

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

Appeal No. E/86698/2018

(Arising out of Order-in- Appeal No. PUN-EXCUS-001-
APP-1040/17-18 dated 25.01.2018 passed by the
Commissioner of Central Tax, Pune I)

M/s. Delphi Automotive Systems Pvt. Ltd. Appellant

Vs.

Commissioner of Central Tax, Pune I Respondent

Appearance:

Ms. Anjali Hirawat, Advocate for the appellant
Shri D.S. Chavan, Supdt. (AR) for the respondent

CORAM:

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

Date of hearing : 10.09.2018

Date of decision : 11.01.2019

O R D E R No: **A/85072 / 2019**

This appeal is directed against the order passed by the Commissioner (Appeals), Central Tax, Pune on 25.01.2018 in Order-in- Appeal No. PUN-EXCUS-001-APP-1040/17-18 confirming interest on differential duty amount of ₹6,40,094/- under section 11AA of the Central Excise Act alongwith ₹4,60,271/- which is 50% penalty on differential amount of non-reversal of cenvat credit availed by the appellant for capital goods upon its removal.

2. Brief facts of the case, as revealed from the appeal memo, is that appellant is a manufacturer of parts of auto air conditioner and is registered under the central excise department for such manufacturing to supply auto air conditioner to M/s. General Motors. The appellant procured mould and dies from M/s. Sanjay Technoplast, carrying out its operation from the same premises where the appellant's unit is situated. Vide Annexure I series all dated 09.10.2011 appellant received from M/s. Sanjay Moulds and dyes as capital goods for ₹1,80,46,000/- and availed cenvat credit of ₹18,58,737/- in respect of excise duty paid on such capital goods. Subsequently it delivered those capital goods vide challan dated 17.10.2011 as per Rule 4(5)(b) of Cenvat Credit Rules 2004. Further, in order to recover cost from General Motors, the appellant raised tax invoice on 19.12.2011 on General Motors with assessable value of ₹1,94,00,000/- along with VAT component @ 12.5% of ₹24,25,000/-.

2.1. Further, case of the appellant is that ownership of the moulds and dyes was transferred to General Motors as a set of tools on the commercial invoice but its possession remained with M/s. Sanjay and therefore it was never removed from the premises of the appellant, but vide audit report dated 22.08.2014 the respondent department had observed that appellant availed cenvat credit of ₹18,58,737/- on purchase of moulds and dyes and sold those goods to

General Motors on 19.12.2011 for which appellant was not to be considered as in possession of those goods since the same transaction amounts to sale of goods. Therefore, the appellant was liable to discharge excise duty of ₹19,98,200/- as the assessable value at which the dies and moulds was sold was ₹1,94,00,000/-. It was put to show-cause, reply was furnished denying the allegation, the matter was adjudicated by Asst. Commissioner, Central Excise North Division and vide Adjudication order no. 8/Adj/NSD/CX/16-17 dated 30.03.2017 equivalent cenvat credit availed to the tune of ₹18,58,737/- along with interest with effect from 19.12.2011 and penalty of equivalent duty amount has been imposed on the appellant.

3. Being aggrieved with the outcome of order-in-original, appellant preferred appeal before the Commissioner (Appeals) Pune who modified the OIO by confirming applicable rate of interest with effect from 26.02.2015 on differential amount as audit had based its finding on the inspection of records. Further after the audit report and before show-cause notice dated 09.09.2016 appellant had reversed the cenvat credit to the extent of ₹9,30,197/- as per calculation under Rule 3(5)(a) of the Cenvat Credit Rules 2004 basing depreciated value of the moulds and dies that was cleared to General Motors through another invoice dated 26.02.2015 and it has admitted the calculation on

depreciated value as erroneous which should stand at ₹12,54,648/-. He also reduced the penalty to ₹4,60,271/- i.e. 50% of the differential amount under section 11AC (c). The said order is assailed before this forum.

