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

APPEAL NO: E/86665/2018

Arising out of: Order-in-Appeal No. GOA-EXCUS-000-APP-144-2017-18 dated 22/03/2018

Passed by: Commissioner of Customs & Central Excise (Appeals), Goa.

M/s Mohit Ispat Ltd.

Appellants – Represented by:
Mr. C.S Biradar , Advocate

versus

Commissioner of Customs & Central Excise, Goa

Respondent – Represented by:
Mr. A.B. Kulgod, Assistant Commissioner (AR)

Date of hearing: 07/08/2018
Date of pronouncement: 17/09/2018

CORAM

Hon'ble Dr. Suvendu Kumar Pati, Member (Judicial)

ORDER NO: A/87299 / 2018

Reduction of penalty amount to 50% from 100% of the duty amount awarded by order-in-original for availing ineligible credit against payment of Education Cess and Secondary & Higher Education Cess on counter veiling duty (CVD) is under challenge in this appeal as appellant sought for its total waiver by him.

2. Contention of the appellant, as reveals from the appeal memo,

is that it had paid 2% Education Cess and 1% Secondary and Higher Education Cess amounting to Rs.5,20,429/- on CVD after 01.04.2012, which was no more leviable from the said date and availed Cenvat credit thereof in 2014-15. During audit it was pointed out that such credit was inadmissible in view of Rule 3 of Cenvat credit Rules which permits Cenvat credit only on duties and thus payment which was no more a duty with effect from 01.04.2012, is inadmissible. In his submission, the Learned Counsel Mr. C.S. Biradar for the appellant conceded that such cess of 2% plus 1% were paid as the same was auto-generated and captured in IDI system during submission of bills of entry. However, he refuted the allegation of department that the appellant had intentionally availed Cenvat credit in respect of Education Cess and Secondary and Higher Education Cess since, being a 100% expert oriented company, the customs duty was leviable at zero rate.

3. In response to such submissions, the Learned AR for the department Mr. A.B. Kulgod fully supported the order of the Commissioner (Appeals) and reiterated the grounds of confirmation of appeal.

4. Peruse the case record, it is found that consistently from the day of filing reply to the show cause, the appellant had stated that no Cenvat credit was availed by them in respect of such education cess etc. in respect of basic custom duty component since it was zero rated

and immediately upon pointing out of such wrong availment of credit against payment of cess on CVD , the duty demand was met way back in the year 2015 while Show Cause Notice on ground of suppression was served on them in 2016. Despite the fact that such payment amounts to double taxation, the appellant had not contested the same before and only questioned the legality of imposition of penalty by invoking extended period. The Show Cause Notice dated 22.11.2016 indicates that the appellant had failed to correctly assess the Central Excise duty resulting in short-payment of duty and on pointing out that the said Cenvat credit is inadmissible, it had reversed the Cenvat credit amount *vide* RG 23 Part II entry No. 29 dated 11.04.2015 but interest was not payable since assesee had sufficient balance in the Cenvat account during the material time and the ground shown in the Show Cause Notice to refuse Cenvat credit was that the assesee had not shown any statutory record to the department. I fail to understand as to how the auditor had endorsed about such availment of inadmissible credit by the Appellant if statutory records were not produced before him. Further, as found from the order of Commissioner (Appeals), he reduced the fine amount to 50% on the ground that the subjected transactions by the appellant were recorded in the Books of Accounts from where auditor could unearth the irregularities during audit. Therefore, the case of the appellant in availing Education Cess and Secondary Cess and Higher Education Cess and viz-a-viz Cenvat credit can only be considered as bonafide mistake in not knowing the change of rule and the same cannot be treated as suppression of fact or mis-statement etc. as they have paid the entire duty demand amount by way of Cess which were no more leviable. Under the circumstances, as discussed above, despite the fact that reliance has been placed on various decisions of the Hon'ble Supreme Court and Hon'ble High Court as well as Tribunal by the Appellant including the decision of the Hon'ble Supreme Court passed in *Rainbow Industries Vs. CC* and *Continental Foundation Joint Venture* cases etc, there is no necessity to rely on those decisions to give a finding in favour of the appellant that such conduct of appellant can never be treated as suppression of fact, willful mis-statement of fraud or violation of statutory provision to invoke extended period and impose fiscal penalty on the appellant. Hence the order.

5. The appeal is allowed and the order passed by the Commissioner (Appeals) dated 22.03.2018 confirming of penalty of Rs.5,20,429/-, is hereby set aside.

(Pronounced in the Court on ……………..)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

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