IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA

EASTERN ZONAL BENCH: KOLKATA

Excise Appeal No. 324/2008

(Arising out of Order-in-Original No. 06/Denovo/Commissioner/08 dated-26.03.2008 passed by the Commissioner of Central Excise, Jamshedpur)

Commr. of Central Excise, JSR

Applicant (s)/Appellant (s)

Vs.

M/s. TISCO Tube Division

Respondent (s)

Appearance:

Shri S.S. Chattopadhyay, Supdt. (A.R.) for the Appellant (s)

Sri D.K. Dhar, Advocate for the Respondent (s)

CORAM:

Hon'ble Shri P.K.Choudhary, Member (Judicial)
Hon'ble Shri Bijay Kumar, Member (Technical)

Date of Hearing: 16.05.2018 ***Date of Pronouncement:12-06-2018***

ORDER NO. : F/O 76232/18

Per Shri Bijay Kumar

Present appeal has been filed by the Revenue against Order-in-Original No. 06/Denovo/Commissioner/08 dated- 26.03.2008 passed by the Commissioner of Central Excise, Jamshedpur. This order is passed in pursuance of this Tribunal's order No. A-188/Kol/2007 dated-22/02/2007 vide which the Order-in-Original No.34/03 dated-29/05/2003 was remanded to original authority for re-determination of the duty liability against the appellant after allowing them duty credit on the input used in the impugned goods and also taking into account the credit available in respect of duty paid on the impugned goods.

2. Brief fact of the case is that the respondent assessee had been availing the benefit of Notification No.281/86-CE dated April 24, 1986 as amended by Notification No. 64/94-CE dated-1.3.1994 for availing the exemption from payment of Central Excise duty on capital goods manufactured within the factory of production.

3. The benefit of captive consumption under these notifications were from 1/3/1994 till 15/3/1995. The benefit of captive consumption was again restored vide issue of Notification No. 67/1995-CE dated March 16, 1995. During the intervening period when there was no notification benefit for captively consumed goods, the respondent assessee was undisputedly required to pay the duty of Central Excise as applicable. But the de novo order that was passed as per the direction of this Hon'ble Bench, the Ld. Commissioner, after verifying the records of Modvat Credit available, has dropped the demand. Against this demand, Revenue has filed the appeal on the grounds;

> *"That the Commissioner erred in dropping the demand in view of the fact that the benefit under Modvat scheme is subject to fulfilment of certain conditions. As the assessee has not fulfilled those conditions, the Revenue is of the view that the benefit of Modvat Credit could not have been extended to them."*

4. Against this backdrop, we have heard the Ld. D.R. who stated that adjudication order passed by Commissioner (Appeal) is not in conformity with the provisions of Modvat rules because no declaration, that is required for availing the Modvat benefit, under erstwhile 57G of Modvat Credit Rule, was filed before the authority. And therefore, the benefit could not have been granted

to them. That, even the CESTAT, in case of Star Industries Vs.

Commissioner of Customs (Imports), RAIGAD, has held that the Revenue neutrality is not the ground for availing the benefit where there is need of fulfilment of all conditions envisaged in the modvat scheme. Further, the Ld. D.R. has relied the decision of Nitin Spinners Ltd. Vs. Commr. of Central Excise, Jaipur-II [2017 (355) ELT 562 (Tri.-Delhi) wherein in para 13 it is held that availability of credit cannot be presumed in order to contesting the duty liability of the appellant assessee which in term is applicable to the provisions of Act and notification thereon. Relevant para 13 of the aforesaid order is reproduced below:

> "......**13.** *The appellant-assessee emphasised that the demand is not tenable as there is revenue neutral situation resulting no addition to the Government revenue. We find that the concept of revenue neutrality cannot be considered as a bar for non-confirmation of tax dues, otherwise payable by the appellant-assessee. If that be so, then in many of the cases the appellant themselves can choose whether to pay duty on goods or services, when the credit is available; or to pay duty only on final product. Such discretion is not vested with taxpayer. This is very much against the concept of value added taxation. The argument that the appellant-assessee need not pay duty as the same is available for credit is against the appellant-assessee's own case. If that is the position, there is no need to fight against the present demand. Apparently, the point of revenue neutrality is being raised only to avoid interest payment as the duty has not been discharged in time. The concept of revenue neutrality may have relevance in order to determine the mala fide or bona fide intent of the assessee. The same cannot be pleaded for non-payment of tax itself. Even the availability of credit itself is subject to various conditions in terms of Cenvat Credit Rules, 2004. The availability of such credit cannot be presumed in order to contest the duty liability of the appellant-assessee, which is in terms of applicable provisions of the Act and the Notification thereunder. We have perused case laws relied upon by the appellant-assessee. No general law has been laid down in these decisions to support the case of the appellant-assessee. The decisions are on the facts applicable to the said case."*

5. On the other hand, the Ld. Advocate appearing on behalf of the respondent assessee has stated that the Commissioner has

done the adjudication as per the remand order, wherein direction was limited to verify the availability of modvat credit in respect of input and capital goods. The appellant assessee had been able to demonstrate the sufficient documentary evidence to prove that the credit is rightly available to them and the same has been considered appropriate by the Adjudicating authority. He further relied following case laws in support of his contention.

(i) Commr. of Central Excise, Pune Vs. Coca-Cola India Pvt. Ltd. - 2007 (213) E.L.T. 490 (S.C.)

(ii) Commr. of Central Excise & Customs, Vadodara Vs. Narmada Chematur Pharmaceuticals Ltd. -2005 (179) ELT 276 (S.C.)

(iii) Synpol Products Ltd. Vs. Commr. of Central Excise & Service Tax, Ahmedabad-II -2016 (335) ELT 697 (Tri.-Ahmd.)

In these Laws, it has been held that when there is Revenue neutrality, there is no question of raising any demand and confirmation thereof. Ld. Advocate further relied on the decision of Commr. of Customs (Preventive) Vs. National Steel & Agro Industries Ltd. [2015 (322) ELT 690 (Bom.)] wherein it is held that the adjudicating authority is not permitted to travel beyond the remand order. He, therefore, submits that the order of the adjudicating authority is in accordance with law and needs to be accepted as appropriate and proper.

6. We have considered the rival submissions and also perused the appeal records. As the issue is lying in a short compass that as to whether the de novo order has been passed as per the direction of this Hon’ble Tribunal regarding availability of Modvat credit during the disputed period, or not. The Adjudicating authority has

examined the relevant records and found that the respondent

assessee had produced the relevant records which substantiate beyond the doubt that modvat credit is available to them. Therefore whatever demand had been raised would be set off against the available Modvat credit. Further, after going through the grounds of appeal filed by the Department in appeal memorandum, we find the reviewing authority has relied on the decision in the case of K.V. Rao Vs. Commr. of Central Excise and Customs, Visakhapatnam [2008 (222) ELT 267 (Tri.-Bang.)] stating that though the Tribunal has allowed the benefit of Modvat credit and held that consequent to which entire exercise would be Revenue neutral but the said decision of Hon'ble CESTAT has not been accepted by the Department and the proposal has been sent to Board for filing appeal in the Hon'ble Supreme Court. However, we find that the department's appeal in this case has been dismissed by Hon'ble Supreme Court on 01.04.2016 as reported in the case of Commissioner Vs. K.V. Rao [2016 (337) ELT A41 (S.C.)]. After careful consideration of the various case laws brought before us by the Department as well as by the Ld. Advocate, we are of the view that the benefit of modvat credit is available to the respondent assessee against demand raised against them in the aforesaid period and therefore, whole exercise will be Revenue neutral. Therefore, we uphold the order of the adjudicating authority and dismiss the Department's appeal.

(***Pronounced in the Court on*** 12-06-2018)

Sd/- Sd/-

(P.K.Choudhary)
MEMBER(JUDICIAL)

(Bijay Kumar)
MEMBER(TECHNICAL)

k.b/-