4. In the memo of appeal and during course of hearing, learned counsel for the appellant Ms. Anjali Hirawat pointed out the contradictory finding of the Commissioner (Appeals) as he directed for reversal of the cenvat credit holding the sale to general Motors in 2011 as deemed date of removal and simultaneously directing to calculate interest from 26.02.2015 i.e. the date of actual removal. Justifying reversal of cenvat credit under Rule 3(5) as correctly done by appellant, Id. counsel pointed out that said rule clearly postulates actual removal from the factory or from the provider of the output is to be taken as the date of application Rule 3(5) of the Cenvat Credit Rules 2004, and the finding in para 9 and 10 that duty is to be paid on the clearance of the goods as per Rule 8 and appellant cannot avail depreciation as the ownership of goods lies with some other person was unjustified. Further it has been submitted by learned counsel that cenvat credit is to be computed on the basis of table provided under 5(a) after removal of capital goods being used. Learned Commissioner has ignored the fact that the actual removal had taken place in 2015 and not in 2011 itself. In placing reliance on the judicial decision reported in

2008 (224) ELT 484 (T-Chennai), 2015 (323) ELT 290 (Mad), 2015 (329) ELT 529 (T-Del), 2016 (332) ELT 895 (T-Del), 2017 (351) ELT 129 (P&H) and several other decisions, Learned counsel for the appellant argued that in similar circumstances, even upon sale/ leasing out factory, there is consistent finding that date of actual removal is the determining factor. Further arguing that entire exercise in the present case is revenue neutral as the said duty paid on mould and dies was to be available as cenvat credit to General Motors and having regard to the fact that alleged evasion of the duty was on the basis of audit, Learned counsel submitted that the stand of the department justifying extended period does not stand the test of scrutiny of law for which the order passed by the learned Commissioner (Appeals) is liable to be set aside.

5. In response to such submissions, learned AR Shri D.S. Chavan, supported the reasoning and rationality found in the order of Commissioner (Appeals) and brought attention of this Court to the fact recorded in the said order that during personal hearing, appellant had withdrawn its stand taken in respect of duty liability and stated that since they have discharged the said liability they only request for waiver of penalty but before this Tribunal, they contested on the maintainability of OIA also on its merit concerning duty liability. He further pointed out that the Commissioner had

given his clear finding that ownership of the goods lies with some other person and therefore credit of ₹18,58,737/- had to be reversed as per Rule 3(5) of Cenvat Credit Rules 2004 and since such evasion of duty was detected only after departmental audit that justify extension of duty liability which won't have come to the notice due to suppression of the same by the appellant for which interference by the Tribunal in the order of Commissioner (Appeals) is uncalled for.

6. Heard from both sides at length and perused relevant provisions of law and the judicial decision submitted in the case. Before going to the detail analysis to find out the justification of order made by the Commissioner (Appeals) vis a vis the argument laid by the appellant in respect of its rationality, its imperative to have a look on the relevant provision of Cenvat Credit Rules 2004 mainly of Rule 4 & 5. Rule 4(2) (a) & (b) read as under:-

“(2)(a) The CENVAT credit in respect of capital goods received in a factory or in the premises of the provider of output service [or outside the factory of the manufacturer of the final products for generation of electricity for captive use within the factory, at any point of time in a given financial year shall be taken only for an amount not exceeding fifty per cent. of the duty paid on such capital goods in the same financial year :

Provided that the CENVAT credit in respect of capital goods shall be allowed for the whole amount of the duty

paid on such capital goods in the same financial year if such capital goods are cleared as such in the same financial year :

[**Provided** further that the CENVAT credit of the additional duty leviable under sub-section (5) of section 3 of the Customs Tariff Act, in respect of capital goods shall be allowed immediately on receipt of the capital goods in the factory of a manufacturer :]

[**Provided** also that where an assessee is eligible to avail of the exemption under a notification based on the value of clearances in a financial year, the CENVAT credit in respect of capital goods received by such assessee shall be allowed for the whole amount of the duty paid on such capital goods in the same financial year.

Explanation. - For the removal of doubts, it is hereby clarified that an assessee, shall be “eligible”, if his aggregate value of clearances of all excisable goods for home consumption in the preceding financial year, computed in the manner specified in the said notification, did not exceed rupees four hundred lakhs.]

(b) The balance of CENVAT credit may be taken in any financial year subsequent to the financial year in which the capital goods were received in the factory of the manufacturer, or in the premises of the provider of output service, if the capital goods, other than components, spares and accessories, refractories and refractory materials, moulds and dies and goods falling under [heading 6805, grinding wheels and the like, and parts thereof falling under heading 6804] of the First Schedule to the Excise Tariff Act, are in the possession of the manufacturer of final products, or provider of output service in such subsequent years.

