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

EASTERN ZONAL BENCH: KOLKATA

Appeal No. E/75700/2018

(Arising out of Orders-in-Appeal No. 101/KOL-V/2017 dated 21/11/2017 passed by Commissioner of CGST & Central Excise (Appeal-I), Kolkata.)

M/s. Classic Steel Pvt. Ltd. Appellant (s)
Vs.
Commissioner of CGST & C. Ex., Kolkata Respondent (s)

Appearance
Shri Arnab Chakraborty, Advocate for the Appellant
Shri H. S. Abedin, A. C. (A. R.) for the Revenue

CORAM:
HON'BLE SHRI P. K. CHOUDHARY, MEMBER (JUDICIAL)
Date of Hearing-08.08.2018

ORDER NO. FO/77273/2018
PER CORAM

Briefly stated the facts of the case are that the Appellant Company is engaged in the manufacture of Speciality Steel Wires viz. Bearing Wires, Needle Wires, Card and Gill Pin Wires classifiable under Chapter 72 of the Central Excise Tariff Act. The Assessee is registered as a SSI Unit. The appellant utilizes primary raw materials such as Alloy Steel Wire Rods imported inter alia from Japan and other countries in Europe. The said inputs are acquired and brought into India on payment of Customs Duty, Countervailing Duty (CVD) and Special Additional Duty along with Education Cesses.

2. On scrutiny of records, it was noticed that the appellant had availed Cenvat Credit of Education Cess and Secondary and Higher Education Cess paid on the basic Customs duty levied on imported inputs.

The Adjudicating Authority confirmed the demand of Cenvat Credit totaling Rs. 3,34,458/- along with interest of Rs.43,828/-. The

Adjudicating Authority appropriated the demand and interest as paid by the appellants. However, he imposed a penalty of Rs. 1,67,229/- under Rule 15 (2) of CCR, 2004 read with Section 11 AC(b) of the Central Excise Act, 1944.

On appeal, the Ld. Commissioner (Appeals) upheld the Adjudication Order and rejected the appeal filed by the appellant assessee. Hence, the present appeal before the Tribunal.

3. The Ld. Advocate appearing on behalf of the appellant contends that there is no one to one co-relation between the credit taken against inputs/input services to the finish goods cleared on payment of duty. Hence, there can be no utilization of the disputed credit if there was sufficient/surplus undisputed credit balance left even after meeting the duty requirements of the said period. He further contends that in terms of Rule 14 of the Cenvat Credit Rules, 2004, which pursuant to its amendment by Notification No. 18/2012 dt. 17/03/2012, requires as a condition precedent, to any recovery thereunder, that the disputed credit be wrongly availed and utilized. In the present case, in view of sufficient credit reserves available to the appellant, not otherwise disputed by the Department at any stage, there can be no basis to the allegation of any mis-utilisation of credit. No recovery of duty is therefore warranted in the present case.

4. The Ld. D. R. re-iterates the impugned orders.

5. Heard both sides and perused the appeal records.

6. On perusal of the records, I find that the Commissioner (Appeals), without addressing the ground of the availability of sufficient credit reserves, proceeded to uphold the findings of the Assistant Commissioner

by passing the impugned Order-in-Appeal No. 101/KOL-V/2017 dt. 21/11/2017. Particularly, it was perfunctorily observed that there was availment and utilization of credit of Rs. 3,34,458/- and that in view of the Board Circular No. 897/17/2009 dt. 3.9.2009 and the Apex Court decision in Union of India v. Ind Swift Laboratories Ltd. 2011 (265) ELT 3 (SC), interest was also recoverable thereon even in the absence of any utilization of credit. The penalty imposed on the appellant was also confirmed in view of the fact that the appellant had admitted to wrongful availment of credit, and that the error was detected in pursuance of audit proceedings. As such, there appeared to be no express finding of suppression, fraud, misstatement or any intent to evade duty on the part of the appellant in the impugned appellate order dt. 21.11.2017.

I also find that where the Department had itself acknowledged by the said letter dt. 1.03.2013 that the purported short paid duty was only Rs. 64,972 (incl. of cess), it was not open for them to thereafter allege short payment of duty of another Rs. 3,34,458/- by a subsequent Show Cause Notice issued to the appellant. Notably, the Assistant Commissioner had even observed in the said adjudication order that the payment of Rs. 66,000/- effected by the appellant towards the purported short-paid amount of Rs.64,972/- was not part of the subject matter of the present dispute. As a result of the actions of the Department, the appellant has ended up paying Rs. 3,67,458/- through PLA and reversing another Rs.33,000 in its credit register. A total of Rs. 4,00, 458/- has been appropriated by the Department against a dispute that concerned wrongly availed credit of only Rs. 3,34,458/-. Evidently, by seeking to recover Rs. 3,34,458/- by the said adjudication order, the Department is attempting to recover duty of Rs. 64,972/- twice, and also recover an additional duty of Rs. 2,69,486/- though credit to such extent was not utilized by the appellant as aforesaid. The breakup of the stated duty demand is provided hereunder:-

> *"i.e Rs. 3,34,458/-=Rs.64,972/- (being duty already recovered once before against letter dt. 1.03.2013 and treated as part of separate proceedings under Rule 8 (3A) CER, 02 by Asst. Commissioner)= Rs.2,69,486/- being the balance demand for which no proof of utilization or short payment of duty has been supplied by the concerned authorities to date"*
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7. Further, since it is the trite law that there is no one to one correlation between the credit taken against inputs/input services to the finished goods cleared on payment of duty by the concerned assessee, there can be no utilization of the disputed credit if there was sufficient/surplus undisputed credit balance left even after meeting the duty requirements for the said period. Though such contention was placed before the Assistant Commissioner and the Commissioner (Appeals), no finding has been made in regard thereto, and no attempt made to properly deal with and/or discuss the same therein in any manner whatsoever. In support of its contentions, the appellant places reliance on the Chartered Accountant's Certificate, and also the following decisions:-

