CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL CHENNAI

Regional Bench – Court No. III

Excise Appeal No. 41099 of 2018

(Arising out of Order-in-Appeal No. Mad-CEX-000-APP-002-2018 dated 29.01.2018 passed by the Commissioner of G.S.T. & Central Excise (Appeals), Circuit Office, Madurai, 4, Lal Bahadur Shashtri Marg, C.R. Buildings, Madurai – 625 002)

M/s. Sri Velayuthaswamy Spinning Mills (P) Ltd., (Unit-II), : **Appellant**
Kottaiyur, Agaram Village,
Dindigul Taluk,
Thadicombu – 624 709

VERSUS

The Commissioner of G.S.T. & Central Excise, : **Respondent**
Circuit Office, Madurai Commissionerate,
No. 4, Lal Bahadur Shashtri Marg,
Madurai – 600 002

APPEARANCE:

Shri. M. Karthikeyan, Advocate for the Appellant

Shri. L. Nandakumar, Authorized Representative for the Respondent

CORAM:

HON'BLE MS. SULEKHA BEEVI C.S., MEMBER (JUDICIAL)

FINAL ORDER NO. 40827 / 2019

DATE OF HEARING: 06.06.2019

DATE OF DECISION: 06.06.2019

Brief facts are that the appellants are engaged in the manufacture of cotton yarn and are registered with the Central Excise Department. They were clearing 100% Cotton Yarn on payment of duty under Notification No. 29/2004-C.E. dated 09.07.2004 as amended and were also availing full exemption under Notification No. 30/2004-C.E. dated 09.07.2004. The appellants also availed CENVAT Credit of the duty paid on capital goods and service tax paid on input services and utilized the credit for payment of duty on finished products which were exported and also cleared for domestic consumption. The appellants did not avail any

CENVAT Credit of the duty paid on inputs. They were reversing the proportionate credit availed on common input services used in the manufacture of both dutiable as well as exempted final products.

2.1 The Department was of the view that the amount so reversed is incorrect. According to the Department, the clearances of the appellant can be made out into the following categories:

(i) Clearance for home consumption claiming exemption under Notification No. 30/2004;
(ii) Clearance for export (DEPB clearance) claiming exemption under Notification No. 30/2004;
(iii) Clearance for export under duty drawback scheme claiming exemption under Notification No. 30/2004;
(iv) Clearance without payment of duty under Notification No. 30/2004 for manufacture of fabrics on job work basis;
(v) Clearance on payment of duty under claim for rebate under Notification No. 29/2004;
(vi) Clearance of yarn waste without payment of duty.

2.2 According to Rule 6 of the CENVAT Credit Rules, 2004, to compute the value of exempted clearances, the appellant has to take into account the value of clearances mentioned against Serial Nos. (i), (ii), (iii), (iv) and (vi) so as to arrive at the value of exempted goods cleared. However, the appellant reversed the credit without taking into account the value of exempted clearances mentioned against Serial Nos. (ii), (iv) and (vi) above. Thus, the appellant had not taken into account the clearances for export claiming exemption under Notification No. 30/2004, clearances without payment of duty under Notification No. 30/2004 manufactured on job work basis and clearances of yarn waste without payment of duty.

2.3 The Department was of the view that the appellant in doing so has short reversed the credit, for which a Show Cause Notice dated 17.06.2015 was issued proposing to recover the same along with interest and for imposing penalties. After due process of law, the Original Authority confirmed the demand, interest and imposed penalty. In appeal, the Commissioner (Appeals) vide impugned order dated 29.01.2018 upheld the order passed by the Original Authority in respect of not including the clearance for export claiming exemption under Notification No. 30/2004 as well as clearance of yarn waste without payment of duty. However, the issue with regard to the clearance of yarn manufactured on job work basis was remanded to the Original Authority for verification. The appellant is now before the Tribunal against the issues that have been upheld by the Commissioner (Appeals).

3.1 Ld. Advocate Shri. M. Karthikeyan appeared and argued the matter on behalf of the appellant. He explained the facts, referring to the Show Cause Notice, and submitted that as shown in paragraph 5 of the Show Cause Notice, the clearances of Cotton Yarn made by the appellant was categorized into six types by the Department and alleged that the amount reversed is incorrect. The Department took the view that the appellant has to include the value of clearances for export claiming exemption under Notification No. 30/2004, clearances of goods manufactured on job work basis and clearances of yarn waste without payment of duty.

