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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
SINGLE MEMBER APPEAL BRANCH

Appeal No. E/3316/2009 , 285 /2010 – SM[BR] **Date 29/11/2011**

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
C.C.E. CHANDIGARH
C.R. BUILDING, PLOT NO. 19, SECTOR 17-C,
CHANDIGARH 160017
C.C.E. CHANDIGARH Appellant
Vs
M/S RAMA INDUSTRIES LTD. Respondent

I am directed to transmit herewith a certified copy of **Final order No. 814 – 815 /2011-SM[BR]** dated 16.11.2011 passed by the Tribunal under **Section 35-C(1)of Central Excises Act, 1944**

Assistant Registrar
(SM Appeal Branch)

Copy to :

1. Respondent
M/S RAMA INDUSTRIES LTD.
VILLAGE-CHAUNDHERI,
P.O. DAPPAR,
DISTT. MOHALI (PUNJAB)

2. Adv. / Consult **SHRI JAGMOHAN BANSAL ADV.**
1640/1, SECTOR-40B, CHANDIGARH.

3. C.D.R
4. Bar association. CESTAT. New Delhi
5. Director Publications. Customs. Excise. I.P. Estate. New
6. M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
7. Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
8. Taxmann Allied Service Pvt Ltd.. 59/32. New Rohtak Road. New Delhi -
9. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road, Ahmedabad-15
10. LAWCRUX Advisors Pvt Ltd. LAW House.1-8.Sector - 10. Faridabad 121003 (Haryana)
11. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
12. Office Copy
13. Guard file

Assistant Registrar
(SM Appeal Branch)

2. **M/S RAMA INDUSTRIES LTD**
VILLAGE- CHAUNDHERI, P.O. DAPPAR, DISTT- PATIALA.

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
Court No.III

E/Appeal No. 3316/2009-SM

(Arising out of order in appeal No.38/CE/Appl/Chd.II/09 dated 25.9.09 passed by the Commissioner of Central Excise (Appeals),Chandigarh)

Date of Hearing:20.10.2011
Date of pronouncement:

CCE, Chandigarh — Appellants

Vs

M/s Rama Industries — Appellants

E/Appeal No. 285/10-SM

M/s Rama Industries — Appellants

Vs

CCE, Chandigarh — Respondent

Appeared for the Appellant: Shri Jagmohan Bansal, Advocate
Appeared for Revenue: Shri S.K. Bhaskar, DR

Coram: **Hon'ble Mr. Mathew John, Member (Technical)**

Final ORDER 814- 815/2011 SM (BR)

Per Mathew John:

M/s Rama Industries are manufacturers of excisable goods. They have been taking credit of duty paid on inputs as per the provision of Cenvat Credit Scheme. They manufacture Gelatin, Ossein and Calphor(Di-Calcium Phosphate) falling under heading 3503, 0501 and 2302 of the First Schedule to the Central Excise Tariff Act, 1995. Out of these Di-Calcium Phosphate was fully exempted from excise duty. During the period 01.01.99 and 19.10.2000, it was noticed that

M/s Rama Industries Ltd. had taken credit of Rs. 9,44,601/- on plant and machinery used exclusively for the manufacture of exempted final products namely Di-Calcium Phosphate. When it was pointed out to M/s Rama Industries that they could not take cenvat credit of duty paid on machines exclusively in the manufacture of exempted goods, they reversed the said amount under the Cenvat Account No. . However, an amount of Rs. 4,62,003/- appeared to be payable as interest for having taken the credit wrongly.

2. A show cause notice was issued for recovering the said interest and also proposing to impose penalty under Rule 173-Q of the erstwhile Central Excise Rules for having taken credit wrongly. The matter was adjudicated by the Assistant Commissioner who confirmed the demand of interest amount of Rs. 4,62,003/- and also imposed penalty of Rs. 9,44,601/- under Rule 173-Q of the erstwhile Central Excise Rules read with section 11AC of the Central Excise Act. Aggrieved by the order, M/s Rama Industries Ltd. filed appeal with the Commissioner (Appeals). The Commissioner (Appeals) confirmed the interest demanded. However, he reduced the penalty amount to Rs. 5 lakhs.

3. Aggrieved by the order of the Commissioner (Appeals), M/s Rama Industries Ltd. and Revenue have filed these appeals and these two appeals are being considered in these proceedings.

4. The argument on behalf of the assessee is that the provisions of Rule 57-AH under which interest became payable for wrong credit taken came into force only on 1.4.2000 whereas the demand is for the period 1.1.99 to 19.10.2000. The assessee also points out that they

had not utilized the credit taken and therefore, no short levy has occurred for utilization of wrong credit and in the absence of short levy, there is no ground for levying interest under provision of Section 11AA or 11AB of the Act. Therefore, the assessee requested for setting aside the demand for interest.

5. The assessee further submits that they had taken credit due to wrong understanding of the provision of law and there was no intention on their part to claim wrongly. Since the credit was not utilized and was reversed immediately when the matter was pointed out, it is very clear that there was no intention to evade duty. It is pointed out that Rule 173-Q can be invoked only subject to provision of Section 11AC and Section 11AC is applicable only when there is fraud, suppression, mis-declaration or any act with intent to evade payment of duty. Since no such motive is attributed to them, no penalty can be imposed on them and the penalty of Rs. 5 lakhs imposed by the Commissioner (Appeals) requires to be set aside.

