CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No.2, R. K. Puram, New Delhi, Court No. 1

Date of hearing: 05.01.2017
Date of decision: 09/02/2017

Excise Appeal No. 57191 of 2013

(Arising out of order in original No.90/2012(CE)-Commissioner dated 31.12.2012 passed by the Commissioner of Central Excise, Jaipur).

CCE, Jaipur-I Appellant

Vs.

M/s Genus Power Infrastructure Limited Respondent

AND

Excise Appeal No. 57291 of 2013

(Arising out of order in original No.90/2012(CE)-Commissioner dated 31.12.2012 passed by the Commissioner of Central Excise, Jaipur).

M/S Genus Power Infrastructures Limited Appellant

Vs.

CCE, Jaipur-I Respondent

Appearance:

Sh. G. R. Singh, AR for the –Revenue
Sh. Hemant Bajaj, Advocate for the assessee

Coram:

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

F. O. Nos. **50727 – 50728/ 2017**

Per: **Ashok K. Arya**:

These two appeals are against the common order-in-original No. 90/2012(CE) dated 31.12.2012 passed by the Commissioner Central Excise, Jaipur.

1.1. The impugned order dated 31.12.2012 adjudicates show cause notice dated 29.07.2011 issued to the appellant, M/s Genus Power Infrastructures Limited (M/s GPIL in short), whereunder cenvat credit amounting to Rs. 10,66,300/- has been disallowed and an equivalent penalty has been imposed on M/s GPIL under Rule 15(2) of Cenvat Credit Rules, 2004. The appellant M/s GPIL is in appeal (No. 57291) inter-alia against confirmation of this demand of Rs. 10,66,300/-.

1.2. The Revenue is in cross-appeal (No. E/57191/2013) mainly stating that whole amount of cenvat credit of Rs. 53,30,722/- taken on the strength of 97 invoices issued by M/s SPM Enterprises, Delhi was wrongly availed by the assessee namely M/s GPIL and the adjudicating authority wrongly dropped the said demand of cenvat credit.

2. The assessee M/s GPIL has been represented by ld. Advocate Sh. Hemant Bajaj and Revenue has been represented by Sh. G.R. Singh, ld. AR.

3. Briefly, the facts are that the department issued show cause notice dated 29.07.2011 to the appellant assessee M/s GPIL inter-alia asking M/s GPIL that why cenvat credit amounting to Rs. 55,30,722/- taken on the strength of 97 invoices issued by M/s SPM Enterprises not be disallowed and recovered from them under Rule 14 of Cenvat Credit Rules, 2004 read with Section 11AC of the Central Excise Act, 1944.

3.1 The show cause notice was adjudicated by the Commissioner vide impugned order dated 31.12.2012, whereunder the only part amount of cenvat credit of Rs. 10,66,300/- was disallowed and confirmed for recovery alongwith interest.

4. Both the appeals being against the common order, are being decided by this Order.

5. Ld. Advocate for the assessee M/s GPIL based on the appeal memorandum and written submissions mainly submits as under:

A. For Appeal No. E/57191/2013 :

(a) It is submitted that the Cenvat credit demand was originally proposed by the impugned notice on the ground that Genus Power had availed credit on inputs, on the basis of invoices issued by SPME without actual receipt of the inputs, hence the credit availed thereof was not admissible. In this regard, it is submitted that the ld. Commissioner after considering the various records and submissions placed before him, agreed with the receipt and usage of the inputs by Genus Power. This fact is recorded in para 75 of the adjudication order.

(b) Further, the fact of receipt of inputs under the disputed invoices is further fortified by the observation made by the ld. Commissioner in para 75 that reversal of cenvat credit of Rs.31,82,272/- was made on removal of inputs as such to their Haridwar Unit, which fact was also regularised by the Deputy Commissioner, Dehradun vide its letter dated 16.08.2010, confirming the receipt of PP Granules by Haridwar Unit of Genus Power. It is an undisputed fact that the waste generated during the processing of PP granules have been cleared on payment of excise duty and this fact is also recorded in the impugned order. Thus, under the situations it clearly establishes the factum of receipt of input by Genus Power and cenvat credit has been correctly availed by Genus Power.

(c) It is submitted that the ld. Commissioner after perusing and satisfying himself with the records, invoices, ledgers, *bilties* submitted by SPME came to the conclusion that the said inputs were actually received by Genus Power against payments made by cheque. Thus, in absence of any evidence brought by the department to the contrary to disprove the observation made by the ld. Commissioner, the charge of non receipt of inputs is not sustainable. Hence, cenvat credit cannot be disallowed.

