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

REGIONAL BENCH – COURT NO.2

Excise Appeal No.77067 of 2016

(Arising out of Order-in-Original No.09/Commr/CE/Adjn./Kol.V/2016 dated 26.09.2016 passed by Commissioner of Central Excise, Kolkata V)

M/s Chowdhury Udyog
"Fortuna Tower", 23A, Netaji Subhas Road, 1st Floor, Suite-26, Kolkata-700001

Applicant

VERSUS

CCEx., Kolkata V
180 Shantipally, Rajdanga Main Road, Kolkata-700107

Respondent

APPERANCE :

Shri Indranil Banerjee, Advocate for the Appellant
Shri T.Mondal, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. P.K.CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR.P.VENKATA SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO.76608/2019

DATE OF HEARING : 25.07.2019
DATE OF DECISION : 25.07.2019

PER P.K.CHOUDHARY :

The facts of the case in brief are that the appellant is engaged in processing of Micro Crystalline Wax, Paraffin Wax, Semi Refined Paraffin Wax falling under Central Excise Tariff Sub-Heading 2712 of the Central Excise Tariff Act along with manufacture of Cable Filling compound classifiable under Chapter 38 of the Central Excise Tariff Act and is thus registered with the Central Excise Department. During the course of verification of the books of accounts of the Appellant for the period, Oct 2014 to July 2015 it was alleged that Appellant had availed and utilized CENVAT credit of Rs. 81,67,937/- on Micro Crystalline Wax, Paraffin Wax, Semi Refined Paraffin Wax and Fully Refined Paraffin Wax out of which no new and identifiable products emerged. Show-cause notice dated 07/10/2015was issued demanding Cenvat credit along with interest and for imposition of penalty under Rule 15 of Cenvat Credit Rules, 2004 read with section 11AC of the Central Excise Act, 1944.

2. The Adjudicating Authority confirmed the demand of Cenvat credit alongwith consequential interest and imposed penalty as proposed in the SCN. Hence the present appeal before the Tribunal.

3. The Ld. Counsel, Shri Indranil Banerjee, appearing on behalf of the appellant, submits that the issue is squarely covered by the judgment of the Tribunal in its own case vide FO 78728-78729/2017 dated 28/12/2017 wherein the Appeal of the Appellants was allowed on the same issue for an earlier period. Thus, he submitted that the appeal be allowed in the same terms.

4. The ld. D.R., Shri T.Mondal, appearing on behalf of the Revenue, justified the impugned order.

5. Heard both sides and perused the appeal records.

6. We find that the present issue involved in this appeal is no more *res-integra* in view of the Tribunal's decision in the appellant assessee's own case vide Final Order No.FO/78728-78729/2017 dated 28/12/2017 wherein for an earlier period, it was held as –

> *"20. On the appellants' plea of reversal of credit, we find that, as rightly pointed out by the Ld.Advocate, the settled position of law is that where the activity does not amount to manufacture and the assessee has paid the duty in the belief that activity amounted to manufacture and Department has collected the duty, the Cenvat Credit need not be reversed even if the activity does not amount to manufacture. In this regard, in the case of Pune III Vs. Ajinkya Enterprises – 2013 (294) ELT 203 (Bom.), the Hon'ble High Court of Bombay held as under :-*
>
> > '***10.*** *Apart from the above, in the present case, the assessment on decoiled HR/CR coils cleared from the factory of the assessee on payment of duty has neither been reversed nor it is held that the assessee is entitled to*

> *refund of duty paid at the time of clearing the decoiled HR/CR coils. In these circumstances, the CESTAT following its decision in the case of Ashok Enterprises - 2008 (221) E.L.T. 586 (T), Super Forgings - 2007 (217) E.L.T. 559 (T), S.A.I.L. - 2007 (220) E.L.T. 520 (T) = 2009 (15) S.T.R. 640 (Tribunal), M.P. Telelinks Limited - 2004 (178) E.L.T. 167 (T) and a decision of the Gujarat High Court in the case of CCE v. Creative Enterprises reported in 2009 (235) E.L.T. 785 (Guj.) has held that once the duty on final products has been accepted by the department, CENVAT credit availed need not be reversed even if the activity docs not amount to manufacture. Admittedly, similar view taken by the Gujarat High Court in the case of Creative Enterprises has been upheld by the Apex Court [see 2009 (243) E.L.T. A121] by dismissing the SLP filed by the Revenue.'*

The same view has to be taken by Hon'ble Gujarat High Court in the case of Creative Enterprises (supra), which has been affirmed by Hon'ble Supreme Court. It has not been disputed by the Department that the duty paid by appellants is more than the Cenvat credit availed by appellants. Accordingly, by following the ratio in Ajinkya Enterprises (supra) and Creative Enterprises (supra), we hold that the assessee is not required to reverse the Cenvat Credit already taken.

21. Since the Department was accepting the duty paid by appellants and the appellants were filling statutory returns on regular basis and everything was in the knowledge of the Department by way of returns being filed by the assessee, and the entire question inv olved is purely interpretation of law, extended period is not invokable. For same reasons, the penalty on the appellants under Section 11AC of the Act, is not justified in the circumstances. Accordingly, the penalty under Section 11AC of the Act is set aside.

22. In the result, we hold that

(i) the activity/precesses on Microcrystalline Wax etc. undertaken by appellants do not amount to manufacture ;

(ii) the Cenvat credit taken by the appellant is not required to be reversed ;

(iii) Penalty under Section 11AC is set aside."

7. We also find that the facts of the present case are squarely covered by the aforesaid decision of the Tribunal.

8. In view of the above, the impugned orders are set aside and the appeal filed by the appellant is allowed with consequential benefit

(Operative part of the order was pronounced in the open court)

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

Sd/
(P.V.Subba Rao)
Member (Technical)

mm