6. The learned DR on the other hand relies on the decision of the Apex Court in the case of Union Of India Vs Ind-Swift Laboratories Ltd reported in 2001 (265) ELT 3 (SC) wherein the Hon'ble Supreme Court has held that when cenvat credit is taken, interest is to be paid even if such credit has not been utilized for payment of excise duty. Therefore, he argues that interest is correctly demanded.

7. In the case of penalty, the learned DR submits that the position that the equipments were being used exclusively for manufacture of an exempted product was always known to the assessee and they should not have taken such credit and the argument that they have

taken it innocently, is without any basis. He also states that he is of the view that it is not necessary to prove mensrea for imposing penalty under Rule 173-Q. He submits that the penalty of Rs. 5 lakhs imposed by the Commissioner (Appeals) is not adequate and this has to be increased to the amount equal to the credit wrongly taken because Section 11AC envisages penalty equal to the duty evaded.

8. I have considered arguments on both sides. It may be seen from para 15 of the decision of the Apex court in the case of Ind-Swift Laboratories Ltd which was given while interpreting Rule 14 of the Cenvat Credit Rules, 2005. This Rule reads as under:-

> "**14. Recovery of CENVAT credit wrongly taken or erroneously refunded.** - Where the CENVAT **credit has been taken or utilized wrongly** or has been erroneously refunded, the same along with interest shall be recovered from the manufacturer or the provider of the output service and the provisions of sections 11A and 11AB of the Excise Act or sections 73 and 75 of the Finance Act, shall apply *mutatis mutandis* for effecting such recoveries."

9. The above rule came into force on 10-09-2004. But even prior to that there were similar provisions. These are reproduces in paras 9.1 to 9.3. But prior to 01-04-2000 the rules where distinctly different as may be seen from the relevant rule re-produced in para 9.3.

9.1 From 01-07-2001 to 10-09-2004

> *"**Rule 12** Recovery of CENVAT credit wrongly taken.- Where the Cenvat credit has been taken or utilized wrongly, the same along with interest shall be recovered from the manufacturer and the*

provisions of sections 11A and 11AB of the Act shall apply mutatis mutandis for effecting such recoveries."

9.2 From 01-04-2000 to 30-06-2001

Recovery of credit wrongly taken

57AH (1) *Where the CENVAT credit has been taken or utilized wrongly, the same along with interest shall be recovered from the manufacture and the provisions of* Sections 1A, 11AA and 11AB of the Act shall apply mutatis mutandis for effecting such recoveries.

(2) Where the CENVAT credit has been taken or utilized wrongly on account of fraud, willful misstatement, collusion or suppression of facts, or contravention of any of the provisions of the Act or the rules made thereunder with intention to evade payment of duty, then, the manufacturer shall also be liable to pay penalty and the provisions of section 11AC of the Act shall apply mutatis mutandis.

9.3 From 01-03-1997 to 31-03-2000

Rule 57T(8) *Notwithstanding anything contained in sub-rule (3) or sub-rule (5) where the credit of duty paid on capital goods has been taken wrongly* ***on account of fraud, willful mis-statement, collusion or suppression of facts or contravention of any of the provisions of the Act or the rules made thereunder with intent to evade payment of duty****, the person who is liable to pay the amount equivalent to the credit disallowed, as determined under sub-rule (3), shall also be liable to pay interest at such rate as may be fixed by the Board under section 11AA of the Act from the first date of the month succeeding the month in which the credit was wrongly taken, till the date of payment of such amount.*

Explanation For the removal of doubts it is hereby declared that the provisions of this sub-rule shall not apply to cases where the credit disallowed became payable before the 23rd day of July, 1996."

10. The ruling of the Apex Court in the case of Ind-Swift Laboratories (Supra) is that the expression credit taken or utilized cannot be interpreted to mean 'credit taken and utilized.' There is no general ruling that if cenvat credit is wrongly taken, interest on such amount wrongly taken its reversal be paid.

11. Now the question is when such provision was introduced for the first time – such provision was introduced in Rule 57AH for the first time with effect from 1.4.2000. So there cannot be an argument that interest was payable for taking wrong credit under the Rules providing for taking Cenvat Credit Scheme prior to 1.4.2000. However, interest will be payable from 1.4.2000 in view of the decision of the Apex court in Ind Swift Laboratories (supra).

12. Now the issue to be examined is whether such interest was payable under Section 11AA of the Central Excise Act which was in force from 26.5.1995 to 11.5.2001. A careful reading of the provision shows that it was applicable only when a short levy or non-levy of excise duty occurred. Wrong cenvat credit taken can result in short levy or non-levy of excise duty only when such wrong credit is utilized for payment of excise duty. Such utilization had not taken place in this case. So interest is not payable under this section either.

13. Further the penalty under Rule 173 Q also could be imposed only if for actions with intent to evade payment of duty. In the overall facts of the case I am not convinced about any intention of the M/s Rama industries Ltd. to evade duty. So Penalty under Rule 173 Q also is not sustainable.

14. However in view of the decision of the Apex Court in the case of Ind-Swift laboratories Ltd (Supra) and the provisions in force from 01-04-2000, I hold that interest for the period 01-04-2000 to the date of reversal will be payable by M/s Rama Industries Ltd.

15. The Appeals filed by M/s Rama Industries Ltd. and that filed by Revenue are disposed of in above terms.

(Pronounced on 16/11/11)

(MATHEW JOHN)
Technical Member

MPS*