CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL <u>CHENNAI</u>

REGIONAL BENCH - COURT No. I

EXCISE APPEAL NO. 41153 of 2016

(Arising out of Order-in-Appeal No.91/2016 (CXA-II) dated 07.03.2016 passed by Commissioner of Central Excise (Appeals-II), Chennai)

M/s. Polyhose India (Rubber) Pvt Ltd., **...Appellant**
Okri Bi F-37-F42 & F-50-F-55,
Sipcot Industrial Park,
Irungattukottai, Pennalur Post,
Sriperumbudur Taluk 602 117.

Versus

Commissioner of Central Excise, **.... Respondent**
Chennai Outer Commissionerate
Newry Towers, 12th Main Road
Anna Nagar, Chennai – 600 040

<u>APPEARANCE :</u>

Shri. M. Karthiyeyan, Advocate for the Appellant
Shri. M. Selvakumar, Authorised Representative for the Respondent

<u>CORAM</u> :

HON'BLE MR. AJAYAN T.V. MEMBER (JUDICIAL)

<u>FINAL ORDER No.40108/2025</u>

DATE OF HEARING: 15.01.2025
DATE OF DECISION:20.01.2025

Per AJAYAN T.V.

This appeal has been preferred by the appellant, being aggrieved by the impugned Order-in-Appeal of the appellate authority upholding the impugned order in original of the adjudicating authority. The adjudicating authority, by the impugned order in original has confirmed a demand of Rs.40,64,459/- along with appropriate interest thereon, imposed an equivalent amount as penalty under section 11AC and also imposed a penalty of Rs.1,000/- under Rule 15(3) of Cenvat Credit Rules 2004, on the finding that the appellant was not entitled to take suo-moto re-credit of the cenvat credit that was earlier reversed and ought to have followed the refund procedure prescribed under Section 11B of the Central Excise Act, 1944.

2. The facts in brief are that the appellant, a 100% EOU, is engaged in the manufacture and export of Rubber hose products and they were availing cenvat credit of service tax paid on input services. In course of their business, for the expansion of their unit, they had engaged the services of M/s. Kirby Building Systems India Ltd. for erection of pre-engineering steel building. During June 2009, they took cenvat credit of services tax of Rs.72,60,233/- paid by the said service provider, on the strength of service tax invoice dated 27.12.2008 issued by the service provider. The said availment was duly reflected in the ER2 returns filed with the department.

3. Thereafter, pursuant to a letter dated 20.07.2009 issued by the department, the appellant, vide their letter dated 21.07.2009 in reply, provided the details of the input service credit taken and also intimated reversal of the cenvat credit of Rs.72,60,233 taken. The said expunging of cenvat credit taken was made by reversing cenvat credit of Rs.67,25,000/- vide debit in the cenvat account and paying Rs.5,35,235 in PLA. In the said letter, the appellant had also intimated that they will take this credit at a later date, once the building is complete in all respects. Further, inasmuch as they had utilized an amount of Rs.6,03,997/- out of the total credit of Rs.72,60,233/- towards payment of excise duty on clearance of final product, they also

paid an interest of Rs.27,765/- towards the said credit taken and utilized.

4. Subsequently, upon completion of the expansion work, as intimated by the appellant's letter dated 21.07.2009, the appellant availed cenvat credit of service tax paid of Rs.40,64,459/- towards the erection services rendered by M/s Kirby during December 2009 and such availment was also reflected in their ER 2 returns filed with the Department. The reason for the difference in the amount reversed and availed subsequently was due to the fact that of the expansion work done and completed, a portion of the manufacturing area was rented out to M/s. Dharni Sugars Private Limited for setting up of private bonded warehouse. Thus, the availment of cenvat credit was proportionately restricted to the erection services availed in respect of the area available for utilization by the appellant.

5. The appellant was issued a show cause notice alleging that there is no provision either in the Central Excise Law or in the Finance Act which permits suo-moto credit of the excise duty/service tax irregularly availed and paid to the department at the instance of the department, except by recourse to the refund procedure laid down under section 11B of the Central Excise Act, 1944. After following the due process of law, the adjudicating authority confirmed the demand and imposed penalties by the impugned OIO, against which the appellant preferred an appeal which came to be rejected by the impugned order in appeal of the appellate authority. Aggrieved by the OIA, the appellant is before the Tribunal.

