

**CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
COURT NO. II**

Excise Appeal No.51717 of 2019 (SM)

[Arising out of Order-in-Appeal No.IND-EXCUS-000-APP-030-19-20 dated 30.04.2019 passed by the Commissioner (Appeals), Customs, Central Goods and Service Tax and Central Excise, Indore (M.P.)]

M/s.Shivani Detergent Pvt.Ltd.

101-J, Sector-1, Pithampur,
Distt.- Dhar (M.P.).

Appellant

VERSUS

**Commissioner of Central Goods &
Service Tax and Central Excise,**

Ujjain, M.P.

Respondent

APPEARANCE:

Shri Ankur Upadhyay, Id. Counsel for the appellant
Shri Pradeep Gupta, Authorised Representative for the respondent.

CORAM: HON'BLE SHRI ANIL CHOUDHARY, MEMBER (JUDICIAL)

FINAL ORDER NO.51877/2021

DATE ON HEARING:11.08.2021

DATE OF DECISION:14.10.2021

ANIL CHOUDHARY:

The issue involved in this appeal by the assessee is whether i) Cenvat credit of Additional duty of Customs (SAD) have been rightly taken as per the amount shown in the 'Bill of Entry';

i) Whether the Cenvat credit of Rs.65,660/- have been rightly taken on excess receipt of raw material-volatile in nature, whereas the amount of CVD in the bill of entry, is a lower amount;

ii) whether the show cause notice is for invocation of extended period of limitation.

2. The brief facts as per the show cause notice dated 1 April 2010 are – during the course of audit of the records of the appellant by the Department

for the period 2007 – 08, it was observed that appellant have taken some excess credit of service tax as follows: –

i) Rs.3,175 vide invoice (No. 696 dated 16 August 2008 and No. 1714 dated 18 February 2008) issued by Harshy Enterprises, pertaining to clearing & forwarding charges. The amount shown in the bill have already been recovered by the shipping agent–CHA, and the amount does not pertain to GTA services.

ii) The service tax amount of Rs.3,497 (3395+68+34) and Rs. 5,364 (5208+104+52), have been recorded in their Cenvat credit register instead of Rs.2,843 (Rs.2760 + 55 + 2 8), which have already been paid by them, but credit would be available to that extent only which has actually been paid or deposited by the CHA–the service provider, to the government. That the excess service tax amount availed as credit, appeared liable to be recovered.

3. The appellant is engaged in the manufacture of detergent cake of 'Tide brand' belonging to Procter & Gamble (India) Ltd. They are paying duty on raw material plus for job charges. It further appeared that appellant have taken excess cenvat credit of Rs.25,705 being additional duty or CVD for the year 2007-2009, whereas they had received some short quantity of chemical – volatile in nature than as mentioned in the invoice and bill of entry.

4. It appeared to revenue that under the provisions of CCR the appellant was required to take proportionate Cenvat credit on actual quantity of raw material physically is received by them. No cenvat credit is allowable on non-receipt or short receipt of raw material. It was further observed that the appellant have taken proportionate cenvat credit on basic excise duty, education cess and higher secondary education cess, except on additional

duty of customs.

5. It further appeared that appellant have taken excess credit of ₹ 65,660 by calculating duty on the excess quantity received, being 6.595 MT, which is not supported by documents. The details of such credit taken is as follows: –

B.E.No.& Date	Quantity		Difference	Cenvat Amount			
	Actual Qty. of BE	Actual Qty. received physically		Actual Cenvat Credit shown in B/E			
				16%	2%	1%	4%
1	2	3	4	5	6	7	8
195690 13.06.2007	95.000	95.205	0.205	8,72,112	17442	8721	-
118298 24.10.07	30.000	32.040	2.040	2,85,747	5715	2858	-
120441/- 09.01.08	60.000	64.350	4.350	585285	11705	5853	-

Cenvat				Difference of excess credit taken			
Actual Cenvat Credit taken by the Noticee							
16%	2%	1%	4%	16%	2%	1%	Total
9	10	11	12	13	14	15	16
8,73,995	17480	8740	--	1883	38	19	1940
3,05,178	6104	3052	--	19431	389	194	20014
6,27,718	12554	6277	--	42443	849	424	43706
				63747	1276	637	65660

6. The SCN was adjudicated vide order-in-original dated 23rd of May, 2018 by the Dy. Commissioner, who confirmed the proposals for recovery of cenvat credit, and further imposed penalty under section 11 AC (1) (C) of the Central Excise Act read with Rule 15 (2) of CCR. The other 2 demands raised in the SCN Rs.1, 04, 890/- (on cenvat credit for input services) was dropped by the Dy. Commissioner and the other demand of Rs.7,18,818/- (for clearance of waste spent acid) was set aside by the Commissioner (Appeals). The aforementioned other 3 demands were confirmed along with

the penalty imposed.

