IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI

APPEAL NO: E/88009/2017

[Arising out of Order-in-Appeal No: MKK/29/RGD/APP/2017 dated 08/09/2017 passed by the Commissioner of Central Excise (Appeals), Belapur.]

Sandoz Private Limited …***Appellant***

versus

Commissioner of Central Excise
Belapur …***Respondent***

Appearance:

Shri Mihir Mehta, Advocate for the appellant

Shri D S Chauhan, Superintendent (AR) for respondent

CORAM:

Hon'ble Shri M V Ravindran, Member (Judicial)

Date of hearing: 12/03/2018
Date of decision: 12/03/2018

ORDER NO: A/85657/2018

This appeal is directed against Order-in-Appeal No: MKK/29/RGD/APP/2017 dated 08/09/2017 passed by the Commissioner of Central Excise (Appeals), Belapur.

2. Heard both the sides and perused the records.

3. On perusal of the records it transpires that the issue is regarding reversal of CENVAT credit under the provisions of Rule 6(3)(i) of the CENVAT Credit Rules, 2004. Appellant herein had availed CENVAT credit on common input services while manufacturing excisable and exempted goods. Appellant's records were audited and it was brought to their notice that they have to reverse CENVAT credit on the common input services attributable to the exempted goods manufactured and cleared as per the provisions of Rule 6(3) of the CENVAT Credit Rules, 2004. Appellant reversed the CENVAT credit attributable to the exempted goods along with interest. Show cause notice was issued for demand of an amount equivalent to 6% of the value of the exempted goods cleared from the appellant's factory on the ground that they have failed to maintain separate accounts for the input services used in the manufacture of dutiable and exempted products. The adjudicating authority confirmed the entire amount demanded in the show cause notice along with interest and also imposed equivalent amount of penalty under Rule 15(2) of the CENVAT Credit Rules, 2004 read with Section 11AC of the Central Excise Act, 1944. Aggrieved by such an order appellant filed an appeal before the first appellant authority *inter alia* raising the ground that they have reversed the CENVAT credit of the service tax attributable to the exempted goods; that the penalty imposed under the

provisions of Rule 15(2) of CENVAT Credit Rules, 2004 read with Section 11AC of the Central Excise Act, 1944 is incorrect inasmuch as there was no suppression as they had always indicated in their monthly returns clearances of exempted goods; that they had filed an intimation in 2014 itself of the intention to manufacture exempted goods, that the penalty under Section 11AC is not imposable. The first appellate authority in the impugned order accepted the contention of the appellant and held that reversal of CENVAT credit attributable to the exempted goods is correct and remitted the matter back to the adjudicating authority for the limited purpose of verifying the claim of reversal of credit by the appellant, held penalty equivalent to 50% of the amount of credit availed is imposable under the provisions of Section 11AC of the Central Excise Act, 1944.

4. The claim of the Learned Counsel before the Tribunal is that the penalty imposed by the first appellate authority under Section 11AC of the Central Excise Act, 1944 is not correct. He read out the provisions of Section 11AC and brings to the notice of the bench that identical issue was agitated before the Hon'ble High Court of Punjab & Haryana in the case of *Commissioner of Central Excise, Ludhiana v. Sangrur Agro Ltd* [2010 (254) ELT 25 (P&H)], produces a copy of the same and submits that the penalty has been set aside.

5. Learned Authorised Representative, on the other hand, submits

that there is wrong availmnt of CENVAT credit of the service tax paid on common input service and accordingly, extended period has been correctly invoked, penalty is rightly imposed by the adjudicating authority on the appellant under the provisions of Rule 15(2) read with Section 11AC of the Central Excise Act, 1944.

6. On careful consideration of the submission made, I find that the first appellate authority in the impugned order, while imposing the penalty recorded the following findings:

> "In the instant case, since suppression of facts have been established, therefore I find that penalty has to be imposed in accordance with sub clause (c) of Section 11 AC(1) of CEA, 1944. I find that the period of demand in the SCN is from April 2013 to September 2016. Therefore, penalty amounting to 50% of the ineligible Cenvat Credit is required to be paid for the period from April 2013 to 14.05.2015, in accordance with the proviso to Section 11AC(1)(c) supra, as the details relating to the transaction, in question, were recorded in their record; and penalty amounting to 100% of the ineligible Cenvat Credit is required to be paid for the period from 15.05.2015 to September 2016, in accordance with Section 11AC(1)(c) of CEA, 1944. Therefore, I find that jurisdictional authority is required to calculate the ineligible Cenvat Credit taken for the period from April 2013 to 14.05.2015 and recover 50% of such Cenvat Credit amount as penalty for the said period and further calculate the differential duty and ineligible Cenvat Credit taken for the period from 15.05.2015 to September, 2016 and recover 100% of such Cenvat Credit amount as penalty for the said period."

7. It can be seen from the above reproduced findings of the first appellate authority, that the entire penalty has been imposed on the appellant under the provisions of Section 11AC of the Central Excise Act, 1944. I find that the Learned Counsel was correct in bring to my notice the *ratio* of judgment of the Hon'ble Punjab and Haryna High Court in the case of *Sangrur Agro Ltd (supra)* wherein the Hon'ble High Court had an occasion to consider an identical issue and their Lordships had passed the following order:

> "The Revenue has filed this appeal impuging the orders (Annexures P-3 and P-4) passed by the Commissioner (Appeals) and by Customs, Excise and Service Tax Appellate Tribunal (for short 'the Tribunal') whereby penalty under Section 11AC of the Central Excise Act has been set aside on the ground that provisions of Section 11A are applicable to recovery of duty of excise whereas, the dispute in the present case is whether Cenvat credit has been claimed over and above the limit prescribed?
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> 2. The respondent is a manufacturer of Vanaspati Ghee. It claimed Cenvat credit on certain inputs more than the prescribed limit. As the respondent had claimed credit more than its entitlement hence, the respondent was required to reverse the same in terms of Rule 12 of the Cenvat Credit Rules, 2002. The respondent duly reversed the excess credit availed by it.
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> 3. The short question is whether the respondent is liable to pay penalty and interest on the excess amount claimed by it? The Commissioner (Appeals) as well as the Tribunal have held that provisions of Section 11AC of the Central Excise

> Act are inapplicable as they relate only to short payment of duty, whereas the present case relates to reversal of the excess amount claimed by the respondent in terms of Rule 6(3)(b) of the Cenvat Credit Rules. Apart from the above, a perusal of the language of Section 11AC of the Central Excise Act shows that the same would be applicable only if in case where there is an attempt to evade duty. The present case relates to reversal of amount under Rule 6(3)(b) of the Cenvat Credit Rules. We are of the considered opinion that Section 11AC of the Central Excise Act is not applicable in the present case. The findings of the Appellate Tribunal are upheld.
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> 4. In view of the above, we find no merit in the appeal and the same is dismissed."

8. The *ratio* as laid down by the Hon'ble Punjab and Haryana High Court is to be followed and I do so.

9. In view of the foregoing, the appeal to the extent challenged by the appellant before the Tribunal in respect of imposition of equivalent amount of penalty is allowed.

10. Appeal stands disposed of as indicated herein above.

(Dictated in Court)

(M V Ravindran)
Member (Judicial)

**/as17032103*