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

REGIONAL BENCH - COURT NO.2

Excise Appeal No.444 of 2012

(Arising out of Order-in-Original No.12/Commissioner/CE/Haldia/Adjn/2012 dated 27.03.2012 passed by Commissioner of Central Excise, Haldia Commissionerate, Kolkata.)

M/s. Tata Steel Limited (Bearing Division)
(P.O.Rakha Jungle, Kharagpur-721301,
West Midnapur, West Bengal.)

...Appellant

VERSUS

Commissioner of Central Excise, Haldia Commissionerate

.....Respondent

(25, Princep Street, 3rd Floor, Kolkata-700072.)

<u>APPEARANCE</u>

Dr.Samir Chakraborty, Senior Advocate & Shri Abhijit Biswas, Advocate for the Appellant (s)

Shri A.Roy, Authorized Representative for the Respondent (s)

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

<u>FINAL ORDER NO. 75391/2020</u>

DATE OF HEARING : 13 January 2020
DATE OF DECISION : 13 January 2020

P.K.CHOUDHARY :

By the Order-in-Original No. 12/Commissioner/CE/Haldia/Adjn/ 2012 dated March 27, 2012 the Commissioner of Central Excise, Haldia has confirmed central excise duty demand of Rs.17,15,01,421/, as credit was not reversed although was required to be reversed, under Rule 12 of the Cenvat Credit Rules, 2002 read with Section 11A(2) of the Central Excise Act, 1944, along with interest under Section 11AB of the Act against the appellant. A penalty of Rs. 17,15,01,421/- has also been imposed upon the appellant under Rule 13 of the Cenvat Credit Rules read with Section 11AC of the Act. Being aggrieved thereby this appeal has been preferred by the appellant.

2. The brief facts of the case are:

(a) The appellant, a manufacturer of bearings (ball & roller) at its factory at Kharagpur, West Bengal, produces, by machining, outer races and inner races (parts of bearings), from duty paid raw materials, i.e., steel tubes, steel bars and forged rolls. On availing credit of the duty paid, some raw material are also sent out for processing work to job workers. After processing, the races are brought back to the factory and bearings manufacture is completed.

(b) The waste and scrap generated are not brought back but duty and cess were paid by the appellant on a monthly basis on such waste on quantity as per standard input output ratio and value of similar waste and scrap generated in the factory and sold from the appellant's factory.

(c) By a show cause notice dated March 31, 2004 the Commissioner of Central Excise, Haldia alleged contravention of Rule 4(5)(a) of the Cenvat Credit Rules on the part of the appellant during the period 01.04.2002 to 31.07.2003 by non-reversal of equivalent amount of cenvat credit attributable to inputs in waste and scrap not returned and that payment of duty on waste and scrap did not satisfy the requirement of law. However, by an order dated 25.05.2004, the Commissioner of

Central Excise, Haldia dropped the proceedings and the demand proposed under the show cause notice. This order was duly accepted by the Revenue.

(d) On 30.04.2007, however, a fresh show cause notice was issued covering the period 01.04.2002 to 31.07.2003 with identical allegations. This included a part of the same period as the earlier show cause notice.

(e) Reply to the said show cause notice was filed by the appellant on 31.05.2007. On 27.03.2012, the impugned order was passed, ex parte.

3. It has been contended on behalf of the appellant that:

(i) Earlier, a Show Cause Notice was issued on the very same issue, pertaining to a part of the period involved in this case, proceedings under which were dropped by the Commissioner by an adjudication order dated 25.05.2004. The said order has been accepted by the Department. The issues decided in the impugned order were duly considered and findings were given thereon in the said order dated 25.05.2004. Therefore, contrary stand cannot be taken in the present case on same allegations/grounds and the Commissioner has erred in doing so. In support, reliance has been placed on the following decisions:

(a) CCE Vs. Novapan Industries Ltd., 2007 (209) ELT 161 (SC)
(b) CCE Vs. Bigen Industries Ltd., 2006 (197) ELT 305 (SC)
(c) Commr. of C.Ex. & Cus Vs. Mundra Port & Special Economic Zone Ltd., 2011 (21) STR 361 (Guj), para 7.

(ii) The appellant was not granted an opportunity of personal hearing. Therefore the impugned order is violative of principles of natural justice and hence unsustainable.

