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

REGIONAL BENCH - COURT NO.2

**Excise Appeal No.193 of 2007**

(Arising out of Order-in-Original No.37/Commr/Bol/06 dated 19 December 2006 passed by Commissioner of Central Excise, Bolpur.)

**M/s. Pondy Technology Limited**
(Sahabdehi Post Office: Hat Ashuria,
Police Station: Barjora, District-Bankura.)

**...Appellant**

*VERSUS*

**Commissioner of Central Excise, Bolpur**

**.....Respondent**

(Sian, Bolpur, District: Birbhum,
West Bengal-731204.)

**<u>APPEARANCE</u>**

Dr.Samir Chakraborty, Sr.Advocate and Shri Abhijit Biswas, Advocate for the Appellant (s)
Shri K.Choudhary, Authorized Representative for the Respondent (s)

**CORAM: HON'BLE SHRI P. K.CHOUDHARY, MEMBER(JUDICIAL)**
**HON'BLE SHRI BIJAY KUMAR, MEMBER(TECHNICAL)**

**<u>FINAL ORDER NO. 76955/2019</u>**

DATE OF HEARING : 21 October 2019
DATE OF DECISION : 18/12/2019

**P.K.CHOUDHARY :**

This appeal is against an Order-in-Original No.37/Commr/Bol/06 dated December 19, 2006 passed by the Commissioner of Central Excise, Bolpur vide which he has disallowed Cenvat credit of Rs.1,76,17,647/- availed during the period July 2004 to December 2005 by the appellant and confirmed a duty demand of Rs.61,94,772/, out of the said Cenvat credit amount of Rs. 1,76,17,647/-, as credit wrongly utilised towards payment of duty while exporting final products from the factory by the appellant under claim of rebate, in terms of Rule 14 of the Cenvat Credit Rules read with Section 11A of the Central Excise Act, 1944. Penalty of Rs.61,94,772/- has also been imposed upon the appellant in terms of Rule 14 of the Cenvat Credit Rules read with Section 11AC of the Act.

2. The appellant carried on the business of manufacture of cut to length line, hydraulic power pack, double action press, spinning machine, disc and coil car parts etc. falling under various sub-headings of Chapter 84 of the First Schedule to the Central Excise Tariff Act, 1985, at its factory at Barjora in the district of Bankura in the State of West Bengal. According to the appellant, they procured input materials from one M/s.Ishaan Technologies Pvt. Ltd., Meghalaya and Manaksia Ltd., EPIP, Amingaon, Guwahati, Assam (in short, “the suppliers”) which comprised of parts/equipments and utilised the same for manufacturing of Briqueting Hydraulic Press (Bailing Press) and Cut to Length Line and Continuous Automatic Coil to Coil Colour Coating Line, with Operational Spares. The said goods were thereafter exported through the Haldia port by the appellant, including in CKD condition, upon payment of duty and claiming rebate in terms of Rule 18 of the Central Excise Rules, 2002 and Notification No. 40/2001-CE (NT) dated June 26, 2001. The appellant availed Cenvat credit under the Cenvat Credit Rules of the duty paid on the said components, machines and other input materials and utilised a part thereof (Rs.61,94,772/- out of the total cenvat credit of Rs.1,76,17,647/-) in payment of duty on the final products cleared.

3. On February 15, 2006 the Commissioner issued a show cause notice proposing disallowance of the cenvat credit availed and for demand and recovery of the sum of Rs.61,94,772/- out of the same, which was utilised in payment of duty on the final products exported and rebate of which was claimed, on the ground that the appellant had irregularly availed Cenvat credit on machines and other input materials

procured from the suppliers and had wrongly utilised a part thereof because there was no manufacture of the final products which were exported from the appellant's factory with the said input materials since the appellant did not have the machinery for carrying out such manufacturing work and the assembly and connection of various machines and parts in the said factory carried out by the appellant did not result in emergence of a new product and, hence, the subject goods were exported without undertaking any manufacturing activity. In addition, it was alleged that the said input materials on being inspected by a Chartered Engineer firm was found to be allegedly old and used and that they were not manufactured goods of the suppliers but were bought and brought into the factory and consequently the invoices under which the said input materials brought were documents on which no Cenvat credit was allowable. Proceedings under this show cause notice has resulted in the impugned order, being aggrieved by which the instant appeal has been preferred by the appellant.

