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

Excise Appeal No.36 of 2011

(ARISING OUT OF ORDER-IN-ORIGINAL NO. 62/COMMR/BOL/10 DATED 13-10-2010 PASSED BY COMMISSIONER OF CENTRAL EXCISE, BOLPUR)

M/s Jai Balaji Industries Limited (Unit IV)
Banskopa, P.O.-Rajbandh, Dist.-Burdwan, Durgapur-713212

Appellant

VERSUS

Commissioner of Central Excise, Bolpur
Nanoor Chandidas Road, SIAN, Bolpur, Dist.-Birbhum, Pin-731204

Respondent

Appearance:

Shri K.K.Anand, Advocate & Shri S.Mohapatra,GM(Taxation) for the Appellant
Shri S.Mukhopadhyay, Authorized Representative for the Respondent

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

FINAL ORDER NO.75547/2021

DATE OF E-HEARING : 27.07.2021
DATE OF PRONOUNCEMENT : 25.08.2021

Per P.K.Choudhary :

The present appeal has been filed by M/s Jai Balaji Industries Ltd., assailing the adjudication order dated 13.10.2010 passed by the Ld. Commissioner vide which the demand has been confirmed consequent to the recovery of CENVAT credit for the period from April 2005 to July,2009.

2. Briefly stated, the facts of the case are that the Appellant, M/s. Jai Balaji Industries Ltd (Unit IV) which was formerly known as Shri Ramrupai Balaji Steels Ltd. upto 23-07-2007, are engaged in the manufacture of Iron and Steel products of different grades classifiable under Chapter 72 of the first schedule to the Central Excise Tariff Act, 1985. A show cause notice dated 02-12-2009 was issued to them by invoking the extended period of limitation on the ground that during

the impugned period, they had availed cenvat credit on bills/photocopy of bills which were issued to the address of the head office situated at 5, Bentinck Street, Kolkata-700001 without issuing any invoice for distribution of input service or following the provisions thereto. It was further alleged that the said head office was not even registered as an input service distributor as required under Rule 9 of the Cenvat Credit Rules, 2004 for distribution of credit on the documents in the name of the head office. Therefore a proposal was made for recovery of Cenvat Credit taken by the Appellant willfully with the intent to evade payment of duty demandable and recoverable from them along with interest invoking the extended period of limitation in terms of the provisions of Rule 14 of the Cenvat Credit Rules, 2004 read with Section 11A of the Central Excise Act, 1944 along with imposition of penalty under Rule 15 Cenvat Credit Rules, 2004 read with Section 11AC of the Central Excise Act, 1944.

3. The Ld. Commissioner vide the impugned Order has allowed the credit of Rs.57,76,485/- on the ground that certain bills as mentioned in the chart were in the name of the factory address at Banskopa, Durgapur. According to him the show cause notice did not mention any other anomaly except the fact that credit had been availed on the basis of photocopy of bills and that credit had not been distributed through input service distributor challans. He allowed the credit by holding that when service providers raised bills for input service to the manufacturing unit directly, then there was no bar to avail that credit on the basis of original copy of the bills of input service providers. However, he disallowed the Cenvat credit of service tax to the tune of Rs.3,53,87,779/- in terms of Rule 14 of Cenvat Credit Rules, 2004 read with Section 11A(2) of Central Excise Act, 1944. He also confirmed the demand of interest under Rule 14 of Cenvat Credit Rules, 2004 read with Section 11AB of Central Excise Act, 1944. However, he imposed a penalty of Rs.2,000/- only in terms of Rule 15(3) of Cenvat Credit Rules, 2004.