3.2. With regard to the issue of demand for clearances of goods manufactured on job work basis, he submitted that the Commissioner (Appeals) has remanded the matter and that the said issue is not contested in this appeal. The issue that is contested in this appeal is only with regard to inclusion of the value of clearances of goods which were exported claiming exemption under Notification No. 30/2004 as well as clearances of yarn waste without payment of duty.

3.3.1 With regard to the clearances for export claiming exemption under Notification No. 30/2004, Ld. Advocate submitted that the appellant has not availed any credit on inputs. The credit was availed only on input services. As per Notification No. 30/2004, the bar is only on availment of credit on 'inputs' and not on 'input services'. He referred to Rule 6 of the CENVAT Credit Rules, 2004 and submitted that as per Rule 6 (6) (v) of the CENVAT Credit Rules, when the goods are exported under bond, the obligation of the manufacturer not to take credit on common inputs used for manufacture of dutiable and exempted products is not applicable. In the present case, the appellants have exported the entire goods and this is not disputed by the Department. The case of the Department is that as per the amendment in Notification No. 42/2001-C.E. (N.T.) by virtue of Notification No. 24/2010-C.E. (N.T.) dated 26.05.2010, a bond is not required for export of exempted goods. It is submitted that execution of a bond is only a procedural requirement and even if no bond is executed, the said provision would apply. In the case of exempted goods, there is no liability to pay duty for which reason the requirement to execute bond is given away with by bringing the amendment in Notification No. 42/2001.

3.3.2 The Department is of the view that since the appellant has not executed a bond, the credit availed on the goods exempted from duty as per Notification No. 30/2004 and exported, are not eligible for credit. He argued that even though the goods are exempted from duty, when exported, the credit on inputs/input services used for the manufacture of finished goods is eligible.

3.3.3 To support this argument, he relied upon the decision in the cases of ***Commissioner of Central Excise Vs. M/s. Drish Shoes Ltd. reported in 2010 (254) E.L.T. 417 (H.P.)*** and ***M/s. Repro India Ltd. Vs. Union of India reported in 2009 (235) E.L.T. 614 (Bom.)***. The decision in *M/s. Drish Shoes Ltd. (supra)* has been upheld by the Hon'ble Supreme Court in ***SLP No. 2887 of 2012***. The decision in ***Union of India Vs. M/s. Sharp Menthol India Ltd. reported in 2011 (270) E.L.T. 212 (Bom.)*** was relied by the Ld. Counsel for the appellant and submitted that the decision has been upheld by the Hon'ble Supreme Court as reported in ***2015 (320) E.L.T. A104 (S.C.)***. The decision in the case of ***M/s. Jolly Board Ltd. Vs. Commissioner of Central Excise, Aurangabad reported in 2017 (49) S.T.R. 620 (Tri. – Mum.)*** was relied upon by the Ld. Advocate to submit that the issue as to the eligibility of credit on inputs/input services used for the manufacture of exempted goods which are exported was considered by the Tribunal even post amendment by Notification No. 42/2001. The Tribunal in the said case held that execution of bond or LUT was only a procedural requirement and the eligibility of credit or refund cannot be denied. This decision of the Tribunal was upheld by the Hon'ble High Court of Bombay as reported in ***2017 (50) S.T.R. 131 (Bom.).*** The Hon'ble Bombay High Court referred to the decision in the case of *M/s. Drish Shoes Ltd. (supra)* in the said judgement. Ld. Advocate also referred to the decision in ***M/s. GPI Textiles Ltd. Vs. Commissioner of C.Ex., Chandigarh-I reported in 2017 (48) S.T.R. 172 (Tri. – Chan.)*** to draw attention to the fact that Notification No. 30/2004-C.E. dated 09.07.2004 on the very same issue was considered by the Tribunal in the said case. Further, the decision in the case of ***M/s. Lavino Kapur Cottons Pvt. Ltd. Vs. Commissioner of C.Ex., Thane-II reported in 2015 (39) S.T.R. 514 (Tri. – Mum.)*** also considers the eligibility of credit of service tax paid on input services while claiming the benefit of Notification No. 30/2004.