4. In the impugned order the Commissioner had held that the operations like assembly, alignment, combination, synchronization of the equipments and the mechanical processes of minor nature like drilling, taping, welding, polishing and painting jobs undertaken by the appellant did not change the character and use of the procured goods and hence no new and different article emerged and, consequently, there was no 'manufacture' in terms of Section 2(f) of the Central Excise Act, 1944 and, hence, the appellant was not entitled to avail Cenvat credit involved in the procured goods.

5. Dr. Samir Chakraborty, Senior Advocate appearing for the appellant contended as under:

(a) There has been no irregular availment or utilisation of cenvat credit. Assembly of different customised machines according to specified designs, even in the manner stated in the show cause notice and the impugned order, is a manufacturing process within the meaning of Section 2(f) of the Act. In support of this he has relied upon the following decisions:

(i) *Flex Engineering Ltd. Vs. Commissioner of Central Excise, 2012 (276) ELT 153 (SC)*

(ii) *Narne Tulaman Manufacturers Pvt. Ltd. Vs. Collector of Central Excise, 1988 (38) ELT 566 (SC)*

(iii) *Bharat Coking & Coal Ltd. Vs. Commissioner of Central Excise, 2001 (127) ELT 758 (T-Cal)*

(iv) *Sheth Computers Pvt. Ltd. Vs. Collector of Central Excise, 2000 (121) ELT 738 (T)*

(v) *BPL India Ltd. Vs. CCE, 2002 (143) ELT 3 (SC)*

(vi) *Poonam Spark (P) Ltd. Vs. CCE, 2015 (322) ELT 413 (SC)* - affirming *Poonam Spark (P) Ltd. Vs. CCE, 2004 (164) ELT 282 (SC)*

(vii) *Leo Circuit Boards Pvt. Ltd. Vs. CCE, 2015 (330) ELT 227 (T)*

(viii) *Majestic Auto Ltd. Vs. CCE, 2001 (130) ELT 551 (T)*

(ix) *Koron Business Systems Ltd. Vs. Union of India, 1992 (58) ELT 48 (Bom)*

(x) *Commr. of Cus & C.Ex. Vs. Samtel Color Ltd., 2013 (293) ELT 501 (All)*.

Applying the principles laid down in these decisions there can be no dispute whatsoever that the final products undisputedly exported by the appellant were manufactured goods utilising the input materials on which Cenvat credit was rightly availed by the appellant under the provisions of the Act.

(b) The Commissioner has erred in holding that the processes undertaken by the appellant on the subject goods was only making of holes/brackets, checking of alignment, fitting of motors, alignment of various parts/machines, drilling/taping of holes, matching of bearings, welding, checking of functioning of machines, programming of machines, etc. The manufacturing processes flow charts submitted by the appellant along with the reply to the show cause notice demonstrate the patent incorrectness of this finding.

(c) From the manufacturing processes detailed in the said flow charts and from the records of the instant proceedings, including the show cause notice and the impugned order, it would be evident that the items exported (the final products) were not single machines but combination of various machines, each having specific function like galvanisation of coil and that when installed at the destination and put together the same would function as a complete plant different from the parts and components comprising the same. This also clearly demonstrates that what were exported by the appellant were new commodities different from the input materials.

(d) In case of export of such goods where it is impossible and impracticable to clear complete machines in fully finished forms and have to be cleared in a CKD condition, it cannot be held that the export of such goods were as parts of the machine and not as complete machine. In support reliance has been placed upon:

(i) *Vinar Systems Ltd. Vs. Commissioner of Customs, 2001 (131) ELT 578 (T-Kol)*

(ii) *Vishwa Industrial Company (P) Ltd. Vs. Commissioner of C.Ex., 1999 (107) ELT 774 (T)*.

(e) The appellant had therefore correctly availed the Cenvat credit amount involved and had legally and validly utilised a part thereof in payment of duty on the final products cleared and exported. The rebate claim of the appellant is also therefore legal, valid and allowable.

