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

Appeal No. E/76379/2017

Arising out of Order-in-Original No. 01-02/Commr/CE/Kol-II/Adjn/2017-18 dated 28.04.2017 passed by the Commissioner of Central Excise, Kolkata-II.

M/s Tide water Oil Co. (India) Limited
109, Foreshore Road,
Howrah-711102.
& 8, Dr. Rajendra Prasad Sarani,
Kolkata-700 001.

….Appellant (s)

Vs.

Commissioner of Central Excise, Kolkata-II
M. S. Building, Custom House,
15/1, Strand Road, Kolkata-700001.

….Respondent (s)

Appearance:
Shri Rajeev Agarwal, C. A. for the Appellant (s)
Shri K. Chowdhury, Suptd. (AR) for the Respondent(s)

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

Date of Hearing: - 16.07.2019

Date of Pronouncement:-13.08.2019

Order No…FO/A/76000/2019

PER SHRI P.K.CHOUDHARY:

The present appeal has been filed by the assessee, M/s. Tide Water Oil Co. (India) Ltd., against imposition of interest and penalty for alleged wrong availment of Cenvat Credit on inputs during the period June 2011 to March 2013.

2. Briefly stated, the facts of the case are that the appellant is engaged in manufacturing lubricating oil and grease. Due to shortage of storage space in factory, the appellant in pursuance to Rule 8 of CENVAT Credit Rules, 2004 obtained permission from the Central Excise Department for storing inputs outside the factory premises which was duly considered and allowed by the Department. Based on the scrutiny of documents like RG-23A Pt-II by CERA Authorities, two periodical Show Cause Notices dated 27.05.2013 and 16.07.2014 were issued alleging irregular availment of Cenvat Credit on input stored

outside the factory in contravention of Rule 8 of the Cenvat Credit Rules, 2004 and Trade Notice No.93/2004 of Commissioner of Central Excise, Ahmadabad-III. It was alleged that the appellant had taken credit on the basis of 90 number(s) of invoices for which goods were received in the storage premises outside factory, instead of availing the Credit on the inputs at the time when the entire quantity of inputs were brought to the factory. The Ld. Commissioner vide the impugned Order-in-Original dated 28.04.2017, while appreciating the fact that the appellant was legally entitled to avail and utilize the Credit in question, dropped the proposal for recovery of credit amounting to Rs.4,18,06,826/-. He however observed that there was a procedural irregularity in availing the credit on inputs stored outside the factory and accordingly, imposed penalty and interest.

3. Sri Rajeev Kr. Agarwal, C.A. appeared for the appellant and Shri K. Chowdhury, Supdt. (AR) appeared for the Revenue.

4. The Ld. CA appearing for the appellant drew my attention to the findings made by the Ld. Commissioner in Para 5.10, pg. no.15 of OIO wherein the Ld. Commissioner has categorically observed that the assessee had sufficient credit balance, excluding the Cenvat credit availed and utilized on the subject invoices which are in dispute. The Ld. Commissioner also noted that the appellant assessee, while dispatching the inputs from the storage tank to the factory, debited the applicable credit amount from its Register maintained at the outside storage and re-credited the subject credit when the subject input entered the factory premises. The said entries have been duly reflected in ER-1 under the head "other payments". It is the submission of the Ld. CA that two important facts are thus not in dispute, first, that the appellant had sufficient balance of credit balances and second, that the appellant has duly disclosed the fact of availment of credit in ER-1 returns, though there may be irregular availment of credit on inputs stored outside factory, and therefore there is no question of any suppression.

5. The Ld. CA further submitted that the Ld. Commissioner in para 5.13 wrongly applied the Tribunal's decision in the case of CCE, Mumbai –I vs. KRCD Ltd- 2014(303) ELT 587(Tri- Mum) to confirm imposition of interest of Rs. 10,74,459/- under Section 11AA of the Central Excise Act, 1944 and penalty of Rs. 5,00,000/- under Rule 15(2) of the Credit Rules readwith Section 11AC of the Act. He argued that the facts of the case in KRCD Ltd (Supra) relied by the Ld. Commissioner are clearly distinguishable with the facts of the appellant's case. In that case, the Revenue had contended that the respondent assessee should reverse the excess credit of 50% on capital goods as the assessee had erroneously taken 100% i.e. the entire credit in the same financial year in which the capital goods were purchased by them. The Tribunal rejected the contention of the Revenue that the respondent assessee should be directed to reverse the excess credit taken on capital goods as the same was any way available to them in the subsequent financial year. However, since two financial years were involved, the Tribunal directed the assessee to pay interest for the intervening period till they were actually eligible for availing such credit. Moreover, in that case, for the procedural irregularity the Tribunal imposed a general penalty of Rs.5,000/- only under Rule 27 of the Central Excise Rules, 2002. It is the submission of the Ld. Counsel that in the instant case, two financial years are not involved and that even after excluding irregular availment of credit which is in dispute, sufficient balance of credit was available and hence there was no loss to the government exchequer. He submitted that penalty of Rs. 5,00,000/- imposed in their case is arbitrary and bad in law as the same has been invoked under Rule 15(2) of CCR, 2004 and there is no fraud or suppression in their case. He emphasized that there is a categorical finding of the Ld. Commissioner that the procedural irregularity in availment of credit was duly reflected in ER-1 returns and hence the allegation of suppression of facts cannot be sustained. Moreover, there is no basis as to how the huge penalty amount of Rs.5 lakhs has been quantified.

