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

Appeal No. E/86191/2018

(Arising out of Order-in-Appeal No. NSK/EXCUS/000/APPL/138/17-18 dated 18.01.2018 passed by the Commissioner (A) CGST & Central Excise, Nashik)

M/s. Accura Valves Pvt. Ltd. — Appellant

Vs.

CCGST & CE, Nashik — Respondent

Appearance:

Shri Govind P. Pingle, Consultant for the appellant
Shri D.S. Chavan, Supdt. (AR) for the respondent

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

Date of hearing : 11.06.2018
Date of decision : 06.12.2018

O R D E R No: **A/88054/2018**

Imposition of duty demand of 6% against availment of common input and input services without maintenance of separate account for dutiable and exempted final products against appellant's voluntary reversal of proportionate credit under Rule 6(3) along with penalty invoking extended jurisdiction is assailed in this appeal.

2. The narrow compass in which the dispute has come up to this Tribunal stage is that appellant company was found to have been availing cenvat credit of duty paid on inputs/ capital goods and service tax paid on input services. Though it is manufacturing exempted goods i.e. part of bicycle valve, a component used in the manufacture of automotive tyre tube valves, it was not maintaining separate accounts for dutiable and exempted goods as well exempted services against which audit pointed out payment of 6% duty on value of exempted goods and exempted services while appellant paid proportionately i.e. 1.13% of the credit availed in respect of common inputs. Despite payment of proportionate duty along with interest belatedly, it was put to show-cause notice and matter was adjudicated upon that resulted in the confirmation of 6% duty liability amounting to `16,65,169/- along with interest and penalty for the equivalent amount for the period from April 2010 to March 2015. It appealed against such order before Commissioner (Appeals) and being unsuccessful in its attempt and dissatisfied with the outcome, the present appeal is preferred.

3. In the memo of appeal and during course of hearing of the appeal, ld. Counsel for the appellant Shri Govind P. Pingle, Consultant submitted that on being pointed out by

the department, proportionate credit was reversed under Rule 6(3A) and the sole reason for rejection of the appeal is that appellant had not exercised the option in writing to the departmental Superintendent giving particulars which was required under Rule 6(3)(ii) read with 6(3A) of the Cenvat Credit Rules. Concerning the appellant's contention against allegation of suppression of fact, the adjudicating authority has avoided to comment on the same. He further argued that, as reveals from para 5 of the order-in-original, the appellant had not availed cenvat credit of duty paid on common inputs and the issue is therefore strictly restricted to availment of credit on common input services. In referring to the decision of the Tribunal reported in 2016 (43) STR 411 (T-Hyd.) and 2017 (347) ELT 112 (T-Bang.), Ld. Counsel for the appellant argued that condition in Rule 6(3A) to intimate to the department is only a procedural requirement and failure to intimate the department to avail second option of reversing the proportionate credit is condonable and would not take away substantial right of the appellant. Further in submitting a table containing the period vis-a-vis percentage of dutiable goods and exempted goods, he noted in his additional submissions, that out of the total credit of `67.06 lakhs in respect of common input services exempted goods cleared constitute only 1.13% against which duty demand @ 6% amounting to 16,65,169/-

equivalent to 25% of the credit availed is absurd, irrational and inappropriate for which he prays for setting aside the order of the Commissioner (Appeals).

4. In response to such submissions, ld. AR for the department justified the reason and rationality of the order passed by the adjudicating authority and brought attention of this Court to the show-cause notice which was issued for availing cenvat credit on input and input services and admittedly no separate record was maintained by the appellant for which he justified leviability of duty @ 6% as contemplated in the Cenvat Credit Rules.

5. Heard from both sides, perused the case records and gone through the judicial decisions cited by the appellant. Admittedly reversal of proportionate credit was made much before issue of show-cause notice. Show-cause notice doe not reveal as to how the matter has gone to the knowledge of the department or brought to the notice of the parties but order-in-original at para 2 indicates that during the course of audit, it was noticed that assessee had availed cenvat credit on common inputs and input services which are used in the manufacture of dutiable as well as exempted final products. However, a finding is given in the order-in-original at para 5, the relevant portion of which reads as follows:-

> In this regard the assessee's submission that they have not availed cenvat credit on inputs of exempted goods i.e. Bicycle valve appears to be correct as seen from the sample bill of entries wherein it is seen that parts of bicycle valves are exempted from CVD by virtue Sr.No. 257 of Notification No. 12/2012-CE, dated 17.03.2012. Therefore question of availment of Cenvat credit on these inputs will not arise. These facts are also confirmed by the auditors in Audit Report. As regards common input services used for manufacturing of dutiable and exempted goods the assessee have claimed that they have reversed Service Tax Credit used in relation to manufacture of the exempted goods. (Underlined to emphasised)

6. Therefore there is force in the submission of ld. Counsel for the appellant that it had not availed credit of duty paid on common inputs and the dispute is therefore restricted to availment of cenvat credit on common input service. Further, the respondent department has not disputed the figures of proportionate payment but order-in-original reveals that in not giving such intimation/option, the assessee has suppressed the material fact that they have availed cenvat credit on common input services which was noticed only during audit, for which extended period of limitation as envisaged in proviso to Section 11A(1) prior to 08.04.2001 and Section 11A(4) with effect from 08.04.2001

is justifiably invocable and the demand of `16,65,169/- along with interest and penalty are appropriately imposed. It is found from the Order-in-Appeal that a vague statement at para 17 is made that appellant had availed cenvat credit on raw materials viz. Brass rods, brass stems and rubber components but no such basis is found from its order despite the fact that the appellants' contention regarding non-availment of credit on inputs/ raw materials required for manufacture and clearance of final products are noted in para 6 of his order.

7. Now coming to the statutory audit procedure, the purpose of audit, as available in the Manual published by the Institute of Chartered Accountants of India in respect of EA audit and CERA audit under Chapter 17 is that the idea behind such conduct of verification is to reasonably ensure that no amount, which under the central excise law is chargeable as duty, escapes taxation and the process of verification is always carried out in the presence of assessee and in the process, the auditor is required to discuss the matter with the assessee and advice him to follow correct procedure in future. It is also referred in the said manual that after such submission of audit report, in cases where the disputed amount have not already been paid by the assessee at the spot, demand notices are issued

by the department for their recoveries. EA 2000 audit was therefore held to be participative audit. Likewise CERA audit is conducted by the Comptroller and Auditor General of India in respect of receipt and expenditure of the Government of India. It also discharges revenue audit which covers central excise, service tax and customs laws during which time the assesses were examined by CERA audit party to point out the deficiencies, leakage of revenue and non recoveries of dues by the Central Excise Department. Therefore, it cannot be said that only because audit party had found non-maintenance of separate records appellant is to be tasked for suppression etc.

8. In exercise of option as contemplated in Rule 6(3A), the assessee has to choose either of those options and in view of the judicial precedent set in the above two referred case laws, non-intimation of such exercise of option can only be treated as mere procedural lapse. Further, nowhere in the said procedure it has been mentioned that in the event of such intimation not being given, tax liability at the higher rate would be applicable to the assessee for which the order passed by the Commissioner confirming 6% liability against proportionate availment of 1.33% credit is not sustainable and hence the Order.

9. The Appeal is allowed and the impugned order passed by Commissioner (Appeals) vide Order-in-Appeal No. NSK/EXCUS/000/APPL/138/17-18 is hereby set aside.

(Pronounced in Court on 06.12.2018)

Dr. Suvendu Kumar Pati
Member (Judicial)

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