

IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL,
WEST BLOCK NO.2, R.K. PURAM, NEW DELHI-110066

BENCH-DB

COURT -IV

Excise Appeal No. E/3050/2009 Ex [SM]

[Arising out of Order-in-Original No. 45/CE JP-II/09 dated 28.08.2009
passed by the Commissioner, Central Excise Commissionerate, Jaipur-II.]

J.K Lakshmi Cement Ltd.

...Appellant

Vs.

C.C.E. Jaipur-II

... Respondent

Present for the Appellant : Mr. A. K. Prasad, (Advocate)

Present for the Respondent: Mr. G.R. Singh, D.R.

Coram: HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)

Date of Hearing: 14.09.2017

Pronounced on :_12.01.2018

FINAL ORDER NO. __50567/2018__

PER: S.K. MOHANTY

This appeal is directed against the impugned order dated 28.08.2009 passed by the Commissioner of Central Excise, Jaipur-II, wherein Cenvat Credit demand of Rs.19,52,920/- was confirmed along with interest and penalty of Rs.5,00,000/- was imposed on the appellant under Rule 15 of Cenvat Credit Rules, 2004.

2. Brief facts of the case are that the appellant is engaged in the manufacture of cement. One of the inputs used in such manufacture is pet coke, which is used as fuel. The appellant procures this input from M/s. Reliance Industries Ltd.,

Jamnagar, which is a 100% EOU. The Central Government vide Notification No.23/2003-CE dated 31.03.2003 provides exemption to excisable goods manufactured in an EOU and supplied to the domestic industries. The Central Excise duty payable by an EOU under the said notification is equal to the Basic Customs duty (+) CVD (+) Edu. Cess (+) SHE Cess on like goods imported into India. Notification No. 23/2003-C.E. dated 31.03.2003 was amended vide Notification No. 10/2008-C.E. dated 01.03.2008, wherein the concession available to EOUs in respect of Basic Customs duty was raised from 25% of the effective Customs Duty to 50% of the effective Basic Customs duty. In respect of raw-materials procured from EOUs, Rule 3 (7)(a) of the Cenvat Credit Rules, 2004 prescribes the formula, which the recipient unit should follow for taking of such credit of the Additional Duty (CVD) amount. The formula prescribed in Rule 3(7)(a) *ibid* was in consonance with the notification dated 31.03.2003. However, when the said notification was amended on 01.03.2008, to raise the concession from 25% to 50% of the effective Customs duty, no corresponding changes were made in Rule 3(7)(a) *ibid*. The amendment was made subsequently on 05.12.2008 vide Notification No. 48/2008-C.E. (N.T.). Since, the appellant had availed Cenvat credit of the CVD amount as per the formula prescribed under Notification No. 10/2008-C.E., dated 01.03.2008, the department has objected to such availment of credit and confirmed the adjudged demand.

3. The Id. Advocate appearing for the appellant submitted that the amendment to Rule 3(7)(a) *ibid* should have the retrospective effect inasmuch as, the Notification dated 01.03.2008 had effectively raised the CVD component payable by an EOU. Thus, he submitted that the cenvat credit taken by the appellant on the inputs as per the prescribed rate of duty under Notification dated 01.03.2008 cannot be denied. He further submitted that since Rule 3 (7) (a) *ibid* was amended by Cenvat Credit (Second Amendment) Rules, 2008 through substitution of the new formula, in place of the old one, such substitution will date back to the issuance of Notification dated 01.03.2008. To support such stand, the Id. Advocate has relied on the judgement of the Hon'ble Supreme Court in the case of Government of India vs. Indian Tobacco Association – 2005 (187) ELT 162 (SC) and Collector of Central Excise, Shillong vs. Wood Craft Products Ltd. – 1995 (77) ELT 23 (SC).

4. On the other hand, the Id. D.R. appearing for the Revenue submitted that since Rule 3(7)(a) *ibid* prescribes the formula for taking cenvat credit by the assessee in the manner prescribed, the same has to be strictly adhered to by the appellant. Further, he also submitted that the amendment of Rule 3 (7) (a) of the rules on 05.12.2008 will be applicable prospectively, inasmuch as, the second amendment Rules of 2008 clearly provides that the said rules shall come into force on the date of their publication in the Official Gazette. He has relied on the judgment of Hon'ble Delhi High Court in the case

of Principal Commr. of S.T., Delhi-I vs. T.T. Ltd. – 2016 (45) STR 25 (Del.) and affirmed by the Hon'ble Supreme Court, reported in 2017 (48) STR J 195 (S.C.), to state that amending notification cannot have the retrospective effect, unless and otherwise, so prescribed.

