IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
EAST REGIONAL BENCH : KOLKATA

Excise Appeal No.77095 of 2019

(Arising out of Order-in-Original No.02/Commr./Bol/19-20 dated 28.05.2019 passed by Commr. of CGST & Excise, Bolpur)

M/s BST Infratech Ltd.
Jamuria Industrial Estate, Mondalpur, Jamuria, Dist.-Burdwan, Pin-713336

Appellant

VERSUS

Commr. of CGST & Excise, Bolpur
Nanoor Chandidas Road, SIAN, Bolpur, Dist.-Birbhum, Pin-731204

Respondent

Appearance:

Shri Sudhir Malhotra, Advocate for the Appellant
Shri T.Mondal, Authorized Representative for the Respondent

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

FINAL ORDER NO.75665/2020

DATE OF E-HEARING : 14.10.2020
DATE OF PRONOUNCEMENT : 21 DECEMBER 2020

Per P.K.Choudhary :

The present appeal is directed against Order-In-Original No. 02/Commr/BOL/19-20 dated 28.05.2019 issued under C.No. V(15)54/Adj/ASN-II/CGST/Bol/18/293 dated 07.06.2019 and passed by the Commissioner, CGST Commissionerate Bolpur, Sian, Bolpur, Distt. Birbhum (WB)-7312014.

2. Briefly stated the facts of the case are that M/s BST Infratech Limited (Formerly Known as M/s Baba Strip & Tubes Ltd.), Jamuria Industrial Area, Jamuria, Mondalpur, Distt. Burdwan, West Bengal (hereinafter referred to as the appellant) were engaged in the manufacture of different items of Iron & Steel classifiable under Chapter 72 & 73 of Central Excise Tariff Act, 1985 (hereinafter referred to as impugned goods). They are holding Central Excise Registration

and availing CENVAT Credit in respect of inputs used in the manufacture of impugned goods.

3. A show cause cum demand notice No. 12/Commr/BST/DGP Audit/ 2018 dt. 07.05.2018 was issued to the appellant under CNo. V(15)275-SCN/BST/Tech/DGP Audit/ Part-1/2018/4696 dt. 08.05.2018 (Annexure 'A') wherein it was alleged that:-

i) An audit was conducted from 28.04.2015 to 01.05.2015 for the period 2013-14 by the department at appellant's factory premises. On scrutiny of documents it was observed that a difference appeared in purchase value of raw material in balance sheet as compared to ER-1 returns thereby resulting in excess availment of CENVAT Credit on inputs. In the audited balance sheet of the appellant for the financial year 2013-14, the purchase amount of material consumed has been shown as Rs.260,32,34,295/-, whereas the price of raw material consumed by the appellant, calculated from the total CENVAT Credit availed by them as shown in their ER-1 returns for the financial year 2013-14 comes to Rs.278,92,71,570/- by using the following formula :-

Price of raw material = Total CENVAT Credit availed on inputs as per ER-1 x 100 / 12.36

ii) It was alleged that the appellant had shown escalated value of raw material in their ER-1 returns submitted to the department during the year 2013-14 and accordingly availed excess CENVAT Credit which is irregular and inadmissible. It was alleged that the appellant had suppressed the material facts from the department and that the appellant actually did not purchase the raw material relating to the differential amount and did only paper transaction to wrongly avail CENVAT Credit to the tune of Rs.2,29,94,207/- (including Cesses) during the year 2013-14 and utilized the same for payment of central excise duty..

iii) It was alleged that during the year 2012-13, there was difference in purchase value of Rs.6,36,16,543/- of raw

material as determined on the basis of balance sheet for the year 2012-13 and thus the appellant availed excess CENVAT Credit amount of Rs.78,63,005/- It has been alleged that as Form 3CD for the year 2012-13 is to be submitted on or before October 2013 and the demand for the financial year 2012-13 is based on the date of submission of balance sheet for the year 2012-13, the demand for the year 2012-13 is well within the time limit of extended period of limitation.

iv) Similar analogy has been applied in the succeeding years of 2014-15 to 2016-17 and the appellant appeared to have availed irregular/ inadmissible CENVAT Credit of Rs.42,96,219/-, Rs.29,11,688/- & Rs.1,14,29,519/- respectively . It has been alleged that appellant willfully and deliberately availed and utilized CENVAT Credit without receipt of raw material or by short receipt of raw material. The appellant had deliberately and willfully availed inadmissible CENVAT Credit total amounting to Rs.4,94,94,638/- during the period from 2012-13 to 2016-17 on the raw material which was not received in their factory premises and never used for manufacture of their final products.

