

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

REGIONAL BENCH - COURT NO.2

Excise Appeal No.99 of 2010

(Arising out of Order-in-Appeal No.40/DB/CE(A)/GHY/09 dated 17.12.2009 passed by Commissioner of Customs & Central Excise (Appeals), Guwahati.)

M/s.B & A Limited A/C Gatoonga Tea Estate

("Poddar Point", 113, Park Street, 9th Floor, "A" Wing, Kolkata-700016.)

...Appellant

VERSUS

Commissioner of CGST & CX, Dibrugarh Commissionerate

.....Respondent

(F-Lane, Milan Nagar, Dibrugarh-786003)

APPEARANCE

Shri Partha Mukhopadhyay, Consultant for the Appellant (s)

Shri S.Mukhopadhyay, Authorized Representative for the Revenue

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

HON'BLE SHRI K. ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NO. 75368/2023

DATE OF HEARING : 27 March 2023

DATE OF DECISION : 11 May 2023

Per : P.K. CHOUDHARY :

The Appellant have availed the benefit of exemption of Central Excise duty by way of refund in terms of Notification No.33/99-CE dated 08.07.1999. The said unit during the period from 15.03.2002 to 28.02.2003 had sanctioned an amount of Rs.17,15,074/- which was paid by the unit through account current (PLA) in terms of the said Notification. The said Notification was amended vide Section 153 of the Finance Act, 2003 (Clause 145 of the Finance Bill 2003) retrospectively from 08.07.1999 to 22.12.2002 so as to provide that the refund shall not exceed the duty paid, less the amount of CENVAT Credit availed of, in respect of duty paid on the inputs used in or in relation to the manufacture of the goods cleared under the said Notification. The sub-

clause 4 of clause 145 of the Finance Bill also provide that recovery shall be made within a period of 30 days from the date on which the Finance Bill 2003 received the assent of the President and in the event of non-payment, interest @ 15% shall be payable. The Finance Bill 2003 received the assent of the President on 13.05.2003. The said Notification was also amended vide Notification No.61/2002-CE dated 23.12.2002 to provide that refund should not exceed the amount of duty paid, less the amount of CENVAT Credit availed of, in respect of the duty paid on the inputs used in or in relation to the manufacture of the goods cleared under the Notification No.33/99-CE dated 08.07.1999. In terms of the above amendment an order was passed by the Ld.Commissioner of Central Excise, Jorhat requiring the Appellant to pay amount of Rs.5,34,865/- within 30 days w.e.f. 14.05.2003 as under:-

(i) Total duty paid through PL A/c (1)

Rs.17,15,074

(ii) Cenvat credit utilized [2 +3]

Rs. 2,82,946

(iii) Further demand under retrospective effect

Rs. 5,34,865

Total payment (P/L A/c + Cenvat + further demand)

Rs.25,32,885

Less : Total duty paid being leviable and chargeable

Rs.19,98,020

Excess of duty be paid over duty leviable/chargeable Rs.5,34,865

2. Being aggrieved the Appellant filed Appeal before the Commissioner(Appeals), guwahati. The Commissioner(Appeals) vide Order-in-Appeal No.52/CE(A)/GHY/06 dated 13.11.2006 dismissed the Appeal. Subsequently, the Appeal was filed before the Tribunal. The Tribunal vide Order No.5/495/509/A-1117-1131/KOL/07 dated 31.05.2007 in a batch of 15 appeals observed that the Adjudicating authority has passed the order without issue of any show cause notice and without hearing the Appellants. Hence the Appellants had no chance to present the actual factual details before the Original authority to arrive at the calculation. Hence it was necessary for the lower authority to ensure that the calculations are properly made in terms of

the retrospectively amended law as upheld by the Hon'ble Gauhati High Court before confirming the demands. Since the lower appellate authority has passed a blank order without looking into the factual details of each Appeal we have no option, but to set aside the impugned order and remand the matter to the original authority for fresh decision. The Deputy Commissioner, Jorhat Division vide de novo order No.DIB/JOR/CEX/05/2008 dated 29.01.2008 observed and passed the following order:-

I have carefully gone through the case records and found that the order dated 04.06.2003 was passed by the Assistant Commissioner, Central excise, Jorhat, in terms of the Section 153 of the Finance Act, 2003 requireing M/s. Gatoonga Tea Estate to pay an amount of Rs.5,34,865.00, which was unutilized balance of CENVAT credit on inputs, within 30 days from 14.05.2003 and interest @ 15% p a on failure. The calculation sheet for arriving at the said amount demanded was also enclosed with the said order. The said calculation for arriving at the amount demanded was made on the basis of a statement dated 05.04.2003 viz- statement of duty paid, CENVAT Credit utilized and refund claimed" submitted by the said unit.

2. The Hon'ble CESTAT, Kolkata in its order No.S-495-509/A-1117-1131/KOL/07 dated 31.05.2007 has held that the original order dated 4.6.03 was passed without issuing any show cause notice or without hearing the appellant to arrive at proper calculation and hence the Commissioner(Appeal), Customs & Central Excise, Guwahati9, should have ensured that calculations are properly made. The Hon'ble CESTAT, therefore, remanded the matter to the original authority and directed the original authority to afford reasonable opportunity of hearing to the appellant in regard to the calculation of the demanded amount before passing fresh order.