(iii) There is no provision requiring reversal of credit availed on inputs in waste and scrap arising in course of manufacture/ processing work carried out at job worker's end. Neither Rule 4(5)(a) nor Rule 4(6) of CCR 2002/2004 provide therefor. Rule 4(5)(a) of the Cenvat Credit Rules only refers to return of goods, duly processed, within the stipulated time period. The said rules are silent about the clearance of waste and scrap upon permission or return thereof to the principal from the job worker's premises. In the absence of any such provision, there can be no denial of the cenvat credit relating to the waste and scrap generated at the job workers end nor can there be any requirement under either Rule 4(5)(a) or Rule 4(6) of the Cenvat Credit Rules for payment of cenvat credit proportionately covering the said waste and scrap on their non-return from the job workers premises or on their clearance from the job workers premises. The appellant has, in support of this contention, relied upon the following decisions:

(a) Rocket Engineering Corporation Ltd. Vs. CCE, 2006 (193) ELT 33 (T)
- affirmed by Bombay High Court in Commissioner of C.Ex. Vs. Rocket Engineering Corporation Ltd., 2008 (223) 347 (Bom)

(b) Mahindra Hinoday Industries Ltd. Vs. Commissioner of C.Ex., 2013 (292) ELT 456 (T)

(c) National Engineering Ind. Ltd. Vs. Commissioner of C.Ex., 2015 (323) ELT 205 (T).

(iv) Further and in any event, on waste and scrap duty has been undisputedly paid. Therefore demand, in any event, is unsustainable. Reliance is placed in support of this contention on:

(a) Tulsyan NEC Ltd. Vs. CCE, 2008 (225) ELT 65 (T)

(b) CCE Vs. Allwya Auto Ltd., 2004 (178) ELT 693 (T).

(v) Demand barred by limitation in the undisputed facts on record, applying the principle laid down in :

(a) ECE Industries Ltd. Vs. CCE, 2004 (164) ELT 236 (SC)

(b) Nizam Sugar Factory Vs. CCE, 2006 (197) ELT 465 (SC).

(vi) Further and in any event, the duty demand confirmed by the impugned order is erroneous and untenable, being based on inflated input price, without disclosing the basis thereof, taken in the show cause notice. Thereby an inflated demand was raised against the appellant in the show cause notice. As against the appellant's average input price during the material period ranging between Rs. 50,000/- to Rs. 60,000/- per MT, the price that has been considered in the show cause notice is Rs. 1,86,944/- per MT.

(vii) Consequently, the duty and interest demands and the penalty imposed are unsustainable and liable to be set aside and the appeal be allowed.

4. On behalf of the Department, the learned Authorized Representative has reiterated the findings of the Commissioner in the impugned order.

5. Heard both sides and perused the appeal records.

6. On perusal of the material on record we find that as per the correspondence of the appellant with the Range Superintendent, the duty on the subject waste and scrap generated at the job worker's end was in fact paid by the appellant, upon ascertaining the value thereof,

taking the value of the processed scrap generated through similar operation at the appellant's factory and which the appellant sold on a regular basis, and invoice details in respect whereof were available. In the absence of any other evidence on record, this establishes the correctness of the transaction value of the waste and scrap sold. Hence, the contrary finding of the Commissioner is erroneous. Further, this method of valuation and payment of central excise duty on the subject waste and scrap pertaining to a part of the period involved was considered and accepted by the jurisdictional Commissioner in the earlier order dated 25.05.2004, which decision has been duly accepted by the Revenue.

6.1 In the case of Commissioner of C.Ex. Vs. Novapan Industries Ltd. (supra) it has been held by the Hon'ble Supreme Court as under:

> "*14. In view of a catena of decisions of this Court, it is settled law that the department having accepted the principles laid down in the earlier case cannot be permitted to take a contra stand in the subsequent cases (See: Birla Corporation Ltd. V. CCE [2005 (186) ELT 266 (SC)], Jayaswals Neco Ltd. V. CCE, Nagpur [2006 (195) ELT 142 (SC)] etc.).*"

6.2 It was therefore incumbent upon the Commissioner to follow the order dated 25.05.2004 of his predecessor, which had been accepted by the Department, and drop the proceedings in the instant case also, by following the principle of *res judicata*.

7. Further, the issue on merits also stands settled by various decisions of the Hon'ble High Courts and this Tribunal. In the case of

CCE Vs. Rocket Engineering Corporation Ltd. (supra), the Hon'ble Bombay High Court held as under:

> "*2. Learned Counsel appearing for the appellant contends that following substantial question of law arises for consideration of this Court:-*
>
> *A. Whether the assessee, i.e., the supplier of inputs to the job worker is liable to pay central excise duty on the scrap generated at the job workers end, which is not received back from the job workers within the specified time in terms of Notification No. 214/86-C.E., dated 25-3-1986 as amended r/w Rule 4(5)(a) of Cenvat Credit rules?*
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> *B. Whether scrap generated at the job workers end out of the processing of the inputs is required to be returned to the supplier and, if it is not returned back whether the supplier of inputs is required to pay appropriate central excise thereon?*
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> *3. Having heard rival parties and having examined the findings recorded in the order in original, it is not in dispute, that the assessee had paid duty on the scrap generated at the factory of the job worker for the period April 1999 to March 2000. There is no liability on the principal manufacturer respondent after 31st March 2000 in view of amended Rule 57AC of the Cenvat Credit Rules. In view of this finding of fact, no substantial question of law arises in this appeal. Appeal is, therefore, dismissed in limine with no order as to costs.*"