4. A Show Cause Notice dated 07.05.2018 was issued to the appellant and an amount of Rs.4,94,94,638/- was proposed as recoverable under Rule 14 of CENVAT Credit Rules, 2004 read with Section 11A (4) along with interest under ibid Rule 14 read with section 11AA of Central Excise Act, 1944. The penal provision under Rule 15 of CENVAT Credit Rules, 2004 read with section 11AC of Central Excise Act were also invoked for contravention of provision of said Rules by way of wrong and fraudulent availment of CENVAT Credit, by suppressing the facts from the department with clear intention to evade payment of duty.

5. The appellant submitted reply to show cause notices vide their letter dt. 01.10.2018 and inter-alia denied the allegation made in show cause notice. The appellant contested the demand of duty besides assailing extended period of limitation and penal provisions.

6. The Ld. Commissioner decided the case vide the impugned order and demanded duty of Rs.4,94,94,638/- under section 11A(10) of the Central Excise Act, 1944 along with interest under the proviso to Rule 14 (1) (ii) of CENVAT Credit Rules, 2004 read with section 11AA of the Central Excise Act, 1944. A penalty of Rs.4,94,94,638/- was also imposed under proviso to Rule 15 (2) of CENVAT Credit Rules, 2004 read with section 11AC (1) (c) of the Act.

7. Being aggrieved, by the impugned order, the appellant has filed the present appeal on the grounds as stated in the Memorandum of Appeal.

8. Sh. Sudhir Malhotra, Advocate the Ld. Counsel for the appellant submits that department has worked out excess availment of CENVAT credit based on reverse calculation i.e. the value of raw material consumed has been arrived from the total CENVAT credit declared in the ER-1 returns by dividing it with the rate of duty i.e. 12.36% or 12.50 %. The value so arrived from CENVAT credit taken was compared with the value from material consumed shown in the Balance Sheet. The excess CENVAT credit has been worked out on the differential value between the values arrived from ER-1 returns qua Balance sheets of respective financial year. He submits that ER-1 return does not show CENVAT credit on raw material consumed; the CENVAT credit taken on receipt of inputs are shown in the ER-1 returns. The appellant also received quantity discount on lifting particular quantity during a month from Steel Authority of India Ltd. , Zinc supplier etc. e.g for lifting 500 MT of product in a month, a discount @ Rs.100/- MT was allowed and credit note to this effect was issued by the supplier and the appellant in the case of quality dispute of the product has issued debit note to the supplier. There were different rates of duty on different inputs consumed on production of final products i.e. on iron & steel products the duty was 12.36% or 12.50%; on Coal Tar duty was 6.18% and on Furnace oil duty was 14.42%. The department neither has taken note of these factors nor has investigated from any consignor of raw material or from any transporter to determine non receipt or short receipt of inputs; that

there is no allegation of any flow back and that there is no inculpatory statement brought on records to substantiate receipt of cenvatable invoices without/short receipt of goods thereto. He states that there is no statutory provisions under Central Excise Law which empowers the Department to arrive at excess CENVAT credit by the formula as relied upon by Learned Adjudicating Authority. The ld. Counsel further submits that the value of raw material purchased/ consumed and shown in the Balance Sheet does not include the value of fuel expenses i.e. coal and furnace oil. The value of fuel expenses are separately shown in the Balance Sheet. The extended period of limitation has incorrectly been invoked and penalty incorrectly imposed. The Ld. Counsel also relied upon various case laws in support of his contentions.

9. The Ld. Authorized representative of department justified the findings of Learned Adjudicating Authority.

10. Heard both the sides through video conferencing and perused the appeal records .

11. The first issue involved in this case is whether the appellant had taken excess CENVAT credit as arrived by the department, holding that it was paper transaction without or short receipt of raw materials. The second issue is whether in the circumstances and the facts on record, extended period of limitation can be invoked.

12. We find that the excess CENVAT credit has been computed based upon audit objection and the audit has worked out the excess CENVAT credit by arriving at value of raw material consumed from CENVAT credit taken and shown in ER-1 returns for the financial year by applying the formula as under:

Price of raw material consumed = total cenvat credit availed on inputs as per ER-1 x 100 / 12.36 or 12.50

13. The value so arrived was compared with the value of raw material consumed as shown in the Balance Sheet of respective financial year. We find that ER-1 return shows the amount of CENVAT credit taken on the quantity of raw material purchased and not on the quantity of raw material consumed. There is no provision for one to