6. Heard Ld. Counsel Shri. M. Karthikeyan appearing for the appellant. He submits that the appellant need not have reversed the credit originally, as they were entitled to avail this cenvat credit of service tax paid towards the erection charges incurred for expanding their manufacturing unit even before the completion of the said process. That, in terms of Rule 4 (7) of the Cenvat Credit Rules, the manufacturer shall be allowed to avail cenvat credit of input services on or after the day on which payment is made to the provider of service of the value of input service and the service tax paid or payable as indicated in the invoice bill or challan as the case may be. That in the instant case, since they had made payment in respect of the input services rendered by M/s. Kirby towards erection of pre-engineering steel buildings during August 2008 to November 2008 and they had availed cenvat credit during June 2009, but nevertheless reversed it on the instructions of the range officer that they were not entitled to avail cenvat credit of service tax paid towards erection charges, before the completion of expansion process, on an erroneous understanding of the position in law. He stressed that in the instant case, there is no dispute that erection services on which they had taken service tax credit are eligible input services in terms of Rule 2 (l) of CCR 2004.

7. He also pointed out that in the letter dated 21.07.2009 itself, they had intimated that they were reversing the credit only for the reason that the building expansion is yet to be completed and that they shall be availing the said credit once the building work gets completed in all aspects at a later date. Thus, when the eligibility of the input service tax credit is not at all disputed by the department at any stage

and even in the impugned notice, and further when the department had not raised any objection to their expression of intention to avail cenvat credit conveyed in the letter dated 21.07.2009, the demand of suo-moto credit taken of the earlier reverse credit, is decidedly not legal, especially since such reversal and re-credit were only accounting entries and in no manner caused a loss of revenue to the Department.

8. He further points out that the lower authority itself has conceded that the appellant is eligible for full credit which is a fact not at all disputed by revenue, but nevertheless, has chosen to demand the credit as the appellant did not follow the refund procedure under section 11B. He submits that the issue of suo-moto re-credit has been decided by the Hon'ble High Court of Madras in the case of ***ICMC Corporation Limited reported in 2014 (302) ELT 45 MAD*** and that this decision have been subsequently followed in the following reported citations,

(i) *Krishnav Engineering Ltd – 2015(12) TMI 234 Allahabad High Court.*

(ii) *Hwashin Automative India Pvt. Ltd., - 2020 (2) TMI 1166 Madras High Court*

(iii) *Tractor and Farm Equipment Ltd., - 2016(11) TMI 511 CESTAT Chennai.*

(iv) *Pepsico India Holdings Pvt Ltd., - 2018 (10) TMI 696 CESTAT Chennai.*

9. Ld. AR Shri. M. Selvakumar reiterates the rationale of the impugned order-in-appeal and submits that the demand upheld by the Appellate Authority was just and proper.

10. Heard both sides, gone through the appeal records and also perused the case laws cited and relied on. This Tribunal finds that, nowhere in the show cause notice, it is alleged that the amount of Rs.40,64,459/- is not otherwise available to the appellant as eligible cenvat credit. As rightly pointed out by the Counsel for the appellant, the original authority in impugned OIO has stated as a fact that the assessee is eligible for full credit, which fact is not at all disputed by the revenue. However, being of the view that the assessee ought not to have taken suo-moto credit and ought to have followed the procedure of filing a refund claim under Section 11B of the Central Excise Act, 1944, the demand has been confirmed. Indisputably it is also evidence from the records that the cenvat credit taken and utilized by the appellant, stands fully recouped, consequent to the reversal entries and payments made, including interest thereon. By such reversal and payments, it is evident that the effect of such reversal is entirely borne by the appellant and the original credit taken stands expunged. Thereafter, as intimated by the appellant when it takes credit of the proportionate cenvat credit, out of the amount of cenvat credit on licit input services which it even otherwise was originally entitled to take credit of, there is no illegality attached to the said taking of credit. Moreover, such taking of credit stands reported in the ER-2 return filed by the appellant. This Tribunal is of the view that in such circumstances there is no necessity to put the appellant through the rigors of seeking refund by following the procedures of section 11B of the Act. The reliance placed by the adjudicating authority on the decision of Tribunal larger bench in BDH Industries is misplaced. This

tribunal in *Sopariwala Exports Pvt Ltd v CCE, Vadodara, 2017 (49) STR 195 (Tri-Ahmd*) has already held that when the High Court decision holds the field the larger bench decision does not have binding effect.

