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

Date of Hearing: 19/09/2018
Date of Pronouncement: 09.01.2019

Appeal No. E/255/2009 & 42/2010-DB
(Arising out of Order-in-Original No. 29/Commissioner/CE/Haldia/Adjn/2009 dated 9/10/2009 & & 8/Commissioner/CE/Haldia/Adjn/2009 dated 10/2/2009 passed by the Commissioner of Central Excise, Haldia Commissionerate)

Tata Metaliks Ltd.. **Applicant (s)/Appellant (s)**

vs.

CCE, Haldia **Respondent (s)**

Appearance:

Shri Dr. Samir chakraborty, Sr. Adv & Shri Abhijit Biswas
……..for the appellant(s)

Shri D. Aaldar,, AC(AR) ……..for the Respondent (s)

CORAM:

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

Final Order No.75021-75022/2019

Per Shri Bijay Kumar

The instant appeal have been filed by the appellant being aggrieved by Two orders-in-Original, both passed by the Commissioner of Central Excise & Service Tax, Haldia Commissioner dated February 10, 2009 and October 9, 2009 respectively (hereinafter referred to as the "said impugned order"). By the said impugned order the Commissioner has confirmed, as alleged irregularly availed Cenvat Credit, duty demand of Rs. 34,61,35,102/- and Rs. 14,75,60,088/- respectively under Rule 12/Rule 14 of the Cenvat Credit Rules, 2002/2004(hereinafter referred to as the "Cenvat Credit Rules") read with the proviso to Section 11A(1)/11A(2) of the Central Excise Act, 1944(hereinafter referred to as the "Act"), along with interest under Rule 12/Rule 14 of the Cenvat Credit Rules read with Section 11 AB of the Act. Equivalent amount of penalties of Rs. 34,61,35,102/- and Rs. 14,75,60,088/- have also been imposed upon the appellant under Rule15(2) of the Cenvat Credit Rules read with Section 11 AC of the Act and Rules 15(1) of the Cenvat Credit Rules respectively. Both the appeals involved the self same issue, only the periods are different. The first impugned order covers the period September 2002 to January 2008 whereas the second impugned order covers the period Feburary 2008 to December 2008(hereinafter referred to as the "said periods") . Accordingly, being disposed of by this common order.

2. The issue involved in the instant appeals are relates to the correctness or otherwise of availment of Cenvat Credit of duty paid on iron ore concentrates by the appellant's supplier thereof, Tata Steel Ltd. (in short "TSL") by the appellant. Accordingly to the Revenue, since the conversation of iron ore into iron ore concentrate does not amount to "manufactured" within the meaning of the Act, TSL was not required to make payment of excise duty thereon and, consequently, the appellant was not eligible to availed Cenvat Credit of the said wrongly paid duty on iron ore concentrates (hereinafter referred to as the "said goods") by TSL. As such, accordingly to the said impugned orders, cenvat credits availed were irregular and were liable to be recovered from the appellant, along with interest and the appellant was liable to penalty for alleged contravention of the provisions of the Cenvat Credit Rules.

3. Ld. Advocate submitted that the issue is regarding availability of the Cenvat Credit on the duty paid by TSL on Iron ore concentrate supplied to the appellant during the impugned period is correct legal and valid and hence there is no question of any disallowance/reversal /recovery of the credit stated to have taken wrongly as held in the impugned orders. It was also submitted that the orders have been passed by the Adjudicating Authority in complete disregard to the Central Excise Law and procedures and also the precedent decisions of the higher courts.

4. It has been submitted by the Ld. Sr. Advocate that the supplier M/s TSL has paid the duty on their own violation on the iron ore concentrates which is factually incorrect and patently illegal. It was submitted that the M/s TSH has paid the order as per the adjudication order passed by the Adjudicating Authority which was upheld by the ld. Commissioner (Appeal). The appellant choose not to contest the same and started paying duty incompliance with the order passed by ld. Commissioner (Appeal). Neither the Department nor the appellant had raised objection and file appeal against the order passed by the Commissioner (Appeal). It was held in the order of Jurisdictional Assistance Commissioner as the Adjudicating Authority held and Commissioner (Appeal) at the first appeal appellate authority that conversion iron ore into ore concentrate amounting to manufactured and duty was accordingly paid by M/s TSL. On the basis of purchase of iron ore from M/s TSL on payment of duty the appellant has taken the Cenvat Credit within the framework of the Cenvat Credit Rules, 2002/2004. It was also contented by Ld Sr. Advocate that the finding of the Adjudicating Authority in the impugned order regarding the non payment of Central Excise Duty on iron ore concentrates in view of exemption allegedly granted by Notification