(d) In support of this submission, reliance is placed on the decision of the Hon'ble Allahabad High Court in the case of Continental Cement Company vs. UOI-2014 (309) ELT 411 (Al.) wherein it has been observed that unless there is clinching evidence of the nature of purchase of raw materials, use of electricity, sale of final products, clandestine removals, the mode and flow back of funds, demand cannot be confirmed on the basis of presumptions and assumptions.

(e) No cogent piece of evidence is available with the department to sustain the charge of availment of credit without receipt of inputs.Reliance placed on the statement of Shri Sunil Kumar Shukla and certain transporters is not sustainable, when there are documentary evidences to prove that inputs were received by Genus Power.

(f) Reliance is placed on the following case laws:

- CCE v. Shakti Zarda Factory (I) Ltd-2015 (321) ELT 438 affirmed by Supreme Court in Commissioner v. Shakti Zarda Factory (I) Ltd. -2015 (321) ELT A210 (SC).

- CCE vs. Swati Polyester – 2015 (321) ELT 423 (Guj.) affirmed by Supreme Court in Commissioner v. Swati Polyester – 2015 (321) ELT A217 (SC).

- CCE v Deora Wires N. Machines Pvt. Ltd. -2016 (332) ELT 393 (Guj.)

B. **For Appeal No. E/57291/2013** :

(1) The confirmation of demand of Rs. 10,66,300/- against Genus Power has been made on a presumptive reasoning which was not even alleged in the impugned show cause notice.

a) It is submitted that the show cause notice is the foundation of any proceeding under the Central Excise Law. It has been observed by the Hon'ble Supreme Court in the case of *CCE vs. Brindavan Beverages (P) Ltd.* – 2007 (231) ELT 487 (SC) that if the allegations in the show cause notice are not specific and are on the contrary vague, lack details and/ or unintelligible then it is sufficient to hold that the noticee was not given proper opportunity to meet the allegations indicated in the show cause notice.

b) Further, once the charges against the dealer and transporter supplying the inputs to Genus Power have been dropped by the ld. Commissioner, it itself is sufficient evidence to conclude that the inputs have been received and credit should have been allowed in full under the disputed invoices as there is no case of diversion of inputs as such in the market or clandestine clearance of the same against cash receipt in the market.

c) Cross Examination is to be allowed whose statements have been relied upon by the department. It is submitted that though Genus Power has specifically requested for cross examination of all those persons whose statements have been relied upon by the department the ld. Commissioner did not address this issue and straightaway negated the statements of transporters relied upon by the department. It is submitted that as per Section 9D of the Central Excise Act, any witness whose statement is relied upon has to be examined in chief by the adjudicating authority and thereafter produced for cross-examination before the assessee before the statement can be taken as evidence against the assessee. In this regard, reliance is placed on the following judicial precedents:

- Sumatex Services Pvt. Ltd. vs. CCE, Jaipur-II, FO No. 55415-55416/2016 dated 28.11.2016.
- J&K Cigarettes Ltd. v. CCE- 2009 (242) ELT 189 (Del.)
- Basudev Garg vs. CC – 2013 (294) ELT 353 (Del.)
- Somendu Saha v. UOI – 2015 (322) ELT 462 (Cal.)
- CCE v. Shyam Traders – 2016 (333) ELT 389 (All.)
- G-Tech Industries v. UOI-2016 (339) ELT 209 (P&H).

6. Ld. AR for the Revenue inter-alia based on appeal memorandum submits as under:

A) **Revenue's Appeal No. E/57191/2013**:

i) The findings of the Commissioner in the impugned order are contrary to settled legal position. The Commissioner heavily relied on the retraction made by Sh. S. K. Shukla, Assistant Manager and held that his retraction is admitted as department failed to investigate the matter and recorded his further statement. The retraction of Sh. Shukla is nothing but an after thought. His initial statement was voluntary.

ii) Hon'ble Supreme Court in the case of *Commissioner of C. Ex. Mumbai vs. Kalvert Foods India Pvt. Ltd.* -2011 (270) ELT 643 (SC) ruled that if a statement has not been obtained through coercion or duress the same is to be considered and relied upon.

B) In case of the appeal No. E/57291/2013 filed by the assessee M/s GPIL, ld. AR reiterates the submissions given for Appeal No. E/57191/2013 and further states that whole amount of cenvat credit i.e. of Rs. 55,30,722/- is to be disallowed and it is to be confirmed for recovery alongwith interest and equivalent penalty also is to be imposed.

