IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI
PRINCIPAL BENCH, COURT NO. IV

Appeal No. E/1892/2010-Ex[SM]
[Arising out of Order-in-Appeal No. 22/RPR-II/2010 dated 25.02.2010, passed by the Commissioner of Central Excise, Raipur]

For approval and signature:
Hon'ble Shri V. Padmanabhan, Member (Technical)

M/s. Bhilai Engineering Corportion ....Appellant

Vs.

C.C.E. Raipur ....Respondent

Appearance:

Sh. A.K. Prasad, Ms. Surbhi Sinha, Ms. Priyanka Goel, advocate for the Appellant
Sh. H.C. Saini, AR for the Respondent

CORAM:
Hon'ble Shri V. Padmanabhan, Member (Technical)

Date of Hearing: 23.12.16

FINAL ORDER NO. 56382 /2016-Ex[SM]

Per V. Padmanabhan

The present appeal is directed against the Order-In-Appeal dated 25.2.2010 passed by Commissioner (Appeals), Raipur. The appellant are availing benefits of Cenvat Credit Rules and also availing the benefits of Duty Exemption Pass Book (Here in after referred to as DEPB) read with Exemption granted under Notification No. 34/97-Cus dated 07.04.97 and 45/2002-Cus dated 22.04.2002. The appellant had availed credit of Rs. 45,26,087/- on various items during March, 2003 to December, 2005 imported by way of adjustment of CVD in DEPB and not by cash payment of CVD availing the exemption under Notification No. 34/97-Cus dated

07.04.97 and 45/2002-Cus dated 22.04.2002. The provisions of para 4.3.5 of Export Import Policy 2002-2007 state that in case of CVD paid by way of adjustment from DEPB no benefit of Cenvat / Drawback will be available. The Bill of Entry submitted also did not contain the proof of payment of CVD as well as the Appellant had also not disclosed the availment of credit of CVD not paid in cash but adjusted against the DEPB before the authority and thus had suppressed the facts from department. Therefore, a Show Cause Notice dated 31.01.2008 was issued against the appellant asking for disallowance and recovery of credit amounting to Rs. 45,26,087/- under Rule 12 and 14 of Cenvat credit Rules, 2004 read with Section 11A(1) of the Act. Recovery of interest was also proposed under Rule 12 and 14 of Cenvat Credit Rules, 2004 read with Section 11 AB of Central Excise Act. In addition to this penalties were also proposed under Rule 13 and 15 of Cenvat Credit Rules, 2004 read with Section 11AC of the Act. The said Show Cause Notice was decided vide the impugned Order-In-Original disallowing the credit of Rs. 45,26,087/- and ordering for its recovery along with interest under Rule under 12 and 14 of Cenvat Credit Rules, 2004 read with Section 11A(1) of the act and Section 11AB of the Act. An equal amount of penalty was also imposed under Rule 13 and 15 of Cenvat Credit Rules, 2004 read with Section 11AC of the Act.

2. With the above background, we have heard Shri A.K Prasad, Ms. Surabhi Sinha, Ms. Priyanka Goel, ld. Counsel for the appellant as well as Shri H.C. Saini, Ld. DR for the Revenue.

3. The Ld. Counsel arguments are summarized below:

(i) The issue was under dispute during the relevant period and the matter was finally resolved by decision of the larger bench of the CESTAT in the case of **ESSAR Steel Ltd., Vs. Commissioner of Central Excise, Vishakhapatnam-2004(173)ELT 239 (Tri.-LB).** Consequently, he submits that the allegation of suppression made against the appellant is not sustainable and hence the Show Cause Notice, which has been issued on 31.01.2008 covering the period March, 2003 to December, 2005 is completely time barred.

(ii) The relevant Customs Notification No. 96/2004-Cus has been issued 17.09.2004 permitting the availment of Cenvat Credit for Bills of Entry on which CVD has been paid making use of DEPB scrip. However, the Show Cause Notice has demanded reversal of such Cenvat credit upto December, 2005. On the ground that the CVD in those cases have been paid making use of DEPB scrips issued partially under old Foreign Trade Policy. In this regard, he submits that issue stand settled in their favour by the Hon'ble High Court of Delhi in the case of **Commissioner of Central Excise Vs. Havells India Ltd.** reported in **2015-TIOL-2399-HC-DEL-CUS.**

4. The Ld. DR, on the other hand supports the orders passed by the authorities below. He submits that CBEC has issued a Circular

No. 59/2004-Cus dated 21.10.2004 in which it has been clarified that the facility of Cenvat credit, only be available in respect of DEPB scrips issued under the new Foreign Trade Policy (2004-09).

