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

Appeal No. E/58301,58348,58349/2013-EX [DB] With/MISC/51674/2016

[Arising out of the common Order-In-Appeal No.24/2013 (c) Dated 22.03.2013 passed by Com., Customs & Central Excise, Jaipur Zone, NCR Building, C-Scheme, Statue Circle, Jaipur – 302 005.]

Mittal Pigments Pvt Ltd.,
R.K. Agarwal,
K.M. Sharma **…Appellant**

Vs.

C.C.E. & S.T.- Jaipur-I **…Respondent**

Appearance:
Sh. A.R. Madav Rao advocate for the appellant
Sh. M.P. Sharma, AR for the respondent

CORAM:
Hon'ble Justice Mr. Dr. Satish Chandra, President
Hon'ble Mr. Ashok K. Arya, Member (Technical)

Date of Hearing.10.11.2016
Date of decision.20.12.2016

Final Order No.55937-55939/2016

Per Ashok K. Arya:

1. M/s Mittal Pigments Pvt Ltd., Sh. R.K. Agarwal and Sh. K.M. Sharma are in appeal against the order in original dated 22/03/2013 passed by Commissioner of Central Excise, Jaipur.

2. The appellant company states that the subject matter concerns with the following main issues.

- **i.** Denial of Cenvat Credit of Rs. 61,14,698/- on alleged short found inputs.
- **ii.** Cenvat Credit of Rs. 35,47,178/- availed on 'goods not received into the factory'(on 18 invoices).
- **iii.** Cenvat Credit of Rs. 66,442/- against the invoice no. 23 dated 23.04.2009 'without receipt of the goods'.
- **iv.** Cenvat Credit of Rs. 11,08,524/- taken on invoices where goods were returned back.
- **v.** Cenvat Credit of Rs. 2,33,694/- taken on invoice no. 201 dated 31.03.2008 'with no record of the consignment passing Churu toll post'.

3. The appellant has been represented by Sh. A.R. Madav Rao, Ld. Advocate and Revenue has been represented by Sh. M.P. Sharma, Ld. AR.

4. We have carefully considered the facts and the submissions of both the sides.

5. The issues concerned are being taken up for consideration and decision in the following subparas one by one.

5.1. Denial of Cenvat Credit of Rs. 61,14,698/- on alleged short found inputs:-

The allegation against the appellant company is that the inputs namely Zinc and Lead Concentrate were not found in the registered premises. The appellant contends that subject duty paid raw material were stocked on the other side of the plot A 203, i.e. adjacent plot to A 203. This adjacent plot was regularized by RIICO's letter dated

05.04.2006 and allotted to the appellant company. The appellant argues that said premises are a part of their registered premises and the same was intimated to the department vide letter dated 03.07.2009, and there is no evidence that said inputs were cleared to third party. The appellant relies on the Tribunal's decision in the case of Munjal Showa Ltd. v CCE 2009 (116) ELT 684.

5.1.1. The appellant is not contesting the shortage found of Arsenic Metal weighing 2100 kg, valued at Rs. 1,37,100/- involving Central Excise duty of Rs. 20,195/-. as the appellant company has already reversed the Cenvat Credit in respect of said Arsenic Metal vide entry no. 942 dated 09.02.2011 in their RG 23A part-II.

5.1.2. After hearing rival submissions, it appears that it is not the case of the department that inputs were either removed or were not put to use in the manufacture of final products. The only charge is that the goods were kept in the plot adjacent to the factory premises. The said adjacent plot has been found to be regularized in the name of the appellant company. The appellant company has also intimated to the Revenue about the regularization of the adjacent plot in the name of the appellant. Therefore, following the decision in the case of ***Munjal Showa Ltd***. *(supra),* confirmation of the duty and penalty on this account is set aside. The assessee-appellant will get the relief accordingly.

5.2. Cenvat Credit of Rs. 35,47,178/- availed on 'goods not received into the factory'(on 18 invoices).

The department's allegation is that the appellant company did not receive the goods against subject 18 invoices and they availed the credit for said goods without actually receiving the same.

5.2.1. The appellant pleads that entire amount of said Cenvat Credit of Rs. 35,47,178 was reversed vide entry no. 801 dated 28.04.2011of the RG 23 A Part-II. The appellant also says that the suppliers of the goods also settled the matter by paying Rs. 40 lakhs plus interest in respect of said non-received goods. The appellant however pleads that they should be called upon to deposit only the interest and 25% of penalty by giving them the benefit of Proviso to Section 11 AC of Central Excise Act, as no option was given to the assessee to pay 25% penalty. When the appellant can legally claim this benefit of payment of 25% penalty only as per provisions of Proviso to Section 11AC of Central Excise Act, the same is hereby allowed to them.