7. In support of his submissions he relied upon the following decisions:-

- ❖ Savio India Ltd. v. Commr. of Customs and C.EX and S.Tax, Coimbatore 2016 (340) ELT 735 (Tri-Chennai)
- ❖ Commr. of C.Ex., Puducherry Commissionerate vs. CESTAT, Chennai [2016 68 taxmaan.com 193 (Madras)].
- ❖ CCE, Delhi vs. Maruti Udyog Limited [2007 (214) E.L.T. 173 (P & H)] upheld by the Hon'ble Supreme Court as reported in Commissioner v. Maruti Udyog Ltd. - 2007 (214) E.L.T. A50 (S.C.)
- ❖ CCE, Ghaziabad vs. Ashoka Metal Decor (P) Ltd.[2011 (21) S.T.R. 469 (All.)]

8. As an alternative argument, he pleaded that the Ld. Commissioner has duly accepted that the storage tank is an "extension of the factory". Having accepted the settled legal principle that the storage tank is an "extension of factory", the inputs received in the storage tank would be legally eligible for credit without any further procedural requirement. On this count also, the availment of credit cannot be said to be pre-mature, and hence interest is not leviable.

With regard to the observation made by the Ld. Commissioner that the appellant had suo-moto paid the interest amount, he submitted that any amount paid in the course of the adjudication proceedings is deemed to be made "under protest" and hence to be considered as a deposit since the assessee has contested the demand raised in consequence to final adjudication thereof. In support of his contentions, he relied on the following decisions: Maihar Cement v. CCE, Bhopal 2004 (178) ELT 991 (Tri-Del.), Jayant Glass Inds. (P) Ltd. v. CCE, Kolkata 2003 (155) ELT 188 (Tri-LB, Delhi), U.P. State Sugar Corporation Ltd. v. Commissioner of C.Ex., Allahabad 2007 (220) ELT 334 (Tri-Del.). He also submitted that as per Article 265 of the Constitution of India, both the levy and collection of tax should be under the authority of law and the Revenue could not retain the interest amount even though paid by the assessee in the course of adjudication when tax is legally not payable.

Lastly, he relied on the decision of the Tribunal in the case of Magalam Enterprise vs. CCE, Vadodara 2003 (159) ELT 393 (Tri-Mum.), wherein in the identical circumstances, the Tribunal has dropped the demand of cenvat credit along with penalty since there was no dispute with respect to entitlement of credit on inputs stored outside factory. He also submitted that the Tribunal in the case of Kalpena Industries v. Commr. of C.EX & S.T., Vapi 2015 (328) ELT 597 has observed that if inputs are used in the manufacture of final products and were cleared after payment of duty, imposition of penalty under Section 11AC read with Rule 15(2) of CCR, 2004 will not arise. He also argued that in absence of suppression, penalty is not imposable.

9. Sri. K. Chowdhury, Supdt. (AR) appearing for the Revenue supported the findings made by the Ld. Commissioner and submitted that the assessee appellant was given a special facility to store the goods outside the factory by way of a specific permission in terms of which it was obliged to avail credit only when the entire goods covered by a single excise invoice was entered into the factory following the Trade Notices issued in that regard, and that it could not pre-maturely avail credit. He submitted that since the appellant has already paid interest in the course of adjudication, it cannot dispute the imposition of interest in this appeal and the said payment has been rightly appropriated in the adjudication order towards adjudged dues. He emphasized that the mere fact that there was a sufficient credit balance will not absolve the assessee from imposition of interest and penalty. He relied on the decision of the Tribunal in the case of Madras Cements Ltd. vs. CCE, Hyderabad 2016 (336) ELT 175 (Tri-Hyd) wherein it has been held that interest is payable in case of premature availment of credit as the credit of balance 50% should be availed in subsequent year in case of procurement of capital goods. Based on the above, the Ld. DR submitted that the appellant could not plead

immunity from interest liability for premature availment of credit together with penalty as rightly imposed by the Ld. Commissioner in the adjudication order for contravention of the conditions prescribed for availing the facility to store goods outside the factory.

10. Heard both sides and perused the appeal records.

11. I find that the issues that arise for consideration before me is whether penalty and interest can be imposed for availing Cenvat credit on inputs stored outside the factory.