5. Heard both sides and examined the case records.

6. Payment of Central Excise duty by the EOUs is governed under the base notification dated 31.03.2003 and subsequent amended notification dated 01.03.2008. The said notifications providing the exemption/concessions are applicable only to the EOUs, on removal of excisable goods to the domestic area. The supplier, in this case, M/s Reliance Industries Ltd. had discharged the duty liability in terms of the above referred notifications for supplying the goods to the appellant. So far as the appellant is concerned, it is an assessee under the Central Excise statute, duly recognized as a manufacturer of excisable goods. The provisions of EOU or Export/Import Policy is not applicable to it and the obligations under the statute has been cast on it to comply with the statutory provisions and for payment of duty on clearance of the finished goods manufactured by it. Since, the appellant has availed the Cenvat credit of CVD amount paid on the inputs; it is required to comply with the provisions of the Cenvat statute. At the time of taking Cenvat credit on the disputed inputs, the appellant did not comply with the conditions/formula laid down

in Rule 3(7)(a) of the Cenvat Credit Rules, 2004, existed at the material time. Rather, it had taken Cenvat credit of the CVD amount paid by the supplier as per the notification dated 31.03.2003 read with notification dated 01.03.2008. The fact is not under dispute that the said notifications are not applicable to the appellant as a domestic manufacturer of excisable goods. Accordingly, the appellant cannot plead that the Notification No. 48/2008-C.E.(N.T.), dated 05.12.2008, issued subsequently, providing the formula for Cenvat credit will be applicable with retrospective effect. Further, the said notification nowhere prescribed that the same will have the retrospective operation. In this context, the law is well settled that in absence of any express provision contained in notification, ordinarily it cannot be presumed that same is retrospective in nature. Thus, in my considered view, the formula prescribed in notification dated 05.12.2008 will be effective prospectively, from its date of publication in the Official Gazette. Accordingly, I am in agreement with the impugned order, so far as it confirmed the Cenvat demand alongwith interest on the appellant.

7. The issue decided by the Hon'ble Supreme Court in the case of India Tobacco Association (*supra*) is entirely different than the case in hand, inasmuch as, while interpreting the word "substitute" used in the amending notification dated 27.11.1997, the Hon'ble Court have held that by virtue of amendment in the base notification dated 07.04.1997, a

mistake was rectified, by way of substitution of other seaports/ICD, from where the similarly placed exporters were exporting the goods. Similarly, in the case of Wood Craft Products Ltd. (supra), it has been held that the product "block board of all kinds" was already included in the entry of Heading 44.08, as "similar laminated wood" and accordingly, the Hon'ble Apex Court held that the amending notification merely clarified and made explicit, that which was implicit in the heading throughout. Contrary is the position in the present case, in as much as, the base notification dated 31.03.2003 and the amending notification dated 01.03.2008 are intended only for the goods manufactured in the EOU Units and not by the domestic industries. Thus, the formula prescribed in Rule 3(7) of the Cenvat Rules, at the relevant point of time, was only applicable for taking of appropriate Cenvat credit. In other words, since the exemption provided in the above notifications is no way concerned or connected with taking of Cenvat credit as per the prescribed formula in Rule 3(7) *ibid* by the domestic industry, it cannot be said that the amending notification dated 05.12.2008 in the Cenvat statute is clarificatory in nature and will date back to the issuance of notification dated 01.03.2008 in respect of duty payable by the EOU units. Therefore, the judgments relied on by the Id. Advocate for the appellant are distinguishable from the facts of the present case. Rather, I find support from the judgment of Hon'ble Delhi High Court in the case of T.T. Limited (supra), relied on by Revenue, wherein it has been held that if the amending notification is

clarificatory, then there should be something enunciated in original/base notification itself.

8. In this case, since the appellant has taken Cenvat credit due to wrong interpretation of the statutory provisions, it cannot be said that it had indulged into the activities of fraud, collusion etc. Therefore, in my considered view, the provisions of Rule 15 of the Cenvat Credit Rules, 2004 cannot be invoked against the appellant for imposition of penalty.

9. In view of the above discussions and analysis, I do not find any infirmity in the impugned order, so far as it confirmed the Cenvat credit and interest demand on the appellant. Accordingly, the appeal to such an extent is dismissed. The appeal is partly allowed to the extent of setting aside the penalty imposed on the appellant.

10. The appeal is disposed of in above terms.

[Pronounced in the open Court on____12.01.2018____]

(S.K. MOHANTY)
MEMBER (JUDICIAL)

Sakshi