

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

Division Bench

Court – I

Excise Appeal No. 2246 of 2010

(Arising out of Order-in-appeal No.52/2010 (H-IV) CE dt.30.04.2010 passed by CCCE & ST
(Appeals-II), Hyderabad)

**Commissioner of Customs, Central Excise
& Service Tax, Hyderabad - IV**

Posnett Bhawan, Tilak Road, Ramkoti,
Hyderabad, Telangana – 500 001

.....Appellant

VERSUS

Lal Mahal Ltd

Sy.No.123, Plot No.10, Qutbullapur Mandal,
Jeedimetla, Hyderabad, Telangana – 500 055

.....Respondent

Appearance

Shri V.R. Pavan Kumar, Authorized Representative for the appellant.
Shri D.K. Singh, Advocate for the respondent.

Coram:

**HON'BLE MR. P. VENKATA SUBBA RAO, MEMBER (TECHNICAL)
HON'BLE MS. RACHNA GUPTA, MEMBER (JUDICIAL)**

FINAL ORDER No. A/30017/2020

Date of Hearing: 21.11.2019

Date of Decision: 21.01.2020

[Order per: P. VENKATA SUBBA RAO.]

1. This appeal is filed by the Revenue, originally decided by Final Order No.A/30562/2019 dt.04.06.2019. As the respondent had not been appearing, the matter was decided exparte after listening to the submissions by the Revenue.

2. Thereafter the respondent filed a miscellaneous application seeking to restore the appeal and hear them and pass a fresh order. By miscellaneous application No.30447/2019 dt.24.10.2019, a coordinate bench at Hyderabad allowed their application for restoration of appeal effectively setting aside the final order. The appeal has been directed to be listed for final hearing on 21.11.2019.

3. We have heard the learned counsel for the respondent and the learned departmental representative. The issue which falls for consideration in this case is whether the assessee/respondent is entitled to Cenvat credit on the Special Additional Duty (SAD) paid by them by debiting under Target Plus scheme as per notification No.32/2005-CUS dt.08.04.2005. Show cause notice No.74/2008 dt.31.10.2008 was served upon by the assessee proposing to deny the Cenvat credit of 4% SAD paid by them by debiting under the Target Plus scheme instead of paying in cash. This show cause notice was confirmed by the original authority by Order-in-Original No.33/2009 dt.31.10.2009. The respondent appealed to the first appellate authority who, by the Order-in-Appeal No.52/2010-CE dt.30.04.2010 (impugned order) allowed their appeal. Hence, this appeal by the Revenue. In the earlier final order, this bench relied on the judgments of the Larger Bench of the Tribunal in the case of Essar Steel Ltd vs CCE, Visakhapatnam [2004 (173) ELT 239], Mohan Breweries & Distilleries Ltd [2015 (325) ELT 42 (Mad.)] and CCCE & ST, Noida vs Precision Pipes & Profiles Co. Ltd [2014 (302) ELT 184 (All.)] and held that Cenvat credit was not available when the amounts were debited under licenses issued under schemes. Hence, the revenue's appeal was allowed. Para 4 to 8 of the final order are reproduced below:

"4. We have heard learned departmental representative. It is mentioned that the issue involved has already been decided by the Larger Bench of this Tribunal in the case of M/s Essar Steel Ltd Vs CCE, Visakhapatnam reported in 2004 (173) ELT 239. The appeal is accordingly prayed to be allowed.