3.4.1 With regard to the second issue relating to the requirement of adding the turnover of yarn waste to arrive at the amount that has to be reversed by the appellant, Ld. Advocate submitted that Rule 57D of the erstwhile MODVAT scheme stated that the inputs contained in waste is eligible for credit and therefore, not required to be reversed. The Board has issued Supplementary Instructions after the introduction of the CENVAT Credit Rules, clarifying this aspect. He referred to paragraph 3.7 of the said Instructions to argue that CENVAT Credit is admissible in respect of inputs contained in any waste, refuse or by-product. The period involved is from 2009 to 2011 (September 2011) and that the said Instructions are binding on the Department. He argued that the reversal of proportionate credit made by the appellant is in order and that the demands made in the Show Cause Notice as regards the issue contested in this appeal are illegal.

3.4.2 He relied upon the decision in the case of ***M/s. Eveready Industries India Ltd. Vs. Commissioner of Customs, Central Excise and Service Tax, Noida reported in 2018-TIOL-2135-CESTAT-ALL*** to submit that the said Supplementary Instructions, observing that credit on inputs contained in waste is eligible, were referred to by the Tribunal to hold that credit of inputs contained in waste is eligible.

3.5 The Ld. Advocate has also argued on the ground of limitation. He submitted that the Show Cause Notice for the period from 2009 to 2011 (September 2011) was issued on 17.06.2015. The appellant had reversed the credit according to their calculation, which is admitted by the Department. The Department has raised the demand alleging that further amount has to be reversed. In fact, the issue is only interpretational and therefore, the Show Cause Notice issued invoking the extended period of limitation cannot sustain.

4.1 Ld. AR Shri. L. Nandakumar appearing on behalf of the respondent supported the findings in the impugned order. He submitted that though the appellant has been reversing proportionate credit, the amount arrived at for such reversal is incorrect. The appellant has not included the clearances for export claiming exemption under Notification No. 30/2004, clearances made under the same Notification which have been manufactured on job work basis and also the clearances of yarn waste without payment of duty. The value of the said clearances ought to have been included for applying the formula as stated in Rule 6 (3A).

4.2 He adverted to Notification No. 42/2001 to submit that the requirement of furnishing a bond while exporting exempted goods has been done away with by such Notification. Thus, the exempted goods have been exported by the appellant without executing a bond. Therefore, Rule 6 (6) (v) of the CENVAT Credit Rules will not assist the appellant. The Department has thus correctly raised the demand.

4.3 Further, common inputs and input services have been used for the manufacture of waste and therefore, the appellant has to include the value of the clearances of yarn waste also.

4.4 With regard to the issue of limitation, Ld. AR submitted that the short payment or short reversal would not have come to light but for the interference of the Department. Therefore, the appellant is guilty of suppression of facts with an intent to evade payment of duty.

4.5 He thus argued that there are no grounds for interference in the impugned order.

5. Heard both sides.

6.1 As narrated above, the first issue is with regard to the requirement of including the value of clearances of export made by the appellant of the goods for which the exemption under Notification No. 30/2004 has been availed.

6.2 Rule 6 (6) (v) of the CENVAT Credit Rules, 2004 states that provisions contained in Sub-Rules (1), (2), (3) and (4) of Rule 6 shall not be applicable in case the excisable goods removed without payment of duty are cleared for export under bond in terms of the provisions of the Central Excise Rules, 2002. For better appreciation, the said Rule is reproduced as under :

> ***"RULE 6. [Obligation of a manufacturer or producer of final products and a [provider of output service].***
>
> *.*
> *.*
> *.*
>
> *(6) The provisions of sub-rules (1), (2), (3) and (4) shall not be applicable in case the excisable goods removed without payment of duty are either –*

(i) .....
(ii) .....
(iii) …..
(iv) …..
(v) cleared for export under bond in terms of the provisions of the Central Excise Rules, 2002; or

…"

Thus, as per Rule 6 (6) (v) of the CENVAT Credit Rules, 2004, when exempted goods are cleared for export under bond, the bar under Rule 6 (1) ibid not to avail credit on common inputs/input services is not applicable.

