IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH, CHENNAI

Appeal No. E/369/2012

(Arising out of Order-in-Original No. 10/2011-12 dated 23.3.2012 passed by the Commissioner of Central Excise, Chennai – IV)

M/s. Mando India Ltd. Appellant

Vs.

Commissioner of GST & Central Excise
Chennai Respondent

Appearance

Shri Raghavan Ramabhadran, Advocate for the Appellant
Shri B.Balamurugan, AC (AR) for the Respondent

CORAM

Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of Hearing :07.09.2018
Date of Pronouncement :13.11.2018

Final Order No. **42813 / 2018**

Per Bench

The appellants are engaged in manufacture of break assembly and shock assembly and are registered with the Central Excise Department. Based on intelligence that the appellants are clearing CENVAT availed inputs without reversing the credit, cleared goods without paying excise duty etc., investigation was conducted. After such investigation, show cause notice was issued inter alia alleging that:-

- The assessee have cleared certain CENVAT availed inputs under delivery challans without reversing the CENVAT credit to the tune of Rs.92,64,820/- during the period from 1.4.2007 to 28.2.2010 as per Annexure A2 to the Notice
- The assessees have cleared certain excisable goods like break assembly, shock assembly to their customers viz. M/s. Hyundai Motors, M/s. Hyundai Plaza, M/s. Ford India, M/s. Mobis India etc. without payment of central excise duty to the tune of Rs.41,15,705/- during the period from 1.4.2006 to 28.2.2010 under delivery challans as per Annexure A3 to the Notice
- The assessee had received certain goods from their customers as rejected goods and have taken CENVAT credit. In few cases, they have cleared the rejected finished goods as scrap and failed to pay the differential duty to the tune of Rs.11,90,475/- i.e.. difference between the CENVAT credit availed on rejected finished goods and duty on the scrap value, as per Rule 16 of Central Excise Rules, 2002 during the period from 1.4.2006 to 28.2.2010 as per Annexure A4 to the notice.
- The assessee had manufactured certain tools for M/s.Mahindran Renault and issued invoices but failed to pay appropriate excise duty to the tune of Rs.7,13,683/- during the period from 1.4.2006 to 28.2.2010 as per Annexure A5 to the notice.

2. After due process of law, the adjudicating authority confirmed the demand along with interest and also imposed penalty. Aggrieved, the appellants are now before the Tribunal.

3.0 On behalf of the appellant, ld. counsel Shri Raghavan Ramabhadra made the following submissions:

3.1 Owing to space constraints, the appellants used a portion of Panelpina Warehouse for storing goods / inputs. This was done after obtaining permission from department. The inputs were brought from warehouse as per manufacturing requirements, under GDN and as per Goods Receipt Note (GRN) credit was availed. When the entire quantity brought was not consumed, the same was returned to factory on Returnable Delivery Challan. When required they were retransferred to factory under GDN. The credit was availed only when the entire quantity pertaining to a specific invoice was received within the factory. The demand is raised alleging that appellant ought to have reversed the credit each time the inputs are returned to the warehouse. Reversal under Rule 3(5) of the Credit Rules is not warranted for the inputs stored at Panelpina Warehouse and brought to factory as per manufacturing requirements.

3.2 The Appellant submits that Rule 3(5) of the Credit Rules is not even attracted in the instant case. Rule 3(5) for the period under dispute stipulated that when credit-availed inputs or capital goods are removed as such from the factory, the manufacturer of final products shall pay an amount equal to the credit availed in respect of such inputs or capital goods. The appellant availed credit on inputs only when the entire lot under one invoice was consumed in the process of manufacture. Therefore, when the inputs were removed, these were not credit availed inputs and Rule 3(5) does not apply.

3.3 The impugned order has rejected this submission on the ground that it was an afterthought and new facts could not be entertained at the stage of adjudication of the dispute. The above averment was made throughout the proceedings, and even in the reply to the show cause notice.

3.4 In any case, the storage outside the factory premises was done after obtaining necessary approval under Rule 6A of CCR, 2002/Rule 8 of CCR 2004. When the movement was authorised by the Department themselves, they cannot now turn around and seek reversal of credit.

