CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
SCO 147-148, SECTOR 17-C, CHANDIGARH – 160 017

DIVISION BENCH
COURT NO. I

APPEAL NO. E/993/2010-[DB]

[Arising out of Order-in-Original No. 01/CE/CHD-II/2010 dated 06.01.2010 passed by the Commissioner of Central Excise, Chandigarh-II]

Nector Lifesciences Ltd (Unit-II) : **Appellant(s)**

VS

C.C.E., Chandigarh : **Respondent(s)**

Appearance:
Present for the Appellant(s): Mr. Vikrant Kackria, Advocate
Present for the Respondent(s): Mr. Bhasha Ram, A.R.

CORAM:

Hon'ble Mr. Ashok Jindal, Member (Judicial)
Hon'ble Mr. Bijay Kumar, Member (Technical)

Date of hearing: 21.02.2019
Date of decision: 20.03.2019

FINAL ORDER NO. 60246/2019

Per Ashok Jindal :

The appellants are in appeal against the impugned order wherein they were asked to reversed the Cenvat credit in terms of Rule 11(3) of the Cenvat Credit Rules, 2004.

2. The facts of the case are that the appellants are manufacturer of bulk drugs and menthol products. The products are being manufactured become exempt for payment of duty w.e.f. 01.03.2008. The Revenue is of the view of that as the appellants have started manufacturing exempted goods, therefore, the Cenvat credit lying in their Cenvat credit account contained in inputs/ semi

finished goods/ finished goods shall lapse in terms of Rule 11 of the Cenvat Credit Rules, 2004. Therefore, the proceedings were initiated and it was held that the appellants are required to reverse the Cenvat credit lying in their Cenvat credit account. Consequent to that the appellants are before us.

3. The Ld. Counsel for the appellants submits that at the time of availment of Cenvat credit, there was no such provision for reversal of Cenvat credit, therefore, the appellants have correctly availed the Cenvat credit on inputs/ capital goods/ input services contained in semi finished goods/ finished goods, therefore, they are not require to reverse the Cenvat credit. He further submits that the same view has been taken by Hon'ble High Court of Himachal Pradesh in the case of ***CCE, Chandigarh vs. United Vanaspati Ltd. – 2010 (251) ELT 373 (H.P.)***. Further, Hon'ble Punjab & Haryana High Court in the cases of ***CCE, Panchkula vs. HMT (TD) Ltd. – 2015 (322) ELT 342 (P&H)*** and ***CCE, Chandigarh vs. CNC Commercial Ltd – 2008 (224) ELT 239 (P&H)*** and this Tribunal also in the case of ***M/s Shiv Engineering Industries vs. CCE, Ludhiana vide Final Order No. 63266/2018 dt. 05.10.2018*** has held that as there is no charging provision "how the Cenvat credit is required to be recovered", therefore, they are not require to reverse the Cenvat credit.

4. On the other hand, the Ld. A.R. relies on the case of ***Albert David Ltd vs. CCE, Meerut – 2003 (151) ELT 443 (Tri. Del.)***.

5. Heard the parties.

6. On consideration of the submissions made by both the sides, we find that the sole issue in this case is that in terms of Rule 11 of the Cenvat Credit Rules, 2004, Whether the appellants are required to reverse the Cenvat credit lying in stock contained in inputs/ semi finished goods/ finished goods at the time of opting for exemption where the final goods were exempted.

7. We find that at the time of availment of Cenvat credit, the appellants were entitled to avail Cenvat credit on inputs/input services and capital goods. Later on, their final goods became exempt; therefore, the case of the Revenue is that the Cenvat credit lying in their Cenvat credit account shall lapse.

8. For better appropriation, the provisions of Rule 11 of the Cenvat Credit Rules, 2004 are incorporated as under:

> ***"Rule 11. Transitional provision.-***
> *(1) Any amount of credit earned by a manufacturer under the CENVAT Credit Rules, 2002, as they existed prior to the 10th day of September, 2004 or by a provider of output service under the Service Tax Credit Rules, 2002, as they existed prior to the 10th day of September, 2004, and remaining unutilized on that day shall be allowed as CENVAT credit to such manufacturer or provider of output service under these rules, and be allowed to be utilized in accordance with these rules.*
> *(2) A manufacturer who opts for exemption from the whole of the duty of excise leviable on goods manufactured by him under a notification based on the value or quantity of clearances in a financial year, and who has been taking CENVAT credit on inputs or input services before such option is exercised, shall be required to pay an amount equivalent to the CENVAT credit, if any, allowed to him in respect of inputs lying in stock or in process or contained in final products lying in stock on the date when such option is exercised and after deducting the said amount from the balance, if any, lying in his credit, the balance, if any, still remaining shall lapse and shall not be allowed to be utilized*

for payment of duty on any excisable goods, whether cleared for home consumption or for export.

