IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.
Principal Bench, New Delhi

COURT NO. IV

DATE OF HEARING : 09/05/2017.
DATE OF DECISION : 09/05/2017.

Excise Appeals No. 2493 of 2009 and 2044-2047 of 2010 (SM)

[Arising out of the Order-in-Appeal No. 70/2009-CE/DLH/2009 dated 27/05/2009 passed by The Commissioner (Appeals) of Central Excise, Delhi and No. 153-156/CE/DLH/2010 dated 15/04/2010 passed by The Commissioner (Appeals) of Central Excise, Delhi – II.]

M/s Pathick Engineering Works	]	
Shri Surinder Kumar Wadhwa, Partner	]	Appellants
M/s Tiya Industries	]	
Shri Gulab Singh, Partner	]	

Versus

CCE, Delhi – II Respondent

Appearance

Shri Naveen Mullick, Advocate – for the appellants.

S/Shri K. Poddar and G.R. Singh, Authorized Representative (DRs) – for the Respondent.

CORAM : **Hon'ble Shri B. Ravichandran, Member (Technical)**

Final Order No. 53201-53205/2017 Dated : 09/05/2017

Per. B. Ravichandran :-

All the appeals are inter-linked with the core issue of Cenvat credit availed by two main appellants namely, M/s Pathick Engineering Works and M/s Tiya Industries. These appellants are engaged in the manufacture of Elastic Rail Clips in terms of contract with railways. In March 2007, the Central Excise officers conducted certain physical verification of raw materials and accounts maintained by these two main appellants. The officers seized 36.986 tonnes of raw material (spring steel bars) worth Rs. 11,05,881/- in the premises of M/s Pathick Engineering Works on the ground that these items are not approved raw material for the manufacture of rail clips for the railways. For confiscation of such seized items, proceedings were initiated separately which resulted in the order dated 25/12/2008. The Original Authority ordered confiscation of the seized items and permitted the same to be redeemed on payment of fine of Rs. 2,76,470/-. He also imposed penalty of Rs. 1,50,000/- under Rule 25 of Central Excise Rules, 2002 for not keeping proper records. On appeal, the said original order was upheld except for reduction of redemption fine and penalty to Rs. 60,000/- and Rs. 40,000/-, respectively.

2. On completion of investigations, further proceedings were initiated by issue of another show cause notice dated 14/11/2008 to all the appellants. The notice proposed recovery of Cenvat credit of Rs. 7,47,597/- from M/s Pathick Engineering Works, Rs. 12,16,726/- from M/s Tiya Industries and also to recover further Cenvat credit of Rs. 4,84,586/- from M/s Tiya Industries towards shortage of raw material found with further proposal to impose further penalties to all noticees. The case was adjudicated and the Original Authority vide his order dated 21/08/2009 confirmed

the proposals in the show cause notice regarding denial of credit and imposed penalties on all the appellants under various provisions of Central Excise Act, 1944, Cenvat Credit Rules, 2004 and Central Excise Rules, 2002. On appeal, the Commissioner (Appeals) vide the impugned order dated 15/04/2010 upheld the original order.

3. The learned Counsel for the appellant submitted that the Cenvat credit on SS Bars were denied to both the manufacturing appellants on the ground that these items are not purchased from authorized dealers as approved by railways and further these items are not used in the manufacture of Elastic Rail Clips to be supplied to railways. He submitted that these items are not used or forming part of the rail clips manufactured and sold to Indian Railways. However, these are used in connection with preparation for the manufacture of rail clips, by using them in trial or for setting up of the deformed dyes. All these items are used in the process of manufacture though not finding place in the final product. After usage these items becomes scrap and were cleared on payment of duty, after due accounting.

4. The learned Counsel submitted that the Original Authority ordered the confiscation of raw material SS bars only on the ground that these are found in excess and are not accounted for in the books of M/s Pathick Engineering Works. Rule 15 of Cenvat Credit Rules, 2004 was invoked for confiscation. He submitted that all these raw materials were in fact entered into the account

and were immediately shown issued to the shop floor and thus there is no closing balance on date of visit by the officers. The Department has never adduced any evidence regarding mis-utilization of these items or unauthorized clearance of all these items by the appellant.