5. After hearing and perusing the entire record, we observe that the issue herein is as to whether the appellant was not entitled to avail Cenvat Credit merely on the basis of debit in the pass book. As brought to our notice, the issue is no more *res integra*. The Larger Bench in the case of M/s Essar Steel Ltd (*supra*) has already held as follows:

"5. We have carefully considered the rival submissions. Modvat scheme is a special scheme where an assessee can avail of the duty paid on inputs as Modvat under certain conditions. One such condition is that duty should have been paid on the inputs. In the present case, no such duty has been paid by availing of the benefit of Notification 34/97. In the cases relied upon by the learned counsel for the appellant the Tribunal observed that the Department was standing on technicalities when it does not allow Modvat credit of duty paid by way of debit in the pass book while allowing credit of duty paid in cash. We, however, are unable to bring ourselves to agree with the above. Our reasons are recorded herein below:

6. Notification 34-97-Cus. exempts goods from payment of duty when the amount representing such duties is debited in the pass book. Thus a person who has not availed the benefit of the Notification and pays duties alone can take Modvat credit.

7. *We, therefore, answer the reference by holding that mere debit in the pass book is not sufficient for the eligibility of Modvat credit."*

6. Subsequently, the Hon'ble High Court of Madras while following the said adjudication in the case of *M/s Mohan Breweries & Distilleries Ltd* as reported in 2015 (325) ELT 42 (Mad.) has held as follows:

"11. Under Para 4.3.5 of the EXIM Policy, it was stated as follows:-

4.3.5. Normally, the exports made under the DEPB scheme shall not be entitled for drawback. However, the additional customs duty/excise duty paid in cash on inputs under DEPB shall be adjusted as Cenvat credit or Duty Drawback as per rules framed by the Department of Revenue. In cases, where the additional customs duty is adjusted from DEPB, no benefit of Cenvat/Drawback shall be admissible.

17. Under the Exemption Notifications, if the importers produced DEPB scrip and availed the exemption for clearance of goods, the goods become non-duty paid goods. The value of DEPB scrip, once used, gets extinguished and hence there would be no question of seeking Cenvat Credit thereafter."

7. Hon'ble High Court of Allahabad in the case of *CCE, C & ST, Noida Vs Precision Pipes and Profiles Co. Ltd* as reported in 2014 (302) ELT 184 (All.) had formed the similar opinion. Following the said adjudications, we hold that Commissioner (Appeals) had taken the wrong view while permitting the availment of Cenvat credit on the basis of mere entry in DEPB book. The order is therefore held unsustainable and is accordingly set aside.

8. *The appeal stands allowed."*

4. Learned counsel for the respondent would submit that while the aforesaid case laws pertain to DEPB and other schemes, the present appeal is specifically with respect to Target Plus scheme. The question to be addressed in this case is whether SAD paid through Target Plus scheme would be eligible for Cenvat credit or otherwise. He would submit that CBEC has issued a Circular No.18/2006-CUS dt.05.06.2006. Para 4 of which reads as follows:

"4. As regards the issue raised as to whether the duty debited through DEPB, DFCE, Target plus etc., schemes would be eligible for Cenvat benefit or drawback facility by the licence holder, it has been made clear in the Finance Minister's Budget speech that full credit of the 4% Special CVD will be allowed to manufacturers of excisable goods. Therefore, it is clarified that the 4% CVD duty debited in DEPB, DFCE, Target plus etc., certificates may be allowed to be taken back as drawback (brand rate). It may be mentioned here that under the Foreign Trade Policy, additional customs duty (CVD) debited in DEPB Scrips/ certificates issued under reward schemes is allowed to be taken as Cenvat/ drawback."

He would therefore, submit that with respect to the specific scheme and the SAD, it has been decided by the Board that Cenvat credit can be availed.

5. He also relies on the following judgment of the jurisdictional High Court of Andhra Pradesh in the case of RCC Sales (P) Ltd [2012 (281) ELT 682 (AP)] in which, jurisdictional High Court has held with respect to the specific scheme that Cenvat credit or drawback facility is available for the amounts debited under Target Plus scheme towards 4% SAD of Customs.

" This appeal under Section 30(G) of the Central Excise Act, 1944 is preferred by the revenue against the final order dated 21-5-2010 of the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Bangalore in Appeal No.Excise/1140/2009, whereby the appeal preferred by the Revenue was dismissed.