(3) A manufacturer or producer of a final product shall be required to pay an amount equivalent to the CENVAT credit, if any, taken by him in respect of inputs received for use in the manufacture of the said final product and is lying in stock or in process or is contained in the final product lying in stock, if,-

(i) he opts for exemption from whole of the duty of excise leviable on the said final product manufactured or produced by him under a notification issued under section 5A of the Act; or

(ii) the said final product has been exempted absolutely under section 5A of the Act, and after deducting the said amount from the balance of CENVAT credit, if any, lying in his credit, the balance, if any, still remaining shall lapse and shall not be allowed to be utilized for payment of duty on any other final product whether cleared for home consumption or for export, or for payment of service tax on any output service, whether provided in India or exported.

(4) A provider of output service shall be required to pay an amount equivalent to the CENVAT credit, if any, taken by him in respect of inputs received for providing the said service and is lying in stock or is contained in the taxable service pending to be provided, when he opts for exemption from payment of whole of the service tax leviable on such taxable service under a notification issued under section 93 of the Finance Act, 1994 (32 of 1994) and after deducting the said amount from the balance of CENVAT credit, if any, lying in his credit, the balance, if any, still remaining shall lapse and shall not be allowed to be utilized for payment of duty on any excisable goods, whether cleared for home consumption or for export or for payment of service tax on any other output service, whether provided in India or exported."

On going through the said provision, it is true that as the appellant's final product has become exempt from payment of duty absolutely, therefore, the appellants are not allowed to utilize the Cenvat credit lying in their Cenvat credit account. But there is no provision that "how the same shall be recovered". Rule 14 of the Cenvat Credit Rules, 2004, is applicable only in a case where the Cenvat credit has been taken and utilized wrongly. Admittedly, the Cenvat credit has not been utilized by the appellants i.e. lying in Cenvat credit account. Moreover, at the time of taking the Cenvat credit, the appellants were entitled to take the Cenvat credit, therefore, they have not taken and utilized the Cenvat credit wrongly. Therefore, the provisions of Rule 14 are not applicable to the facts of this case. Moreover, there is no charging provision has incorporated for recovery of Cenvat credit till yet.

9. A similar issue has been dealt by this Tribunal in the case of ***M/s Shiv Engineering Industries (supra),*** wherein in terms of Rule 3(5) of the Cenvat Credit Rules, 2004, if the inputs were cleared as such, the assessee is required to reverse the Cenvat credit taken on such inputs in terms of Rule 3(5) of the Cenvat Credit Rules, 2004. But in case, if the Cenvat credit has not been reversed then how the same is recoverable. In the said case, this Tribunal has observed as under:

> *"**7.** On careful consideration of submissions made by both sides, I find that Rule 3(5) of the Cenvat Credit Rules, 2004 which reveals the situation is extracted here below:*
>
> > *"(5) when inputs or capital goods, on which cenvat credit has been taken, are removed as such from the factory, or premises of the provider of output service, the manufacturer of the final products or provider of output service, as the case may be, shall pay an amount equal to the credit availed in respect of such inputs or capital goods and such removal shall be made under the cover of an invoice referred in rule 9. "*
>
> *And Rule 14 of Cenvat Credit Rules is also extracted here below:*

> *"Where the Cenvat credit has been taken or utilized wrongly or has been erroneously refunded, the same along with interest shall be recovered from the manufacturer or the provider of the output service and the provisions of sections 11A and 11B of the Excise Act or sections 73 and 75 of the Finance Act, shall apply mutatis mutandis for effecting such recoveries."*