No. 4/2006/CE dated 1st March 2006. The said Notification has no applicability, whatsoever, to the iron ore concentrate, as the exemption has been granted to ores falling under chapter heading 2601 to 2607 Central Excise Tariff. It was maintained by him that iron ore concentrates are note covered under said Notification. It was also submitted that Iron ore and iron ore concentrates are treated under Central Excise Tariff as distinctly different commercial commodity which would evident from tariff heading 2601 of CET 1985. The iron ore is classifiable under heading 2601 11 50 and iron ore concentrate is classified separately under Chapter Heading No. 2601 20 00. In view of above, the finding in the impugned order is completely incorrect and inappropriate.

5. Ld. Sr. Advocate further submitted that when the iron ore concentrate is supplied to the appellant on payment of duty, the respondent of such material by the appellant, the Cenvat Credit cannot be denied on the plea that processes undertaken by supplier "in this case TSL" did not amount to manufacture within the meaning of Section 2(f) of the Act and hence the some paid by the supplier in respect to subject input was not duty and thus ineligible to Cenvat Credit under Cenvat Credit Rules. As such, further or not TSL had not, by process carried out the iron ore to convert the same in iron ore concentrates manufactured "any excisable goods, within the mining of the Central Excise Act is wholly irrelevant for the purpose of determining as to whether or not the appellant is entitled to cenvat credit of the duty paid on the such goods. In this connection, reliance was placed on the following judgments;

(i) ***CCE vs. Nahar Granites Ltd***. 2014 (305) ELT 9 (Guj)

(ii) ***CCE & Customs vs. MDS Switchgear Ltd***. 2008 (229) ELT 485(SC)

(iii) ***V G Steel Industry vs. CCE,*** 2012 (27) STR 94 (P & H)

(iv) ***Balakrishna Industry Ltd. vs CCE,*** 2014 (309) ELT 354(T)

(v) ***CCE vs. Poddar Pigments Ltd.***, 2016 (341) ELT A 324(Raj)

(vi) ***Bhambra Fabricators vs CCE,*** 2016 (332) ELT 822 (T)

(vii) ***CCE & ST vs. DCM Shriram Consolidated Pvt. Ltd***. 2017 (349) ELT 326.

(ix) ***CCE vs. Advance Diesel Engines Pvt Ltd***. 2012 (278) ELT 491 (T)

6. Accordingly, Ld. Sr. Advocate prayed that impugned order is not sustainable in law and required to be set aside in appeal.

7. Ld. Special Counsel on behalf of the appellant submitted that it is correct that the duty has been paid by the supplier of the goods "TSL" by the appellant. However, he said that such payment of duty was not legally required following the decisions of Hon'ble Tribunal in case of Commissioner of Customs and Central Excise, JSR-BBSR-II. He placed reliance on para 7 of the impugned order;

> *7.Applying the test laid down by the Apex Court we observe that the process undertaken by the respondent remove extraneous, unwanted material from the ore and as such is devoid of "guague" which adheres to the blasted ores. From this it has been claimed by the Revenue that the constituents of the final products are distinctly different from that of the blasted ore. The Revenue then applying the Explantion Notes of HSN has come to the conclusion that iron ore has become a new commodity known as iron ore concentrates" which is no more exempted from payment of duty as Notification No. 19/88-CE dated 1/3/88*

has been rescinded by Notification No. 19/96-CE dated 23/7/1996. We find ourselves unable to agree with the Revenue that on account of the processes undertaken by the Respondents, a new and different article has emerged on which Central Excise duty can be levied and collected. Even according to HSN the term "concentrates" applies to ores which have had part of all of the foreign matters removed either because such foreign matter might hamper subsequent metallurgical operations or with a view to economical transport. In our view, removing of foreign matter would not, in the present matter, bring into existence a new and different article having a distinctive name, character or use. The use of iron ore as mined or iron ore after the process undertaken by the respondent remains same that is to be used in metallurgical industrial for the extraction of metals. In India Rare Earths case, (supra) the Appellant were removing gangue materials from the sand. It has been held by this Tribunal that "at the end of the processes, the minerals sand do not undergo any transformation. They remain the same condition in which they remained along with ordinary sand on the sea beach. No upgradation or augmentation of their purity takes place. The Chemical structure of the ore remained the same. The process are not any special treatment which would take the ores out of the stage of plain and simple ores". The learned Advocate has also relied upon the decision in the case of Super Engineering Co. 1996 (82) ELT 539, wherein the Tribunal has held that "the process of pulverizing, washing and cleaning of brass/ash does not result into emergence of a new marketable commodity with a separate, distinct name having separate physical chemical composition or characteristic." Similarly view were expressed in the case of Seth Liladhar Biyani & Sons vs. CCE Jaipur, 2001 (129) ELT 423)(T) relied upon by the learned advocate. In view of this we hold that the processes undertaken by the Respondents do not result in the manufacture of a different commercial commodity. Hence no Central Excise duty is leviable. Accordingly, all the appeals are rejected.