2. The appeal was filed against the Order-in-Appeal No. 08 of 2009 dated 30-9-2009, passed by the Commissioner of Central Excise, Customs and Service Tax (Appeals), Hyderabad. The respondents are manufacturers of Safety Razor Blades. A demand notice was issued to the respondents seeking demand of Cenvat credit availed by them in respect of Special Additional Duty of Customs debited in Target Plus/DEPB Scheme. The adjudicating authority dropped the proceedings initiated by a show cause notice; aggrieved whereby the Revenue preferred an appeal before the Commissioner (Appeals). The appellate authority, relying upon an earlier decision of the CESTAT in Mohan Breweries & Distilleries Ltd. - 2009 (240) E.L.T. 400 (Tribunal) dismissed the appeal and upheld the Order-in-Original. Aggrieved, the Revenue preferred a further appeal to the CESTAT.

3. In dismissing the appeal the CESTAT held, following the earlier decision in C.C.E., Hyderabad v. Aurobindo Pharma Ltd. - 2010 (261) E.L.T. 594 (Tribunal) that in view of the Circular No. 18/2006-Cus., dated 5-6-2006 holding that the duty debited through DEPB, DFCE, Target Plus etc. schemes would be eligible for Cenvat benefit or drawback facility by the licensed holder and full credit of the 4% Special CVD will be allowed to manufacturers of excisable goods and further clarified that 4% CVD duty debited in DEPB, EFCE, Target Plus etc. certificates may be allowed to be taken back at draw back (brand rate). As the primary and appellate authorities and the further appellate authority had calculated rightly, relying upon the Circular dated 5-6-2006 and an earlier decision of the Tribunal in Aurobindo (2 supra), no substantial question of law arises for consideration in this appeal.

4. The appeal is without merits and is accordingly dismissed at the stage of admission. No costs."

6. He would submit that this issue was raised by them before the original authority also, who, however, held that the relevant notification No.32/2005-CUS dt.08.04.2005 only provided for availment of credit of CVD equivalent to Central Excise duty leviable under sub-section (1) of section 3 of Customs Tariff Act. The same view has been taken in the present appeal by the revenue. However, a plain reading of the notification shows that Cenvat credit is allowed on Additional Duty leviable under section 3 of Customs Tariff Act. The relevant Para is as follows:

"(6) that the importer shall be entitled to avail for the drawback or CENVAT credit of additional duty leviable under section 3 of the said Customs Tariff Act against the amount debited in the said certificate."

7. This shows that any additional duty of customs leviable under section 3 can be taken as Cenvat credit even if the duty is paid by debiting under Target Plus scheme. Both the additional duty of customs levied under section 3(1) of the Customs Tariff Act and the Special Additional Duty (SAD) of customs levied under section 3(5) of the Customs Tariff Act are two forms of additional duties of customs levied under section 3. He would, therefore, submit that it is wrong to argue that SAD is not levied under section 3. It is, indeed, levied under section 3, although under a different sub-section. In view of the above, he prays that the revenue's appeal may be rejected.

8. We have considered the arguments on both sides and perused the records. Our earlier final order was based on the decisions of the Larger Bench of the Tribunal and the Hon'ble High Court of Madras in various related schemes such as DFCE, DEPB schemes. None appeared on behalf of the respondent during that period to argue their case. Now learned counsel for the respondent has submitted that the jurisdictional High Court of Andhra Pradesh has, with respect to the very specific scheme, viz., Target Plus scheme in the case of RCC Sales (P) Ltd (supra), held that Cenvat credit is available in respect of the SAD debited in Target Plus scheme. Respectfully following the judgment of the Hon'ble Jurisdictional High Court, we uphold the impugned order and reject the revenue's appeal.

9. The appeal is rejected.

(Pronounced in the open court on 21.01.2020)

(P.VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

(RACHNA GUPTA)
MEMBER (JUDICIAL)