(f) Further, the show cause notice and the demand pertaining to the period July 2004 to December 2004 (out of the total period of July 2004 to December 2005) is barred by limitation, the show cause notice having been issued beyond the prescribed period of one year as contained in Section 11A(1) of the Act. The extended period of limitation as per the Proviso to Section 11A(1) of the Act is inapplicable in as much as there was no suppression of any material fact or willful misstatement by the appellant with intent to evade duty. All relevant and material facts were made known and/or were within the knowledge of the jurisdictional Central Excise authorities at all relevant and material point of time. Monthly returns in the statutory RT-12/ER-1 forms were duly submitted by the appellant, along with copies of RG-23A Part I and Part II, RG-23C Part I and Part II, TR-6 challans and copies of invoices on the basis of which credit of duty were availed of. All relevant information relating to the goods purchased and on which Cenvat credit was obtained were there. Further, the jurisdictional Superintendent and Inspector of Central Excise verified the identity of the goods mentioned in ARE-1 and also verified the duty assessed and the particulars of duty payable which have been recorded in D.S.A./RG-1 and after finding the ARE-1s and invoices are correct from the point of view of identity of goods and its assessment to duty sealed the said goods and allowed export thereof. At no point of time was there any doubt or objection or reservation of any kind whatsoever raised by the said jurisdictional officers regarding the validity and legality of the appellant availing Cenvat credit in respect of the subject goods. In such circumstances, as per settled law, the extended period of limitation is not applicable. The vague reasons contained in the impugned order in support of invoking the extended period of limitation are devoid of any merit and do not satisfy the requirements laid down by the Apex Court for invocation of the Proviso to Section 11A(1) of the Act.

6. It has been contended on behalf of the Revenue by the Learned Authorized Representative, besides reiterating the findings of the Commissioner in the impugned order, as follows:

(a) There was no assembly of the subject goods but reassembly thereof upon obtaining the same in CKD condition and the only work done was replacement of minor parts because of wear and tear and hence the decisions relied upon on behalf of the appellant to establish that assembly of parts and components obtained even in SKD/CKD condition to form a different excisable goods falling under different tariff heading of the Central Excise Tariff were not applicable to the instant case. The Chartered Engineer's certificate evidenced that the goods were old and used and, hence, there could be no 'manufacture' of goods, as contended.

7. In rebuttal, it has been contended on behalf of the appellant that:

(i) The first submission of the Learned DR does not find any support from the impugned order. Nowhere in the impugned order or in the show cause notice it is held/alleged that there was "reassembly" involved. On the contrary, in, *inter alia*, the continuing paragraph at page 5 of the impugned order it is clearly and unequivocally stated that the operations undertook involved, *inter alia*, "assembly". At several places in the said continuing paragraph the Commissioner has observed that the jobs undertaken by the appellant were "assembly" and "to assemble". In fact the issue sought to be decided by the Commissioner was, as would appear from the last 3 lines of the said continuing paragraph, "whether the process of assembling undertaken by the noticee tantamount to manufacture". In the subsequent paragraph the Commissioner, for the reasons stated therein, has held that "in the instant case the noticee in fact has done 'assembly' of CKD (completely knocked down) or SKD (semi knocked down) components only" and that such "assembling of components" does not amount to manufacture. Consequently, the decisions of the Courts and Tribunal, relied upon by the appellant fully apply to the instant case and, on application thereof, the impugned order cannot be sustained.

(ii) In the impugned order the Commissioner has specifically observed that the aspect of old and used goods is "not relevant for deciding the issue", according to him. It is on this basis the Commissioner refused allowing cross examination of the Chartered Engineer. Inspite thereof the Learned Authorized Representative has sought to rely upon this contention, thus traversing beyond the order itself. This submission of the Learned Authorized Representative is also therefore untenable.

8. We have heard the parties and have perused the appeal records.

9. The dispute relates to whether the activities undertaken by the appellant on the goods procured from its suppliers has resulted in 'manufacture' of excisable goods within the meaning of Section 2(f) of the Central Excise Act and whether the appellant is eligible to avail cenvat credit of the duty paid on the said procured goods.

10. Dealing with the issue as to whether assembling of duty paid components of a weighbridge amounts to 'manufacture', the Hon'ble Supreme Court in the case of *Narne Tulaman Manufacturers' Pvt. Ltd. Vs. Collector of C.E., 1988 (38) ELT 566 (SC)* observed and held as follows:

"*3. The appellant's contention before the Tribunal was that it was only preparing a part and that part is dutiable as a separate part. The appellant, however, did the work of assembling. As a result of the work of the appellant a new product known in the market and known under the excise item 'weighbridge' comes into being. The appellant will become a manufacturer of that* *product and as such liable to duty. This is precisely what the Tribunal found on the facts of the case. The appellant seems to have been obsessed by the idea that as a part of machine is liable to duty then the whole end product should not be dutiable as separate excise goods. That is mistake, a part may be goods as known in the excise laws and may be dutiable. The appellant in this case claims to have manufactured only the indicator system. If the indicator system is a separate part and a duty had been paid on it and if the rules so provide then the appellant may be entitled to abatement under the rules. But if the end product is a separate product which comes into being as a result of the endeavour and activity of the appellant then the appellant must be held to have manufactured the said item. When parts and the end product are separately dutiable both are taxable.*"

11. In the case of *Poonam Spark (P) Ltd. Vs. Commissioner of Central Excise, 2015 (322) ELT 413 (SC)* also the Hon'ble Supreme Court, dealing with a case of assembly of various components received from another company on a base plate to form a Water Purification and Filtration System, has held that since the end result of the process or activity resulted in a new and different commercial product, the said process or activity amounted to 'manufacture' within the meaning of Section 2(f) of the Central Excise Act, 1944.

12. In the case of *Bharat Coaking & Coal Ltd. Vs. Commissioner of C.Ex., 2001 (127) ELT 758 (T-Cal)* it was contended on behalf of the assessee that the process of fitting and assembling of duty paid bought out parts of coal tubs did not amount to manufacturing activity within the meaning of Section 2(f) of the Central Excise Act, 1944. Rejecting the said contention, this Bench of the Tribunal held as under:

"*3. After hearing Shri R.K. Roy, ld. JDR we do not feel convinced on the arguments of ld. Advocate on this point. The* *activity undertaken by the appellants is not a simple process of buying of various items from the market and connecting them with each other, as was the case relied upon by the ld. Advocate. We find that the appellants are purchasing the various articles from the market which articles cannot be called, by any stretch of imagination, complete coal tubs. Neither the unwheeled coal tub, nor wheels, nor axels, nor tub blocks can be called a complete coal tubs or can be put to use to which a wheeled coal tub can be put to. the resultant product which emerges after the completion of the processes undertaken by the appellants is a wheeled coal tub which is different from the various parts etc. purchased by the appellants from the open market. Merely because the appellants are not themselves manufacturing the parts and are buying the same from the market will not turn the activity undertaken by them into a non-manufacturing activity. Accordingly we fully agree with the findings of the Commissioner that fitting and assembling of separately identifiable products results into an altogether separate identifiable final product having a specific identity, name and use. Accordingly we reject the said plea o the appellants.*"

13. In the instant case also we find that it is an undisputed fact that the appellant procured duty paid machineries, parts and accessories of ‘Continuous Automatic Coil to Coil Colour Coating Line’ and ‘Briqueting Hydraulic Press’ and carried out the processing jobs thereon as set out in the impugned order, which included “assembly” to produce the aforesaid final products which were exported upon payment of duty under claim of rebate. It is also seen from the records that the input machines, parts and accessories were goods classifiable as excisable goods by themselves under tariff items different from the tariff items under which the exported final products were classified. Hence the principle laid down in the aforesaid decisions of the Hon’ble Supreme Court and this Bench of the Tribunal are applicable to the instant case.

Respectfully following the same we are therefore of the view that the activities undertaken by the appellant amounted to 'manufacture' of excisable goods within the meaning of Section 2(f) of the Central Excise Act, 1944.

14. Consequently, the appellant is eligible to avail Cenvat credit of the duty paid on the said input machineries, parts, etc. under the Cenvat Credit Rules and there is no infirmity on the part of the appellant in availment of Cenvat credit in the instant case. The disallowance of Cenvat credit of Rs.1,76,17,647/- and the duty demand of Rs.61,94,772/- confirmed by the impugned order against the appellant are therefore unsustainable.

15. We are also of the view that the Commissioner in the impugned order having held that the aspect of old and used goods, alleged in the show cause notice, was not relevant for deciding the issue involved herein and no appeal having been preferred by the Revenue against this finding, this issue cannot be agitated afresh in the present appeal of the appellant, the said finding having become final.

16. In the result, the impugned order is set aside and the appeal is allowed, with consequential relief.

(Order pronounced in the open court on 18/12/2019.)

SD/

**(P.K.CHOUDHARY)**
**MEMBER (JUDICIAL)**

SD/

**(BIJAY KUMAR)**
**MEMBER (TECHNICAL)**

**sm**