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

Appeal No. E/103/2010

(Arising out of Order-in-Appeal No.32/2009 dated 25.09.2009 passed by CCCE & ST (Appeals I & III), Hyderabad)

Ashirwad Steels & Industries Ltd ….. Appellant(s)

Vs.

CCCE & ST, Hyderabad - III ….. Respondent(s)

Appearance
Shri K. Nagaraja Rao, Advocate for the Appellant.
Shri Pawan Kumar, Superintendent/AR for the Respondent.

Coram:
HON'BLE Mr. M.V.Ravindran, MEMBER (JUDICIAL)
HON'BLE Mr. P. Venkata Subba Rao, MEMBER (TECHNICAL)

Date of Hearing: 08.08.2018
Date of Decision: 08.08.2018

FINAL ORDER No. A/31006/2018

[Order per: P.V. Subba Rao.]

1. This appeal is filed by the appellant against the Order-in-Appeal No.32/2009 dated 25.09.2009.

2. The facts of the case are that appellant herein is a manufacturer of sponge iron and is registered with the Central Excise department and has been paying Central Excise duty. They have also been availing CENVAT credit. For the GTA services availed by them, they paid service tax on reverse charge mechanism and had taken credit of the same in their CENVAT account. During the period January, 2005 to January, 2009 they had utilized the CENVAT credit so taken towards payment of Central Excise

duty of their final product in violation of Rule 3(4) of CENVAT Credit Rules, 2004 inasmuch as, they have utilized the credit in excess of what was available in their account at the close of the month during which the goods were cleared. The assessee is required to pay duty by the 5th of the close of every month using either CENVAT credit or in cash. However, the CENVAT credit which they can use is only to the extent it is available in their balance on the close of the previous month for which the duty is being paid. In other words, if they got any credit in CENVAT account after the close of the month they cannot use it to pay duty. The appellant herein had utilized the credit which they had taken after the close of month and utilized the same towards payment of Central Excise duty and thereby violated Rule 3(4) of CENVAT Credit Rules, 2004. A show cause notice dated 12.03.2009 was issued to them demanding an interest of Rs.1,27,426/- on the mis-utilized CENVAT credit of Rs.1,41,78,112/- during the period under Rule 14 of CENVAT Credit Rules read with Sec.11AB of the Central Excise Act. It was also proposed to impose penalty on them under Rule 25 of Central Excise Rules for contravention of Rule 8 of Central Excise Rules, 2002. It is further proposed to impose on them, a penalty as per Rule 15 of CENVAT Credit Rules, 2004 read with Sec.11AC of the Act for contravention of Rule 3(4) of the CENVAT Credit Rules, 2004. After following due process of law, the lower authority confirmed the demands as proposed and imposed a penalty of Rs.10,000/- on the assessee under Rule 15 of CENVAT Credit Rules, 2004 and imposed a penalty of Rs.1,41,78,112/- under Rule 25 of the Central Excise Rules, 2002 for contravention of Rule 8 of Central Excise Rules, 2002. Thus the amount of penalty imposed on the assessee is equal to the amount of duty which they have not correctly paid (by utilising CENVAT credit wrongly).

Aggrieved, the appellant preferred an appeal before the first appellate authority who, vide the impugned order rejected the appeal and upheld the Order-in-Original. The assessee filed this appeal against the impugned order. They do not dispute the facts of the case. They also do not dispute that they had wrongly utilized the CENVAT credit during the period of dispute. They appealed on the following grounds:

(a) The issue involves a bonafide mistake of utilising the CENVAT credit wrongly in violation of Rule 3(4) and there is no demand of duty in the show cause notice itself. Therefore, there is no evasion of duty or an allegation to this effect.

(b) The proceedings were initiated on the basis of their monthly returns, which along with challans, were available with the department for scrutiny and hence, the allegation of intention to evade is not sustainable.

(c) They have been submitting both the ST-3 and ER-1 returns to the same range and not to two different formations and hence, the range was fully aware of their activities.

(d) At any rate, the alleged non-payment of Central Excise duty amounts to only late payment by 2 to 5 days and hence, they are not liable for penalty.

(e) Rule 25 of Central Excise Rules, 2002 is a penal provision but it must be read with Sec.11AC. Sec.11AC mandates penalty equal to duty evaded or short paid or not paid. Since there is no demand of duty in the notice itself, no penalty under Sec.11AC read with Rule 25 can be imposed. Rule 15 of the CENVAT Credit Rules, 2004 permits imposition of maximum penalty of

Rs.2,000/- only during the relevant period and hence, imposition of penalty of Rs.10,000/- under this rule is not correct.

(f) There is no suppression of facts as all records were available with the Central Excise department and they were fully aware of the details of their activities.

(g) There was no financial accommodation to the appellants since they had discharged both Central Excise duty and service tax on GTA services under reverse charge mechanism and had taken credit of the service tax so paid which they are entitled to but had wrongly used it immediately for payments of duty. Therefore, the entire exercise is revenue neutral. Since, there is no notice for demand of duty, interest should not be charged either.

3. Learned Counsel for the appellant reiterated the above submissions. Learned departmental representative reiterated the arguments made in the Order-in-Original and Order-in-Appeal. We have carefully considered both sides. The appellant had cleared goods and had paid Central Excise duty by the due date by wrongly utilizing the CENVAT credit which was taken after the close of the month in violation of Rule 3(4) of the CENVAT Credit Rules, 2004. The show cause notice does not propose to demand Central Excise duty. The penalty under Rule 25 read with Sec.11AC equal to the amount of duty is unsustainable because there is no demand for duty at all. We, therefore, find that the penalty of Rs.1,41,78,112/- imposed upon the appellant is liable to be set aside and we do so. As far as the penalty under Rule 15 of CENVAT Credit Rules for contravention of Rule 3(4) is concerned, we find the same is imposable but the maximum amount during the relevant

period is only Rs.2,000/-. Therefore, the penalty needs to be restricted to this extent. As far as the interest under Rule 14 of CENVAT Credit Rules, 2004 read with Sec.11AB is concerned, we find when the CENVAT credit is wrongly taken or utilized, an interest thereon is recoverable under Rule 14 of the CENVAT Credit Rules, 2004 and therefore, we find no reason to interfere with the interest imposed on them. In view of the above, we pass the following order.

(i) The interest imposed under the Order-in-Original is upheld.

(ii) The penalty under Rule 15 of CENVAT Credit Rules is reduced to Rs.2,000/-

(iii) The penalty under Rule 25 of Central Excise Rules, 2002 read with Sec.11AC is set aside.

4. The appeal is disposed of as indicated herein above.

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

(P.VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

(M.V. RAVINDRAN)
MEMBER (JUDICIAL)

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