IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT NO.

Appeal No. E/87669/2016

(Arising out of Order-in-Appeal No.CD/303/M-II/2016 dt. 17/02/2016 passed by the Commissioner of Central Excise (Appeals),Mumbai Zone-II

Nazareth Metals : **Appellant**

VS

Commissioner of Central Excise, Mumbai : **Respondent**

Appearance

Shri R.C. George, Advocate for Appellant

Shri Chatru Singh, Asstt.Commr. (A.R) for respondent

CORAM:

Hon'ble Dr. D.M. Misra, Member (Judicial)

Date of hearing : 14/08/2018
Date of decision : 14/08/2018

ORDER NO. A/87175/2018

Per : Dr. D.M. Misra

Heard both sides.

2. This is an appeal filed against Order-in-Appeal No. CD/303/M-II/2016 dt. 17/02/2016 passed by the Commissioner of Central Excise (Appeals),Mumbai Zone-II.

3. Briefly stated the facts of the case are that the appellant had availed inadmissible Cenvat Credit of Rs.3,14,658/- during the period 2001-02 to 2004-05 against invoices without receiving the material in their factory. During the course of audit in March 2009, the said inadmissible credit came to the notice of the department accordingly the appellant had reversed the credit of

Rs.3,14,658/- with interest. Later they were issued with a the show cause notice proposing penalty and recovery of interest against reversal of the said credit. On adjudication, the amount paid was appropriated and the penalty of equivalent amount imposed, also with a direction to pay interest of Rs.2,21,274/- vide order dt. 15.03.2010. Also, in the meantime the appellant had suo motu availed the credit of Rs.3,14,685/- and reflected it in their monthly Return in July 2009. Another show cause notice was issued to them on 10.5.2010 to recover the said suo motu credit and proposal for penalty. The said show cause notice was adjudicated vide Order-in-Original dt. 24.08.2010. Aggrieved by both the orders, the appellant preferred appeals before the Commissioner (Appeals), who in turn, rejected their appeals. The appellant carried out the order of the Ld. Commissioner (Appeals) before this Tribunal and vide order dt. 19.9.2014 disposed of their appeals observing that the demand for recovery of cenvat credit be restricted to a period of five years and also in relation to availing of suo motu credit held that the appellant are entitled to credit for the period within the period five years from the date of issuance of show cause notice, and remaining amount is required to be reversed by the appellant. Consequently, the appellant filed refund claim calculating the amount of credit required to be reversed restricting it to the period of 5 years from the date of issuance of the first show cause notice on 3.11.2009. The total amount claimed was Rs.7.86,018/- after adjusting their liability of Rs.1,33,473/-. The said refund claim was rejected by the adjudicating authority and later confirmed the Ld. Commissioner (Appeals). Hence, the present appeal.

4. Ld. Advocate Shri R.C. George for the appellant submits that in the order of this Tribunal dated September 2014 while disposing both the appeals the Tribunal at para 4 observed that recovery of inadmissible credit be restricted to five years from the date of issuance of the show cause notice and in para 4.1 observed that the appellant are required to reverse suo motu credit equivalent to the demand of cenvat credit held to be inadmissible and recoverable from them in term of para 4 of the said order. He submits that the entire amount of credit, penalty and interest has been recovered from the appellant by the department by freezing their bank accounts. In view of the order of this Tribunal the liability become Rs.1,33,473/- and the remaining amount of Rs.7,86,018/- has been claimed as refund. The authorities below mis-interpreting the order of this Tribunal denied the refund observing that no finding has been recorded in relation to second appeal challenging the admissibility of suo motu credit. It is his contention that in view of the categorical finding in para 4 & 4.1 of the Tribunal, the refund is admissible to them.

5. Learned A.R. for the Revenue reiterates the findings of the learned Commissioner (Appeals). He submits that while disposing first appeal arising out of the cause of action arose by issuance of show cause notice in 2009, this Tribunal directed to restrict the amount inadmissible credit to a period of five years. However, in the case of demand of suo motu credit availed in July 2009. It was held that five years period be calculated from the date of issuance

of show cause notice. It is his contention that computing the period of five years from the second show cause notice, refund is inadmissible credit to the appellant.

6. I find that the appellant had availed inadmissible credit of Rs.3,14,658/-. While disposing the appeal in relation to the inadmissible credit, this Tribunal directed the recovery be made for a period of five years from the date of issuance of show cause notice and accordingly demand became Rs.30,372/-. The Tribunal subsequently also have observed in relation to suo motu credit that it cannot be more than five years thus it cannot be read to confirm the demand of Rs.3,14,658/- instead of Rs.30,372/-. Therefore calculating the inadmissible amount of cenvat credit, penalty equivalent to credit and interest on the amount of credit, the total amount due becomes Rs.1,33,473/-, which the appellant is required to reverse. However during the course of the appellant proceeding an amount of Rs. 9,19,491/- has been recovered from the appellant pursuant to the orders passed on various issues. In absence of any other grounds raised by the Revenue on the refund claim, in my view, the appellants are entitled to refund of Rs.7,86,018/-. In the result, the impugned order is set aside and the appeal is allowed with consequential relief if any. Appeal is allowed.

(Pronounced & Dictated in court)

(Dr. D.M. Misra)
Member (Judicial)

SM.