5.3. Cenvat Credit of Rs. 66,442/- against the invoice no. 23 dated 23.04.2009 'without receipt of the goods':-

The assessee company has not been able to disprove the allegation that they took the Cenvat Credit of Rs. 66,442/- without actual receipt of corresponding inputs. The appellant has not placed on record any proof of receipt of subject inputs in their factory premises. Therefore, recovery of Cenvat Credit of Rs. 66,442/- along with interest and equivalent penalty imposed are hereby confirmed equivalent penalty against the appellant company.

5.4. Cenvat Credit of Rs. 11,08,524/- taken on invoices where goods were returned back:-

The allegation here is that the appellant company took the Cenvat Credit on nine 'self invoices' where there is no proof that the goods were actually returned to them. The appellant says that original allegation in the SCN (Show Cause Notice) was for wrong availment of credit on 14 invoices where there was no proof that the goods were actually returned to them. The appellant pleads that in case of five invoices **(no. 271, 293, 726, 727, 31)** demand was dropped in the OIO. The appellant further pleads that in case of remaining nine invoices, they submitted a chart making it clear that customers returned the goods by a GR or by endorsing the invoice itself.

5.4.1. The appellant company gives the proof of the return of goods in the form of letters from the customers or the marking on the invoice itself etc. The appellant also submits that in some cases the difference in the value of the goods in the invoice and the GR is due to transportation loss, which cannot be a ground for denying the credit to the appellant. We do not find any reason and the evidence for nonacceptance of the proof of return of the goods submitted by the appellant company in the form of letter, marking on the invoices GRs etc. Therefore Cenvat Credit of Rs. 11,08,524/- is hereby found to be admissible to the appellant company.

5.5. Cenvat Credit of Rs. 2,33,694/- taken on invoice no. 201 dated 31.03.2008 'with no record of the consignment passing Churu toll post':-

The department's allegation is that there is no record of the subject consignment covered by invoice no 201 dated 31.03.2008 passing through Churu Toll Post, which is on the way from supplier's factory to the appellant's factory premises. The appellant company argues that non-entry of the goods at the toll post of Churu is not substantial evidence to state that the goods were not received at the appellant company's factory. The appellant says that toll receipt at the Lakhanpur Border for the same consignment is however available. The appellant cites in support the case of Siddhartha Bronze Products Pvt. Ltd. V C.C.E. % S.T., Bhavnagar reported at 2015 (328) ELT 429 (Tri. – Ahmed.)

5.5.1. By considering the rival submissions, it appears that mere non entry of the consignment at one of the toll posts cannot prove that the goods covered under the subject invoice were not received by the appellant company, unless there are other substantial corroboratory evidences to prove the charge of non-receipt of such goods. In the instant case, there is no material brought on record by the Department in support of allegation. When it so then the demand of Cenvat Credit of Rs. 2,33,694/- on this account is not sustainable and is hereby dropped.

6. The appellant, Sh. Ramesh Kumar Agarwal, director for the appellant company has been penalized with the penalty of Rs. 15 lakh under Rule 26(1) of Central Excise Rules 2002 by the impugned order. The impugned order *inter alia* states that entire activities of the appellant company were being looked after by Sh. R.K. Agarwal, director. Sh. Agarwal didn't reply to the Show Cause Notice and he has been beneficiary of wrong availment of Cenvat Credit etc.

6.1. As the total liability of the appellant company has come down substantially in our Order from total demand of Rs. 1,10,90,641/- to Rs. 35,47,178/-, the penalty of Rs. 15 lakh imposed on Sh. R.K. Agarwal is reduced to Rs. 1,00,000/- (one lakh) only.

7. The impugned order also imposed a penalty of Rs. 10,000 (Rs. Ten thousand only) on Sh. K.M. Sharma, the appellant, who is the authorized signatory of the appellant company. Considering the overall facts and circumstances of the case the said penalty imposed on Shri K.M. Sharma is hereby set aside.

8. The impugned order is modified to the above effect. In the result these appeals are allowed in above terms. Miscellaneous Application is also disposed off.

[Pronounced in open Court on 20.12.2016]

(Justice (Dr.) Satish Chandra)
President

(Ashok K. Arya)
Member (Technical)

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