6.3.1 The demand has been raised stating that Notification No. 42/2001 has done away with the requirement to exclude a bond when exempted goods are exported. In the case of *M/s. Drish Shoes Ltd. (supra),* the Hon'ble High Court has analyzed the issue as to whether credit is eligible on the duty paid on inputs and input services used in the manufacture of exempted goods which are exported. The said question of law framed by the Hon'ble High Court is quoted as under :

> *"(1) Whether an assessee exclusively manufacturing wholly exempted goods NIL tariff rate of duty) is eligible to avail CENVAT credit of duty paid on the said inputs and input services under Rule 6(1) of the CENVAT Credit Rules, 2002/CENVAT Credit Rules, 2004, used in the manufacture of such exempted goods, even if such goods are exported."*

After a detailed discussion, the Hon'ble High Court in paragraph 20 has answered the question as under :

> ***"20.*** *In view of the above discussion, we hold that an assessee, manufacturing goods chargeable to nil duty, is eligible to avail CENVAT credit paid on the inputs under the exception clause to Rule 6(1), as contained in Rule 6(5) of CENVAT Credit Rules, 2002 and Rule 6(6) of CENVAT Credit Rules, 2004, used in the manufacture of such goods, if the goods are exported. Question No. 1 is answered accordingly."*

Thus, it was held that even if the exempted goods are exported, credit is eligible.

6.3.2 Now, the question is whether the amendment brought forth to do away with the requirement to execute a bond while exporting exempted goods would change the situation. The Tribunal in *M/s. Jolly Board Ltd. (supra)* had occasion to consider the issue post amendment vide Notification No. 42/2001. In paragraph 7 of the said judgement, the Tribunal, after referring to the decision in *M/s. Repro India Ltd. (supra),* has held that the requirement for execution of a bond is only a procedural one and therefore, refund cannot be denied. The facts in the said case was the denial of refund of unutilized credit under Rule 5 of the CENVAT Credit Rules, 2004 read with Notification No. 5/2006. The relevant paragraph is reproduced as under :

> ***"7.*** *The issue came up before the Hon'ble High Court of Bombay in Repro India Ltd. (supra) wherein the Hon'ble High Court held that CENVAT credit used in the manufacture of final product being exported irrespective of the fact that final product are otherwise exempted by provisions of Rule 6(6)(v) of the CENVAT Credit Rules, 2004 are applicable. Further, I find that in the case of Salzer Controls Ltd. - 2003 (160) E.L.T. 1169 and Paras Ship Breakers Ltd. this Tribunal has held that non-execution of bonds are only technical lapse. Further, in the case of Well Known Polyester Ltd. (supra) wherein the exempted goods were exported without bond or LUT by an assessee who was not even registered without bond or LUT by an assessee who was not even registered with the Central Excise department. This Tribunal has held that execution of bond/LUT was only procedural lapse for which refund could not be denied."*

The said decision in *M/s. Jolly Board Ltd (supra)* has been upheld by the Hon'ble High Court of Bombay as reported in *2017 (50) S.T.R. 131 (Bom.).* While analyzing the issue, the Hon'ble High Court has endorsed the view taken in *M/s. Drish Shoes Ltd. (supra).*

6.3.3 Further, the decisions in *M/s. Lavino Kapur Cottons Pvt. Ltd (supra)* as well as *M/s. GPI Textiles Ltd.(supra)* are judgements wherein the eligibility of credit on input services for the goods exported after availing the exemption under Notification No. 30/2004 was considered. The relevant paragraph of M/s. *Lavino Kapur Cottons Pvt. Ltd (supra)* is noticed as under

> ***"7.*** *The appellant availed Cenvat credit on input service used in the manufacture of their final products. The department denied them the credit on service paid on input service on the ground that they have exported the goods while claiming the benefit of Notification 30/2004. The case of the appellant is that they are a 100% EOU and they are exporting most of their product and they have claimed the benefit of Notification 30/2004. The department has denied them Cenvat credit availed in view of the provisions of Rules 6(1) and 6(2) of the Cenvat Credit Rules, 2004, which are reproduced hereunder :-*
>
> > *"(1) The Cenvat credit shall not be allowed on such quantity of input or input service which is used in the manufacture of exempted goods or for provision of exempted services, except in the circumstances mentioned in sub-rule (2).*
> >
> > *(2) Where a manufacturer or provider of output service avails of Cenvat credit in respect of any inputs or input serviced, and manufactures such final products or provides such output service which are chargeable to duty or tax as well as exempted goods or*

> *services, then, the manufacturer or provider of output service shall maintain separate accounts for receipt, consumption and inventory of input and input service meant for use in the manufacture of dutiable final products or in providing output service and the quantity of input meant for use in the manufacture of exempted goods or services and take Cenvat credit only on that quantity of input or input service which is intended for use in the manufacture of dutiable goods or in providing output service on which service tax is payable."*

