CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD
Bench – SM
Court – I

Appeal No. ST/31139/2017

(Arising out of Order-in-Appeal No. HYD-SVTAX-000-APP-0161-17-18-ST dated 31.07.2017, passed by Commissioner(Appeals-II) Hyderabad.)

Gland Pharma Limited **....Appellant(s)**

Vs.

CCT - Hyderabad **.....Respondent(s)**

Appearance
Sh. Joseph Dominic, Advocate for the Appellant.
Sh. P.S. Reddy, (Asst. Commissioner) for the Respondent.

Coram:
Hon'ble Mr. M. V. RAVINDRAN., MEMBER (JUDICIAL)

Date of hearing: 05/02/2018
Date of decision: 05/02/2018

FINAL ORDER No.______________________

This appeal is directed against Order-in-Appeal No. HYD-SVTAX-000-0161-17-18-ST dated 31.07.2017.

2. Heard both sides and perused the records.

3. The relevant facts of the case are

"that the appellant, holds centralized registration for various services; allotted STC No.AAACG8036BST001. An audit intervention occurred when it was observed that for the years 2011-12 to 2013-14 [material period], the appellant split their input services into three categories, namely (A) input

services used in dutiable goods; (B) input services used in exempted goods; and (C) input services used commonly in both, where availment is 100%, 0% and 54% respectively, based on previous years' turnover. In terms of Rule 6(3A)(iii) of the Cenvat Credit Rules (CCR) 2004, the element "G" of the formula represents Total input services credit availed during the month, for application in the formula to determine credit attributable to exempted goods/services. However, the appellant had adopted only the credit of common input services [element (C) above] instead of total input services credit availed [pertaining to A+B+C above] for "G", in Rule6(3A)(b)(iii). Similarly, while reversing the credit, the appellant adopted incorrect value for the element "P" in the formula prescribed in Rule 6(3A) (c)(iii). Such incorrect adoption of values for "G" and "P" in the formula prescribed in Rule 6(3A)(c)(iii). Such incorrect adoption of values for "G" and "P" resulted in short-reversal / excess availment of credit to the extent of Rs. 30,13,366 for the material period. It was also viewed that the appellant committed gross violations with malafide intent unearthed only during the audit intervention, meriting the invocation of the proviso to Sec 73(1) in proposing the demand for reversal of the excess credit so quantified, with interest and penalty under Sec 75 and 78 respectively.

2.1. A show cause notice Sl.No.90/2015-16/ADC dated 28.03.2016 in C.No.V/30/71/2015-16-MIS-II was issued, raising the demand proposals; and adjudicated in the impugned order, culminating in the instant appeal. The lower authority confirmed the demand for recovery of excess credit of 30,13,366 under Rule 14 CCR 2004, along with interest; and imposed a penalty of Rs. 30,13,366 under Rule 15 ibidem read with Sec 78 supra. He held inter alia that the appellant opted for proportionate reversal under Rule 6(3A), in accordance with the option exercised under Rule 6(3)(ii); that the multiplication factors, i.e. elements "G" and "P" in Rules 6(3A)(b)(iii) and 6(3A)(iii) have been incorrectly adopted; that the ratios of the Tribunal ruling cited at Para 8.1.7 and 8.1.10 of the impugned order squarely applied to the instant case; and that the malfeasance warranted the penalty imposed."

The appellant contested Order-in-Original before the first appellate authority on merits as well as on limitation, after rejecting contentions, the

Adjudicating Authority confirmed the demands with interest and imposed penalties; the first appellate authority upheld the Order-in-Original.

4. Ld. Counsel submits that the issue can be decided from limitation angle itself; the issue is regarding availment of Cenvat Credit which according to the revenue is irregularly, wrongly availed; the same was known to authorities and returns were filed and the records were audited, accordingly there cannot be a allegation of misstatement or suppression of facts. He would rely upon the judgement of Hon'ble High Court of Karnataka in the case of MTR Foods Ltd., 2012 (282) E.L.T. 196 (Kar.), followed by the Tribunal in the case of Seema Electric Lighting Products India Pvt. Ltd., 2015-37-STR-754 (Tri.-Ahmd) which was upheld by the Gujarat High Court as reported in 2015-37-STR-718 Gujarat.