4. The learned Advocate appearing on behalf of the Appellant submitted that upto 23-07-2007 there was only one unit known as Shri Ramrupai Balaji Steels Ltd. However, w.e.f. 23-07-2007 the Appellant acquired the said M/s. Shri Ramrupai Balaji Steels Ltd. It is clear that upto that date there was only one head office and one manufacturing unit. Therefore, there was no case of any distribution of credit from the head office to the manufacturing unit. Even subsequent to 23-07-2007 no case has been made out that the said credit was utilized by multiple units. It is his contention that due to financial arrangements the invoices were issued in the name of the head office which used to forward the original copy to the manufacturing unit. According to him the only allegation in the show cause notice is that the head office was required to take registration as input service distributor as provided under Rule 9 of the Cenvat Credit Rules, 2004 for distribution of credit on the documents in the name of the head office. It is his contention that it was purely a technical lapse for which the substantive benefit could not be denied to them. The eligibility of the inputs service to the Appellant has not been disputed in the show cause notice. That though the Government had framed rules under Notification No.26/05-ST dated 07-03-2005 and Notification No.27/05-ST dated 07-06-2005, which inter alia, laid down the procedure for Registration for input service distributor but the said rule is only of procedural nature for which they cannot be denied substantive benefit. There is nothing in the said rules which would ultimately disentitle an input service distributor from availing cenvat credit. That they had maintained full records and no discrepancy to this effect has been pointed out in the show cause notice. It is his submission that certain original invoices relating to bank advices and auxiliary insurance services on which they had availed input services to the extent of Rs.18,29,339/- and Rs.11,42,161/- respectively were missing on which they had submitted a statement as Annexure G to the show cause notice. However, they had submitted two certificates of Chartered Accountants dated 24-08-2010 and 25-08-2010 respectively which are placed at pages 84 to 86 and 87-88 of the

appeal memo. The Chartered Accountant in both the certificates had certified that the said banking and financial services as well as auxiliary insurance services were received and used by the company in the activities relating to its business. It was further certified that the cenvat credit in respect of bank advices and auxiliary insurance services had been availed once only on the date of cenvat credit shown in their records. The Chartered Accountant in the respective certificates had also given the date of taking of credit along with the document number and date. According to the learned Advocate there is no rebuttal of this factual position by the Commissioner in the impugned Order.

5. In support of his various submissions, the Ld. Advocate has relied upon the following judgments:-

(i) Commissioner of Central Excise Vs. Dashion Ltd reported in 2016 (41) STR 884 (Guj.).

(ii) Commissioner of Customs and Central Excise Vs. Sri Ram Piston & Rings reported in 2019 (369) ELT 631 (All.).

(iii) Sanvijay Rolling & Engineering Ltd Vs. Commissioner of Central Excise, Nagpur reported in 2018 (11) G.S.T.L. 344 (Bom).

(iv) Rajender Kumar & Associates Vs. Commissioner of Service Tax, Delhi-II reported in 2021 (45) G.S.T.L. 184 (Tri.-Del.)

(v) Madhya Pradesh Consultancy Organization Ltd Vs. Commissioner of Central Excise, Bhopal reported in 2017 (4) G.S.T.L. 100 (Tri.-Del.)

(vi) Commissioner of S.T., Chennai Vs. Hathway Cable & Datacom Pvt Ltd reported in 2019 (369) ELT 714 (Tri.-Chennai).

(vii) Nestle India Ltd Vs. Commissioner of Cus. & C.Ex., Goa reported in 2017 (5) G.S.T.L. 294 (Tri. – Mumbai).

(viii) Rajasthan Patrika Pvt Ltd Vs. Commissioner of C.Ex & CGST, Jaipur reported in 2020 (34) G.S.T.L. 226 (Tri.-Del).

(ix) Deewan Reclaim Rubber Vs. Commissioner of C.Ex., Ghaziabad reported in 2017 (350) ELT 105 (Tri.-All.).

(x) Unicure India Ltd Vs. Commissioner of Customs, C.Ex. & S.T., Noida reported in 2017 (3) G.S.T.L. 418 (Tri. – All.).

(xi) Biotor Industries Ltd Vs. Commissioner (Appeals), C.Ex., Cus & S.T., Vadodara-1 reported in 2018 (10) G.S.T.L. 34 (Tri. – Ahmd.).

(xii) Jayco Electricals Vs. Commissioner of C.Ex. & S.T., Meerut-1 reported in 2017 (352) ELT 271 (Tri. – All.).

