CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL CHENNAI

REGIONAL BENCH – COURT NO. I

Excise Appeal No. 40750 of 2018

(Arising out of Order-in-Appeal No. 26/2017 (CTA-II) dated 31.01.2018 passed by the Commissioner of G.S.T. & Central Excise (Appeals-II), Newry Towers, 2054/1, II Avenue, 12th Main Road, Anna Nagar, Chennai – 600 040)

M/s. Samraj Engineering Controls Pvt. Ltd., **: Appellant**
No. 167/1, 167/2, Mettupalayam Village,
Sriperumbudur,
Kanchipuram District – 631 604

VERSUS

The Commissioner of G.S.T. & Central Excise, **: Respondent**
Chennai North Commissionerate,
No. 26/1, Mahatma Gandhi Road, Nungambakkam,
Chennai – 600 034

APPEARANCE:

Shri. G. Derrick Sam, Advocate for the Appellant

Shri. L. Nandakumar, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. P. DINESHA, MEMBER (JUDICIAL)

FINAL ORDER NO. 40960 / 2019

DATE OF HEARING: 16.07.2019

DATE OF DECISION: **25.07.2019**

When the matter was called out on the date of hearing, Shri. G. Derrick Sam, Ld. Advocate appearing for the assessee, made the following submissions :

(i) The appellant manufactures both dutiable and exempted goods;

(ii) The Show Cause Notice dated 13.10.2016 came to be issued only after the audit of the records maintained by the assessee and there is no whisper about any other document which is being referred to;

(iii) The Revenue had also verified the CENVAT documents as well as the CENVAT account maintained by the assessee before issuing the Show Cause Notice;

(iv) There was a similar audit in October 2012 wherein no irregularities as to the wrong availment of CENVAT Credit was pointed out and it was only in the subsequent audit, i.e., in October 2015 that the availment of CENVAT Credit on Aluminium Sheets and MS Chequered Sheets was questioned, for the period from December 2012 to August 2015;

(v) There is no case made out or even suppression alleged in the Show Cause Notice and the only allegation levelled is that it appeared that the assessee had wilfully availed the ineligible credit with an intent to evade payment of duty.

1.2 During the course of hearing, Ld. Advocate filed samples of Form ER-1 for the months of December 2012 and September 2015 which, according to him, contains all the details like the Notification under which the goods were cleared without payment of duty and also various inputs used in the appellant's manufacturing process.

1.3 Ld. Advocate further relies on the judgement of the Hon'ble Apex Court in the case of ***M/s. Uniworth Textiles Ltd. Vs. Commissioner of Central Excise, Raipur reported in 2013 (288) E.L.T. 161 (S.C.)*** and in particular, refers to paragraphs 12 and 24 to buttress his arguments that there was no question of suppression since every allegation in the Show Cause Notice was picked up from the records/Books of the appellant. He also drew support from the order of the Hyderabad Bench of the Tribunal in the case of ***M/s. Ultratech Cement Ltd. Vs. Commissioner of Cus. & C.Ex., Tirupathi reported in 2016 (339) E.L.T. 127 (Tri. – Hyd.)*** wherein it has been held that the disclosure of availment of CENVAT Credit in the ER-1 returns is sufficient to dislodge the allegation of suppression. He also relied on the following decisions:

(i) *Rajasthan State Warehousing Corp. Vs. C.C.E., Jaipur – 2011 (23) S.T.R. 385 (Tri. – Del.);*
(ii) *C.C.E., Bangalore-I Vs. MTR Foods Ltd. – 2012 (282) E.L.T. 196 (Kar.);*
(iii) *Garrison Polysacks P. Ltd. Vs. C.S.T., Vadodara-II – 2013 (292) E.L.T. 513 (Tri. – Ahmd.);*
(iv) *Hero Honda Motocorp Ltd. Vs. C.C.E., Delhi-III – 2014 (310) E.L.T. 364 (Tri. – Del.);*
(v) *C.C.E., Pune-I Vs. Thyssenkrupp Industries I Ltd. – 2017;*

1.4 Ld. Advocate summarizes his arguments by submitting that there were no *mala fides* attributed to the appellant since, upon being pointed out during audit, it voluntarily reversed the credit alleged to have been wrongly availed for the normal period i.e., from November 2014 to August 2015 and hence, the demand for the period from December 2012 to October 2014 for which the extended period of limitation was invoked, was not justified.

2.1 *Per contra*, Shri. L. Nandakumar, Ld. AR appearing for the Revenue, while supporting the findings of the lower authorities, submitted as under :

(i) From perusal of the sample ER-1 returns, there is nothing on record to suggest that the inputs used, on which CENVAT Credit was availed, were used in the manufacture of dutiable or exempted goods;
(ii) Only when the audit took place in October 2015 did the Revenue observe the availment of wrong credit;
(iii) The ratio laid down by the Hon'ble Supreme Court in the case of *M/s. Uniworth Textiles Ltd. (supra)* is not available because of the fact that there was no suppression unlike in the case on hand where the assessee knew about the use of the inputs *vis-à-vis* the manufacturing activity and the availment of

CENVAT Credit thereon in respect of exempted goods;

(iv) The assessee has ignored the provisions of Rule 9(6) of the CENVAT Credit Rules, 2004;

(v) The Show Cause Notice makes out a case that the intention of the assessee was very much there to evade payment of duty and accordingly, justifies the invocation of the larger period of limitation.