one correlation in CENVAT credit scheme. The appellant also received credit note on quantity discount from suppliers and also issued debit note in the case of quality dispute e.g during the year 2013-14 due to inferior quality of raw material, a debit note for Rs.12,49,45,715/- was issued to supplier of billets and the appellant received a credit note of Rs.17,19,147/- from Steel Authority of India(SAIL). Similarly, during the year 2016-17 the appellant received credit not of Rs. 1,57,95,597/ from SAIL and for Rs.18,21,000/- from Zinc supplier. The said notes were on record before the Ld Adjudicating authority but the same are neither disputed nor commented upon in the impugned order. We also find that there were different rates of duty prevailing during the period under reference i.e. 12.36%, 12.50%, 6.18%, 14.42%. The ld Adjudicating Authority has considered rate of duty only at 12.36% or 12.50%. We find that this method of determining excess CENVAT credit is not provided under the statute as conceded by the Ld AR and cannot be made the basis to further investigate the matter and cannot be the sole ground for denial of CENVAT credit taken. It is observed that there is no other evidence on record like investigation from supplier of raw material, transporter or evidence of cash flow back or any inculpatory statement to substantiate that excess CENVAT credit taken was based on paper transaction i.e. without or short receipt of raw material against invoices. There is also no reference to any statutory provisions to justify/ support the said computation of excess CENVAT credit demanded in the instant case. Therefore the entire demand of excess CENVAT credit in the absence of any corroborative evidence is nothing but based on presumptions and is not permissible under the law. The Tribunal in the case of Beer Bros. Vs. Commissioner of Central Excise, New Delhi 2016 (333) ELT 337 (Tri-Del) held that charge of excess cenvat credit on the strength of balance sheet only is not sustainable as under;-

> ***"5.*** *In this case, the basis for arriving at a decision that appellants have taken excess Cenvat credit is the balance sheet figures whereas as per the Rule 9 of Cenvat Credit Rules, 2004, Cenvat credit is available on the basis of invoices issued by the*

input supplier. From the show cause notice as well as the impugned order, it is not coming out whether the audit team has verified the Cenvat credit account corresponding to the invoices received by the appellants for inputs which is the prime document for availment of Cenvat credit. Therefore, I hold that show cause notice is defective for want of evidence, i.e., invoices and it is not coming out from the investigation whether the Cenvat credit account has been verified to the corresponding invoices or not. Therefore, quantification of duty admissible on Cenvat credit on the strength of balance sheet figures is incorrect. Therefore, the charge of availment of excess Cenvat credit on the appellant is not sustainable. Consequently, Cenvat credit availed by the appellant cannot be denied in the absence of any supportive evidence. In these circumstances, the Cenvat credit availed by the appellant is correct. Consequently, duty along with interest, entire demand and penalties are not imposable. With these observations, impugned order is set aside. Appeals are allowed with consequential relief, if any."

14. We are fully in conformity with the findings in the above said case law and it squarely covers the case in hand.

15. We find that the total demand has been computed by applying extended period of limitation in terms of Section 11A of Central Excise Act, 1944. The said section prescribes conditions under which extended period of limitation can be invoked;-

:(4) Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, by the reason of—

(a) fraud; or

(b) collusion; or

(c) any wilful mis-statement; or

(d) suppression of facts; or

> *(e) contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, by any person chargeable with the duty, the Central Excise Officer shall, within five years from the relevant date, serve notice on such person requiring him to show cause why he should not pay the amount specified in the notice along with interest payable thereon under section 11AA and a penalty equivalent to the duty specified in the notice.*

In the present case, the entire demand is based on the audit objection and is alleged to have been detected only after the audit was conducted.

16. We find the appellant is duly registered with the department and there is no allegation in the impugned order of non submission of any periodical returns. The appellant unit took central excise registration on 12.04.2007 and audit of department and by AG, West Bengal regularly being conducted as per details below :-

Sl.No.	**Audit conducted by**	**Period of Audit**	**Date of Audit conducted**	**Remarks**
1.	Central Excise Audit party	F.Y. 2008 - 2009	08/02/2010 TO 11/02/2010	
2.	Central Excise Audit party	F.Y. 2009 - 2010	22/11/2010 TO 23/11/2010	
3.	Central Excise Audit party	F.Y. 2010 - 2011	14/09/2011 TO 15/09/2011	
4.	Central Excise Audit party	F.Y. 2011 - 2012	06/11/2012 TO 08/11/2012	
5.	Central Excise Audit party	F.Y. 2012 - 2013	18/12/2013 TO 21/12/2013	

The allegation of suppressing the facts from the department does not hold good in the event of periodic audit of the appellant as above. There is no other evidence in the impugned order to show that the appellant has willfully suppressed the facts from the department in

order to evade payment of duty. As such extended period of limitation cannot be invoked in the present case. Reliance is placed on the following case laws;-

(i) Collector of Central Excise Vs. Malleable Iron & Steel Casting Co. Pvt. Ltd. 1998 (100) ELT 8(SC).

(ii) Collector of Central Excise Vs. H.M.M. Ltd. 1995 (76) ELT 497 (SC).

17. In view of the above discussions, the impugned order cannot be sustained and is accordingly set-aside.

18. The appeal filed by the appellant is thus allowed with consequential relief, if any.

(Pronounced in the open court on 21.12.2020)

Sd/

(P. K. Choudhary)
Member (Judicial)

Sd/

(P. Anjani Kumar)
Member (Technical)

mm