The learned Advocate has also challenged the demand on the ground of limitation. According to him when they had reflected all the transactions in their books of accounts it could not be alleged that there was any willful mis-statement with intent to evade payment of duty. The learned Advocate drew our attention to Rule 15 of Cenvat Credit Rules, 2004. Rule 15(3) of Cenvat Credit Rules, 2004 provides for imposition of penalty of Rs.2,000/- if the credit in respect of input services has been taken wrongly or in contravention of any of the provisions of these rules whereas Rule 15(4) of Cenvat Credit Rules, 2004 provides that where the Cenvat credit in respect of input service has been taken or utilized wrongly by reason of fraud, collusion, willful mis-statement, suppression of facts, or contravention of any of the provisions of the Finance Act or of the rules made thereunder with intention to evade payment of service tax, then, the provider of output service shall also be liable to pay penalty in terms of the provisions of section 78 of the Finance Act. In this case the Commissioner has imposed penalty of Rs. 2,000/- under Rule 15(3) of Cenvat Credit Rules, 2004. Had it been a case of willful mis-statement or suppression of facts then the Commissioner would have imposed equal amount of penalty as provided under Section 11AC of the Central Excise Act which was invoked in the show cause notice or under Rule 15(4) of Cenvat Credit Rules, 2004, which provides imposition of hundred percent of the credit availed in terms of provision of Section 78 of the Finance Act. However the Commissioner chose to impose penalty under Rule 15(3) of Cenvat Credit Rules, 2004 which means there was no willful mis-statement or suppression of facts. According to him though in the show cause notice proviso to Section 11A was invoked along with the proposal for imposition of penalty under Section 11AC of the Act but the Commissioner in the Order has not imposed any penalty under Section 11AC of the Act as he did not find it a fit case for imposing penalty equal to the duty. Therefore, the finding of the Commissioner that extended period of limitation was invokable in the present case is legally not sustainable.

6. The learned A.R. for the Revenue, has reiterated the findings of the Commissioner and contended that the Appellant was given various opportunities to produce the original copies of the invoices, on which they availed the credit, but they failed to avail the said opportunities. Therefore the Commissioner has rightly disallowed the credit. According to him the Appellant vide Annexure-G itself has accepted that original bills in respect of credit of Rs.29,71,500/- were not available with them but he did not give any comment on the veracity of the two Chartered Accountant certificates dated 24-08-2010 and 25-08-2010. He fairly conceded that one of the judgments relied upon by the Advocate i.e. Commissioner of Central Excise Vs. Dashion Ltd reported in 2016 (41) STR 884 (Guj.) has been accepted by the department as is reflected in the CBEC circular No.1063/2/2018-CX dated 16-02-2018.

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

8. We have carefully gone through the facts of the case and the legal position. We have also perused the various judgments relied upon by the learned Advocate in support of his submissions. We find that the only allegation leveled in the show cause notice was that bills/photo copies of bills produced were raised in the address of the head office at 5, Bentinck Street, Kolkata-700001 and the said office did not follow the procedure of getting registered as input service distributor as required under Rule 9 of the Cenvat Credit Rules, 2004 for distribution of credit on the documents in the name of the head office. In the first place we may point out that even the show cause notice in opening para stated that M/s. Jai Balaji Industries Ltd (Unit IV) was earlier known as Shri Ramrupai Balaji Steels Ltd. The

