

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

Appeal No. E/78863/2018

Arising out of Order-in-Appeal No. 130/HWH/XAP-3/2017-18 dated 23.04.2018 passed by the Commissioner of CGST & Central Excise, Kolkata.

Commissioner of CGST & Central Excise, Howrah.

Howrah CGST & Central Excise Commissionerate,
M. S. Building, 15/1 Strand Road, Kolkata-700001.

....Appellant (s)

Vs.

M/s Tide Water Oil Company (India) Ltd.

109, Foreshore Road, Shibpur,
Howrah, West Bengal-711102.

....Respondent (s)

Appearance:

Mr. K. Chowdhury, Suptd. (AR) for the Appellant (s)

Mr. Rajeev Agarwal, C. A. for the Respondent(s)

CORAM:

HON'BLE SHRI P.K.CHOUDHARY, MEMBER (JUDICIAL)

Date of Hearing: - 29.07.2019

Date of Decision: - 13.08.2019

Order No...FO/A/75996/2019

PER SHRI P.K.CHOUDHARY:

The present appeal has been filed by the Revenue against Order-in-Appeal dated 23.04.2018 passed by the Ld. Commissioner, CGST & Central Excise, Kolkata North, whereby the demand of central excise duty of Rs.27,51,403/- with interest and penalty, consequent to denial of CENVAT Credit have been set aside. In the said order, the Ld. Commissioner has remanded the matter to the original authority for verification purpose. Cross objection bearing no. 75419/2019 has been filed by the assessee, M/s Tide Water Oil Co. (India) Ltd. in the aforesaid departmental appeal.

2. The facts of the case in brief are that the assessee is engaged in the business of manufacturing lubricants, oil and allied products on which central excise duty is being paid. They are availing the benefits

of CENVAT Credit as per the CENVAT Credit Rules, 2004. In the ER-1 returns filed during the period 2010-11, the amount of CENVAT credit disclosed therein did not match with the credit amount disclosed in ER-4 annual return. The said ER is an annual financial statement, required to be filed electronically in accordance with Rule 12(2)(a) of Central Excise Rules, 2002. Duty demand was confirmed vide Order-in-Original dated 23.1.2016 with interest and imposition of penalty on the differential amount of CENVAT credit appearing in both the returns. In the first appeal filed by assessee, the Ld. Commissioner has set aside the demand and remanded the matter to the original authority for making a comparative study of CENVAT Credit register with that of ER-1 and ER-4 returns for the FY 2010-11 which is the period in dispute herein.

3. Shri K. Chowdhury, Suptd. (AR) Ld. Departmental Representative (DR) appeared on behalf of the Revenue and Sri Rajeev Agarwal, CA, appeared on behalf of the assessee.

4. The Ld. DR for the Revenue submitted that the Ld. Commissioner (Appeals) could not remand the case to the original authority inasmuch as he is not vested with the power under Section 35A of the Central Excise Act, 1944. Another plea that was raised by the Ld. DR is that in terms of Rule 5 of the Central Excise Appeals Rules, no new evidence could be produced by the assessee before the Commissioner in the appeal stage. He accordingly submitted that the Ld. Commissioner erred in giving credence to the CENVAT Credit Register produced by the assessee in the appeal stage which was never produced before the Original authority. On both the above counts, the Ld. DR contested the impugned order passed by the Ld. Commissioner.

5. On the contrary, the Ld. Counsel appearing for the assessee submitted that there was no difference in the CENVAT credit amount. He stated that due to system error, in the ER-4 return filed by the assessee electronically, there appeared some erroneous entries. Copy of the ER-4 return is attached in the Appeal Paper Book. He submitted

that an alphabet 'E' with decimal appeared at multiple places which were not entered by the assessee. He submitted that the said system error is clearly evident from the ER-4 and thus the same could not be relied upon to raise demand of irregular credit. He also submitted that ER-1 return is the statutory document which reflects the value of CENVAT Credit taken and utilized for a particular period, which is backed with CENVAT Credit registers maintained by them at the factory.

