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

E/42236 & 42237/2016-SM

[Arising out of Order-in-Appeal No.72/2016, dated 23.08.2016 passed by the Commissioner of Central Excise & Service Tax (LTU), Chennai]

M/s.SAINT GOBAIN GLASS INDIA LTD. APPELLANT

Versus

COMMISSIONER OF CENTRAL EXCISE & SERVICE TAX (LTU), CHENNAI RESPONDENT

Appearance:

For the Appellant Shri S. Muthuvenkataraman, Adv.
For the Respondent Shri K.P. Muralidharan, AC (AR)

CORAM:

Hon'ble Smt. Archana Wadhwa, Member (Judicial)

Date of hearing/decision 17-05-2017

FINAL ORDER NOs. 40711 - 40712/2017

Per Archana Wadhwa:

Both the appeals are being disposed of by a common order as the issue involved is identical. It is seen that the demand of duties were confirmed against the appellants by denying them the proportionate Cenvat credit availed in respect of Furnace Oil used for generation of electricity, a part of which was transmitted to Tamil

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Nadu Electricity Board (TNEB). There were two other issues involved concerning non-reversal of Cenvat credit in respect of waste and scrap of iron as also of jumbo bags and wrong utilization of Cenvat credit in respect of damaged inputs.

2. The said decision of the original adjudicating authority was appealed against before Commissioner (Appeals), who upheld the denial of credit but reduced the penalty. The said order of Commissioner (Appeals) was appealed again by the assessee as also by Revenue before Tribunal. The Revenue's appeal was against reduction of penalty by Commissioner (Appeals). It is seen that both the appeals were disposed of by Tribunal vide two different orders and in both the cases the matter was remanded to Commissioner (Appeals).

3. Commissioner (Appeals) vide his one order passed in *de novo* proceedings upheld the confirmation of demand along with imposition of penalty to the extent of 100%. However, vide another separate order, he again imposed penalty to the extent of 100% in terms of the remand order of the Tribunal on the Revenue's appeal. Hence the two different orders, in respect of the same issue, stand passed by Commissioner (Appeals) and both of them stands challenged by the appellant by ways two different appeals. In as much as, the issues involved in both the appeals are same, I proceed to decide both the appeals by a common order.

4. The main issue relates to reversal of Cenvat credit in respect of that quantum of Furnace Oil, which has gone to the generation of electricity and which electricity stands transferred by the appellant to TNEB. Learned advocate appearing for the appellant fairly agrees that

the Larger Bench decision of the Tribunal in the case of *Gujarat Narmada Fertilizers Co. Ltd. Commissioner of Central Excise, Vadodara* reported in *2008 (11) E.L.T.431 (L.B.)*, which is in favour of the assessee was appealed again by the Revenue before the Hon'ble High Court of Gujarat, who upheld the same. On further appeal by the Revenue before the Hon'ble Supreme Court, the same was reversed, as reported in the case of *Commissioner of Central Excise Vs Gujarat Narmada Fertilizers Co. Ltd.* reported in *2009 (240) E.L.T.661 (S.C.)*. As such, the issue on merits stand decided against the appellant.

4.1 However, learned advocate assails the impugned order on the point of limitation by submitting that the credit was availed during the period April, 2000 and June, 2001, whereas, the show-cause notice stand issued in 2005. He submits that there was lot of confusion in the field during the relevant period and the Larger Bench decision as also the Hon'ble High Court of Gujarat decision was in favour of the assessee. The same were reversed only subsequently by the Hon'ble Supreme Court. In such a scenario, no malafide can be attributed to the appellant so as to invoke the longer period of limitation. For the above proposition, he relies upon the Tribunal's decisions in the case of *Kay Kay Press Metal Corporation Vs Commissioner of Central Excise, Valsad* reported in *2011 (270) E.L.T.691 (Tri.-Ahmd.)* and *Commissioner of Central Excise & Customs, Daman (Vapi) Vs Mafatlal Industries Ltd.* reported in *2009 (245) E.L.T.265 (Tri.-Ahmd.)*.

5. In fact, he draws my attention to the Supreme Court decision itself in the case of *Gujarat Narmada Fertilizers Co. Ltd.* (supra), wherein, Hon'ble Supreme Court has observed as under:-

"It may be noted that litigation on interpretation of CENVAT Credit Rules has arisen on account of various conflicting decisions given by the various Benches of CESTAT, the reason being that the Rules have not been properly drafted. In the circumstances, we are of the view that in this batch of cases no penalty is leviable, however, in order to decide the amount of duty payable by each of the assessees, the matters are remitted to the Adjudicating Authority to decide the amount of duty payable without penalty on reversal of credit to the extent of the input being used in the manufacture of exempted final products/to the extent of the excess electricity being wheeled out to the Grid and to the Township."

5.1 It is the contention of the learned advocate that in as much as the Supreme Court has granted benefit to the assessee in respect of penalty by observing that the issue involved was interpretation of law and there were conflicting decisions by various benches. In as much the criteria for invocation of extended period and for imposition of penalty are same and in view of the fact that there is no malafide intention and issue involved was bonafide interpretation, the demand raised by invoking the longer period is unsustainable.

6. After hearing the learned departmental representative appearing for the Revenue who submits that law having been clarified by the Hon'ble apex court in respect of merits of the case, clearly lays down that an assessee is not entitled to the credit in respect of Furnace Oil used in the manufacture of electricity, which is wheeled out and the appellant having taken the credit contrary to the law laid down by Hon'ble Supreme Court, is liable to reverse the same, irrespective of the notice having been issued beyond the normal period of limitation.

7. Having considered the submissions made by both sides, I find that there is no dispute on the merits of the case. The only point required to be considered is as to whether notice issued in 2005 covering the period from April, 2000 to June, 2001 is barred by

Customs, Excise & Service Tax Appellate Tribunal limitation or not. The criteria for invocation of the longer period of limitation is suppression, misstatement etc., with an **intent to evade payment** of duty. Admittedly, during the relevant period and even thereafter, there were decisions of various higher courts. The Larger Bench of the Tribunal itself has held that the credit would be available. In such a scenario, which view stands upheld by the Hon'ble High Court of Gujarat, no malafide intention can be attributed to the assessee, so as to invoke the longer period of limitation. Accordingly, I hold the demand to be barred by limitation and set aside the denial of credit in respect of Furnace Oil along with setting aside of interest and penalty.

8. A part of the demand stands confirmed in respect of Waste and Scrap and Jumbo Bagsas also in respect of the damaged inputs. As the demands on the said two issues are on lower side, the appellants have accepted the liability to pay back the same and in fact, debited the same even prior to the issue of show-cause notice. The only prayer of the appellant is to set aside penalty in as much as the entire credit was availed by reflecting the same in statutory records in terms of the Central Excise provisions. As such, it stands contended that there was no suppression with any malafide on their part so as to invite any penal action.

8. By appreciating the above, I confirm the demand as not contested but set aside the penalties imposed in respect of the said demands on the ground of absence of any malafide.

9. As regards the second appeal E/42237/2016, the same is against the second time imposition of penalty. The Commissioner (Appeals) had already imposed penalty against the first impugned

order and as such there was no occasion for him to pass the second order for imposition of penalty. As such, it can be safely concluded, the second order is infructuous In any case, in the first order, penalty having been set aside, I set aside the penalty in the second appeal also. Both the appeals are disposed of in the above manner.

(Dictated and pronounced in open court)

18/5/17

(ARCHANA WADHWA)
MEMBER (JUDICIAL)

ksr
18-05-2017

Customs, Excise & Service Tax Appellate Tribunal

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