8. *As per Rule 3(5) of Cenvat Credit Rules, 2004, an assessee if removed any capital goods or inputs as such on which cenvat credit has been taken, the assessee is required to pay an amount equal to the credit availed in respect of the said inputs or capital goods. During the impugned period provisions of Rule 14 were not inserted in the law which came into force w.e.f. 01.03.2013 by way of explanation, therefore, it is to be examined whether provisions of Rule 14 are applicable to the facts of this case or not. Rule 14 is applicable when cenvat credit has been taken or utilized wrongly or has been erroneously refunded to the assessee. Admittedly, in this case at the time of procurement of inputs, the appellant was entitled to avail cenvat credit, therefore, it is not a case that the appellant has taken cenvat credit wrongly. Further, from the facts of case and allegation of made in the show cause notice it is not coming out whether the said cenvat credit has been utilized by the appellant or not? Therefore, benefit of doubt goes in favour of the appellant. Further, it is not the case of erroneously refund to the appellant. In that circumstances, provisions of Rule 14 are not applicable to the facts of this case, therefore, in the facts and circumstances of the case Rule 14 are not applicable. In view of the above, it is not necessity to analyze the decision of the Hon'ble Apex Court in the case of Sulochana Amma (Supra) to decide whether the explanation given under Notification No. 3/2013-CE (NT) dated 01.03.2013 is substantial change in law or not or merely, explanation of Rule 3 (5) of the Cenvat credit rules, 2004.*

9. *As discussed above, the provisions of Rule 14 of the Cenvat Credit Rules, 2004 are not applicable to the facts of this case, therefore, no proceedings are sustainable against the appellant. In that circumstance, the impugned order is set aside. In result, the appeal is allowed with consequential relief, if any."*

Admittedly, in the case in hand, the Cenvat credit sought to be recovered in terms of Rule 14 of the Cenvat Credit Rules, 2004 and as discussed above, the appellants were entitled to take the Cenvat credit at the time of availment of Cenvat credit, therefore, the same cannot be said that they have taken Cenvat credit wrongly. Further, the Cenvat credit is lying in their Cenvat credit account; therefore, the same has not been utilized by the appellants wrongly. In these terms, Rule 14 of the Cenvat Credit Rules, 2004 is not applicable to the facts of this case. Moreover, there is no recovery mechanism has been prescribed under law as provided for recovery under Rule 3(5) of the Cenvat Credit Rules, 2004 w.e.f. 01.03.2013. Therefore, we hold that as there is no recovery provision during the impugned period, the Cenvat credit shall not be recovered from the appellants. Moreover, the Hon'ble Punjab & Haryana High Court in the case of ***HMT (TD) Ltd (supra)*** after considering the decision in the case of ***Albert David Ltd (supra)***, relied upon by the Ld. A.R., observed as under:

> ***"20.*** *In the instant case, it is not a matter of dispute that the assessee has paid the duty on inputs used in the indicated manufacturing of final goods, the assessee has maintained separate accounts/record, duly entered credit of duty-paid on the inputs in manufacture of final goods and validly availed the Cenvat credit. Therefore, the same cannot be reversed on the ground that the final product (i.e. agricultural Tractors) were subsequently exempted from tax. Thus, the contrary arguments of the learned counsel for the Revenue 'stricto sensu' deserve to be and are hereby repelled under the present set of circumstances. No contrary judgment has been cited on behalf of the Revenue. Therefore, the aforesaid judgments are the complete answer to the problem in hand."*

Further, in the case of ***CNC Commercial Ltd (supra)***, the Hon'ble Punjab & Haryana High Court observed as under:

> ***"5.*** *We have heard the learned Counsel for the appellant-revenue of a considerable length and find that no question of law warranting admission of the appeal would arise. There are findings of fact recorded by the Commissioner (Appeals) as upheld by the Tribunal to the effect that the assessee-respondent had correctly availed and utilized the credit of duty paid by them on those inputs when these final products were chargeable to excise duty. It has further been found that there was no one to one relationship of the inputs used and the final products manufactured and cleared from the factory. It has rightly been held that the credit of duty paid on inputs cannot be confined to a particular raw material to which the credit is related and out of which a final product is manufactured. Therefore, it has been rightly held that the assessee-respondent were not required to reverse the Cenvat credit of Rs. 88,731/-. The judgment of the Hon'ble Supreme Court in Dai Ichi Karkaria case has been correctly applied. There is thus no merit in these appeals which are accordingly dismissed."*

10. In view of the above observations, we do not find any merit in the impugned order. Accordingly, the same is set aside.

11. In result, the appeal is allowed with consequential relief, if any.

(Order pronounced in the court on 20.03.2019)

(Bijay Kumar)
Member (Technical)

(Ashok Jindal)
Member (Judicial)

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