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

Appeal No.E/68/2002

[Arising out of Order-in-Original No.45/2001 (Commr.) dt. 08.11.2001 the Commissioner of Central Excise & Customs, Coimbatore]

Premier Evolvics Pvt. Ltd. Appellant

Versus

Commissioner of Central Excise, Coimbatore Respondent

Appeal Nos.E/278/2002 & E/279/2002

[Arising out of Order-in-Appeal No.54 & 55/2002 (CBE) (GVN) dt. 28.02.2002 and OIA No. 57 & 58/2002 (CBE) (GVN) dt 1.3.2002 passed by the Commissioner of Central Excise (Appeals), Tiruchirapalli]

Commissioner of Central Excise, Coimbatore Appellant

Versus

Premier Evolvics Pvt. Ltd. Responde

Appearance:

Shri C. Saravanan, Advocate
For the Assessee

Shri A. Cletus, ADC (AR)
For the Revenue

CORAM:

Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of hearing/decision :13.04.2017

FINAL ORDER No. 40656 - 40658/2017

The facts of the case are that selective audit was conducted by the department in respect of the assessee M/s.Premier Evolvics Pvt. Ltd. (hereinafter referred to as the assessee) for the period

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April 1997 to September 1998 in October-November 1998. During the course of audit, apparent discrepancies in availment of cenvat credit to the extent of Rs.17,19,850/- came to light which amount was paid up by the assessee on being informed by department, Rs.13,03,646/- through PLA and remaining Rs.4,16,204/- through RG-23A Account. Assessee apparently realized that the quantum of amount alleged to have been irregularly availed (as alleged by department) was incorrect and they preferred refund claims namely Rs.10,77,586/- (out of Rs.13,19,519/- paid through PLA) and Rs.1,78,157/- (out of Rs.4,00,332/- paid through RG 23 Account). Assessee did not press claim for refund of balance amount of Rs.2,26,060 [Rs.13,03,646 (-) Rs.10,77,586] and Rs.2,38,047 [Rs.4,16,204 (-) Rs.1,77,157] respectively. In other words, no refund was claimed for Rs.4,64,107. Department issued SCNs dt. 16.02.2000 (read with corrigendum dt. 23.02.2000) and another SCN dt. 15.02.2000 proposing to reject part of the refund claims preferred and restricting the eligibility of refund to Rs.2,02,815/- and Rs.28,199/- respectively. These proposals were confirmed by the original authority. Both department and the assessee filed appeals to the Commissioner (Appeals) against the orders in refund proceedings. The Commissioner (Appeals) vide a common OIA No.57 & 58/2002 dt. 1.3.2002 and No.54 & 55/2002 dt. 28.2.2002 allowed the assessee's appeal and rejected those of the department. The department appealed against these orders of

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Commissioner (Appeals) which were registered as E/279/2002 and E/278/2002.

2. While these proceedings were going on, assessee had further paid up an amount of Rs.9,38,557/- bringing the total amount paid by them to Rs.26,58,407/-. In the meantime, the department extended the audit for the five year period, which was conducted in October-November 2000, for the period earlier and subsequent to the period covered by the first audit, namely for the periods 1995-97 and 1998-2000.

3. During the course of the second audit, it appeared to the department that further amount of Rs.9,38,557/- had also been irregularly availed as modvat credit by the assesse, which amount was also paid up by the assessee on various dates between August 2002 to October 2002. Consequently, another SCN dt. 20.12.2000 was issued proposing recovery of allegedly irregularly availed Modvat credit amounting to Rs.26,67,927/- under the erstwhile Rule 57 (i) (ii) and Rule 57U (2) (now Rule 57AH) of the Central Excise Rules, 1944 read with Section 11A (1) of the Central Excise Act, 1944. Notice also proposed demand of interest under Rule 57I (3) ibid, Rule 57U (8) (now Rule 57AH) read with Section 11AB of Central Excise Act and also imposition of penalty under Rule 57I (4) (amended as Rule 57AH) and Rule 57U (6) (amended as Rule 57AH) of the Rules read with Section 11AC of the Central Excise and under Rule 173Q of the Central Excise Rules, 1944.