3.5 In any case, the Appellant submits that the instant case is not one of Revenue Leakage. The present case is one where, had the Appellant reversed the credit under Rule 3(5), the same amount would have been available to them again at the time when the returned inputs are brought back from Panelpina Warehouse to the factory for use in manufacture. This credit would have been eligible and would have been utilised towards excise duty payments. To have followed the process as demanded by the Department in the instant case would have only resulted in more scriptory work to the assessee as well as to the Department, with no revenue leakage as even a distant consequence.

3.6 The Appellant submits that the decision of the Tribunal in *Commissioner of C. Ex., Rajkot vs. Reliance Industries Ltd*. reported at *2008 (224) E.L.T. 117 (Tri. - Ahmd.)* wherein the Tribunal noted that as the demand was available as credit to the Appellant, denying exemption would have added in more scriptory work to the assessee, without resulting in any revenue earning to the Department or revenue loss to the assessees. The above decision was relied upon by this Tribunal in *Vodafone Essar Cellular Ltd. vs. CCE&ST, Coimbatore* vide *Final Order No. 40972/2018 dt. 01.03.2018*. It is also settled law that when the exercise is academic with no revenue implication, the proceedings merit to be dropped. Reliance in this regard is placed on *CCE v. Indeos ABS Ltd. [2010 (254) E.L.T. 628 (Guj.)]* and *CCE v. Narayan Polyplast [2005 (179) E.L.T. 20 (S.C.)].* Therefore, the demand for reversal under Rule 3(5) is wholly baseless and merits to be set aside.

3.7 As regards the third issue, it is submitted that the liability to pay differential duty under Rule 16 of the Credit Rules, 2002 does not arise. In some cases, the finished goods are sent back to the Appellant for defects. The Appellant takes credit in terms of Rule 16 of the CER. Where the defects can be rectified, the Appellant repairs the goods, clears the same back to the customer and reverses credit availed, thereby complying with Rule 16. Where goods are not capable of repair, the Appellant disposes them as scrap without executing any process on such goods. In such cases, duty is paid on the value of scrap sold. The Appellant submits that differential duty is not liable to be paid, as duty has been accurately paid on the transaction value of the scrap.

3.8 The second limb of Rule 16(2) prescribes payment of duty at the rate applicable on the date of removal on the value determined under section 4 in any other case, which covers situations where no process that amounts to manufacture is done. The Appellant has correctly paid duty on the scrap sales at transaction value, as stipulated under the second limb of Rule 16(2).

3.9 The Appellant submits that issue is no longer res integra and has been settled vide the following case laws in favour of the appellant:

a. M/S Tube Investments of India Ltd. vs. Commissioner, LTU Chennai – 2018-TIOL-710-CESTAT-MAD

b. M/s Tube Products of India vs. CCE, Chennai-IV - 2016-TIOL-597-CESTAT-MAD

c. Apollo Tyres Ltd. Vs. CCE, Pune-III - 2011 (272) E.L.T. 84 (Tri. - Mumbai)

3.10 As regards the demand for payment of excise duty of Rs.40,85,299/-, confirmed by adjudicating authority out of the demand of Rs.41,15,705/- in the show cause notice, the ld.

counsel submitted that the demand for excise duty on goods returned to the appellants by customers after testing is wholly mis-placed. The Appellant submits that the Appellant sends out finished goods to its customers for testing of quality parameters under RDC, as the customers usually seek the finished goods on Just-in-time basis. The finished goods are returned to the Appellant the very next day. The Appellant submits that the case of the Department herein is not that no excise duty was paid on the said final products. However, the finished goods are sent out so that the customer may test the said final products, and then place Purchase Orders on the Appellant on the basis of parameters as satisfied by the samples provided by the Appellant. As there is no allegation that the said finished goods were not received back by the Appellant, or that even a part of them escaped duty at the time of clearance for sale, the Appellant submits that the demand is wholly misplaced and must be set aside.