Cenvat credit has been introduced to mitigate the cascading effect of the double taxation. Therefore, if the final product is exported, it deserves for a relaxation/dispensation to enable the goods to be internationally competitive and in view of the principle that only the goods are exported and taxes are not exported including the taxes on final products or taxes on inputs used in the manufacture of final product. The intention of the legislation is to ensure that duty is not levied on the export goods or on inputs used in the manufacture of goods which is reflected in Rule 6(6)(v) ibid reproduced hereunder :

> *"(6) The provisions of sub-rules (1), (2), (3) and (4) shall not be applicable in case the excisable goods removed without payment of duty are either -*
>
> *(i) …….*
>
> *(ii) ………*
>
> *(iii) …….*
>
> *(iv) ……..*
>
> *cleared for export under bond in terms of provisions of the (v) Central Excise Rules. 2002."*

Further, the Hon'ble High Court of Bombay in the case of Repro India Ltd. v. UOI reported in 2009 (235) E.L.T. 614 (Bom.) held as under :-

> *"Even though Rule 6(1) of the Cenvat Credit Rules, 2004 provides that no Cenvat credit will be available in respect of the inputs used in the manufacture of exempted products. Rule 6(6)(v) of the Cenvat Credit Rules creates an exemption inter alia in respect of the excisable goods removed without payment of duty for export under bond in terms of Central Excise Rules, 2002. Considering the language of Rule 6(6)(v) of the Cenvat Credit Rules, 2004 the petitioners are entitled to avail Cenvat credit in respect of the inputs used in the manufacture of the final products being exported irrespective of the fact that the final products are otherwise exempt."*
>
> *(Underline supplied)*

So far as the decision cited by the learned AR in the case of Suryamitra Exim Pvt. Ltd. v. CCE, Guntur reported in 2012 (283) E.L.T. 504, the export related to frozen shrimps and frozen fish which are attracting no duty or nil rate of duty and the exception provided in respect of export

> *bond should be read in the context of liability to duty, which is the primary condition for the purpose of allowing Cenvat credit under the Cenvat Credit Rules which is not the issue in the present case. The input services used in the manufacture of final product have suffered service tax and are exported is not in dispute in this case. Therefore, the case law cited by the learned AR is not relevant to the present case. In these circumstances, the learned Commissioner's order is not sustainable and the same is accordingly set aside and the appeal is allowed."*

The said view has been reiterated in the case of *M/s. GPI Textiles Ltd. (supra).*

6.4 From the discussions made above and also following the decisions cited *supra*, I am of the view that the credit availed on input services is eligible and the contention of the Department that the credit has to be reversed is against the provisions of law. The first issue is therefore found to be in favour of the appellant.

7.1 The second demand is with regard to the requirement of including the turnover of yarn waste cleared by the appellant. The Department is of the view that the credit on inputs contained in the waste is not eligible and has to be reversed by the appellant. As pointed out by the Ld. Counsel for the appellant, Rule 57D of the erstwhile MODVAT scheme had specifically mentioned that the credit on inputs contained in waste is eligible. Paragraph 3.7 of the Supplementary Instructions issued by the Department after introduction of the CENVAT Credit Rules, 2002, reads as under :

> *"3.7 CENVAT credit is also admissible in respect of the amount of inputs contained in any of the waste, refuse or bye product. Similarly, CENVAT is not to be denied if the inputs are used in any intermediate of the final product even if such intermediate is exempt from payment of duty. The basic idea is that CENVAT credit is admissible so long as the inputs are used in or in relation to the manufacture of final products, and whether directly or indirectly."*

It is very much clear from the above Instructions issued by the Department that credit is admissible on the amount of inputs contained in any waste, refuse or by-product.

7.2 The argument of the Ld. AR for the Department that the appellants are manufacturing waste cannot be accepted. The appellants are not consciously manufacturing waste and it is merely a refuse or waste which is not dutiable, as held by the Hon'ble Supreme Court in various decisions. The Tribunal in the case of *M/s. Eveready Industries India Ltd.*

(supra) has held that the credit on inputs contained in waste is not required to be reversed.

7.3 Following the said decision, I am of the view that the appellant succeeds on the second issue also.

8. The impugned order, to the extent as discussed above, is set aside without disturbing the direction of the Commissioner (Appeals) remanding the issue with regard to clearances of goods manufactured on job work basis.

9. The appeal is allowed with consequential reliefs, if any, as per law.

(Dictated and pronounced in open court)

(SULEKHA BEEVI C.S.)
MEMBER (JUDICIAL)

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