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4. This proposed demand covered the period from April 1995 to March 2000 and also had a overlap on the refund claims for the year 1997-98 preferred by the assessee as aforesaid out of which part of the claims had been allowed by the refund sanctioning authority and part was rejected. However, entire claim of Rs.12,55,746/- [Rs.10,77,586 + 1,78,157] was subsequently allowed by Commissioner (Appeals) as discussed above.

5. These proposals were confirmed in toto by the Commissioner (Adjudication) vide impugned order-in-original dt. 08.11.2011 (impugned order) for appeal E/68/2002 wherein apart from confirming the proposed recovery of cenvat credit of Rs.26,67,927/- and interest thereon, penalty of Rs.25 lakhs was also imposed on the assessee.

6. Aggrieved, the assessee had filed an Appeal No.E/68/2002 against this impugned order before this forum.

7. In the first round of litigation before this forum, all these three appeals were disposed of by a common Final Order No.268-270/2008 dt. 26.03.2008, wherein, inter alia, it was decided as under :

> "5. After considering the submissions, we note that the two show-cause notices relating to refund claims were issued in February, 2000 and that the show-cause notice in question was issued by Commissioner in December, 2000. The time gap between them is too small for the assessee to plead limitation on the strength of the cited decision of the apex court. Further, on merits, we have not found the requisite correlation between the credit of Rs.14,12,184/- and the inputs said to have been received in the factory and used in, or in relation to, the manufacture of the final products during the material period. The appellants do not seem to have made out a case against the demand of duty of Rs.14,12,184/-. Credit of this amount, already reversed by the assesse in the relevant accounts, cannot, therefore be allowed to be recredited or refunded. In the result, demand of duty to the extent of Rs.14,12,184/- shall stand sustained.

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6. We have already found that the above credit of Rs.14,12,184/- was reversed in the relevant accounts. This happened long before issue of the show-cause notice. It is settled law that, where duty was paid before show-cause notice, there is no question of imposition of any penalty under Section 11AC of the Central Excise Act. The penalty in the present case is one imposed under Rule 571 (4) of the Central Excise Rules, 1944, which provision was *parimateria*with Section 11AC of the Act. Following the ruling of the apex court, we set aside the penalty imposed by the Commissioner. For similar reasons, the interest demanded by the Commissioner under Section 11AB of the Central Excise Act is also vacated. The order of the Commissioner shall stand modified accordingly. The appeal of the assessee is disposed of."

7.1 Department preferred appeal against this Tribunal's final order before the High Court of Madras, vide C.M.A.No.3139-3141/2008 and the Hon'ble High Court, vide order dt. 22.12.2014, allowed the appeals by way of remand to Tribunal. While doing so, the Hon'ble High Court inter alia held as follows :

"7.6 In the light of the law enunciated in the decisions referred supra, the decision of the Tribunal holding that mandatory penalty is not leviable cannot be accepted and accordingly set aside and the matter is remanded to the Tribunal to reconsider this issue afresh in the light of the decisions referred supra and Notification No.14/96-CE (NT), dated 23.7.1996.

REFUND CLAIMS – NON SPEAKING ORDER

8. The next plea raised by the learned Standing Counsel appearing for the department is that the Tribunal by a non speaking order has dismissed their appeals challenging the partial grant of refund claims by the Deputy Commissioner in favour of the assessee.

9.1 It is seen from the records that the Deputy Commissioner on 30.6.2000 and 27.7.2000 partially rejected the refund claims made by the assessee. Assailing the said orders passed by the Deputy Commissioner, the assessee preferred two appeals and the department also preferred two appeals before the Commissioner of Central Excise (Appeals). The Commissioner of Central Excise (Appeals), by orders dated 28.2.2002 and 1.3.2002, allowed the appeals filed by the assessee and dismissed the appeals preferred by the department. Aggrieved by the order dated 28.2.2002 passed by the Commissioner of Central Excise (Appeals), the Department filed appeals before the Tribunal in Appeal Nos.E/278 & 279/2002. However, the Tribunal, by order dated 26.3.2008 impugned in these appeals, dismissed the appeals observing as under :

"2. After examining the records and hearing both sides, we think we should dispose of the Revenue's appeals after enjoying the fun arising therefrom. The department issue

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two show-cause notices, each of which proposed to reject partly a refund claim of the assessee. The assessee's objections to this proposal were rejected and the Assistant Commissioner upheld the department's proposal. In the result, the refund claims filed by the assessee were stood partly rejected as proposed in the respective show-cause notices. Against the Orders-in-Original, the assessee had a grievance and the Revenue had none. The assessee filed appeals and the same were allowed on merits by the Commissioner (Appeals). The Revenue also filed appeals" against the Orders-in-Original even in the absence of grievance and the appellate authority rightly rejected those appeals. The Revenue however, chose to perpetuate the fun by filing further appeal with the Tribunal and there are Appeal Nos.E/278 & 279/2002, which we dismiss."