5. On the demand of Rs. 4,84,586/- towards raw materials found short in the premises of M/s Tiya Industries, the learned Counsel submitted that despite of their detailed submission there is no finding at all recorded by the learned Commissioner (Appeals) in his impugned order. He submitted that the stock taking has been made by estimation and no consideration was given for the wastage and loss due to process. There is no evidence of any diversion of duty paid raw material by the appellant. The learned Counsel also submitted regarding penalties imposed on the partners of the appellant firm.

6. The learned AR contested the appeals. It is submitted that the investigation carried out by the Department clearly brought out that SS Bars procured by the appellants from non-approved sources cannot be used in the manufacture of rubber clips for railways. Evidences collected from similarly placed manufacturer indicated that these items cannot be used for die setting or any process. As such, the lower authorities are correct in denial the credit availed by the appellants on these raw materials.

7. I have heard both the sides and perused the appeal records. The first issue for decision is the correctness of denial of

credit on SS bars procured by both the manufacturing appellants from non-approved sources. The impugned order recorded the following findings :-

> "6. I have carefully gone into the facts of the case and submission made by the appellants in appeal memo as well as during the course of hearing. The limited issue involved in the instant case is whether SS Bars as purchased by the appellants from the non-approved suppliers of Railways and simply used for trial/die setting purposes in the manufacture of Elastic Railway Clips could be considered as an admissible input for availing Cenvat credit or not. In the instant case the investigation of the Department is limited to the fact that the Elastic Rail Clip, is an item which is exclusively manufactured and supplied to Railways or Railway Contractors for onward supply to various zones of Railways; that these Elastic Railway Clips are used to hold Rail tracks and for that purpose and to avoid frequent resistant and to maintain hold on Rail Tracks, a specific type of Steel Spring Bars of size 20.64 mm (+/- 0.2 mm) is prescribed by Railways and that for sourcing of material for manufacture of Elastic Railway Clips M/s Rashtriya Ispat Nigam Limited, M/s Sun Flag Iron & Steel Co. (Nagpur), M/s Modern Steels and M/s Upper India etc. are the authorized manufacturers/suppliers, wherefrom the manufacturers of ERCs could get required raw material and use in the manufacture of Elastic Rail Clips. Investigations revealed that the appellants have used a sizeable amount of raw material other than the prescribed one from various dealers of Steel and have utilized such Cenvat credit therefrom in payment of CE duty on ERCs. For this un-prescribed raw materials for trial/die setting purposes for economic reasons and thereafter the same was placed as waste and scrap and was thereafter cleared on payment of

duty with due accountal in their Excise records. In this context, I find that so far argument and stand maintained by the appellant is concerned, the same could be correct on certain footings and on account of non-verification of clearances made of prescribed or un-prescribed raw materials or for legal purposes but for similar reasons for practice and manner followed by similar other manufacturers could also be the same as they are also the parties who participate in similar tenders with Railways and are engaged in the manufacture of Elastic Railway Clips like the appellants in the present case and therefore, the appellants have completely failed on this account. Therefore, on going through with the findings of the adjudicating authority and above reasoning. I find that the orders passed by the adjudicating authority in the instant case against the main appellants and co-appellants are correct and fair and the Cenvat credit utilized by them on un-prescribed raw materials is to be paid/reversed by them alongwith penalties imposed on them".