3.11 The demand for excise duty on repair work done for customers is not sustainable as the said repairs do not amount to manufacture. The Appellant submits that finished goods are received from customers for carrying out repair work. These are sent back to the customers after executing repairs. Such repairs do not amount to manufacture, and therefore, no excise duty is liable to be paid. The Appellant submits that Excise Duty is liable to be paid only where manufacturing activity is undertaken on the goods. It is well-settled that onus of proving that manufacture has been undertaken rests on the Department. Reliance is placed on *Flex Engineering Ltd. v. CCE [2012 (276) E.L.T. 153 (S.C.)].* The Department has not discharged this burden at all and the demand has been confirmed on the sole basis that the demand (amount) has been paid voluntarily by appellant, and therefore the contravention is proved. The Appellant submits that the demand on this count is wholly baseless.

3.12 The demand for Excise Duty on inputs sent to Job Workers for further processing is not tenable. The Appellant sends out inputs to Job Workers such as M/S Premier for tool grinding, and other processing works. The Appellant submits that the instant case is squarely covered under Rule 4(5)(a) of the Credit Rules, which permit credit-availed inputs to be sent out to a job worker for further processing, testing, repair, re-conditioning, etc. The Department has contested this on the ground that valid excise invoice did not cover the transaction. The Appellant has shown the invoices under which inputs are cleared to the Job workers for carrying out job work, and the return documents under which the Job worker returns the jobbed inputs to the Appellant. Merely because the said documents are addressed as 'RDC' the transaction does not become a clearance liable to excise duty payment. The demand on this count merits to be set aside in entirety.

3.13 The demand for excise duty on goods cleared under RDC during system failure is not tenable. The Appellant submits that the demand for excise duty on goods cleared under RDC on account of unforeseen system failures is incorrect because the said clearances are co-related against an Excise Invoice at the earliest instance that the system failure is rectified. Therefore, the present demand is not one where certain clearances have escaped assessment to excise duty, but only one where the said invoices are raised subsequently. The Appellant submits that the duty paid clearances cannot be subjected to excise duty twice for the reason that proper invoices were not raised. Payment of demand and contesting the matter amounts to payment under protest.

3.14 Extended period is not invokable. Accordingly, demand for period upto 31.01.2010 is time barred. The Appellant submits that there is no suppression, mis-declaration with intention to evade payment of duty in the present case. The sending of goods to the warehouse was done only after obtaining due permission for the department and under proper documentation. The other transactions were also done under the cover of appropriate documentation such as Rule 4(5)(a) challans, etc. All the necessary information was gathered by the Department upon verification of the internal records of the appellant which itself shows that due disclosures had been made. The impugned order has invoked extended period on the sole ground that the appellant has voluntarily paid the entire duty. The order does not bring out any case apart from this to prove suppression or mala fide intention on part of the appellant. It is settled law that for invocation of extended period, there ought to be positive act on the part of the appellant. In this regard, reliance is placed on *Continental Foundation Jt. Venture v. CCE [2007 (216) E.L.T. 177 (S.C.)]*. In the present case, the department having failed to establish the same, extended period is not invokable. Therefore, if at all, the demand ought to be restricted to the normal period, i.e., from 01.02.2010 to 28.02.2010.

4. On behalf of Revenue, ld. AR Shri B. Balamurugan supported the findings in the impugned order. He submitted that the inputs were received in the factory, the appellant have availed credit and thereafter have returned it to the warehouse. They have repeatedly done so. Whenever the inputs are removed as such, the appellant ought to have reversed the credit. They have thus violated the provisions of law and the demand raised to the tune of Rs.92,64,820/- is right and proper. With regard to the demand of differential duty of Rs.11,90,475/-, he submitted that the goods which were received into the factory for repair were thereafter cleared as scrap under central excise invoice on payment of central excise duty. The appellants have therefore paid less excise duty considering the goods as scrap and therefore the differential

duty demanded is correct. The demand of Rs.40,85,299/- has been rightly confirmed for failure to discharge excise duty. The appellants have been deliberately evading duty by not reversing the credit when inputs are removed as such. Hence the extended period has been rightly invoked.