11.1 First, I deal with the issue regarding the imposition of penalty. I find that the Ld. Commissioner has made a detailed examination of the ER-1 returns filed by the appellant, on perusal of which he has given a specific finding in para 5.10 of the adjudication order that availment and reversal of credits have duly been reflected in the said returns which is based on the RG-23A Pt-II registers maintained at both the places – within the factory as well as the Storage tank located outside the factory. He also observed that said availment of credit has been shown under the head of "other payment" in ER-1 returns. Moreover, in para 5.7 readwith para 5.9 of the adjudication order, he has admitted that merely because of error in availment of credit when the entire input covered in an invoice are received in the factory, the substantial benefit of cenvat credit cannot be denied. He also agreed with the factual aspect that the inputs in question have been duly used in the manufacture of final goods on which excise duty has been paid and therefore the appellant is legally entitled to avail credit on the said inputs. Even though after taking a note of the Tribunal's decision in case of Mangalam Enterprise vs. CCE, Vadodara 2003 (159) ELT 393 (Tri-Mum), wherein the penalty has been specifically set aside on the ground that the deviations from the normal practice necessitated by business exigencies should not be the reason for denial of legally available facility, the Ld. Commissioner rather chose to impose penalty under Rule 15(2) of the Credit Rules read with Section 11AC of the Act, which provision is applicable only in case of wrong availment of credit for reasons of fraud or suppression, which is clearly absent in the case before me. In the given facts of the case and in view of the discussions made above, I find no reason to sustain the imposition of penalty and hence set aside the same.

11.2. Now I take up the second issue with regard to interest. It is noted that the Ld. Commissioner in Para 5.10 of the order has categorically observed that the assessee had sufficient credit balance, excluding the Cenvat credit availed and utilized on the subject invoices in dispute. Thus, the fact that adequate credit balance is available during the material period and is not in dispute. Despite that credit has been pre-maturely reflected in the RG-23 register and ER-1 return since goods were not received in the factory, there is no consequent short payment of duty and hence no loss to exchequer. I find that the decision of the Tribunal in the case of KRCD Ltd (Supra) relied by the Ld. Commissioner in para 5.13 for imposition of interest pertained to the situation where the assessee had taken 100% credit for receipt of capital goods, in place of 50% in the year of receipt of goods which was the maximum entitlement, resulting short payment of output duty causing loss to the exchequer. The decision in the aforesaid case of KRCD Ltd (Supra) is therefore not applicable to the facts of the present case. Moreover, as the Ld. Commissioner himself has observed that for mere procedural lapse, the substantial benefit of credit cannot be denied, more particularly in case where there is a sufficient credit balance always available during the period in dispute. I also take note of the ratio of the decision rendered in Savio India Ltd. v. Commr of Customs and C.EX and S.Tax, Coimbatore 2016 (340) ELT 735 (Tri-Chennai) wherein it has been held that -

> *" ....That indicates that there was sufficient balance of Cenvat Credit in the statutory record maintained by the appellant, which is RG-23 Part II register. The worksheet is also annexed to that letter exhibiting such position. In existence of sufficient balance, there shall not be levy of interest and so also there shall not be levy of penalty on the appellant. Accordingly appeal is allowed to this extent."*

Identical views have been expressed by the Hon'ble Madras High Court in Commr of C.Ex., Puducherry Commissionerate vs. CESTAT, Chennai (Supra), and by Hon'ble Punjab & Haryana High Court in

Maruti Udyog Limited which was followed by subsequently upheld by the Hon'ble Supreme Court (Supra). In view of the above settled legal position of law, I am inclined to hold that interest cannot be levied when sufficient credit balance is available, despite that a portion of credit amount has been availed contrary to the guidelines issued in trade notices, inasmuch as in such cases there is no loss to the exchequer and therefore there cannot be any question to compensate the Revenue by levying interest. Mere fact that the appellant has paid interest in course of adjudication, the same will be deemed to be under protest following the decision of the co-ordinate Bench of the Tribunal in the case of Maihar Cement v. CCE, Bhopal 2004 (178) ELT 991 (Tri-Del.), wherein it has been observed as under:-

> *"I find that in this case the duty was paid by the appellants consequent to issue of show cause notice by the department. Subsequently, the show cause notice was decided in their favour by the Commissioner and they filed the refund claim. Since they were contesting the show cause notice, therefore, the time limit prescribed under Section 11B is not applicable till the decision of the Commissioner as they are contesting the issue. Therefore, the deposit of the amount will be deemed to be under protest. Therefore, rejection of the appeal on the time bar issue is not correct. The order of the lower authorities is accordingly set aside and the appeal is allowed. Ordered accordingly"*

Identical views have been taken in the case of Jayant Glass Inds. (P) Ltd. and U. P. State Sugar Corporation Ltd. (Supra).

13. In view of the above discussions, the demand of interest and the penalty imposed cannot be sustained and accordingly, the same are set aside. The appeal filed by the appellant is thus allowed with consequential benefits.

(Pronounced in the open court on…13.08.2019.)

Sd/-

(P.K.Choudhary)
Member (Judicial)

T.K.