CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL CHENNAI

REGIONAL BENCH – COURT NO. III

Excise Appeal No.42634 of 2017
(Arising out of Order-in-Appeal No.124/2017 (CTA-II) dt. 31.07.2017 passed by Commissioner of Central Excise (Appeals-II), CGST & Central Excise , Chennai]

M/s.Mobis India Ltd. **Appellant**
Plot No.G-1, SIPCOT Indl. Park,Third Floor, Subramanya Arcade,
irungattukottai,
Kancheepuram District 602 117.

VERSUS

Commissioner of Central Excise,
CGST & Central Excise,,
Newry towers, 2054/1, II Avenue,
12th Main Road, Anna Nagar,
Chennai 600 040. **Respondent**

APPEARANCE :

Shri M.N. Bharathi, Advocate for the Appellant

Shri B.Balamurugan, AC (AR) for the Respondent

CORAM :

HON'BLE MS. SULEKHA BEEVI. C.S., MEMBER (JUDICIAL)
HON'BLE MR. P. VENKATA SUBBA RAO,MEMBER (TECHNICAL)

DATE OF HEARING : 31.10.2019
DATE OF DECISION : 31.10.2019

FINAL ORDER No. 41247 / 2019

PER P. VENKATA SUBBA RAO

This appeal is filed against OIA No. 124/2017 (CTA-II) dt. 31.07.2017

2. Heard both sides and perused the records.

3. The appellant are manufacturers of motor vehicle parts and holds Central Excise Registration. They also hold service tax registration for payment of service tax on services rendered by them and also on services received by them under reverse charge mechanism. On perusal of records, the department noticed that appellant, among other things, procured Microcat DVD from Australia classifying it under Customs Tariff Heading 8523. Thereafter, they were repacking the DVDs and selling them as motor vehicle part under tariff heading 8708 discharging excise duty based on MRP under Section 4A of the Central Excise Act, 1944.

4. The department was of the opinion that packing or repacking of a DVD does not amount to 'manufacture' and therefore appellant was not required to pay excise duty at all and the DVDs which they were selling were not liable to excise duty at all. As these products are exempted they cannot avail any cenvat credit in terms of Cenvat Credit Rules, 2004 (CCR, 2004). It was found that Microcat DVD is only an electronic "parts catalogue" used by dealers and service agents and is not a manufactured product. Accordingly, show cause notice dt. 18.02.2015 was issued to the appellant proposing to recover the amount of Rs.27,10,486/- being ineligible cenvat credit taken by them under Rule 14 of CCR 2004 read with the proviso to Section 11A. It was also proposed to demand interest under Rule 14 of CCR read with Section 11AB / Section 11AA of the Central Excise Act, 1944. It was further

proposed to impose penalty upon them under Rule 15 (2) of CCR 2004 read with Section 11AC.

5. After following due process, the Additional Commissioner vide OIO dt. 25.02.2016 confirmed the demand and interest and imposed penalties. Aggrieved, the appellant appealed before the first appellate authority which was rejected by the impugned order. Hence this appeal.

6. Ld. Counsel for the appellant would submit, at the outset, that the period of dispute in this case is October 2009 to September 2012. The SCN was issued on 21.02.2015 well beyond the normal period of limitation. It is not in dispute that they had paid central excise duty under Section 4A of the Central Excise Act, 1944. It is also not in dispute that the disputed clearances on payment of duty have been included in the returns which they filed regularly with the Central Excise Department. There is no allegation in the SCN that they have not disclosed anything that needs to be disclosed in their returns. Under these circumstances, the entire demand is time barred and therefore needs to be set aside on this count alone. Consequently, the demand of interest and imposition of penalties also need to be set aside.

7. On merits, he would argue that they had imported Microcat DVD from Australia classifying it under Customs Tariff Heading 85234080. They had classified DVD under 8708 instead of 8523 which was a bonafide mistake and they had no intention to evade payment of duty. In fact, he would submit that they had paid duty which, according to the SCN, need not have been paid. He further argued that they had utilized cenvat credit taken on the imported DVDs to pay Central Excise duty

under Section 4A when they sold them to the dealers. He further submits that as a result of the difference in the CENVAT credit of additional duty on the inputs and excise duty paid on the DVDs, there was a small balance of cenvat credit was lying in their balance which has also been debited by them after the SCN was issued. Therefore, the entire case is revenue-neutral. Department wants the cenvat credit to be reversed and the same has been effectively reversed by paying the amounts as excise duty. He further submits that no MRP was affixed on the products when they had imported which they had affixed on the DVDs which amounts to 'manufacture' as per Section 2(f) (iii) of the Central Excise Act, 1944. He relies on the case law of *Glovis India Ltd.* (Final Order No.40787/2017 dt. 15.05.2017) to buttress his argument that repacking in their goods amounted to "manufacture". He would therefore urge that the demand should fail on this count as well. Thirdly, he would argue that in cases where the assessee has paid excise duty treating the activity as manufacturing activity and such payment has not been disputed by the department cenvat credit is available to the assessee as has been decided by the Hon'ble High Courts of Karnataka, Bombay and Gujarat in *CCE Bangalore Vs Vishal Precision Steel Tubes & Strips Pvt. Ltd*. - 2017 (349) ELT 686 (Kar.). *Ajinkya Enterprises* - 2013 (294) ELT 203 (Bom.) and *Creative Enterprises* - 2009 (235) ELT 785 (Guj.) In view of the above, he would urge that demand for reversal of cenvat credit availed must fail both on merits and on limitation. Consequently, the demand of interest and imposition of penalty also do not survive. He prayed that the impugned order may be set aside and the appeal may be allowed.

