

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

REGIONAL BENCH - COURT NO.2

Excise Appeal No.76633 of 2018

(Arising out of Order-in-Appeal No.34/CE/RKL-GST/2018 dated 23.02.2018 passed by Commissioner(Appeals), GST, Central Excise & Customs, Bhubaneswar.)

M/s. Shri Radha Raman Alloys Limited

(Jharbada, P.O.-Kutra, Dist.-Sundargarh, Odisha-770070.)

...Appellant

VERSUS

Commissioner of CGST & CX, Rourkela Commissionerate

.....Respondent

(Nayabazar, Rourkela-769010 (Odisha).)

APPEARANCE

Shri Abhishek Jaju, Advocate for the Appellant (s)

Shri S.Mukhopadhyay, Authorized Representative for the Respondent (s)

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

FINAL ORDER NO. 75358 / 2020

DATE OF HEARING : 23 December 2019

DATE OF DECISION : 17 March 2020

P.K.CHOUDHARY :

Briefly stated the facts of the case are that the appellant is a manufacturer of MS ingots. For the manufacture of their final product, the appellant assessee procured raw materials such as pig iron, sponge iron, MS scrap and slag. Period of dispute is from November 2009 to August 2014. During the audit of the records, monthly ER-1 and other returns as well as other documents filed by the appellant, it was pointed out that Cenvat credit claimed on slag is inadmissible inasmuch as the said input, i.e. 'slag' is absolutely exempted in terms of exemption Notification No.4/2006-CE dated 01.03.2006. It is the case of the department that in terms of section 5A(1A) manufacturers are barred to remove absolutely exempted goods on payment of duty and referring to the Board's Circular No.940/01/2011-CX dated 14.01.2011.

Show cause notice dated 01.12.2014 was issued for recovery of Cenvat credit alleged to have availed and utilized wrongly along with interest and for imposition of penalty. The adjudicating authority disallowed the Cenvat credit amounting to Rs.27,65,702/- and ordered for recovery of the same along with interest. A penalty of equal amount has also been imposed under Rule 15(2) of Cenvat Credit Rules, 2004 read with section 11AC of the Central Excise Act, 1944. On appeal, the lower appellate authority upheld the order-in-original and rejected the appeal before him. Hence the present appeal before the Tribunal.

2. Heard both sides and perused the appeal records.

3. I find that the issue is no more *res integra* in view of the various decisions of the Tribunal, High Courts and Supreme Court. Some of the decisions are cited below:-

- (a) Hindustan Coca-Cola Beverages Pvt.Ltd. Vs. CCE, Pune-III
[2014 (301) E.L.T. 360 (Tri.-Mumbai)]
- (b) Neuland Laboratories Ltd. Vs. CCE, Hyderabad-I
[2015 (317) E.L.T. 705 (Tri.-Bang.)]
- (c) CCE, Chennai Vs. CEGAT, Chennai
[2006 (202) E.L.T. 753 (Mad.)]
- (d) CCE & C Vs. MDS Switchgear Ltd.
[2008 (229) E.L.T. 485 (S.C.)]

Relevant Paragraphs of the above-mentioned judgements are reproduced below:-

Hindustan Coca-Cola Beverages Pvt.Ltd. Vs. CCE, Pune-III

“12.We have considered the submissions of the ld.advocate.....
.....

Similarly, this Tribunal in the case of CCE, Hyderabad v. Tube Investments of India Ltd. reported in [2004 \(176\) E.L.T. 363](#) (Tri.-Bang.) has held that once duty paid inputs received, Modvat credit cannot be denied on the grounds that such inputs were not liable for duty. If any action for wrong payment of duty is required to be taken, it should be at the place where duty was paid. In view of the said position we set aside demand on this count.”