It is also seen that the issue is no more res-integra, and stands settled in the appellant's favour by the decision of the jurisdictional High Court in ICMC Corporation Limited reported in 2014 (302) ELT 45 MAD, which has also been followed in these cases:-

(i) *Krishnav Engineering Ltd – 2015(12) TMI 234 Allahabad High Court.*

(ii) *Hwashin Automative India Pvt. Ltd., - 2020 (2) TMI 1166 Madras High Court*

(iii) *Tractor and Farm Equipment Ltd., - 2016(11) TMI 511 CESTAT Chennai.*

(iv) *Pepsico India Holdings Pvt Ltd., - 2018 (10) TMI 696 CESTAT Chennai.*

It is seen that this Tribunal has in its decision in M/s. Pepsi Co India Holdings Pvt Ltd., Vs. Commissioner of GST & C. Ex., Chennai Outer – 2018 (10) TMI 696 – CESTAT Chennai, held as under: -

> *5. From the Table above, it is clear that the appellants had adjusted higher amount from the CENVAT credit amount towards discharging duty liability for the months of July and November 2012. Later realizing the mistake, they had taken suo moto credit of the excess CENVAT amount debited by them.*
>
> *The department has denied the suo moto credit alleging that there are no proper documents for avalling the credit for the second time. I find that this allegation by the department is erroneous for the reason that for the second time, the appellants have taken the credit only because they had made a wrong book*

entry at the initial stage. This does not amount to availing credit for second time. The Larger Bench of the Tribunal in the case of BDH Industries Ltd (supra), had held that the assessee cannot take suo moto credit. However, the Hon'ble Karnataka High Court in the case cited supra had earlier held that the mistake of debiting the amount in the CENVAT credit can be corrected by the assessee later. Further, the jurisdictional High court in the case of ICMC Corporation Ltd. (supra) had occasion to analyse the very same and has held as under-

> *"13 We do not subscribe to the view expressed by the Revenue Admittedly, the assessee originally availed the Cenvat credit on Service Tax for discharging its liability*
>
> *However, for sound reasons, it reversed the credit. Strictly speaking, in this process, there is only an account entry reversal and factually there is no outflow of funds from the assessee to result in filing application under Section 11B of the Central Excise Act. 1944 claiming refund of duty. The contention of the Revenue that even in reversal of the entry there is bound to be an unjust enrichment has no substance or based on any legal principle, since, what is availed off by the assessee is only a credit on the duty paid on the services rendered. Further, the assessee is entitled to take note of as per Rule 6(5) of the Cenvat Credit Rules, 2004 as there is no dispute of the fact that a sum of 3.21,308/- available as Cenvat credit was in respect of input services which are given under Rule 6(5) of the Cenvat Credit Rules, 2004. When that being the case, in respect of those services specifically mentioned under Rule 6(5) of the Cenvat Credit Rules, 2004 as it existed during the relevant period viz., 2004-2006 getting the reversal of the entry is in tune with its stand taken, which was accepted by the Tribunal in the earlier round of litigation".*

6. This decision was followed by the Hon'ble High Court of Allahabad in Kishnav Engineering Ltd 2016 (331) ELT 391 (All) Following the said decisions of the Hon'ble High Courts I am of the view that the allegations in the show cause notice cannot *sustain. The impugned order is set aside and the appeal is allowed with consequential relief if any.*

11. It is also pertinent that the jurisdictional officer has not raised any objection to the appellant's intimation of its intent to avail the credit being reversed at a later date, when communicated vide appellant's letter dated 21.07.2009. That apart, the appellant has also stated that they had intimated the availment of the credit in the ER 2 returns filed and further that to an audit objection against the availment during March 2011, they had, vide letter dated 27.04.2011, replied that the objection is unsustainable. These contentions in reply have not been controverted by the lower authorities. This Tribunal has vide its Final Order 41524/2024 dated 28.11.2024 in the case of Xomax Sanmar Limited, Unit II v. Commissioner of CGST and Central Excise, Trichy, has among other things, held that it is the responsibility of the jurisdictional central excise officers to scrutinize the returns filed reflecting the information of cenvat credit taken, and the failure to take up the information for scrutiny is not to be held to the detriment of the appellant by invoking the extended period of limitation. Even otherwise, when the appellant has already communicated its intent to take the credit reversed at a later date upon completion of the work and when it reflects the credit taken in the ER-2 returns, the appellant cannot be held to have made any wilful mis-statement or suppression of facts with intent to evade payment of duty warranting invoking of the extended period of limitation. Therefore, given that the SCN in this case is dated 11.09.2013 and has been issued invoking the extended period of limitation for making demand of the credit taken in the month

of December 2009, it is evidently beyond the normal period stipulated in Section 11A and thus the demand is also barred by limitation.

13. This Tribunal is therefore of the view that the demand made of Rs.40,64,459/- under Rule 14 of Cenvat Credit Rules, 2004 read with Section 11A of the Central Excise Act, 1944 and the demand of appropriate interest thereon as well as the penalties imposed under the impugned order in original, are untenable. Hence, the impugned order in appeal upholding the said order in original cannot sustain, and is therefore accordingly set aside. For the above reasons, on merits, as well as on limitation, the appellant succeeds in its appeal. Appeal is allowed with consequent relief in law, if any.

(Order pronounced in the open court on 20.01.2025)

(AJAYAN T.V.)
Member (Judicial)

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