8. Per contra, Ld. D.R supports the findings of the lower authorities. He would urge that cenvat credit is available only if the goods are used for manufacture of the final product and such final products are chargeable to excise duty. Where the final products are exempt, the input credit cannot be taken. In this case, the appellant has not undertaken any manufacturing activity and has only labelled DVDs which have been imported, misclassified them under a different heading and sold them to the dealers. This activity cannot be termed as "manufacture" in the absence of any specific legal provision to the effect. Therefore, they are not entitled to take cenvat credit wrongly availed by the appellant is liable to be recovered. The impugned order has correctly upheld such recovery along with interest and imposition of penalties. On the question of limitation, Ld. D.R would argue that assessee has only filed returns giving aggregate value and has not disclosed that they were paying central excise duty on products which they were not manufacturing at all. He would also argue that the appellant has not disclosed that they were availing cenvat credit on the additional duty paid on the imported DVDs. Therefore, invocation of extended period of limitation was correct and proper in all respects. On the question of labelling or relabeling amounting to "manufacture" in terms of Section 2 (f) (iii), he would submit that this section applies only to goods listed in the Third Schedule to the Central Excise Tariff Act, 1985. There is nothing on record to show that the DVDs in

question have been covered by this Schedule. He prays that the appeal may be rejected and the impugned order may be upheld.

9. We have considered arguments on both sides and perused the records. The first question which we need to address is whether the activities undertaken by the appellant amount to 'manufacture'. Undisputedly, all that the appellant had done was repacking the goods and affixing MRP stickers on them. The appellant's argument is that in terms of Section 2 (f) (iii) it does amount to 'manufacture'. Section 2(f) is reproduced below :

> (f) "manufacture" includes any process,—
>
> (i) incidental or ancillary to the completion of a manufactured product;
>
> (ii) which is specified in relation to any goods in the section or Chapter notes of [the First Schedule to the Central Excise Tariff Act, 1985 as amounting to [manufacture; or
>
> (iii) **which, in relation to the goods specified in the Third Schedule, involves packing or repacking of such goods in a unit container or labelling or re-labelling of containers** including the declaration or alteration of retail sale price on it or adoption of any other treatment on the goods to render the product marketable to the consumer,
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> and the word "manufacturer" shall be construed accordingly and shall include not only a person who employer hired labour in the production or manufacture of excisable goods, but also any person who engages in their production or manufacture on his own account;

10. From the above, we find that packing and repacking, labelling or relabelling amounts to 'manufacture' in respect of the goods which are listed in the Third Schedule to the Central Excise Tariff Act, 1985. This is a legal fiction created by the statute and applies only to such goods which are listed in the third schedule and not to others. The DVDs

which they have imported were classified under 85234080. We find that this tariff heading is not included in the third schedule. Evidently labelling or relabelling these DVDs will not make them classifiable under a different heading (8708) as has been done by the appellant. Further, we find even the chapter heading 8708 is also not covered under the Third Schedule. Therefore, by no stretch of imagination can the activity of the appellant be called the 'manufacture'. Therefore, the excise duty paid by the appellant treating this activity as manufactured is clearly not supported by law. Since the final product is not chargeable to excise duty, cenvat credit cannot be availed on the imported DVDs. However, we find that the appellant has filed the returns which were legally required, with the department. Scrutiny of such returns and calling for any further information would have disclosed this fact that appellant was paying the central excise duty wrongly. The department could have directed them not to pay central excise duty accordingly but the department has not done so. Therefore, we find that the erroneous payment of the appellant made as central excise duty was not detected by the department despite the appellant disclosing in their returns the details which they were mandatorily required to disclose. Under these circumstances, we find that the demand for reversal of CENVAT credit invoking extended period of limitation does not sustain at all. We have considered the argument of Ld. D.R that the appellant has not disclosed full details and has only given aggregate values in their returns and thereby not disclosed that duty was paid on relabelled DVDs. Be that as it may, as long as the details required in the returns are filed by appellant, they cannot be alleged to have suppressed any information from department. If the Central Excise returns required only aggregate value and not details and therefore such details have been disclosed by the appellant, they cannot be alleged to have suppressed any information. The period in dispute is October 2009 to September 2012 while the SCN was issued well beyond the normal period on 21.02.2015 when this action of the appellant came to light during the audit. It was equally possible for the assessing officers to have scrutinized returns and found that excise duty was being paid wrongly after availing CENVAT credit.

11. The second question is if the assessee has treated the activity of manufacture and paid excise duty thereon and availed cenvat credit can cenvat credit be subsequently denied by the department holding that the activity was not manufacture in the first place. The Hon'ble High Court of Karnataka in the case of *Vishal Precision Steel Tubes & Strips Pvt. Ltd.* (supra) has held that cenvat credit cannot be denied under such circumstances. This ratio of this judgement of the Hon'ble High Court of Karnataka binds us to hold that cenvat credit cannot be recovered from the appellant even on this count.

12. As we have held that cenvat credit cannot be denied and recovered from the appellant the demand of interest thereon as well as proposed penalties do not survive.

13. In view of the above, the impugned order is set aside and the appeal is allowed.

(Operative part of the order pronounced in court)

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

(P. Venkata Subba Rao)
Member (Technical)

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