

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

E/Misc./41964/2017 & E/535/2012

(Arising out of Order-in-Appeal No.54/2012 dated 28.9.2012
passed by the Commissioner (Appeals), LTU, Chennai)

M/s. Shree Ambiga Sugars Ltd.

Appellant

Vs.

Commissioner of GST & Central Excise
Trichy

Respondent

Appearance

Ms. P. Kanthi Visalakshmi, Advocate for the Appellant
Ms. T. Usha Devi, DC (AR) for the Respondent

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

Date of Hearing : 30.01.2019
Date of Pronouncement : 19.02.2019

Final Order No. **40317 / 2019**

Per Bench

The appellants are engaged in the manufacture of sugar and molasses and are registered with the Central Excise Department. They also have cogeneration power plant that was functioning under the name and style of 'M/s. Supreme Renewable Energy Ltd.'. The said power plant which was a separate entity later got amalgamated with the appellant with effect from 1.4.2003. After such amalgamation, they are

functioning as sugar division and power division of M/s. Shree Ambiga Sugars Ltd., the appellant herein. The electricity produced in the power division is used within the factory for manufacture of sugar and molasses and they are availing the credit of duty paid on capital goods, inputs and service tax paid on input services. On verification of records of the appellant, it was noticed that they had availed credit of service tax paid on input services as well as duty paid on capital goods and inputs used for generation of electricity in the power plant. Since electricity has been brought under the ambit of excisable goods with effect from February 2005 and there is no duty prescribed on electricity, department was of the view that the appellants are not eligible to avail credit of inputs, capital goods as well as input services relating to the electricity that is wheeled out to TNEB. Show cause notices were issued proposing to demand service tax of Rs.35,56,421/- along with interest and also for imposing penalties. After due process of law, the original authority confirmed the demand, interest and imposed penalties and also ordered appropriation of the amount paid / reversed by the appellant. In appeal, Commissioner (Appeals) upheld the same. Hence this appeal.

2. On behalf of the appellant, Id. counsel Ms. P. Kanthi Visalakshmi appeared and argued the matter. She submitted that the period involved is from April 2004 to May 2009 and the show cause notice dated 4.5.2010 has been issued invoking the

extended period of limitation. In fact, the appellant had availed the CENVAT credit on the inputs, input services for production of electricity which is used in the manufacturing activity as well as electricity is wheeled out to TNEB on the bonafide belief that the credit is eligible. The show cause notice has been issued by the department only after the decision of the Hon'ble Supreme Court in the case of Maruti Suzuki Ltd. Vs. Commissioner of Central Excise – 2009 (240) ELT 641 (SC). It is submitted by her that the appellant was filing returns and reflecting the credit availed in such returns. That therefore they had not suppressed any fact from the department. Further, on 24.3.2006, consequent to the amalgamation, the appellant had intimated the department regarding the revised factory plan and availment of credit of capital goods and inputs. This itself would show that the appellant had no intention to evade payment of duty or tax. It is also submitted by her that the issue whether credit is eligible on the inputs, input services used for manufacture of electricity that is sold was under litigation and contentious for long period. There were decisions in favour of the appellant as well as the Revenue. She adverted to the decision of the Tribunal in Final Order No. 42083/2018 dated 20.7.2018 in the case of M/s. Sri Kannapiran Mills Ltd. and submitted that the Tribunal in the said case has taken note of the submissions made by the appellant therein that there are two contrary decisions on the very same issue of availing credit