9.2 We find that there is absolutely no reason given by the Tribunal as to why Appeal Nos.E/278 & 279/2002 were dismissed. It is a cursory order. As the order passed by the Tribunal in Appeal Nos. E/278 & 279/2002, is bereft of reasons and analysis, the same is set aside and the matter is remanded to the Tribunal for passing a reasoned order.

In the result, these appeals are allowed by way of remand to the Tribunal. On remand, the assessee is also entitled to raise all the objections on the merits of the department's claim. No costs."

8. Hence these appeals are being heard for de novo consideration.

9. Today when the matter in respect of appeal Nos.E/278 and 279/2002 came up for hearing, Ld. Advocate Shri C. Saravanan submits as follows:

i) Assessee's records and removals etc. were captured in ERP system; that they were following a practice of debiting modvat credit in respect of inputs/capital goods that would have been removed outside the factory for reasons like field service, R & D etc.; that although they debited the amounts totaling to Rs.26,58,407/- during the course of two audits, they realized that they had already paid up the part of this amount at the time of

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removal of the goods, for which reason only they have preferred refund claims.

ii) Refund claims were made only in respect of removals for which they were able to obtain supporting documents evidencing the debit of modvat credit at the time of removal. However, they did not press for refund of Rs.4,64,167/- only because they could not obtain necessary supporting documents thereof.

iii) On account of peculiar nature of the assessee's line of manufacture, huge number of inputs/capital goods are involved and the documentation required for receipt, removals as such etc. would involve large volumes of paper work.

iv) They have all the documentary evidence to sustain the quantum of refund claims already made, amounting to Rs.10,77,586/- and Rs.1,78,157/-.

v) They have no reason to suppress such activities or for that matter indulging in any irregular availment of these amounts, when actual modvat credit availed for the period of dispute worked out to about Rs.8 crores.

vi). Hence there was no intention of any fraudulent intention or malafide and in any case, entire operations was under ERP.

vii) Only because they were not able to collect voluminous documents in respect of part of the removals, they had preferred, reduced refund claims, to the extent of Rs.12,55,743/- (under 2 claims) only as against the total demand of Rs.26,52,055/- confirmed in adjudication by original authority.

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viii) Demand has been confirmed for the period April 1995 to March 2000 and penalty of Rs.25 lakhs has been imposed; that only from 1.18.1996 vide Notification No.14/96-CE (NT) dt. 23.07.1996 amendment to certain rules of the erstwhile Central Excise Rules, 1944 was effected, inter alia, liability to pay penalty was brought in as sub-rule (4) of Rule 57I ibid. Similar amendment was brought from same date to Rule 57U, by addition of a sub rule (5).

ix) During the period of dispute, issue in contention should have been reconciled when sub-rule (2) of Rule 57I as it stood during the relevant period and since they had discharged the amount demanded much before issue of the SCN. Hence sub-rule (3) and sub-rule (4) will not be attracted in their case and neither interest nor penalty would be liable on them.

10. On the other hand, Ld. A.R Shri A. Cletus (ADC), for the Revenue, submits that :

i) In the impugned orders of the Commissioner (Appeals) dt. 1.3.2002 and 28.2.2002 while allowing the appeals of the assessee, Commissioner (Appeals) has not gone into the aspects of whether the credits corresponding to the goods taken out had been reversed at the time of their reversal and whether assessees by way of paying the amount when pointed out by departmental officers have made the total payment.

ii) As regards penalty, the Hon'ble High Court in their said order had given a categorical finding quoting various case laws. Hon'ble High Court held that mandatory penalty is leviable in this

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case in para 7.6 of the order following Supreme Court decision in *Dharmendra Textile Processors and* others [2008 (231) ELT 3 (SC)]. Accordingly, mandatory penalty of Rs.25 lakhs is very much imposable.

