CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD

Division Bench
Court – I

Appeal No. E/1073/2009
(Arising out of Order-in-Appeal No. 80/2009 (H-1) CE, dated 28.08.2009 passed by CCCE&ST, Hyderabad)

Alumeco India Extrusion Ltd. .. Appellant

Vs.

CCE C&ST, Hyderabad-I .. Respondent

Appearance
Shri S Sunil, Advocate for the Appellant.
Shri Guna Ranjan, Superintendent /AR for the Respondent.

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

Hon'ble Mr. P.V. SUBBA RAO, MEMBER (TECHNICAL)

Date of Hearing: 10.09.2018
Date of Decision: 10.09.2018

FINAL ORDER No.A/31217/2018

[Order per: Mr. M.V. Ravindran]

1. This appeal is directed against Order-in-Appeal No. 80/2009 (H-1) CE, dated 28.08.2009.

2. The relevant facts that arise for consideration after filtering out unnecessary details are the appellant herein are engaged in the

manufacture of Aluminium extrusions/profiles availing the CENVAT credit on inputs and capital goods as per CENVAT Credit Rules, 2004; imported certain inputs under advance licence scheme without payment of applicable customs duty, in terms of Notification No. 93/2004-Cus, dated 10.09.2004; during an investigation it was noticed that on stock verification the inputs imported without payment of duty were found short. Proceedings were initiated to demand appropriate customs duty on raw material found short. Appellant on receipt of show cause notice, approached the Settlement Commission for settling the case as provided under section 127 of the Customs Act, 1962 accepted the shortages pointed out by DRI. Subsequently on making the payments of customs duty as per the direction of the Settlement Commission, appellant availed CENVAT credit of the duty paid in the proceedings before the Settlement Commission. A show cause notice was issued for demanding such CENVAT credit availed by the appellant alleging that having settled the matter before the Settlement Commission, there can not be any availment of CENVAT credit on the amounts so paid as full duty. The said show cause notice was defended. Adjudicating authority, after following due process of law, confirmed the demands raised alongwith interest and also imposed penalties. Aggrieved by such an order, an appeal was preferred before the first appellate authority, who also after following due process of law, did not accept the contentions raised by the appellant and upheld the Order-in-Original. Hence this appeal.

3. Ld. Counsel after giving overall view of the litigation initiated by the departmental proceedings in the show cause notice issued by DRI, submits that only reasoning of the lower authorities for denying the CENVAT credit of the CVD paid on the amounts settled before the Settlement Commission is that the said amount has to be considered as amount paid in settling the issue and cannot be considered as eligible for availment of CENVAT credit. Subsequently he draws our attention to the provisions of Rule 3 and Rule 4 of CENVAT Credit Rules, 2004 and submits that the said rules do not contemplate for denying the CENVAT credit to appellant on this ground. He would submit that there is no dispute with regard to receipt of the inputs in the factory of the appellant as can be seen from the first show cause notice issued by DRI. It is his submission that the inputs were received in the factory and has been evidenced by various documents by appellant before the lower authorities in the proceedings initiated by DRI and also before the lower authorities in this appeal. It is his submission that the ratio of the decision of the Tribunal in the case of CCE, Pune-II vs. Shreem Capacitors Pvt. Ltd. [2017(348)E.L.T 355 (Tri.-Mumbai)] and reads exhaustively on the said decision. He submits that even the adjudicating authority has recorded that appellant had produced various documents to show receipt of the goods in the factory premises. It is his submission that in order to get these goods, they had settled the issue with the Settlement Commission in respect of the shortage of inputs procured without payment of duty under Advance Licence.

4. Ld. DR on the other hand submits that appellant herein had settled the issue before the Settlement Commission wherein they are required to make full and disclosure of the facts for settling the case; that having settled the issue before the Settlement Commission, it would mean that appellant had accepted the shortages of the inputs and CENVAT credit cannot be availed on the inputs which are not used for manufacture of final products. Another point raised by him is that when the appellant had availed the CENVAT credit no documents were available and had availed the credit on TRC challans which is incorrect. He relies upon the decision of Hon'ble Apex Court in the case of Sanghvi Reconditioners Pvt. Ltd. vs. Union of India [2010 (251)E.L.T 3 (S.C.)] for the proposition that appellant cannot resile from his pleadings before the Settlement Commission and can not wake up now with new point for the issue already settled before the Settlement Commission and hence CENVAT Credit availed is correctly denied. He would submit that the decision of the Settlement Commission has attained the finality and hence the stand taken by the appellant before the Tribunal in availing the CENVAT Credit is amounting to seeking reopening of the decision of the Settlement Commission.

5. Heard both sides and perused the records.

6. On perusal of records, we find that the only issue that arises for consideration by this Bench in the present appeal is whether the reasoning adopted by lower authorities for denying the CENVAT credit availed by the

appellant are correct or otherwise. Undisputed facts are that appellant availed the benefit of Customs Notification by procuring inputs without payment of duty under Advance Licence Scheme; that the goods were received in the factory premises and accounted for in the records maintained; that there was shortage of inputs when the officials of DRI visited the premises of the appellant; show cause notice issued by DRI demanding the customs duty for the shortages of the material was settled by the appellant in the Settlement Commission; they had discharged the appropriate Customs duty as per the orders of the Settlement Commission; availed CENVAT Credit of only the CVD paid in the amounts discharged by them for orders of the Settlement Commission.