(emphasis supplied)

Neuland Laboratories Ltd. Vs. CCE, Hyderabad-I

“4. After hearing learned Authorised Representative (AR) on behalf of Revenue and going through the records including written submissions filed by the appellant, I find that the issue is no longer *res integra* and

there are several decisions taking a view that the assessing officer in-charge of the assessee who has taken the credit cannot sit in judgment as to whether the duty was payable or not on the goods supplied. What is required to be examined is whether duty has been paid or not and if duty has been paid by the supplier/assessee, the receiving assessee cannot be found fault with if he takes Cenvat credit of the duty paid so long it is used as input and Cenvat credit is admissible. I find that the decision of Hon'ble High Court of Madras in the case of Commissioner of Central Excise, Chennai-I v. CEGAT, Chennai [[2006 \(202\) E.L.T. 753](#) (Mad.)] is applicable to the facts of this case. In that case, the Hon'ble High Court came to the conclusion that Rule 57A(1) of Central Excise Rules, 1944 provides for availment of Cenvat credit of duty paid and not payable. The High Court observed that this distinction is very important and which indicates that what is to be taken into account is the factual state of affairs. Thereafter, the Hon'ble High Court observed that once the duty has actually been paid on the raw material, the credit is admissible. In this case also, it is not the case of the Revenue that duty was not paid. Therefore, the decision of the Hon'ble High Court of Madras is clearly applicable to the facts of this case. Even the amended Cenvat Credit Rules have similar provisions and provide for Cenvat credit of duty paid on inputs and therefore the appeal has to be allowed.

5. At this stage learned AR submits that the decision of the Hon'ble High Court of Madras would not apply to the present case. According to Rule 3, a manufacturer/producer of final products shall be allowed to take credit of duty of Excise specified in the First Schedule to the Central Excise Tariff Act leviable under Central Excise Act. He submits that in respect of other duties also similar clauses have been incorporated in Rule 3 wherein the Schedule where the clause to be specified is mentioned. After introduction of Eight Digit Tariff in 2005, Ethyl Alcohol un-denatured (potable liquor) no longer figures in the Tariff at all. Therefore, during the relevant time Ethyl Alcohol (Ethanol) was not covered under any heading in the First Schedule and it cannot be treated as excisable at all. Since credit can be availed on the Excise duty paid in respect of the goods in the First Schedule to the Central Excise Tariff Act, the credit cannot be taken and this aspect is required to be considered.

6. I have considered these submissions carefully. According to Rule 6 of the Central Excise Rules, 2002, the assessee shall himself assess the duty payable on excisable goods. Assessment involves classification of the goods, determination of rate of duty, determination of quantum of duty and payment thereof. This requirement has to be fulfilled by the assessee who is responsible to make the payment of duty. For this purpose, he has to determine the duty payable. As observed by Hon'ble High Court of Madras, there is no such obligation on the person who receives the goods and avails the Cenvat credit. He is eligible to take Cenvat credit of duty paid which is specified in the First Schedule to the Central Excise Tariff Act. What is to be noted as observed by the Hon'ble High Court is the fact that he is not required to determine the duty payable since what is provided in Rule 3 is that he shall be eligible to take credit of the duty paid. He is not required to determine the duty payable which is a part of assessment and is required to be done by the supplier of the goods. If the arguments advance by learned AR are accepted, the duty payable is also to be determined by the receiver of the goods and he has to determine that aspect first and then take credit, the assessee is required to assess all the goods/services received which is definitely

not contemplated by the statute. This aspect is considered along with the provisions of Rule 9 of the Cenvat Credit Rules. Sub-rule (5) of Rule 9 provides that manufacturer has to maintain proper records for receipt, disposal, consumption and inventory of capital goods/inputs in which relevant information regarding the value, duty paid, Cenvat credit taken and utilised and the person from whom the inputs or capital goods have been purchased is recorded. It is to be noted even here, there is no mention of duty payable. The responsibility of the receiver of the inputs/capital goods is to ensure that duty has been paid and the same has been received by him, accounted for by him and utilized by him properly. I do not think that law requires the receiver of the inputs/capital goods to undertake this activity and therefore, even though there is no specific discussion on this aspect in the decision of the Hon'ble High Court of Madras, yet, I feel that the decision would be applicable to the facts of the case before me.

7. *Further, the Board's Circular No. 940/1/2011-CX, dated 14-1-2011 was also brought to my notice. In this Circular, it has been stated that where an assessee pays Excise duty on exempted goods, the amount recovered as Excise duty has to be deposited with the Central Government and Cenvat credit also needs to be recovered in terms of Rule 14 of the Cenvat Credit Rules, 2004. Rule 14 of the Cenvat Credit Rules, no doubt, provides for recovery of credit taken. The Board assumes that if an assessee takes credit of duty which was not required to be paid but paid, availment of credit would attract the provisions of Rule 14 of the Cenvat Credit Rules. The conclusion is that the credit which was taken wrongly would arise when an assessee is required to determine whether the inputs/capital goods received by him are liable to duty or not and whether duty is payable or not. There is no rule which puts an obligation on the receiver of goods. When we take note of the fact that the assessee may receive inputs/capital goods/services classifiable under almost all the headings, it is difficult to imagine that legislature would require the assessee to determine whether duty is payable for all these items or not and then take credit. Even a jurisdictional Central Excise officer may not have all the items listed in the Schedule for assessment. In fact, assessment has been taken away even from the Central Excise officer. That being the case, the Board's Circular which has been issued without taking into consideration and considering the implications of the provisions and implications of the instructions on the assessee cannot be applied blindly to arrive at a conclusion against the assessee."*