2.2 Ld. AR relies on the decision of the Hon'ble High Court of Bombay in the case of ***M/s. Tigrania Metal & Steel Industries P. Ltd. Vs. Commissioner of Central Excise reported in 2015 (326) E.L.T. 650 (Bom.)*** and the order of this Bench of the Tribunal in the case of ***M/s. Chemfab Alkalis Ltd. Vs. Commissioner of C.Ex., Pondicherry reported in 2010 (251) E.L.T. 264 (Tri. – Chennai)*** to support his case.

3. Ld. Advocate for the appellant, countering the above arguments of the Ld. AR, contends that the Show Cause Notice was issued only in October 2016 and does not specifically address suppression, fraud, etc., to justify invoking the larger period of limitation and that therefore the Revenue has not made out a case and accordingly, prays that the demand beyond the normal period of limitation i.e., from December 2012 to October 2014 may be directed to be dropped. For the above reasons, he also pleads that the penalty is required to be deleted as no case for suppression is made out.

4. Heard both sides, perused the documents placed on record and have also gone through the various decisions relied upon by both sides.

5.1 It is the case of the Revenue that the appellant had wrongly availed input credit on input which was not used by it in the manufacture of any dutiable products which, according to the Revenue, is contrary to Rule 6 (1) of the CENVAT Credit Rules, 2004. Further, the Revenue has also alleged that the fact of wrongly availing CENVAT Credit came to light only during verification/audit in

October 2015. The undisputed fact therefore remains that the allegation of wrong availment was detected only from the Books/records of the assessee; there is no whisper about finding the alleged irregularity not in the context of the Books/records of the assessee but otherwise and there is also no whisper about any independent enquiry yielding any result.

5.2 Further, I also find that it is not the case of the Revenue nor is there any finding that there was an act of suppression by which the appellant intended to evade the tax/duty or successfully evaded the payment of duty. Albeit Show Cause Notice alleges contravention of Rule 6 (1), there is nothing beyond this; no whisper about suppression, fraud, etc., much less even intention to evade payment of duty, in the Show Cause Notice.

6. It is also a matter of record that the appellant, upon being pointed out, did reverse the above credit and duly reflected the same in their ER-1 return filed for the month of January 2016. Section 11AC of the Central Excise Act, 1944 provides that where any duty of excise has not been levied or paid or has been short-levied or short-paid, etc., by reason of fraud, collusion, etc., with an intent to evade payment of duty, such person is liable to pay a penalty equal to the duty determined. As per the provision of Rule 15 (2) of the CENVAT Credit Rules, 2004, in a case where the CENVAT Credit has been taken and utilized wrongly by reason of fraud, suppression, etc., and in contravention of any of the provisions of the Central Excise Act or of the rules made thereunder with an intent to evade payment of duty, the manufacturer shall also be liable to pay penalty in terms of the provisions of Section 11AC of the Central Excise Act.

7. In the case on hand, there is no dispute about the fact that the ER-1 return disclosed the availment of CENVAT Credit and even though it is filed under self-assessment system, the Officers are supposed to scrutinize the same. Just because the assessee had taken CENVAT Credit in respect of certain input services which

according to the Revenue was not admissible, it cannot be concluded that such credit had been taken knowing very well that the same was inadmissible unless some evidence is brought on record.

8. The Hon'ble Apex Court in the case of ***M/s. Escorts Ltd. Vs. Commissioner of Central Excise, Faridabad reported in 2015 (319) E.L.T. 406 (S.C.)*** while dealing with the factum of suppression, has observed as under :

> ***"18.*** *Similarly in Continental Foundation Joint Venture Holding v. Collector of Central Excise, Chandigarh-I, (2007) 10 SCC 337 = 2007 (216) E.L.T. 177 (S.C.), this Court held :*
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> > *12. The expression "suppression" has been used in the proviso to Section 11A of the Act accompanied by very strong words as "fraud" or "collusion" and, therefore, has to be construed strictly. Mere omission to give correct information is not suppression of facts unless it was deliberate to stop (sic evade) the payment of duty. Suppression means failure to disclose full information with the intent to evade payment of duty. When the facts are known to both the parties, omission by one party to do what he might have done would not render it suppression. When the Revenue invokes the extended period of limitation under Section 11A the burden is cast upon it to prove suppression of fact. An incorrect statement cannot be equated with a wilful mis-statement. The latter implies making of an incorrect statement with the knowledge that the statement was not correct."*
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> ***19.*** *Judged by this test, it is clear that on facts in the present case there was no suppression on the part of the appellants nor was there any willful attempt to evade duty. As stated by the appellant, the appellant has been manufacturing tractors from 1965 onwards. There has never been any change in the manufacturing process. In the year 1994-95, IC engines were stated by the department to contain Transmission Assemblies, which were dutiable. On receiving a reply from the appellant, the department did not levy any Excise duty on such Transmission Assemblies. The show cause*

> *notice itself stated that the issue of manufacture and captive consumption of Transmission Assemblies for tractors is the same as that for IC engines. These facts, coupled with the fact that not a single Transmission Assembly of tractors manufactured by the appellant had been sold makes it clear that there was no suppression or any intent to evade Excise duty in the present case. We feel that the show cause notice needs to be quashed on this ground alone. Accordingly, the appeal is allowed, and the judgment dated 27-5-2004 passed by CESTAT is set aside."*

9. As observed by me in the case on hand, the Show Cause Notice issued without the specific allegation of suppression, fraud, etc., invoking the larger period of limitation cannot therefore sustain in the light of the dictum of the Hon'ble Supreme Court *(supra).* The impugned order for the period from December 2012 to October 2014 cannot sustain and therefore, the same is set aside.

10. The appeal is allowed accordingly.

(Order pronounced in the open court on **25.07.2019**)

(P. DINESHA)
MEMBER (JUDICIAL)

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