3. The Hon'ble CESTAT in its said order has held that in absence of any stay or contrary decision from any higher judicial forum, the order dated 21.09.05 of the Gauhati High Court, upholding the constitutional validity of the retrospective amendment vide section 153 of the Finance Act, 2003, is to be followed. The Hon'ble CESTAT has specifically held that credit availed and lying unutilized is required to be demanded.

4. The said unit in their reply dated 05.10.07 and during personal hearing held on 17.12.07 has broadly contended that demand in terms of section 153 of the Finance Act, 2003 is illegal, is not applicable in their case or unutilized CENVAT credit can not be recovered. They have also contended that points raised by them in their reply were not argued before any judicial or quasi-judicial forum.

5. I find that the points raised by the unit have no relevance so far as present adjudication is concerned as the Hon'ble CESTAT in its order has held that unutilized credit is recoverable and remanded the case for fresh decision after affording reasonable opportunity of hearing in regard to the calculation of the demanded amount.

6. However, I find that they have not come up with any revised calculation of the unutilized credit. In fact, the calculation for arriving at the demanded amount was made on the basis of the statement dated 05.04.2003 submitted by the unit.

7. Thus, I find that the unutilized balance of CENVAT credit amounting to Rs.5,34,865.00 is recoverable from the unit.

3. The Appellant again filed an Appeal before the Commissioner(Appeals) and the Commissioner(Appeals) vide the impugned order upheld the de novo order No.DIB/JOR/CEX/05/2008 dated 29.01.2008 and rejected the Appeal before him. Hence the present Appeal before the Tribunal.

4. In their submissions, the Appellant stated that

(i) The demand is not sustainable as it was made in excess of the power conferred under section 153 of the Finance Act 2003 (Corresponding to Clause 145 of Finance Bill, 2003).

(ii) The Tribunal Kolkata vide its Order dated 12/03/2018 in Appeal No Ex/355/2008 between Hunwal Tea Estate Vs Commissioner of Central Excise, Dibrugarh held that the Revenue has acted beyond the scope of Clause 145(1) of the Finance Bill,2003, by raising the demand of recovery of credit till 28/02/2003 instead of 22/12/2002. The Appeal filed by the Appellant in the present case bears the same question of law as well as facts and circumstances and hence the said decision is squarely applicable to their case.

(iii) The exemption notification ceased to have any effect on Tea Industry on withdrawal of Basis Excise duty on Tea w.e.f.28/02/2003.

(iv) There was a void between the date of giving retrospective effect and the date of applicability of the notification. The retrospective effect can only be effected between two live ends of a legal process and it can never bind two dead ends.

(v) The Hon'ble Gauhati High Court vide its order dated 30.06.2005 in UOI vs. Assam Brook Ltd. observed that extending the operation of the Exemption Notification beyond 28/02/2003 is not possible for the companies whose basic excise duty was abolished. The liability of the retrospective effect shall be operational only for those who were still within the operational effect of the Exemption Notification as on 13/05/2003, but not for those who ceased to be within the same on 28/02/2003 or in stricter sense the retrospective effect on 22/12/2002 itself.

(vi) The demand is violative of Entry 84 of List 1 of Schedule VII read with Article 246 being having no nexus with manufacturing. Mere balance of CENVAT Credit represents a mere balance which cannot assume the character of duty.

(vii) The unutilized Cenvat credit lying in the books is neither tax nor duty nor impost of any nature which can be collected.

(viii) If the demand was paid it would result in excess payment of duty. Accordingly, they contended that the demand is not sustainable.

5. The Ld Departmental Representative reiterated the findings of the Adjudicating Authority in the Impugned order.

6. Heard both sides and perused the documents available on record.

7. We find that the demand in this case has arisen due to retrospective amendment of Notification 33/99-CE dated 08/07/99 through section 153 of the Finance Act 2003 . The said retrospective amendment was upheld by the Hon'ble Guahati High Court vide its Order dated 21/09/2006. The above said amendment envisaged that CENVAT Credit availed shall be payable retrospectively within a period of 30 days from the day the Finance Bill received the assent of the Hon'ble President

and in the event of non payment of duty, 15% interest shall be payable from the date immediately after the expiry of the period of 30 days. Accordingly, the impugned order confirmed the demand of 5,34,865/- being the CENVAT credit lying unutilized as on 28/02/2003. It is the case of the Appellant that this demand has gone beyond what is envisaged in the retrospective amendment. The Appellant stated that the retrospective amendment only validates recovery of CENVAT Credit availed between 08/07/1999 to 22/12/2002. The demand in this case has gone beyond 22/12/2002 and sought recovery of CENVAT Credit lying unutilized as on 28/02/2003. They cited the decision of this Bench in the case of Hunwal Tea Estate Vs Commissioner of central excise, Dibrugarh where under the same facts and circumstances, the Tribunal set aside the demand and allowed their appeal. We find that the aforesaid decision in the case of Hunwal Tea Estate cited by the Appellant is squarely applicable to the facts of this case. The retrospective amendment has validated recovery of CENVAT credit availed for the period from 08/07/99 to 22/12/2002 only. Whereas, the demand in this case has gone beyond 22/12/2002 and demanded recovery of CENVAT credit availed upto 28/02/2003 which is not permissible. Accordingly, we hold that the demand in the impugned order is not sustainable and is liable to be set aside.

8. In view of the above discussion, we set aside the impugned order and allow the appeal filed by the Appellant.

(Order pronounced in the open court on 11 May 2023.)

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

Sd/
(K. ANPAZHAKAN)
MEMBER (TECHNICAL)