He further submitted that copy of CENVAT Credit Register and revised ER-4 return filled in manually were duly submitted on 24.10.2016 alongwith the Reply to Show Cause Notice at the adjudication stage. He also stated that a certificate from Chartered Accountant dated 01.10.2014 was also submitted on 04.12.2014, which is on record. The original authority did not give any credence to the above documents while adjudicating the matter and therefore the plea of the Ld. DR that the said documents were not produced before the original authority is completely erroneous. He accordingly submitted that the ground taken by the Revenue in their appeal petition that the Ld. Commissioner should not have given credence to aforesaid documents as per Rule 5 of the Appeal Rules is also incorrect as the same was not a new evidence.

The Ld. Counsel further submitted that they have filed Cross Objection in terms of Section 35B(4) of the Central Excise Act,. Accordingly, the said cross objection is required to be disposed by the Tribunal as if it is an appeal filed by the assessee against the part of the order with which the assessee is aggrieved. He submitted that the assessee is aggrieved with the portion of the impugned order to the extent direction for remand has been made for comparison of CENVAT credit with the one disclosed in the returns. He submitted that since all relevant records were already available with the original authority, no purpose would be served if the matter is remanded back. He drew my attention to the specific findings made by the Ld. Commissioner in page 7 of the impugned order wherein he has observed that the Credit

Register submitted by the assessee is in line with the ER-4 returns filed with the department. He also drew the attention of the Bench to the reply to the Show Cause Notice submitted by the assessee at the adjudication stage wherein they relied on the decision of the Tribunal in the case of Chandigarh Network System Pvt Ltd vs. CCE, Chandigarh-II 2016 (44) STR 603 (Tri-Chan.), wherein the Tribunal held that the only document to check whether the assessee has availed credit wrongly or not is CENVAT Credit Account and not the returns filed although the assessee has shown excess opening balance in the return which could be verified through the CENVAT Credit Account. It is his submission that when the Ld Commissioner has made a categorical finding that credit amount that has been claimed in ER-1 return which is at par with the CENVAT Credit Register, no further proceedings are required, more so in view of the reason that ER-4 return filed online was defective on account of system error.

He also submitted that the demand was otherwise barred by limitation inasmuch as the Show Cause Notice was issued on 16.10.2014 for the period in dispute pertaining to 2010-11. Since the proceedings have been initiated on the basis of statutory returns, there could not be a case of any suppression.

6. Heard both sides and perused the appeal records filed by the Revenue and the Cross Objection filed by the assessee.

7. I find that the dispute in hand arose due to the difference in the CENVAT credit figures in the two returns filed by the assessee i.e., monthly ER-1 returns vis-a-vis the annual ER-4 return. I have perused the ER-4 returns where the alphabet 'E' with decimals have appeared at multiple places which can only be attributed to the system error, a fact not controverted by the Revenue and therefore, no negative inference can be drawn against the assessee merely based on the data contained in ER-4 return. I also find that Ld. Commissioner has made a categorical finding that the assessee has duly submitted the CENVAT Credit Register at the adjudication stage which corresponds to the ER-1 return and therefore, the Credit figures disclosed in the said ER-1

return have to be accepted as sacrosanct without any demur. I agree with the submissions made by the Ld. Counsel appearing on behalf of the assessee that the Credit amount accounted in the CENVAT Credit Register have to be considered as has been held in the decision of this Tribunal in Chandigarh Network System Pvt Ltd (Supra). In view of the same, I do not find any reason to saddle the assessee with the demand of CENVAT Credit, as has been rightly held by the Ld. Commissioner in the impugned order by setting aside the duty demand.

In so far as the issue whether the matter should be remanded back to the original authority is concerned, I find that since the Ld. Commissioner is satisfied on both the counts – (i) that there was a system error based on which he has set aside the duty demand and (ii) that the assessee had submitted the Credit Register at the adjudication stage which corresponds to the credit figure shown on ER-1 returns, there is no reason to remand the matter as no purpose would be further served in the given facts of the case. In any case, the whole proceeding is hit by limitation inasmuch as the Show Cause Notice in the present case was issued on 16.10.2014 for the impugned period 2010-11. Since the proceedings have been initiated on the basis of statutory returns, this is not a case of suppression and therefore demand cannot survive on limitation also.

6. In view of the above finding, the appeal filed by the Revenue is partly allowed and the Cross Objection filed by the assessee is disposed.

(Pronounced in the open court on...13.08.2019.)

Sd/-
(P.K.Choudhary)
Member (Judicial)

T.K.