IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH: KOLKATA

Appeal No.E/493/2009, CO-103/2010

(Arising out of Order-in-Original No.93/Commr./CE/Kol-II/Adjn./2008-09 dated 31.03.2009 all passed by the Commissioner of Central Excise, Kolkata-II)

Commissioner of Central Excise, Kolkata-II

Applicant (s)/Appellant (s)

Vs.

Indo Thai Flexible Tubes

Respondent (s)

Appearance:

Shri H.S.Abedin, AC(AR) for the Appellant (s)
Shri B.N.Chattopadhyay, Consultant for the Respondent (s)

CORAM:
Hon'ble SHRI P.K.CHOUDHARY, Member (Judicial)
Hon'ble SHRI Bijay Kumar, Member (Technical)

Date of Hearing:- 04.06.2018

Date of Pronouncement : 19.07.2018

ORDER NO.FO/76449/2018

Per Shri P.K.Choudhary

1. The respondent assessee is engaged in the manufacture of Stainless Steel House Assemble, S.S.Bellow classifiable under Chapter 83 of the First Schedule of Central Excise Tariff Act, 1985. Briefly stated the facts are that the respondent assessee took cenvat credit on M.S. Round, G.I Steel Tubes & Pipes, M.S.Pipes, Black Pipes during 2006-07 & 2007-08 (upto 31.07.2007). Show Cause Notice dated 08.07.2008 was issued for the alleged contravention of process of Rule 3 of Cenvat Credit Rules, 2004. It is the case of the Revenue that the items on which credit has been taken are classifiable under Chapter Heading 72 and 73 of the Central Excise Tariff Act,

1985 and also alleging that the inputs have not been used for the manufacture of any finished goods, since the process undertaken by the assessee before clearing the goods, does not amount to manufacture. Accordingly, show cause notice was issued proposing to recover the alleged illegal cenvat credit availed alongwith interest and imposition of penalty. The adjudicating authority passed the following order :

> *"In view of the above discussions and findings, I hold that the Cenvat credit taken by the noticee is lawful and accordingly drop the demands of duty and interest made in the notice.*
>
> *I also refrain from imposing any penalty."*

Being aggrieved by the order passed by the Commissioner, Revenue is in appeal before the Tribunal.

2. Ld. D.R. appearing on behalf of the appellant Revenue reiterates the grounds of appeal and submits that the Adjudicating Authority has erred in observing that Rule 3(5) of the Cenvat Credit Rules, 2004, is applicable as the activity of the assessee was clearance of inputs 'as such', whereas, in the instant case, the goods were cleared after cutting and were not in 'as such' condition as it was received in the factory of the assessee. He further submits that Rule 16(1) and 16(2) of the Central Excise Rules, 1944 are not applicable in the instant case.

3. Ld. Consultant appearing on behalf of the respondent assessee reiterates the order of the Adjudicating Authority and submits that there is no infirmity in the adjudication order and accordingly the appeal filed by the Revenue may be dismissed. He relied on various decisions in support of his submissions.

4. Heard both sides and perused the appeal records.

5. We find that the issue is no more resintegra in view of the various decisions of the Hon'ble High Courts;

(a) Commissioner of Central Excise & Customs, Surat-III vs. Creative Enterprises [2009(235) E.L.T. 785(Guj.)]

(b) Commissioner of Central Excise, Pune-III vs. Ajinkya Enterprises [2013(294) E.L.T. 203(Bom.)]

(c) Commissioner of Central Excise, Bangalore-V vs. Vishal Precision Steel Tubes & Strips Pvt. Ltd. [2017(349) E.L.T. 686(Kar.)].

The relevant paragraphs of the decision of the Hon'ble High Court of Karnataka at Bengaluru in the case of Commissioner of Central Excise, Bangalore-V vs. Vishal Precision Steel Tubes & Strips Pvt. Ltd. (supra), are reproduced wherein the Hon'ble High Court has held has under:

