IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, CHENNAI

REGIONAL BENCH - COURT NO. – III

Excise Appeal No. 40203 of 2013

(Arising out of Order-in-Appeal No. 223/2012 dated 19.10.2012 passed by the Commissioner of Central Excise (Appeals), Madurai)

M/s. Interfit India Ltd. **Appellant**
S. No. 630/1-B, Natham Road
Reddiarpatti, Dindugal – 624 003.

Vs.

Commissioner of GST & Central Excise **Respondent**
C.R. Buildings
Lal Bahadur Shastri Marg
Bibikulam
Madurai – 625 002.

APPEARANCE:

Shri M. Rajendran, Advocate for the Appellant
Shri Arul C. Durairaj, Superintendent (AR) for the Respondent

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Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)

Final Order No. **40787 / 2020**

Date of Hearing: 07.10.2020
Date of Decision: 07.10.2020

Brief facts are that the appellants were issued a Show Cause Notice alleging wrongful availment of credit taken on capital goods for the reason that the capital goods were not received into the factory. After due process of law, the original authority vide Order-in-Original No. 16/2009 dated 31.8.2009, upheld the allegations in the Show Cause Notice thereby confirming the reversal of wrongfully availed credit and demanded interest of Rs.12,094/- and also imposed penalty of Rs.1,76,115/-. Against such order, the appellant preferred appeal before the Commissioner (Appeals) and vide Order in Appeal No. 470/2010 dated 25.10.2010 the appellate authority upheld the adjudication order. Against such order passed by the appellate authority, the appellant preferred appeal before the Tribunal and vide Final Order No. 613/2011 dated 20.5.2011, the Tribunal remanded the matter to the original authority with a specific direction to pass appropriate orders after verification whether the capital goods were in the factory. In such denovo adjudication, the original authority after receiving the report from the Range Officer, upheld the interest liability, however, set aside the penalty proposed in the Show Cause Notice. Against such confirmation of demand of interest, the appellant filed appeal before the Commissioner (Appeals) and vide order impugned herein, the Commissioner (Appeals) sustained the liability to pay the interest of Rs.12,094/- for the period 6.9.2007 to 19.3.2008 on the wrongly availed credit. The appellant is now before the Tribunal against such order.

2. On behalf of the appellant, ld. counsel Shri M. Rajendran appeared and argued the matter. He submitted that the capital goods under dispute are in the nature of 'Direct Reading Optical Emission Spectrometer'. It was imported vide Bill of Entry dated 10.7.2007. The said capital goods were received in the factory and appellant had rightly availed the credit. However, there was damage to the item and it was taken out of the factory for a short time for repair. During the said period, there was an internal audit conducted and for the reason that the capital goods was not available at that time, a Show Cause Notice was issued alleging wrong availment of credit on capital goods which were not received in the factory and also proposing to

demand the interest on the wrongly availed credit and to impose penalty. After due process of law, the original authority upheld the demand of wrongly availed credit, interest thereon as well as the penalty. Against such order, the matter had reached the Tribunal and vide Final Order dated 20.5.2011, the Tribunal passed the following order:-

> *"1. ……. He submits that once the assessees establish that the machine was available in their factory, even though they would not challenge the reversal of credit by way of seeking re-credit thereof, penal action against them would not be warranted.*
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> *2. On a careful consideration of submissions by both sides, I find that the matter can be decided by directing that the officers visit the factory of the assessees and satisfy themselves as to the availability of the spectrometer in question in the factory. If the assessee is able to prove that the spectrometer in its factory is the one imported on 10.7.2007 under the relevant Bill of Entry, then there is no ground for holding that the assessees did not bring the machine into their factory and therefore they had suppressed the purchased and receipt of the machine in their factory so as to justify any penalty on them."*

Thereupon, the matter was adjudicated by the original authority after taking verification from the Range Officer as to the presence of the capital goods. It is pointed out by the ld. counsel that the Range Officer had reported that the capital goods have been received in the factory. The ld. counsel submitted that though the appellant had challenged the wrongly availed credit, had made a submission that they would not be seeking re-credit of the same for the reason that the factory is non-functional and registration has already been surrendered. The finding of the authorities below that the appellant has not challenged the confirmation of wrong availment of credit is erroneous. He prayed that the demand of interest may also be set aside.

3. On behalf of the department, ld. AR Shri Arul C. Durairaj appeared and argued the matter. He pointed out that the credit was wrongly availed for the period 6.9.2007 to 19.3.2008. The Tribunal had remanded the matter to verify the availability of capital goods inside the factory and such verification was done only in 2011. For this reason, the credit availed during the period 6.9.2007 to 19.3.2008 without the capital goods inside the factory is correct. Therefore, the demand of interest on the wrongly availed credit is also correct. He therefore supported the findings in the impugned order.

4. Heard both sides.

5. On perusal of the final order dated 20.5.2011, the Tribunal has directed officers to visit the assessee's factory and satisfy themselves as to the availability of the Spectrometer in question. After such verification, it is seen noted in the denovo adjudication order that the capital goods were present in the factory. Thus the allegations raised in the Show Cause Notice that the capital goods were not received in the factory and that the credit availed is wrong is without any factual basis. Further, it can also be seen that the appellant had challenged before the Tribunal the allegation of wrong availment of credit and submitted only that they would not be seeking re-credit of the same for the reason that they had already surrendered the registration of the factory. The authorities below have confirmed the interest on the basis that the appellant has not challenged the demand of wrongfully availed credit. It has to be noted that the appellant all along has challenged the demand of wrongful availment of credit and only conceding that they would not be seeking re-credit of the same for

the reason of surrender of their registration and that such re-credit would not be of any use to them. When the capital goods are seen in the factory and it is proved that they have been received into the factory while taking the credit, the allegation of wrong availment of credit cannot sustain. Due to change of circumstances in the nature of surrender of registration, the appellant opted not to seek re-credit. This does not make the credit wrong credit. The allegations in the Show Cause Notice has to be rpoved. From para 2 of the final order dated 20.5.2011, it is seen that the allegation in the Show Cause Notice is that the assessee did not bring the machine into the factory and suppressed the purchase and receipt of the machine in their factory for which the Show Cause Notice was issued. This allegation is now proved to be wrong after the verification by the Range Officer. In such circumstances, allegation of wrong availment of credit cannot sustain and therefore, the interest thereon also would not sustain. The penalty has already been set aside by the authorities below.

6. From the above discussions, I hold that the demand of interest by the department alleging wrong availment of credit cannot sustain and requires to be set aside, which I hereby do. The impugned order is set aside and the appeal is allowed.

(Dictated and pronounced in open court)

(**SULEKHA BEEVI C.S.**)
Member (Judicial)

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