(i) Indian Aluminium Company Limited v. CCE, Calcutta, 2001 (137) ELT 1092

(ii) CCE, Coimb. V. Lakshmi Technology & Engg. Indus. Ltd., 2011 (23) STR 265

(iii) Tims Products V. CCE, Calcutta, 1999 (113) ELT 868

Notably, in terms of Rule 14 of the Cenvat Credit Rules, 2004, which pursuant to its amendment by Notification No.18/2012 dt. 17/03/2012, requires as a condition precedent to any recovery thereunder, that the disputed credit has been wrongly availed and utilized. In the present case, it is submitted in view of the sufficient credit reserves available to the appellant, not otherwise disputed by the Department at any stage, there can be no basis to the allegation of any misutilisation of credit. No recovery of any duty is therefore warranted in the present case given the conditions precedent to invocation of Rule 14 of the Cenvat Credit Rules, 2004 read with Section 11A of the Central Excise Act, 1994 cannot be said to have been satisfied herein.

Inasmuch as the application of the said Circular dt. 3.09.2009 and the Apex Court's decision in Ind Swift (supra) is concerned, it is observed that the same may be relevant only for the period up to March 17, 2012, pursuant whereto Rule 14 of the Cenvat Credit Rules, 2004, was amended in the manner aforesaid, so as to allow recovery of only such portion of inadmissible credit that has been wrongly availed and utilized. Ind Swift (supra) therefore, has no application whatsoever, for the period from March 17, 2012 to November 2012.

8. Further, given that the Commissioner (Appeals) has not made any specific finding of any intent to evade duty on the part of the appellant, and there are no statements or any evidence for that matter as to the prevailing intentions of the Directors of the appellant or those in charge of its operations, during the said period, it is submitted that the extended period may not be invoked and no penalty may be imposed in terms of Rules 14 and 15 of the

Cenvat Credit Rules, 2004 read with Sections 11A and 11 AC of the Central Excise Act, 1944. Since the Show Cause Notice was issued on 24.06.2013 for the period of March, 2012,, for which Ind Swift (supra) may have been relevant, would in any event, fall outside the normal period of limitation.

9. It is my considered view that even for the month of march, 2012, there can be no basis for recovering interest on the wrongly availed credit. Following the decision of the Karnataka High Court in CCE, Bangalore v. Bill Forge (P) Ltd., 2012 (279) ELT 209 (Kar), which sought to distinguish Ind Swift (Supra) on facts, it made further apparent that where there is no short payment of duty resulting from any utilization of credit, there cannot be any basis for recovering interest merely on the wrongly availed credit, as in the present case. The findings in Bill Forge (Supra) are also consistent with the decision of this Hon'ble Tribunal in SRF Limited, v. CCE, Chennai, 2007 (220) ELT 201(T), as recently approved by the Apex Court in 2016 (331) ELT A 138 (SC), whereby the doctrine of revenue neutrality has been applied to the Cenvat Credit Rules, 2004. Such principle is consistent with earlier Apex Corut 3-member constitutional bench decisions in CCE v. Narmada Chematur Pharmaceuticals Ltd, 2005 (179) ELT 276 (SC) and International Auto Limited v. CCE, Bihar, 2005 (183) ELT 239 (SC) that have overriding precedence over the Division bench decision of the Apex Court in Ind Swift (Supra) (vide Central Board of Dawoodi Bohra Community v. State of Maharashtra, 2010 (254) ELT 196 (SC), which provides that a larger bench decision of the Apex Court

continues to gain precedence over a subsequent contrarian decision by a bench of a lesser strength). Evidently, it could not have been the intention of the Apex Court in Ind Swfit (supra) to render redundant the prior larger bench decisions of the apex Court on revenue neutrality, and compromise the applicability of such doctrine to the Cenvat Credit Rules, 2004. The observations of the Karnataka High court in Bill Forge (supra) in paragraph 18 thereof, whereby Ind Swift (Supra) is distinguished, thereby stand justified. Thus, on applying the principles laid down by the Apex Court on Revenue neutrality to the facts of the present case, it may be apparent that where there is no evidence of any short payment of duty or loss of revenue to the State, there can be no basis for recovering the same from the assessee, be it with interest thereon or otherwise.

10. In view of the above discussions, I observe that there has been no short payment of duty on the part of the appellant during the said period as alleged, particularly in view of there being no utilization of credit as aforesaid, and in view of the purported short paid duty of Rs. 64,972/- having already been paid by the appellant in a prior Rule 8 (3A), CER, 02 proceeding, which the Department chose not to pursue. The impugned demand under Rule 14 of the Cenvat Credit Rules, 2004 for recovery of Rs.
3,34,458/- therefore entails double recovery of duties already collected by the State. There is hence, no loss of revenue. In the premises, applying the stated principles, there can be no basis for recoveries purportedly confirmed by the said appellate order dated

21.11.2017 of duty, interest and/or penalty under Rules 14 and 15 of the Cenvat Credit Rules, 2004 read with Sections 11A and 11AC of the Central Excise Act, 1944, for the said period.

11. Accordingly, the impugned order is set aside and the appeal is allowed with consequential benefits to the appellant.

Sd/-
(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

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