7.1 In the case of National Engineering Ind. Ltd. Vs. CCE (supra), this Tribunal has held as follows:

> "*The dispute in the present appeal relates to the dutiability of waste and scrap generated in the case of job worker, to whom the rar material was sent by the appellant as principal manufacturer and such waste and scrap was generated and was retained by the job worker.*
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> *2. After hearing both sides for some time we find that Tribunal in the case of Rocket Engineering Corpn. Ltd. [2006 (193) ELT 33 (Tri-Mum)] has held that waste and scrap generated at job workers end subsequent to 1-4-2000 is not dutiable in the hands of principal manufacturer. The said decision of the Tribunal was confirmed by Bombay High Court as reported in CCE V. Rocket Engineering Corpn. Ltd. [2008 (223) ELT 347 (Bom)]. It stands clearly held in the said decision that no liability stand held on the principal manufacturer after 31-3-2000 to pay duty on the scrap generated at the job workers end.*
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> *Following the said judgment, Tribunal, in the case of Emco Ltd. V. CCE, Mumbai-III [2008 (223) ELT 613 (Tri-Mum)] has held that waste and scrap generated at job workers end, duty liability cannot be fastened on principal manufacturer. To the same effect is the decision of Tribunal in the case of Preetam Enterprises V. CCE, Pune-II [2004 (173) ELT 26 (Tri-Mum)].*
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> *3. Learned DR brought to our notice Tribunal's decision in the case of Mahindra Ugine Steel Co. Ltd. [2005 (192) ELT 781 (Tri-Mum)] laying down to the contrary as decided in other case. We note that period of dispute in the case of Mahindra Ugine Steel*

was from December 1991 to August 1996, i.e., prior to 1-4-2000 when the provisions of Rule 57AC was scrapped fully from the statute book.

4. Inasmuch as the issue stand covered by the above referred decision of the Tribunal and the period involved is subsequent to 1-4-2000, by following the earlier decision, we set aside the impugned order and allow the appeal with consequential relief to the appellant."

7.2 Both the above decisions fully apply to the instant case, the facts and issue involved being the same.

8. In view of the aforesaid, respectfully following the abovestated decisions of the Hon'ble Supreme Court and the Bombay High Court and the Tribunal, we find that the impugned order of the Commissioner is unsustainable. Further, we find that CBEC Circular F.No.B-4/7/2000-TRU dated 03.04.2000 provides certain clarifications in this regard. The relevant portion is reproduced below :-

"Government of India
Ministry of Finance (Department of Revenue)
Central Board of Excise & Customs, New Delhi

Subject : CENVAT Rules - Clarifications - Regarding.

1. As you are aware, CENVAT Rules were notified vide Notification No. 11/2000-C.E. (N.T.), dated 1st March, 2000 and they were to come into force from 1-4-2000. Since then, we have received references from the Commissioners as also from trade and industry, seeking clarification on certain aspects.

2. We have examined these references. Some modifications have now been carried out in the CENVAT rules and the CENVAT rules have now been *notified vide Notification No. 27/2000-C.E. (N.T.), dated 31st March, 2000. These come into force w.e.f. 1st April, 2000.*

3. ....

4. ....

5. Some doubts have been raised whether CENVAT credit would be admissible on the part of input that is contained in any waste, refuse or by-product. In this context it is clarified that CENVAT credit shall be admissible in respect of the amount of inputs contained in any of the aforesaid waste, refuse or by-product. Similarly, CENVAT should not be denied if the inputs are used in any intermediate of the final product even if such intermediate is exempt from payment of duty. The basic idea is that CENVAT credit is admissible so long as the inputs are used in or in relation to the manufacture of final products, and whether directly or indirectly.

6. A specific provision has now been made if the inputs or capital goods are cleared to a job worker. It has been provided that they should be received back within 180 days. If they are not received, the manufacturer shall debit the CENVAT credit attributable to such inputs or capital goods, otherwise it will be an offence. However, the manufacturer shall be entitled to take CENVAT credit as and when the goods sent to the job worker are received back. If part of the goods are received back within 180 days and the rest of the goods are received back after 180 days, the obligation for debiting the credit shall arise only in respect of CENVAT credit attributable to that part which is not received within 180 days."

9. In view of the above discussion, the impugned order dated 27.03.2012 passed by the Commissioner of Central Excise, Haldia is set aside and the appeal of the appellant is allowed, with consequential relief, if any.

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

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

Sd/
(P.ANJANI KUMAR)
MEMBER (TECHNICAL)

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