7. We have carefully considered the facts of the case, the submissions of both the sides and the case laws cited.

8. Revenue's Appeal (No. E/57191) :

The impugned order-in- original has adjudicated the issue of admissibility of cenvat credit to the assessee namely M/s GPIL to whom the show cause notice dated 29.07.2011 was issued. The Revenue mainly alleges that in case of 97 invoices the subject inputs were not received by M/s GPIL and they were accordingly not utilised for manufacturing and, therefore, cenvat credit was not admissible to assessee for the said inputs.

8.1 The impugned order has examined the issue in detail and **has given the findings that the assessee M/s GPIL was a bonafide purchaser and it has not been proved that the said goods were not received by them.** Commissioner in this regard in the impugned order observes as under:-

> "75. *It is on the record that the noticee were receiving goods regularly from noticee No. 5 (SPM Enterprises) under invoices. These excise invoices contains all the particulars as prescribed under rules and above all the goods were received for further use in the manufacture of the final product which was supplied to various Electric Boards. The noticee have made payment of the goods inclusive of excise duty as evident from ledger. Therefore, they were a bona fide purchaser of the alleged goods for a price which included the duty element also. It is on the record that noticee have reversed the cenvat amounting to Rs. 31,82,272/- on as such clearances of 275.865 MT of PP Granules to their Haridwar unit. The said clearances of PP granules gets established from the report of Deputy Commissioner, Central Excise Division, Dehradun as intimated vide their letter C. No. II(8)Prev./Follow-up/Hero Honda/2010/11714 dated 16.08.2010. From the above it is observed that the goods in question were received by their Haridwar unit. It is an on record that neither the department has adduced evidence beyond doubt that the alleged inputs were not received in the unit and it was only a paper transaction nor has it been proved that any other raw material was received and used by the appellant for production of their final product. If department is of the view that it was only a paper transaction then it should have proved that there was flow back of money from dealer to the noticee. On the contrary records produced by the noticee shows bona fide transaction on their part*".

Thus it appears to be the fact that the goods were received by the Haridwar unit of Respondent-assessee. The Department has not submitted any substantial evidence to prove otherwise than the findings arrived at by the Commissioner in the impugned order. Therefore, the Revenue's appeal (Appeal No. E/57191/2013) has got no substance; the case laws cited by the Revenue are not applicable to the present facts. Consequently, the Revenue appeal has no merits and deserves to be rejected.

9. **Assessee M/s Genus Power Infrastructure Ltd.'s Appeal No. E/57291/2013**:

The assessee M/s GPIL's appeal is against the confirmation of demand of Rs. 10,66,300/- and against the imposition of equivalent penalty on them.

9.1 The assessee –appellant mainly argues that once the input reached factory premises they should be allowed full credit when there is no case for diversion of input or clandestine clearance of the same against them. M/s GPIL, the appellant also argues that they have not been given opportunity to cross-examine the persons whose statements were relied upon for sustaining the demand of cenvat credit amounting to Rs. 10,66,300/-. However, we find that the impugned order has discussed in detail the issue of **non use of the subject raw material for manufacturing by the assessee**. The impugned order in its paragraphs 71, 72 and 78 discusses the use and non-use of the raw material for manufacturing the final product and after the detail discussion has arrived at the inadmissible cenvat credit amounting to Rs. 10,66,300/-.

9.2 However, the impugned order does not anywhere discuss to arrive at the conclusion that 109.512 MT of PP granules on which (after deduction of duty paid on scrap i.e. Rs. 54,824/-) cenvat credit demand of Rs. 10,66,300/- (Rupees ten lacs sixty six thousand and three hundred only) has been confirmed was either diverted or clandestinely removed. Without the fact of clandestine removal being on record, it is not legal to disallow cenvat credit for the subject goods, if the same had been received by assessee-appellant in the factory. The impugned order notes that the subject goods were received by the appellant and when there is no diversion or clandestine removal of 109.552 MT of material, the denial of cenvat credit on the same cannot be legally sustained. Therefore, this issue needs fresh examination by the original adjudicating authority for which fresh personal hearing and opportunity of production of fresh evidence as per law is to be made available to the appellant-assessee namely M/s GPIL. Consequently, appeal (No. 57291/2013) is allowed by way of remand, which shall be decided *de novo* accordingly within a period of four months of receipt of the order by the adjudicating authority.

10. In the result, the Revenue's appeal (E/57191/2013) fails and the assessee M/s GPIL's appeal (E/57291/2013) is allowed by way of remand and the impugned order is modified to above effect.

(Pronounced on 09.02.2017).

(Justice (Dr.) Satish Chandra)
President

(Ashok K. Arya)
Member (Technical)

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