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

Division Bench
Court - I

Appeal No.	Appellant	Respondent	Impugned Order
E/581-583/2008	ITC Ltd	CCCE, Hyderabad-III	OIA: 35, 36 & 37/2008 dt.30.4.2008 passed by CCCE, Hyderabad-III
E/106/2009		CCCE & ST, Hyderabad-I	OIA: 22/2008 dt.31.10.2008 passed by CCCE & ST, Hyderabad-I
E/174/2009	CCCE, Hyderabad-III	ITC Ltd	

Appearance:
Shri J P Khaitan & Shri G. Prahlad, Advocates for the Appellant
Shri Arun Kumar, Joint Commissioner/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: 29.01.2019
Date of Decision: 14.03.2019

FINAL ORDER No. A/30352-30356/2019

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

1. All these appeals pertain to the same issue and hence are being disposed of together.

2. The appellant is a manufacturer of paper and paperboards using imported waste paper as raw material. Waste paper is unconventional raw material for manufacture of paper and paperboards classified under Chapter heading 4707 of the Customs Tariff. The appellant imports this material and uses it to manufacture paper. When the waste paper is imported it often contains some non-paper content like plastic and metal waste and scrap. The question as to how such material should be classified and charged to customs duty was considered by the Hon'ble Tribunal-Chennai in the case of ITC Ltd [2016 (336) ELT 365] and it was held that non-paper waste contained in the imported material is chargeable to merit rate of duty under

the respective under the respective Chapter headings in Chapter 39 and 72. The Tribunal also held that non-paper waste is liable under confiscation under Sec.112 of Customs Act and penalties are imposable under Sec.114(a). The appellant filed an appeal before the Hon'ble Supreme Court vide Civil Appeal No.1398/2016 which has been admitted but there is no stay against the order of the Tribunal.

3. The dispute involved in the present appeals relates to disallowance of the credit of Additional Duty of Customs paid by the assessee on consignments of waste paper imported. The Asst. Commissioner of Customs permitted provisional release of the consignments of the mixed waste paper provisionally treating 12% of each consignment as plastic waste and 5% as metallic waste. The provisional assessment was to be finalized on production of certificate from Central Excise having jurisdiction of the factory indicating the actual quantities of plastic and metal wastes and scrap. Based on the provisionally assessed bills of entry the appellants have taken credit of additional duty in respect of the imported consignments irrespective of whether the bills of entry were assessed finally or provisionally and also irrespective of whether the material was assessed as paper waste or as plastic waste or metal waste. Show cause notices were issued denying proportionate credit of non-paper waste content. The first notice dated 28/07/2006 covering the period July, 2005 to September, 2005 was in respect of the bills of entry finally assessed under heading 4707 before the dispute regarding non-paper waste content arose. This show cause notice proposed to deny amount on credit proportionate to the quantity of the non-paper waste content found on segregation of imported consignments at premises of the assessee's job worker. The other three notices related to the period January, 2006 to November, 2007 covering both bills of entry

assessed under heading 4707 as waste paper before the dispute with regard to the non-paper waste content arose and also bills of entry provisionally assessed in terms of Asst. Commissioner's direction dated 01.03.2005 holding 83% of consignment as waste paper, 12% as plastic waste and 5% as metallic waste.

4. Learned counsel for the appellant submits that there is no dispute that the waste paper content of the consignments imported by them had more than 80% paper content and some non-paper content. In terms of Rule 3(b) of Rules of Interpretation of Tariff, the mixture should have been classified as waste paper which gave the consignment its essential character. However, the customs authorities had not viewed it so as waste paper had a duty concession. In respect of 52 bills of entry, entire assessments were done under customs tariff heading 4707 holding the entire consignments as waste paper. In respect of the rest, the goods were classified under different headings and were charged to duty proportionately subject to the verification of the actual content on segregation at the assessee's/ their job worker's premises and certified by the Central Excise authorities. He would argue that when the entire consignment was classified as waste paper, there is no ground to deny them the credit on the ground that it also contains some non-paper material. The term 'input' as defined under Rule 2(k) of CENVAT Credit Rules, 2004 squarely covers the waste paper imported by them. Merely because some portion of the input goes as waste on segregation and does not form part of the final product, it is not a ground to deny them the credit of additional duty paid on such consignments. He would further submit that their process of manufacture of waste paper invariably requires segregation of imported material into paper waste and other material. Without segregation, manufacture cannot take place.

Therefore the process of segregation of inputs into waste paper, plastic waste and metallic waste should be considered as part of the manufacturing process and not as a process which precedes manufacturing. He relies on the judgment of the Hon'ble Supreme Court in the case of Collector Vs Rajasthan State Chemical Works [1991 (55) ELT 444 (SC)] wherein it was held that the process of segregation of raw material, though a preliminary one, is an integral part of the manufacturing process. He would argue they cannot be denied the credit of the CENVAT taken on the entire consignment.

5. In respect of those consignments where the assessment was done provisionally classifying the imported material as waste paper, plastic waste and metallic waste, classifying them under different headings also, he submits that although the assessment was done under three different headings (subject to finalization) of three materials indicated in the bills of entry were used in the manufacture of their final product inasmuch as the entire material had to be segregated before processing it further. This segregation is done at their job worker premises.