5. Ld. Departmental representative reiterates the findings of the Adjudicating Authority and the first appellate authority on the limitation and on merits.

6. On careful consideration for the submission made by the both sides. I find that the issue is of availment of Cenvat Credit during the period 2011-12 to 2013-14 on common inputs and reversal of credit attributable to inputs consumed in exempted goods.

7. Show Cause Notice is issued on 28.03.2016 for reversal of Cenvat Credit attributable to the inputs used for exempted goods under provisions of Rule 6(3A) of Cenvat Credit Rules, 2004. It is on record and undisputed that records of appellant were checked by audit party. It was specifically

pointed out by Ld. Counsel to the lower authorities that the audit of the appellant's units, was under taken regularly and no contravention was noticed, hence different view of the second audit party could not claim suppression of facts for invoking extended period for demand. I find it correct and concur with the proposition.

8. I find strong force in the submissions made, as the judgement of the Hon'ble High Court of Karnataka in the MTR Foods Limited has been followed by the various decision of Tribunal and the ratio is squarely applicable in the case in hand. I respectfully reproduce the ratio in paragraph No. 3 & 4 from the judgement in the case of MTR foods.

> *"3. The learned counsel appearing for the Revenue submits that the defect was noticed in September, 2004, and the proceedings initiated on 25-09-2007 was well within the period of 5 years and therefore the Tribunal was not justified in setting aside the order on the ground of limitation. Section 11A on which reliance is placed reads as under:*
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> *11A. Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded. – (1) When any duty of excise has not been levied or paid or has been short-levied or short-paid or (erroneously refunded, whether or not such non-levy or non-payment, short-levy or short payment or erroneous refund, as the case may be, was on the basis of any approval, acceptance or assessment relating to the rate of duty on or valuation of excisable goods under any other provisions of this Act or the rules made there under), a Central Excise Officer may, within (one year) from the relevant date, serve notice on the person chargeable with the duty which has not been levied or paid or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:*
>
> *Provided that where any duty of excise has not been levied or paid or has been short levied or short-paid or erroneously refunded by reason of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made there under with intent to evade*

payment of duty, by such person or his agent, the provisions of this sub-section shall have effect, [as if for the words (one year), the words "five years" were substituted:

Sub-Section (1) of Section 11 provides for a period of one year as the period within which recovery of dues not levied or not paid or short levied or erroneously levied could be recovered. If the case falls under the proviso such as the duty has not been levied by reason of fraud, coercion or wilful suppression of facts or contravention of any of the provisions of this Act or the Rules made there under with an intent to evade payment of duty by such person or his agent then 5 years is the period prescribed for initiating proceedings.

4. As is clear from the material on record, the returns were filed promptly. In the returns it is clearly mentioned that they availed credit under the aforesaid rules. The audit partly accepted the same. It is only in the second audit that they noticed the mistake and initiated proceedings. Therefore, in the light of the aforesaid facts none of the other conditions prescribed in the Proviso exists in this case to extend the period of limitation of 5 years. It is in this background the Tribunal was justified in setting aside the order passed by the appellate authority and in restoring the order passed by the original authority. Therefore, there is no merits in this appeal. Accordingly, it is dismissed."

Respectfully following the above reproduced ratio, I hold that the show cause notice dated 28.03.2016, is wrongly invoking extended period for demand hence, impugned order is liable to be set aside on limitation. Accordingly, the impugned order is set aside and the appeal is allowed on limitation.

(Operative part of this order was pronounced in court
on conclusion of hearing)

(M.V. RAVINDRAN)
MEMBER(JUDICIAL)

Swapna….