5. Foreign Trade Policy, 2002-2007 have a specific condition stipulating that the Additional Customs duty (CVD) paid by making use of DEPB scrips shall not be eligible for the benefit of Cenvat credit in the hands of the importer. However, such condition was deleted, when the new Foreign Trade Policy was announced for the period 2004-2009. Such amendments were carried out w.e.f. 28.1.2004. Inspite of the amendment in the policy, the relevant Customs Notification was re-issued only with effect from 17.9.2004. The relevant Customs Notification issued was 96/2004 –Cus dated 17.09.2004 CBEC has issued a Circular No. 59/2004-Cus dated 21.10.2004 in which it was clarified that the facility of Cenvat credit would be available only in respect of DEPB scrips issued under New Foreign Trade Policy (2004-2009). In the light of the above, department took the view that the benefit of Cenvat credit, wherever CVD was paid in making use of DEPB scrips, was not entitled, firstly, upto 16.09.2004 since the relevant Customs notification did not permit so and secondly the same was sought to be denied wherever CVD was paid even after 17.9.2004 if DEPB scrips used were issued under the earlier FTP (2000-2007).

6. Under the Foreign Trade Policy 2002-07 itself, the issue whether Cenvat credit can be permitted, when CVD is paid using

the DEPB was very much disputed by different benches of the Tribunal and held differently, which necessitated the issue to be referred to larger bench which decided, in the case of Essar Steel Ltd (Supra) that Cenvat credit will not be allowable on the strength of such documents. This larger bench decision was issued while Final Order dated 16.08.2004. From the facts that the dispute has been going on for fairly a long time, which came to be decided against the assessee only by the decision of the larger bench (Supra), it is concluded that the issue was disputed. Under the circumstances, it cannot be alleged that the appellant indulged in suppression of facts with deliberate intent to avail ineligible Cenvat credit. Consequently, the Show Cause Notice dated 31.1.2008, which has been issued covering the period March, 2003 to December, 2005 is to be held as time barred. In this view of the matter, no part of the demand will survive.

7. The other ground on which the demand has been upheld in the impugned order is that some of the credits have been available on the basis of DEPB scrips issued under the earlier Foreign Trade Policy (2002-2007). In the light of the circular issued by the Board, the Cenvat credit has been denied. This issue has since been settled in favour of the appellants by the Hon'ble High Court, Delhi. In the case of Commissioner of Delhi Vs. Havells India Ltd.(Supra), the Hon'ble High Court held as follows:

> *"5. The case of the Department was that the Assessee had paid the additional Customs Duty using the DEPB issued under the FTP of 2002-07 while the benefit of CENVAT credit could be availed in terms of the*

Notification No. 96/2004-Cus only when the payment of import duty or additional customs duty had been made using the DEPB issued under the FTP of 2004-09.

6. The Division Bench of Punjab and Haryana High Court in has in its order dated 22nd April 2010 in CEA No. 37 of 2010 (Commissioner of Central Excise v. M/s. Neel Kanth Rubber Mills) referred to the EXIM Policy which was amended by the Notifications dated 28th January 2004 and 17th September, 2004 which entitled an importer to avail Cenvat credit of additional Customs duty against the amount debited in the DEPB scrips. It was noted by the High Court that there was no condition in the said notifications that the debits made in the DEPB issued under a particular FTP alone would be eligible for CENVAT credit and that debits in a DEPB issued under a previous FTP would not b eligible for credit.

7. Ms. Sonia Sharma, learned counsel for the Appellant states, on instructions, that to the best of the knowledge of the appellant, no appeal has been filed as of date against the aforementioned order of the Punjab and Haryana High Court in Commissioner of Central Excise v. M/s. Neel Kanth Rubber Mills (supra) which decides the issue in favour of the assessee and against the Department.

8. The Court finds that the said decision indeed covers the issue against the Department on all fours. The appellant has not been to show any notification by which the benefit of CENVAT credit has been expressly denied where the payment of Customs duty or additional customs duty is made using DEPB scrips issued in terms of the FTP 2002-07."

8. In view of the above discussions, the impugned order is set aside and the appeal allowed.

[Dictated and Pronounced in the open court]

V. Padmanabhan
(Member Technical)

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