6. In view of the above, he would submit that the credit of additional duty paid by them on all the bills of entry whether or not entire consignment was classified as waste paper under chapter heading 4707 and whether or not the bills of entry were provisionally assessed and whether or not such provisional bills of entry were subsequently finalized, they are entitled to credit. He would further submit that at any rate the dispute involves interpretation of CENVAT Credit Rules and this being an interpretational dispute which is now pending before the Supreme Court no penalty should have been imposed upon them under Sec.11AC. In support of this contention, he relies on the following judgments.

a. Bata India Ltd v Special Director [1998 (66) ECC 278 (Cal)]
b. Commissioner v Rama Wood Craft Pvt Ltd [2008 (225) ELT 348 (Tri-LB)]
c. Chairman, SEBI v Shriram Mutual Fund [2006 (5) SCC 361]
d. Vee Kay Enterprises v Commissioner [2011 (266) ELT 436 (P & H)]

7. Learned departmental representative reiterates the findings of the lower authorities and asserts that the assessee is entitled to only such amount of credit as is equal to the additional duty of customs paid on the raw material used in or in relation to manufacture. The question whether entire mixture which is imported should be considered as waste paper or it should be treated as three different forms of waste classifiable under different headings as already been decided by the Tribunal Chennai in the assessee's own case (supra) and this decision has not so far been reversed by the Hon'ble Apex Court . Therefore, the ratio would apply.

8. Once the assessment is under three different headings they cannot take credit of such material which evidently is not waste paper and is in no way concerned with the manufacture of their final product but is of some other material. Therefore, the appeals may be rejected.

9. We have considered the arguments on both sides and perused the records. We find the question of interpretation of the Customs Tariff for classifying the imported goods is not a question before us. In these cases, the only dispute is whether or not the assessee is entitled to the benefit of CENVAT credit on the entire additional duty paid in the bills of entry. The question of classification has already been decided by the Tribunal Chennai in the assessee's own case and the matter is pending before the Hon'ble Supreme Court. Rule 2(k) of the CENVAT Credit Rules reads as follows:

"(k) "input" means-
(i) all goods, except light diesel oil, high speed diesel oil and motor spirit, commonly known as petrol, used in or in relation to the manufacture of final products whether directly or indirectly and whether contained in the final product or not and includes lubricating oils, greases, cutting oils, coolants, accessories of the final products cleared along with the final product, goods used as paint, or as packing material, or as fuel, or for generation of electricity or steam used in or in relation to manufacture of final products or for any other purpose, within the factory of production;
(ii) all goods, except light diesel oil, high speed diesel oil, motor spirit, commonly known as petrol and motor vehicles, used for providing any output service;
Explanation 1- The light diesel oil, high speed diesel oil or motor spirit, commonly known as petrol, shall not be treated as an input for any purpose whatsoever.
Explanation 2- Input include goods used in the manufacture of capital goods which are further used in the factory of the manufacturer; but shall not include cement, angles, channels, Centrally Twisted Deform bar (CTD) or Thermo Mechanically Treated bar (TMT) and other items used for construction of factory shed, building or laying of foundation or making of structures for support of capital goods"

10. As is evident from the term "input" what matters is which material has gone into the process of manufacture. It is true if some element of the input goes into waste, credit cannot be denied on that count. What is important is, what does the input invoice/ bill of entry say and how it classifies the input. As long as input bill of entry is assessed or the input invoice classifies the product in a particular way, it has to be followed unless the classification itself is challenged and modified in an appeal. In respect of bills of entry where the input is treated as waste paper unless such classification has been challenged and modified at the appellate stage, the appellant is entitled to CENVAT credit. It does not matter whether some portion of the waste paper so classified turns out to be non-paper content. Insofar as the bills of entry (whether provisional or final) where the inputs are classified under three different headings as waste paper, plastic waste and metallic waste is concerned, only the waste paper is an input which is used in the manufacture of the final product viz., paper and paperboards. The plastic waste and the metallic waste which are imported along with that in a mixed form are classified separately and no credit can be availed on such non-

paper waste which evidently does not form any part of the final product. The process of segregation only separates more clearly the three different wastes which were any way assessed separately to ascertain the exact quantities. Therefore, merely because material other than inputs which are already assessed separately are mixed up with the input, it cannot be said that such other materials which have nothing to do with the process of manufacture but are only mixed up with the inputs used in the manufacture at the time of input will not entitle them to credit. The case of Rajasthan State Chemical Works (supra) was on a different issue which was with reference to exemption for power used in or in relation to manufacture as per exemption notification. It was held that since the power was used for seperation of raw material without which further process cannot take place the assessee was entitled to the benefit of the exemption notification. Such is not the case here. In the above case, use of power was essential to segregate material for the manufacture of the product so that the materials which go into the manufacture are separated from those which do not. In this case what the assessee is claiming is credit on materials which do not go into the manufacture and which have been classified as other materials. Thus this case is different.

11. In conclusion, we hold that eligibility of CENVAT credit depends solely on raw material used and how it was classified in the input bills of entry/ invoices. The classification made in the bills of entry/ invoices cannot be changed while determining the eligibility of the CENVAT credit. Wherever the inputs bills of entry classified the product as waste paper, the appellant is entitled to the benefit of CENVAT credit on waste paper regardless of the fact that some component of such waste paper may be non-paper. Wherever the bills of entry have classified the inputs under different

headings, the appellant is entitled to the credit of additional duty paid on waste paper and not the credit of additional duty paid on plastic waste and metal waste. In view of the above, the appeals are disposed of as follows:

a) The appellant is entitled to the credit of duty paid on the waste paper as indicated in the bills of entry and is not entitled to credit of additional duty paid on plastic waste, metal waste etc.

b) As far as penalty under Rule 15 of CENVAT Credit Rules, 2004 is concerned, we find that the appellant could have been under the impression that they were entitled to the credit of CENVAT and hence no case is made out to impose a penalty under Rule 15 of CENVAT Credit Rules, 2004.

c) The penalties are set aside.

(Pronounced in the Open Court on 14.03.2019)

(P.VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

(M.V. RAVINDRAN)
MEMBER (JUDICIAL)

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