> *"3. We may record that the Tribunal in the impugned order at paragraph 2 has observed thus :-*
>
> > *"2. It is undisputed that the appellants were paying duty of excise on their final product by utilizing the Cenvat credit. As such, the question required to be decided is that irrespective of the fact that whether the activity of the appellant amounts to manufacture or not and when admittedly, the credit availed is being utilized for payment of duty of excise on the said activity, whether there would be any obligation on the part of the assessee to reverse the credit. Though the appellants have referred to various decisions of the Tribunal confirmed by the Hon'ble Bombay High Court, we find tht all such decisions stands considered by the majority order of the Tribunal in the case of Asian Colour Coated Ispat Ltd. v. CCE [2015 (317) E.L.T. 538 (Tri.-Del.)]. Wherein it stands held that when the Cenvat credit availed on the inputs stand utilized for payment of duty on the final product, there would be no requirement of reversal of the said credit even if the activity undertaken by die assessee does not amount to manufacture. By following the said decision, we set aside the impugned order and allow the appeal with consequential relief to the appellant".*

4. *The aforesaid order shows that when the Cenvat credit is availed on the inputs stand utilized for payment of duty on the final product, there would be no requirement of reversal of the said credit. Even if the activity is undertaken by the assessee does not amount to manufacture.*

5. *We may usefully refer to the decision of the Bombay High Court in the case of Commissioner of Central Excise, Pune-III v. Ajinkya Enterprises [2013 (294) E.L.T. 203 (Bom.)], wherein, the Bombay High Court at paragraphs 8 and 9 observed thus :-*

> *"8. We see no merit in the above contentions. As rightly contended by the representative of the assessee appearing in person, till 1st March, 2005 the Revenue has accepted that the activity carried on by the assessee constituted manufacturing activity in view of Board Circular dated 7th September, 2001 and accordingly, held that the assessee is entitled to take credit of duty paid on HR/CR coils. It is only because, the Board, on 2nd March, 2005 has withdrawn the Circular dated 7th September, 2001, the Revenue is claiming that the activity carried on by the assessee does not amount to manufacturing activity. The question is, whether on the facts of the present case, the Revenue, based on the Circular dated 2nd March, 2005, is justified in calling upon the assessee to reverse the credit or pay the amount to the extent of the credit liable to be reversed, with interest and penalty?*
>
> *9. It is relevant to note that the Board in its Circular dated 7th September, 2001 had only held that the activity of cutting/slitting/ of HR/CR coils into sheets or strips constitutes manufacture. Admittedly, the assessee had carried on additional activities such as pickling and oiling on the decoiled HR/CR coils, which is a complex technical process involving huge investment in plant and machinery. Since these additional activities were not considered by the Board in its Circular dated 7th September, 2001, the withdrawal of the said Circular cannot be a ground to hold that the activity carried on by the assessee did not constitute manufacturing activity. It is only on 24th June, 2010, the Board has issued a Circular to the effect that the process of pickling does not amount to manufacture. Therefore, during the relevant period, that is, during the period from 2nd March, 2005 to 31st December, 2005, it could not be said that the issue was settled and that the assessee paid duty on decoiled HR/CR coils knowing fully well that the same*

> *were not manufactured goods. If duty on decoiled HR/CR coils was paid bona fide, then availing credit of duty paid on HR/CR coils cannot be faulted".*

> ***6.*** *The another decision of High Court of Gujarat in the case of Commissioner of Central Excise & Customs, Surat-III v. Creative Enterprises - 2009 (235) E.L.T. 785 (Guj.) at paragraph 6, it was observed thus :-*

>> *"6. When one goes through the order of the first appellate authority, it is apparent that the respondent has been held to be a manufacturer as defined in Section 2(f) of the Central Excise Act, 1944. The appellate authority has taken into consideration the activities carried on by the respondent-assessee. The Tribunal is justified in holding that if the activity of the respondent-assessee does not amount to manufacture there can be no question of levy of duty and if duty is levied. Modvat credit cannot be denied by holding that there is no manufacture".*

> ***7.*** *It is an undisputed position that the final product is treated as dutiable and duty is paid by the assessee. When once duty is paid by the assessee treating the activity as manufacturing activity by the Department, Cenvat credit is available and there is no question of reversion of Cenvat credit. As such, in view of the aforesaid two decisions of the High Court namely, Bombay High Court and Gujarat High Court, we do not find any question of law would arise for consideration as sought to be canvassed."*

6. By respectfully following the ratio as laid down by the Hon'ble High Court and the decision on this issue, we do not find any infirmity in the impugned order and the same is accordingly upheld. The appeal filed by the Revenue is dismissed. The cross objection filed by the respondent assessee is disposed of.

(Pronounced in the Open Court on 19.07.2018)

S/d. S/d.

(Bijay Kumar)
Member (Technical)

(P.K.Choudhary)
Member (Judicial)

ss