iii) In the instant case, while duty liability is Rs.26,67,927/-, penalty of Rs.25 lakhs has been imposed invoking Rule 57I (4), 57U (6) as replacement of Rule 57AH (2) read with Rule 173Q of the Central Excise Rules, 1944 read with Section 11AC. Show cause notice has clearly alleged suppression of facts on the part of the assessee.

iv) Reference is drawn to para 7.6 of the Hon'ble Madras High Court's judgement dt. 22.12.2014 in C.M.A.Nos.3139 to 3141 of 2008, wherein the Hon'ble High Court has observed: "in the light of the law enunciated in the decisions referred supra, the decision of the Tribunal holding that mandatory penalty is not leviable cannot be accepted and accordingly set aside and the matter is remanded to the Tribunal to reconsider this issue afresh in the light of the decisions referred supra and Notification No.14/96-CE (NT), dated 23.7.1996". For these reasons, Ld. A.R states that mandatory penalty is liable to be imposed in this case.

v) Even if the argument is taken that Section 11AC is applicable only w.e.f. 28.9.1996 and hence earlier period cannot be covered by the said section, Rule 173Q which has also been invoked in the SCN and was very much in force during entire period of dispute and said rule could be invoked for the entire period.

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vi) Extended period has been invoked in the SCN and that is co-existent with mandatory penalty under Section 11AC of the Central Excise Rule, 1944 and hence once suppression is proved there cannot be any escape from mandatory penalty at least for the period after coming into effect of Section 11AC. Hon'ble Madras High Court in the cited judgment has also not accepted the decision of Tribunal holding that mandatory penalty is not leviable.

vii) When inputs as well as capital goods were taken out, input credit taken has to be reversed and that has not been done. These facts were not in the knowledge of department. As per allegations in the SCN, assessees have removed inputs and capital goods from the factory without reversing modvat credit on the capital goods retained in the factory but became obsolete. It appears that these removals/retention have been intentionally done with purpose to benefit from non-reversal of modvat credit. This action on their has not been brought out to the knowledge of the department and hence would amount to suppression.

viii) In respect of the refund claims, assessee did not produce the requisite evidences to support their claim which has been recorded in the order by the refund sanctioning authority. Commissioner (Appeals) while allowing the appeals against these orders, has not listed out all such documents and has made observation that supporting documents for the refund claim are very much large in number and however range

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officials were absolutely aware of the systems and whole documents must have been verified in regular visit by range officers. This, according to Ld. A.R is a vague, unsubstantiated conclusion.

ix) Ld. A.R finally submits that Commissioner (Appeals) has wrongly placed reliance on the ERP system.

11. In counter, Ld. Advocate submits that:

(i) The alleged discrepancies highlighted in the SCN have all been made out after study of their private documents only. In the event, same documents should also be relied upon or accepted in their quest to prove that they had effected reversals in respect of removal of inputs/capital goods. In fact, as mentioned earlier, only because they were not able to locate records supporting corroborative evidence from their records, they had pressed for refund amount of Rs.14,12,184/- only. They are not able to reconcile and substantiate except for the aforesaid quantum of Rs.14,12,184/-

(ii) The demand of Rs.12,55,743/- is in respect of remaining part of impugned inputs/capital goods which were removed only on reversal of credit and or have been issued for manufacturing process or otherwise are very much retained in the factory without further processing.

(iii) In these circumstances, once they are very much able to prove that there was no removal of goods outside the factory without reversal, they would be able to prove movement of other inputs/capital goods, which have been questioned by the

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department since they have the requisite documents available for the same.

(iv) As earlier stated, although except in respect of balance amount of Rs.14,12,184/- which they are not pressing only because they are not able to scrutinize voluminous documents, in this scenario, no suppression can be alleged against the assessee. The question of suppression in the instant case would have arisen, if they had availed credit without actual receipt of the inputs or for that matter manipulated entries in RG.23A to enable fraudulent discharge of duty liability.

(v) On other hand, impugned inputs / capital goods have also been definitely received by them; there is no dispute that inputs/capital goods have been received initially for the purpose of availment of modvat credit for manufacturing purpose.

(vi) In this case also, they had legitimately caused removal of goods either outside the factory or for manufacture. However, due to lack of corroborating documents, they have not claimed refund of part of the amount relating to those documents which however should not be translated into a conclusion that they have indulged in any suppression for evasion of payment of duty of entire demand.