8. A plain reading of the above finding will indicate that the issue examined by the Commissioner (Appeals) is admissibility of credit of duty paid on SS bars which are used for trial/die setting purposes. In fact, impugned order records that the claim of the appellant could be correct regarding usage of these items. Further, relying on the details gathered from similarly placed manufacturer the denial of credit was upheld by the impugned order. I find that neither the original order nor the first appellate order has examined any evidence relating to non-utilization of these duty paid inputs (SS Bars) in or in relation to the manufacturer of dutiable final products. In fact the denial of

credit is mainly based on the fact that these raw materials are of non-standard nature as prescribed by the railways and also have been procured from unapproved sources. No evidence of these items having been not received in the premises of the appellant or having been diverted without put into use has been recorded by the lower authorities. The appellants admitted that these non-standard raw materials are not used in the manufacture of rail clips by them. They are used in connection with trial or connected process which help in the final manufacture of rail clips using approved raw materials. The impugned order also records that the investigation revealed that the appellants have used a sizable amount of raw material other than the prescribed one in their factories. As already noted there is no evidence of any diversion of duty paid raw materials. The denial of credit cannot be only on the basis that the raw materials are from non-approved sources or similarly placed manufacturer has asserted that these items are not required even for trial or testing. I find that the duty paid raw material if used in relation to manufacture of dutiable final products, credit cannot be denied on the grounds recorded by the lower authorities.

9. Regarding seizure and confiscation of raw material, SS Bars, I find that the proceeding have been initiated and concluded invoking provisions of Rule 15 of Cenvat Credit Rules, 2004. The said rule reads as below :-

> "**[RULE 15. Confiscation and penalty.** — (1) If any person, takes or utilises CENVAT credit in respect of input

or capital goods or input services, wrongly or in contravention of any of the provisions of these rules, then, all such goods shall be liable to confiscation and such person, shall be liable to a penalty [in term of clause (a) or clause (b) of sub-section (1) of section 11AC of the Excise Act or sub-section (1) of section 76 of the Finance Act (32 of 1994), as the case may be].

(2) In a case, where the CENVAT credit in respect of input or capital goods or input services has been taken or utilised wrongly by reason of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of the Excise Act, or of the rules made thereunder with intent to evade payment of duty, then, the manufacturer shall also be liable to pay penalty in terms of the provisions of [clause (c), clause (d) or clause (e) of sub-section (1) of section 11AC of the Excise Act.]

(3) In a case, where the CENVAT credit in respect of input or capital goods or input services has been taken or utilised wrongly by reason of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of these rules or of the Finance Act or of the rules made thereunder with intent to evade payment of service tax, then, the provider of output service shall also be liable to pay [penalty in terms of the provisions of sub-section (1) of section 78] of the Finance Act.

(4) Any order under sub-rule (1), sub-rule (2) or sub-rule (3) shall be issued by the Central Excise Officer following the principles of natural justice.]"

10. The above provisions authorized confiscation in respect of inputs or capital goods on which credit has been taken wrongly in contravention of any of the provisions of Cenvat Credit Rules,

2004. I find the confiscation ordered in the present case is due to non-accountal of these raw materials in the statutory records. If these raw materials are not accounted in the records, the question of availing credit on them does not arise. Accordingly, for non-accounted raw material Rule 15 of Cenvat Credit Rules, 2004 has no application. The whole premise of seizure and confiscation has been mis-directed applying the un-connected provisions of law. As such, the same are not sustainable. Even otherwise, the denial of credit or wrong utilization of credit on such raw material has not been found sustainable as discussed above. On this ground also the proceedings initiated are not tenable.

11. Regarding denial of Cenvat credit of Rs. 4,84,586/- it is noticed that there is no discussion or finding in the impugned order dated 15/04/2010 by the Commissioner (Appeals). This issue has to be re-examined by the Commissioner (Appeals) for a decision. The defence submitted by the appellants are to be examined for a decision. The matter is remanded to Commissioner (Appeals) on this issue. The appellant shall be given an opportunity to present their side of the case.

12. In view of the above discussion and analysis, I find the impugned orders are liable to be set aside. The appeals are to be allowed. Ordered accordingly, except with reference to the demand and recovery of Rs. 4,84,586/- of Cenvat credit on items

alleged to be found short, the matter has to be decided afresh by the Commissioner (Appeals).

13. The appeals are disposed of accordingly.

(Dictated and pronounced in open court)

(B. Ravichandran)
Member (Technical)

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