5. Heard both sides.

6.1 The first issue is with regard to the demand of credit to the tune of Rs.92,64,820/-. As narrated from the facts and submissions stated above, it can be seen that the appellants were storing inputs in their warehouse at Panelpina. It is not disputed that they had obtained permission from the department for storing the goods in the said warehouse. As per the requirement in the factory, they had removed the inputs from the warehouse to the factory. However, the practice followed by the appellant was that the unused inputs were returned to the warehouse due to space constraints on Returnable Delivery Challan (RDC). Thereafter, whenever the inputs were again required, they are retransferred from the warehouse to the factory under Goods Delivery Note (GDN). Thus, all the retransfer / removal of goods were being done under documents. The only allegation of the department is that at each retransfer, the appellant ought to have reversed the credit. It is brought out from evidence that the appellants have availed credit only when the entire quantity of inputs as per the invoice were used for manufacture. Even though part of inputs were returned, they did not avail credit on such inputs. Thus, though they have retransferred the unused inputs to their warehouse, there is no excess credit availed than that is relatable to the invoice corresponding to the procurement of inputs. When the inputs are brought to the factory since credit is not availed, there is no requirement of reversal of credit as under 3(5) of CENVAT Credit Rules, 2004. The credit is availed only when entire quantity of inputs as per an invoice is used for manufacture. The allegation therefore that the appellants are liable to pay credit of Rs.92,64,820/- cannot sustain. As rightly argued by the ld. Counsel, the strict compliance of provision of law by reversing the credit, each time when the inputs are sent to the warehouse due to space constraints would only add more accounting work. Since there is no revenue loss from such acts of the appellants and is only a procedural infraction, we consider that the demand cannot sustain. The Tribunal in the case of Reliance Industries Ltd. (supra), in a similar situation, held that when there is no revenue loss and the procedure would only add more scriptory work to the assesse, the demand would not sustain. For the discussions made above, we hold that the demand on this score to the tune of Rs.92,64,820/- requires to be set aside, which we hereby do.

6.2 The differential duty of Rs.11,90,475/- has been demanded under Rule 16. The appellant undertake repair of rejected goods which are returned by customers. They avail credit in terms of Rule 16 on such rejected goods. Whenever the rejected goods were repaired and sent to customers, such credit was reversed under Rule 16. Whenever the rejected goods were incapable of being repaired, they cleared the same as scrap by discharging central excise duty on scrap value. The department has demanded the difference of the credit availed on such unrepaired goods and the duty paid on the value of the scrap. The said issue has been decided in the case of Tube Investments of India Ltd. Vs. Commissioner of Central Excise, Chennai – 2018-TIOL-710-CESTAT-MAD and the relevant portion is as under:-

> *"As seen from the above, we find that the sub-rule (1) stipulates circumstances under which duty paid goods can be returned to the factory and the assessee is entitled to take credit of duty paid on the said goods. The sub-rule (2) contemplates two situations (i) if the process undertaken by the assessee does not amount to manufacture, then they shall pay the amount equal to the cenvat credit taken and (ii) in another case, the assessee pay duty on the returned goods as per the transaction value. In the instant case, it is established beyond doubt that no process has been carried out on the returned goods. Therefore, on the question of whether first part of sub-rule or the second part of sub-rule of Rule 16 is applicable, we find on the very same issue has been detail in detail by the Tribunal's coordinate Bench, Mumbai in the case of M/s. Apollo Tyres Ltd. Vs. CCE, Pune – II (supra) allowed the appeal.*
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> *xxxx xxx xxxxx xxxxx*
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> *We are in agreement with the above decisions and the same are applicable to the present case as the issues are identical and the duty paid goods are rejected and returned to the factory of the assessee and without doing any processes the said goods were sold by auction to third party 'as is where is basis' and cleared on payment of excise duty on the transaction value as per Section 4 of the Central Excise Act.*
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> *xxxx xxx xxxxx xxxxx*

In view of the foregoing discussions and by maintaining this Tribunal's decision in the case of Craftsman Automation (P) Ltd. case, which relied M/s. Apollo Tyres (P) Ltd. case, we hold that in the present case, the second leg of sub-rule (2) of Rule 16 i.e. "in any other case" is applicable and they had correctly discharged excise duty on the returned goods cleared as such. The appellants are not liable to pay the amount equal to cenvat availed on the returned goods. Accordingly, the demand is set aside in the assessee's appeal. Consequently, they are not liable for any penalty and the same is also set aside."