In the aforesaid case, the Tribunal while dealing with the implication of Board's Circular dated 14.01.2011 held that there is no provision or Rule under Cenvat Credit Rules, 2004, which puts an obligation on the receiver of goods to ascertain whether duty was payable on the said goods or not by the manufacturer supplier and then avail credit. Even a jurisdictional Central Excise officer at the manufacturers suppliers' end may not be able to do the same as power of assessment has been taken away even from him. That being the case, the Board's Circular which has been issued without taking into consideration the implications of the provisions and the instructions,

cannot be applied blindly for drawing adverse conclusion against the assessee. It was also held that merely on the strength of the said Circular dated 14.01.2011 Cenvat Credit cannot be denied, when there is no such provision in the Cenvat Credit Rules, 2004.

CCE, Chennai-I vs.CEGAT, Chennai

“2.Learned standing Counsel for the department, Shri Veeraraghavan, has contended that since the raw material of the assessee had been exempted from duty vide Notification dated 28-2-1999, he could not claim Modvat credit. However, from the perusal of the impugned order, it appears that, in fact, duty was paid by the assessee’s supplier despite the aforesaid notification. It may be that the supplier was unaware of the exemption notification or it may be that some condition of the notification was not complied with but, nevertheless, the fact remains that duty was paid by the assessee’s supplies. This factual position is not disputed.”

CCE & C Vs. MDS Switchgear Ltd.

“5. By the order-in-original dated 30th October 2000, the Commissioner of Central Excise & Customs, Aurangabad confirmed the demand of Rs. 13,08,701/- under Section 11A of the Act and imposed a penalty equivalent to the amount of duty under Section 11AC of the Act and also a penalty of Rs. 1,00,000/- under Rule 173Q of the Rules. Recovery of interest under Section 11AB of the Act was also ordered.

6. Aggrieved by the above order-in-original, the assessee preferred an appeal before the Tribunal which has been accepted by the impugned order. Revenue, being aggrieved, has filed the present appeal.

7. The Tribunal has come to the conclusion that in fact there was no loss of revenue. It accepted the appeal by recording the following reasons :

“Reasons given by the appellants for the alleged inflation of the value of the intermediate goods are logical. What was required of the Commissioner was to examine the quantum of the loading of the assessable value by the Modvat credit on the earlier inputs. That exercise has nowhere been done. If the department was of the opinion that the value of the final product was depressed, then they could have charged the Jalgaon unit with under-invoicing of their product. That has also not been done. The valuation as given by the Sinner unit was duly approved by the department and the payment of duty was also duly accepted. We find absolutely no substance in the attempt of the learned Commissioner to convert a part of the duty so paid into ‘deposit of duty’. There is no legal basis for such presumption. The rules entitled the receipt manufacturer to avail of the benefit of the duty paid by the supplier manufacturer. A quantum of duty already determined by the jurisdictional officers of the supplier unit cannot be contested or challenged by the officers in charge of recipient unit [2000 (38) RLT 179].”

8. Counsel appearing for the Revenue could not assail any of the findings recorded by the Tribunal.

9. That being the position, we agree with the view taken by the Tribunal and find no merit in these appeals which are dismissed leaving the parties to bear their own costs."

I find that the facts of the present case are squarely covered by the above-mentioned judgements.

4. In view of the aforesaid decisions of the Tribunal and by respectfully following the judgements of the Hon'ble High Court and the Supreme Court, it is my considered view that the impugned order cannot be sustained and is accordingly set aside. The appeal filed by the appellant is allowed with consequential benefits, as per law.

(Order pronounced in the open court on 17 March 2020.)

SD/
(P.K.CHOUDHARY)
MEMBER (JUDICIAL)

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