel for the respondents that the action taken by authorities was beyond the period of limitation. Even otherwise, the proviso to sub-section (2) of Section 28 is clearly applicable as the materials clearly indicate non levy and short levy on account of misrepresentation of facts by the respondents.

8. After Considering the facts of present appeal, I find force in the submissions made by Appellant regarding the extending period of limitation. While considering the issue in similar case i.e 2013 (298) ELT 225 (Tri-Delhi) in the case of CCE Indore Vs NEPA Limited, Tribunal held that the assessee being a Public Sector Undertaking, there can be no *mala fide* intention to avail irregular and non-available CENVAT credit and non-payment of duty with intent to evade payment of duty and held that lower period of limitation and imposition of penalty are not imposable. Once there is no averment either in the SCN or impugned orders regarding the availment of benefits by suppression of fact or fraud, invoking extended period of limitation is not proper and considering the law laid down by the Hon'ble Apex Court, I am allowing the appeal on the ground of limitation without going into the merits of the case. Hence, the appeal is allowed.

(Order pronounced in the Open Court on **15/02/2023**)

(P.A. AUGUSTIAN)
JUDICIAL MEMBER

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