Following the above decision, we hold that the demand cannot sustain and requires to be set aside, which we hereby do.

6.3 An amount of Rs.40,85,299/- has been demanded on various grounds which can be summarized as under, as tabulated by appellant:-

Issue	**Particulars of Demand**	**Duty demanded (INR)**
Goods sent to customers for testing	Goods are supplied to customers on Just-in-Time Basis, due to which the customer carries out sample periodical testing, inspection and verification instead of testing every spare parts as and when supplied. Sample are sent to customers for such testing under RDC and are received at the appellant's factories that very day or the next day.	50,917/-
Goods returned to customers after repairs	Components supplied to customers are returned to appellant for repair work, under RDC as per Rule 4(5)(a) of the Credit Rules. Appellant carries out repair work and then supplies the repaired commodities to customers under its RDC	4,42,938/-
Goods sent out for job work	Appellant sends out inputs / capital goods for further processing or for tool grinding purposes to job workers and RDC	17,84,883/-
Invoices issued belatedly due to system failure	In some circumstances, there is a system failure while supplying components due to which invoice could not be raised at the time of clearance. In such situations, the appellant clears the goods under RDC and then subsequently raises excise invoice on payment of ED	18,06,561/-
	Total	**40,85,299/-**

6.4 From the above Table, the first demand to the tune of Rs.50,917/- is in respect of central excise duty when the goods have been supplied by appellant to customers for periodical sample testing. The appellants are duty bound to discharge the duty when the goods are cleared from the factory for testing. The appellant contends that they have discharged duty whenever finished product was cleared. However, this requires verification. For this reason, we find the issue is to be remanded to adjudicating authority. In case, the appellants have not discharged the central excise duty, when the goods are removed from the factory, the demand on this ground, in our view, is legal and proper and requires no interference.

6.5 An amount of Rs.4,42,938/- is the demand of excise duty in respect of components supplied to customers and which are returned to appellant for repair work under RDC as per Rule 4(5)(a) of CENVAT Credit Rules. It is brought out from the facts that the appellants are carrying out repair work and such process of repair work does not amount to manufacture. The facts discussed in the orders passed by authorities below does not throw much light as to the activity of repair/testing undertaken would amount to manufacture or not. Hence, in our view, this issue also requires reconsideration by adjudicating authority. Needless to say that if the activity of repair does not amount to manufacture, the demand would not sustain. This issue is therefore remanded.

6.6 An amount of Rs.17,84,883/- is seen to be a demand of excise duty raised when the appellant has sent inputs / capital goods for further processing or for tool grinding purposes to job workers under RDC. It is submitted by ld. counsel that the said goods were sent under Rule 4(5)(a) of CENVAT Credit Rules and received within 180 days. The department also has admitted that such goods are cleared under the said provision of law. Interestingly, the demand of excise duty is not on job worked goods and instead the demand of excise duty is on inputs / capital goods which are sent for job work which, in our view, is incorrect and cannot sustain and is liable to be set aside, which we hereby do.

6.7 An amount of Rs.18,06,561/- is raised alleging that there is delay in issuing invoices. From the facts brought out before us, it is seen that in certain circumstances when there was failure in the system, the appellant had delayed raising the invoices, though the goods were cleared. In such situation, they have cleared goods under RDC and then subsequently raised the central excise invoice. In fact, there was no delay in payment of central excise duty and duty was paid when goods were cleared. There was delay in raising the invoices only. This has occurred only due to some technical fault in system to raise invoices for which the assessee cannot be burdened with demand of excise duty. It is not the case of department that duty was not paid when goods were cleared. The said demand therefore requires to be set aside, which we hereby do.

7. From the discussions made above, the appeal is partly allowed by modifying the impugned order as per the conclusions above and partly remanded as discussed in paras 6.4 and 6.5. The appellants are eligible for consequential benefit, if any, as per law.

(Pronounced in court on 13.11.2018)

(**Madhu Mohan Damodhar**)
Member (Technical)

(**Sulekha Beevi C.S.**)
Member (Judicial)

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