7. Being aggrieved the appellant is in appeal before this Tribunal.

8. Heard the parties.

8.1 The appellant Counsel, Mr. Ankur Upadhyay, Advocate urges that they do not press the demand of Rs.3,175, the same being small in nature and also the relevant supporting documents with them are not available.

8.2 As regards the demand of Rs.25,705 it is urged that admittedly appellant have taken the credit of additional duty, which is as per the invoice/bill of entry. It is urged that the raw material in question is a chemical having volatile nature, and there is bound to be some loss in transit, which is a normal loss. Accordingly revenue is not justified in confirming the demand on the ground that appellant should have taken less credit for the actual quantity of inputs received. Reliance is placed on the ruling of Hon'ble Rajasthan High Court in the case of **'Union of India versus Wheelbarrow Spearing Ltd, 2008 (222) ENT 362** where the facts were that the assessee had received in the factory, the consignment of HFO which was marginally less than the actual quantity stated in the invoice, which was a normal loss on account of transit operation. The assessee had availed the modvat credit on the basis of CVD paid on the goods received by him, as per invoice. The payment was evidenced by the invoices. However the Assistant Commissioner pointed out that, to the extent the lesser quantity of HFO was received in the factory, the assessee was not entitled to avail Modvat credit on such short receipt of the HFO, and directed reversal of Modvat credit to that extent. The Commissioner (Appeals) and the Tribunal were of the opinion that the Tribunal were of the opinion that the assessee is entitled to avail full modvat credit on the basis of CVD paid on inputs received by them in the factory, as evidenced by the invoices, but the

marginal loss of goods in transit, as well as due to normal evaporation, cannot be taken note of for the purpose of reducing the modvat credit. Since the availing of modvat credit was found to be in order, the penalty levied by the assessing officer for availing of modvat credit more than alleged entitlement, was set aside. The Hon'ble High Court agreed with the view taken by the Tribunal, observing that there is no dispute of any diversion of the goods covered under the invoices in question, and entire goods were received under consignment, have not been put to any use other than as input in the end product manufactured by the assessee and the transit loss was found by the Tribunal to be normal loss due to evaporation, it must be held that the CVD paid by the consignor/importer was paid in respect of the goods, entirely used by the assessee as input in the manufacture of the end product. It was further observed that Rule 57 G envisages that such amount of modvat credit availed by the assessee which is evident by the invoices, has inherent correlation with the payment of duty with the goods, covered by such invoices. Thus no curtailment of modvat credit was permissible. Unless the assessee is found to be wrong or in case of diversion of inputs received under invoice, there is no provision to avail lesser modvat credit than what had been proved to have been paid on the entire goods received and used in the factory of the manufacturer. Accordingly this ground is allowed and the demand of ₹ 25, 705 is set aside.

8.3 So far the demand of Rs.65,660/- is concerned, the learned counsel points out that the appellant have taken lesser credit, where due to normal loss appellant have received marginally lesser quantity than that mentioned in the invoice/bill of entry, proportionately. Similarly they have availed proportionately excess credit in respect of some of the invoices/bill of entry, where they have received marginally excess quantity than that mentioned in

the invoices/bill of entry. Such marginal excess happened as the dispatcher/shipper dispatches some excess quantity to take care of the loss in transit. It is further urged that as revenue have not objected to taking of lesser credit, than that mentioned in the invoices/bill of entry, accordingly there should be no objection to the excess credit taken where the appellant have received some excess quantity.

8.4 The learned counsel further urges that from a plain reading of the show cause notice it is evident that, the issues raised in the notice are of interpretation in nature. Admittedly appellant have recorded the transactions in the books of accounts and statutory registers in the normal course of business. Further appellant have filed the returns regularly. Further no malafide have been attributed and/or alleged in the show cause notice save and except the only charges, that if the audit had not taken place, these facts would not have come to notice, resulting in loss of revenue.

9. Opposing the appeal, Id. Authorised Representative for the Revenue supports the impugned order.

10. Having considered the rival contentions I find that the appellant is registered with the Department and have maintained proper books of accounts and registers. I further find that the issue involved herein is wholly interpretational in nature. I further find that the show cause notice is also erroneous, as revenue have sought to recover an amount of Rs.1,04, 890 + Rs.7,18,818/- which are been finally dropped by the court below. Further, this Tribunal found that the demand of Rs.25,705/- is not sustainable and the same have been raised by misconception, as regards treatment of normal loss. I further find that there is no Mala fide on the part of the appellant as they have taken less credit in case of normal loss of the quantity, and have erroneously taken excess credit for the normal gain or

excess quantity received. In this view of the matter I hold that extended period of limitation is not available to revenue. Accordingly the impugned order in appeal is set aside so far it have confirmed the demand and penalty.

11. Accordingly this appeal is allowed. The impugned order-in-appeal stands modified as indicated hereinabove. The appellant shall be entitled to consequential benefits in accordance with law.

[Order pronounced on 14.10.2021.]

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

Ckp.