on inputs used for generation of electricity. The Hon'ble Supreme Court in the case of Commissioner of Central Excise, Vadodara Vs. Gujarat State Fertilizers and Chemicals Ltd. – 2008 (229) ELT 9 (SC) and Commissioner of Central Excise Vs. Gujarat Narmada Fertilizers co. Ltd. – 2009 (240) ELT 661 (SC), the Hon'ble Apex Court had taken a different view. In the case of Commissioner of Central Excise, Vadodara Vs. Gujarat Narmada Valley Fertilizers Co. Ltd. – 2012 (286) ELT 481 (SC), the Apex Court has referred the matter to the Larger Bench, which is pending decision. That the issue being contentious and interpretational in nature, invocation of extended period cannot sustain. Apart from mere allegation that appellant suppressed facts, there is no positive act brought out by the department to establish that there is suppression on the part of the appellant with intent to evade payment of duty / tax. She relied upon the judgment of the Hon'ble Supreme Court in the case of Cosmic Dye Chemical Vs. Collector of Central Excise, Bombay – 1995 (75) ELT 721 (SC) to argue that the words 'suppression' being qualified by immediately preceding words "willful" some positive act has to be established by the department to invoke the extended period. The decision in the case of Ultra Tech Cement Ltd. Vs. Commissioner of Central Excise, Bhavnagar – 2010 (262) ELT 432 (Tri. Ahmd.), was relied by the counsel to argue that when the issue is interpretational, the extended period cannot be invoked.

3. The Id. AR Ms. T. Usha Devi supported the findings in the impugned order. She argued that the appellant did not reverse the credit immediately on the decision of the Apex Court with regard to the ineligibility of credit. They had reversed the credit only on 31.1.2011 which is after almost nine months of issuance of show cause notice. From this, it is very much clear that the appellant had intentionally taken wrong credit and therefore is guilty of suppression of facts with intention to evade payment of duty / tax. The Commissioner (Appeals) has discussed the same in para 6 of the impugned order. She also relied upon the judgment of the Hon'ble Supreme Court in the case of Maruti Suzuki India Limited Vs. Commissioner of Central Excise, Delhi – III – 2017 (5) GSTL 18 (P&H) to argue that CENVAT credit on inputs and input service is not eligible in respect of the electricity that is wheeled out of the factory.

4. Heard both sides.

5. The issue is with regard to the demand raised alleging wrong availment of CENVAT credit on inputs and inputs services, capital goods used for production of electricity which is sold to TNEB. The Hon'ble Supreme Court in the case of Maruti Suzuki Ltd. – 2009 (240) ELT 641 (SC) has held that the credit in respect of input services which is used for electricity that is sold outside is not eligible for credit. Applying this decision, the appellant does not have a case on merits. The Id. counsel for appellant has argued only on the ground of limitation. In para 6

of the impugned order, the Commissioner (Appeals) has noted as under:-

"6. Moreover, this disputed issue has been settled finally in favour of the department by the Hon'ble Supreme Court in the case of Maruti Suzuki Ltd. Vs. Commissioner of Central Excise, Delhi – III [2009 (240) ELT 641 (SC)]. As per their contention, when they had bonafide belief that the credit is admissible as held by decisions of various Tribunals, they could have very well reversed the credit upon the delivery of the said Hon'ble Apex Court judgment, but failed to do so. Therefore, the department was left with no other option except to invoke the extended period under proviso to section 11A(1) of the Act which is duly justified. It is also pertinent to note that only after the issuance of SCN dt. 4.5.2010, they reversed the credit on 31.1.2011 i.e. after almost nine months. Thus, it is very clear that the appellant had intentionally taken the wrong credit and proviso to section 11A(1) of the Act has been rightly invoked."

6. From the above, it can be seen that the only allegation of suppression pointed against the appellant is that they failed to reverse the credit upon delivery of the judgment of the Hon'ble Apex Court in Maruti Suzuki Ltd. – 2009 9240) ELT 641 (SC). It is very much clear that the show cause notice has been issued after the decision rendered by the Apex Court in the said case. The department has no case that the appellant had not disclosed the credit availed in their ER-1 returns. Further, the appellant has reversed the entire credit on 31.1.2011. All these would go to show that there was no intention to evade payment of duty or tax less any positive act of suppression on the part of the appellant. We therefore hold that the department has miserably failed to establish with cogent evidence that the appellant is guilty of suppression of facts with intention to evade

payment of duty so as to invoke the extended period of limitation. The show cause notice issued to the appellant is time-barred. The impugned order therefore requires to be set aside, which we hereby do. The appeal succeeds on limitation. We make it clear that if there is any demand for the normal period, the same would sustain.

7. The miscellaneous application filed by Revenue for change of cause title is allowed.

(Pronounced in court on 19.02.2019)

(Madhu Mohan Damodhar)
Member (Technical)

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

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