7. On this factual matrix, it has to be seen whether the CENVAT Credit availed by the appellant is correct or otherwise. It is to be noted that there is no allegation of diversion of the materials/inputs procured without payment of customs duty nor there is any allegation that there was clandestine manufacture and clearance of finished goods out of the inputs found short during the visit of the DRI Officers.

8. We find that similar issue was decided by the Tribunal in the case of Shreem Capacitors Pvt. Ltd. (supra) (wherein one of us Shri M.V. Ravindran was also a Member). The order of the Tribunal being directly on the point, is reproduced in its entirety.

“This appeal is directed against Order-in- Appeal No. PII/BKS/275/2005 dated 24.06.2005.

2. Heard both sides and perused the records.

3. On perusal of the records, we find that the issue involved in this case is regarding the allegation that the respondent are not entitled to the cenvat credit as the same has been taken on countervailing duty which became recoverable by allegation of fraud, mis-statement or suppression of fact etc. The respondent herein were importing various goods and claiming the benefit of notification 25/99-Cus which allowed them concessional rate of duty. On an investigation conducted by the DRI it was noticed that the respondent is not eligible for the said exemption. A show-cause notice was issued to the respondent who settled the issue by taking the matter to the Settlement Commission and paid the customs duty/CVD and other duties as directed by the Settlement Commission. The respondent availed the cenvat credit of such CVD paid by them in furtherance of the order of the Settlement Commission. It is the case of the revenue that respondent is not eligible for CVD credit as the said CVD was paid after the issuance of show-cause notice which invoked the extended period and alleged suppression and mis-statement of facts. Ld. adjudicating authority confirmed the demands raised. First appellate authority held that the impugned order was incorrect as the amount which has been settled by the respondent before the Settlement Commission and availed cenvat credit cannot be reopened.

4. Ld. Departmental Representative would submit that once there is an allegation of suppression of facts and in a statement the entitlement availed cenvat credit of such an amount is barred by Rule 7 of Cenvat Credit Rules. He would also submit that Settlement of the case by the appellant before the Settlement Commission cannot be considered as clean chit given for mis-statement and collusion and has to be considered as an amount have been paid due to mis-statement or suppression of fact and hence credit is deniable. It is his submission that the decision of the Bombay High Court in the case of Indorama Synthetics (India) Ltd. vs. UOI 2013 (290) ELT 208 is applicable as in that case the Hon'ble High Court has settled the law as to what is the effect

of order of Settlement Commission. He would also rely upon the judgment of the Larger Bench Tribunal in Bosch Chassis Systems India Ltd. 2008 (232) ELT 622 for the same proposition.

5. Ld. counsel would submit that the Larger Bench decision relied upon by the departmental authorities is in fact supporting his case. He would submit that reliance is placed on the judgment of the Tribunal in the case of Indian Oil Corporation Ltd. 2011 (274) ELT 561 for the proposition that a settlement before the Settlement Commission is not admission of guilt and hence cenvat credit availed is correct. He would submit that it has been held by the Hon'ble High Court of Delhi in Ashwani Tobacco Co. Pvt. Ltd. 2010 (251) ELT 162 that the Settlement Commission is not an adjudicating authority and order of settlement is not an adjudication order.

6. We have considered the submission made by both sides.

7. We find that the first appellate authority has in para 4 and 5 of the impugned order recorded clearly how the order passed by the Settlement Commission is not an adjudication order and as per section 127J of the Customs Act, 1962 is an order of settlement between the department and the assessee and it cannot be reopened.

8. We find strong force in the contention of the counsel that denying cenvat credit which is availed of the CVD paid in pursuance of the order issued by the Settlement Commission would be in fact reopening the entire issue which is already settled. Be that as it may, the decision of the Hon'ble High Court of Bombay in Indorama Synthetics (India) Ltd. is directly on the point inasmuch as the order of the Settlement Commission is not an adjudication order and is settlement of the case. Availing of cenvat credit on the amounts settled before the Settlement Commission is not barred by any provision of the Cenvat Credit Rules, 2004. In the absence of any provisions, we do not find any reason to interfere in the reasoned order passed by the first appellate authority.

> 9. In view of the foregoing, in the facts and circumstances of the case, we uphold the impugned order and reject the appeal."

9. In view of the fact that similar identical issue stands decided by the Tribunal; it is in favour of the assessee appellant , respectfully following the same and in the facts and circumstances of the case, we hold that the impugned order is unsustainable and liable to be set aside and we do so.

10. Impugned order is set aside and appeal stands allowed.

(Operative portion of the order pronounced in open court on conclusion of hearing)

(P.VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

(M.V. RAVINDRAN)
MEMBER (JUDICIAL)

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