12. Heard both sides and have gone through the facts of the case.

13. These appeals are of 2002 vintage, coming up before the Tribunal for the second time. While they have thus made such

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a long journey, the core issue is in a very small compass, namely whether removal of inputs/capital goods or for that matter inputs/capital goods which were removed from the factory by assessee, had been done on reversal of modvat credits as liable and whether in respect of other impugned goods, they had indeed been released for manufacturing process or otherwise lying unused in the factory premises for reasons of obsoleteness.

13.1 The other pertinent fact to be kept in mind in these appeals is that Appeal Nos.E/278-279/2002 though emanating from refund claims and assessee's appeal E/68/2002 though emanating from demand of irregularly availed modvat credit, both owe their birth to the selective audits conducted by the department. Two audits were conducted, one for the period April 1997 to March 1998 and another for April 1995 to March 2000. Assessee's contention is that they had debited the amount totaling to Rs.26,58,407/- during the two audits, on the request of the departmental officers. Subsequently, however, on introspection, they apparently realized that there were no irregular removals or irregular availment of modvat credit in respect of said inputs/capital goods and that they were able to locate supporting documents in respect of modvat credits of Rs.12,55,743/- paid partly through PLA and partly through RG.23-A, for which reason they had filed two refund claims. Ld. Advocate has repeatedly stressed that they have chosen to file refund claims only for Rs.12,55,743/- and not

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made claim for remaining amount partly because they could not locate all the corresponding documents which were voluminous and partly because some of the documents could not be located at all. For these very reasons, Ld. Advocate has further contended that the demand of Rs.26,58,407/- in respect of Appeal E/68/2002 needs to be confined only to Rs.14,12,184/-.

13.2 On the other hand, Ld. A.R has very categorically pointed out that refund claims were rejected by the original authority precisely for lack of non-production of supporting documents and that Commissioner (Appeals) has wrongly allowed the appeals of the assessee by placing reliance on the EDP system documents and on his observations that these had been verified by the Range Superintendent from time to time. Ld. A.R also stresses that acts and omissions of the assessee as put forth in the SCN all point to suppression of facts and extended period can very much be invoked. He has propounded that even though section 11AC has come into effect only from 28.09.1996, since Rule 173Q of erstwhile Central Excise Rules, 1944 has also been invoked, the latter can very much be applicable to the entire period of dispute.

13.3 The whole issue thus boils down to whether the assessee indeed has evidence to support their assertion that there was no mischief afoot on their part. Both sides agree that the quantum of inputs and capital goods are very huge in number and consequently, the connected documents/records thereof

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are also voluminous. This forum definitely does not have wherewithal to examine all these documents individually and in detail to prove or disprove assertions of the assessee/Revenue.

14. It would therefore in the fitness of things that the matter is remanded back to the original authority involved in these three appeals for causing such verification afresh. However, keeping all factors in mind, it is directed that the dispute relating to the refund claims in Appeal Nos.E/278 and 279/2002 shall be taken up for *de novo* consideration in the first instance, since the outcome thereof will necessarily have a bearing on the adjudication demand relating to Appeal E/68/2002. In case the assessee is able to satisfactorily prove with documents and vindicate the correctness of their refund claims of Rs.10,77,586/- and Rs.1,78,157/- with necessary documents including private records, and if he succeeds in the matter, it would obviously be concluded that there was no willful suppression in the matter, unless proved otherwise. In such *de novo* adjudication, the assessee shall be given full opportunity for exposing their cause including being permitted to submit additional submissions or documentary proof / evidences in support of their stand to claim that refund claim that they are eligible for refund and that they have not caused suppression. It is further made clear that since refund claims are allowed in the earlier proceedings totaling to around Rs.12 lakhs and the assessee has not pressed for the balance amount of Rs.14,12,184/-, the second amount will also be

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considered as not being contested with to the demand preceding the case. While in de novo proceedings, the adjudicating authority concerned should take into account and address the various contentions and assertions made by ld. Advocate in paras 9 and 11 of this order, including the arguments that no suppression was involved, as also the various contra contentions made by Ld. A.R in para 10.

Appeal is remanded to original authority with above directions.

(Dictated and pronounced in open court)

(MADHU MOHAN DAMODHAR)
MEMBER (TECHNICAL)

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