Appellant in reply to the show cause notice has categorically stated that the present Appellant had taken over this unit only w.e.f. 23-07-2007. Upto that point there was only one head office and one manufacturing unit. So there is no justification to deny the Cenvat credit up to the said date. Even subsequent to 23-07-2007 there is neither any allegation in the show cause notice nor any finding in the Order-in-Original that the Cenvat credit on input services was utilized in more than one unit. It is our considered view that if the revenue was of the opinion that there was any misutilisation of the credit from the head office to the manufacturing unit, the onus was upon them to have proved the said fact with concrete evidence. No such exercise was ever conducted by the department. Now the question which remained for consideration is that whether the Cenvat credit on input services can be denied to the Appellant merely on the ground that the head office was not registered as input service distributor as required under Rule 9 of the Cenvat Credit Rules, 2004 for distribution of credit on the documents in the name of the head office. This question has been answered by the various judgments of High Courts. The first judgment relied upon by the Ld. Advocate is the case of Commissioner of Central Excise Vs. Dashion Ltd reported in 2016 (41) STR 884 (Guj.) wherein the Hon'ble Gujrat High Court has held in clear terms that there is nothing in the statutory rules to disentitle an unregistered input service distributor from availing Cenvat credit. It has further been held that non-registration of the unit as input service distributor is only a procedural irregularity for which the Cenvat credit cannot be denied. It has been held that when the assessee is maintaining full records of credit received and distributed which was duly verified by the department, the credit could not be denied to them. The learned AR has brought to our notice the CBEC Circular No. 1063/2/2018-CX dated 16-02-2018 at S.No. (2). This judgment of the Hon'ble Gujarat High Court has been accepted by the department. Similarly, the Hon'ble Allahabad High Court in the case of Commissioner of Customs and Central Excise Vs. Sri Ram Piston & Rings reported in 2019 (369) ELT 631 (All.) has held that the rules relating to "Input Service

Distributor" are purely machinery provisions and directory in nature. No prejudice is caused to Revenue if assessee was allowed to make substantial compliance. Apart from holding that the provisions of Notification No. 26/2005-ST dated 07-06-2005 are procedural in nature, the High Court has held in para 32 of the judgment that once the utilization had been made by the manufacturing unit either against an invoice or against the letter, it would automatically get reflected in the returns filed thereafter by the assessee and no part of it could be claimed to have escaped the attention or scrutiny of the departmental authorities for reason of transfer of Cenvat credit having been evidenced on a letter and not an invoice or bill or challan. Similar law has been laid down in other judgments relied upon by the Advocate. The sum and substance of these judgments is that Cenvat credit on input services cannot be denied merely because that the duty paying invoices were in the name of the head office whereas the input service credit was utilized in the manufacturing unit. It has also been held that even if the head office is not registered under Rule 9 of the Cenvat Credit Rules, 2004, that itself would not debar the assessee from availing the Cenvat credit when there is no dispute about the eligibility of the credit on the said inputs service to the manufacturer. In respect of availment of credit on bank advices and auxiliary insurance services we have gone through two Chartered Accountant's certificates dated 24-08-2010 and 25-8-2010 along with the enclosed statements containing details of documents on which Cenvat credit had been availed by the Appellant. The Chartered Accountant in both the certificates has certified that the said banking & financial services as well as auxiliary insurance services were received and used by the Appellant. He has also certified that the Cenvat credit on such services had been availed only once as shown in their records. Despite the fact that the above Chartered Accountant's certificates are on record, the Commissioner has not rebutted or controvered the veracity of the same. Therefore, we hold that the case made out by the Department lacks sufficient reasons to deny the cenvat credit on input service in respect of banking & financial services and auxiliary insurance services.

9. On the issue whether the extended period of limitation is applicable to the facts of the case, we find that though the show cause notice was issued under extended period of limitation where there was a proposal to impose penalty on the Appellant of Rs. 2,000/- only in terms of Rule 15(3) of Cenvat Credit Rules, 2004 read with Section 11AC of the Act. We find that the Commissioner has only imposed penalty on the appellant under Rule 15(3) of Cenvat Credit Rules, 2004. We agree with the submissions of the Advocate that having not imposed penalty either under Section 11AC of the Central Excise Act which was duly invoked in the show cause notice or under Rule 15(4) of Cenvat Credit Rules, 2004, the Commissioner has impliedly accepted that it was not a case of willful mis-statement or suppression of facts with intent to evade payment of duty. Therefore, we hold that the demand of Cenvat credit beyond the period of one year is barred by limitation .

10. In view of the above findings, the impugned order cannot be sustained, hence the same is set aside. The appeal is allowed with consequential relief, if any.

(Pronounced in the open court on 25 August 2021)

Sd/

(P. K. Choudhary)
Member (Judicial)

Sd/

(Raju)
Member (Technical)

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