8. It was impressed upon by Ld. Sr. Counsel that Central Excise duty has been paid without authority of the law same cannot be availed as the Cenvat Credit under Cenvat Credit Rule of 2002 and 2004. He has also submitted that the order in case of Steel Authority of India(supra) has been upheld by Hon'ble Supreme Court dates Civil Appeal No. 6389-6390 of 2003 dated 3rd May, 2012, and accordingly the same has attained the finality. On being enquired about the order passed by the Ld. Adjudicating Authority and affirmed by the Appellate Authority, which has been accepted by the Department as referred above, how it can be said the duty was paid by M/s TSL at their own valuation without Authority of law, he has no answer. However, he has supported the order of the ld. Adjudicating Authority.

9. We have heard the rival submissions and perused the case records.

10. We find that the issue involved in this case is regarding the availment of the Cenvat Credit on the duty paid by the appellant from M/s TSL. It has not been disputed by the Department that the duty has been paid by the manufacturer of the goods in pursuance of the judicial pronouncement vide the order of the Ld. Adjudicating Authority and upheld by the Commissioner(Appeal). In the circumstances, we do not find any infirmity committed by the appellant within the provisions of the Cenvat Credit Rules, 2002-04 by availing such credit. Reliance is placed on the various decisions by the ld. Sr. Advocate wherein it has been held that in such a situation, Department cannot deny the credit to the appellant. We also find under Rule 3(1) of the Cenvat Credit Rules 2002-04, specifically provides that a manufacture/procedure of the final good is entitled to take cenvat credit of excise duty paid on any input/capital goods received in the factory for

manufacture of final product. Rule 3(4) of the Cenvat Credit Rule also allow the appellant to utilise the said credit for the payment of Central Excise Duty in respect of dutiable final product manufactured and cleared by the appellant during the impugned period. Hence, we do not find any irregularity committed by the appellant in the instant case by availing of the Cenvat Credit and also the appellant has availed and utilised the Cenvat Credit as per the law . We also find that under Cenvat Credit Rules 7(2) of Cenvat Credit Rules. 2002 Rule 9 of the Cenvat Credit Rules, 2004, requires the appellant to take all reasonable said ensure that the duty of excise on the input goods/capital goods, in respect of which cenvat credit is being availed, has been paid. The condition which is required to be satisfied by the appellant has been explained in the Explanation 2 of said Rules;

> **Rule 7(2)** of the Cenvat Credit Rules, 2002/Rule 9(3) of the Cenvat Credit Rules, 2004 require that a manufacturer or producer of excisable goods shall take all reasonable steps to ensure that the duty of excise on the input or capital goods, in respect of which Cenvat Credit is being availed of, has been paid (as indicated in the documents accompanying the goods.). The manner in which this requirement is to be satisfied has been explained in the "Explanation" to the said Rule 7(2) /Rule 9(3) of the Cenvat Credit Rules. The relevant materials on record ex-facie establish that Tata steel had duly complied with the said requirement. IT had ensure that appropriate duty of excise as indicated in the invoices accompanying the said goods had been paid. In such circumstances, there cannot be any allegation/finding of contravention of either Rule 3(1) of Rule 7 of the Cenvat Credit Rules 2002/Rule 9 of the Cenvat Credit Rules, 2004 by the appellant or non-compliance with the requirement thereunder.

11. We do not also find any merits on the contention raised by the ld. Sr. Consultant on behalf of the Department that the duty paid by the supplier M/s TSH should not be treated as the duty but merely deposit and hence no eligible for Cenvat Credit under Cenvat Credit Rules. This assertion of ld. Sr. Consultant is contrary to the Cenvat Credit Rules, 2002/2004.

12. Accordingly, we set aside the impugned order and allow the appeal with consequential relief if any.

(Pronounced on 09.01.2019)

Sd/ Sd/

(P.K.Choudhary) **(Bijay Kumar)**
MEMBER(JUDICIAL) **MEMBER(TECHNICAL)**

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