Illustration. - A manufacturer received machinery on the

16th day of April, 2002 in his factory. CENVAT of two lakh rupees is paid on this machinery. The manufacturer can take credit up to a maximum of one lakh rupees in the financial year 2002-2003, and the balance in subsequent years.”

7. Rule 4(5) reads as

(5) (a) The CENVAT credit shall be allowed even if any inputs or capital goods as such or after being partially processed are sent to a job worker for further processing, testing, repairing, re-conditioning or for the manufacture of intermediate goods necessary for the manufacture of final products or any other purpose, and it is established from the records, challans or memos or any other document produced by the manufacturer or the provider of output service taking the CENVAT credit that the goods are received back in the factory within one hundred and eighty days of their being sent to a job worker and if the inputs or the capital goods are not received back within one hundred eighty days, the manufacturer or provider of output service shall pay an amount equivalent to the CENVAT credit attributable to the inputs or capital goods by debiting the CENVAT credit or otherwise, but the manufacturer or provider of output service can take the CENVAT credit again when the inputs or capital goods are received back in his factory or in the premises of the provider of output service.

(b) the CENVAT credit shall also be allowed in respect of jigs, fixtures, moulds and dies sent by a manufacturer of final products to –

(i) another manufacturer for the production of goods; or

(ii) a job worker for the production of goods on his behalf, according to his specifications.”

8. From the above two provisions it is very much clear that cenvat credit in respect of capital goods can be taken up to 50% in the same financial year and the balance of cenvat credit in the subsequent year except component spares, accessory refractories and refractory material, moulds and dies and goods falling under heading 6805, 6804 of the First Schedule of the Central Excise Tariff Act. Likewise under sub-rule 5A such cenvat credit is allowed even if **capital goods** is sent to job worker provided the same is received back in the factory within 180 days of their being sent to job worker. Sub-rule 5(b) which is applicable to the instant case does not prescribe such 180 days stipulation in availing such credit. Therefore, even if the moulds and dies are kept with job worker for production of goods on behalf of manufacturer, such credit can be availed for an indefinite period. A conjoint reading of these two provisions indicate that as because in the case of mould and dies only 50% credit is available and apparently keeping that in mind legislatures have put no stipulated time period for return of the goods to the manufacturer like within 180 days since in other cases of capital goods except those components stated above, entire cenvat credit is available which can be availed in two years while for dies and moulds, it is 50% of the duty paid in the first year and not on any subsequent years. In the appellant's

case entire cenvat credit was availed by it though it removed the same to the seller to whom it has put in the category of job worker.

9. Consequent upon such removal to another factory though available in the same premises, would have the effect of reversal of entire cenvat credit availed had the appellant not shown him as job worker, but while the mould and dies were with the job worker, appellant sold it to M/s. General Motors with adequate payment of VAT. Going by the definition of sale as found in the Central Excise Act under section 2(h), sale means any transfer of the possession of goods by one person to another in the ordinary course of trade or business for cash or deferred payment or other valuable consideration. Such a transfer with physical delivery of possession was not made but appellant had earned profit on sale of such mould and dyes in the guise of recovering the cost from General Motors. This being the factual position, going by the provision of sale of goods act, such sale after receipt of amount can only be completed with symbolic delivery of possession and in the case in hand, there is no such reference to such delivery of possession. Apparently because of that, in the OIO and OIA such transaction was held to be deemed removal. However, having regard to the fact that when sale was done through invoice, the articles were not in possession of the appellant.

Further, after the appellant had received the consideration amount, it has lost its title over the goods despite the fact that no evidence is apparent on the delivery of possession. Therefore, it can only be concluded that with effect from raising of invoice on 19.12.2011, consequent upon receipt of payment of sale price, appellant had lost its ownership right over the capital goods and manufacturing by the said job worker, M/s. Sanjay can only be treated as manufacturing being made by General Motors itself and not by the appellant since no right of ownership exist with it. The appellant is, therefore, duty bound to reverse the credit with effect from 2011 which it had not done, may be under the erroneous interpretation of law. This being the factual and legal scenario the case laws referred above clearly distinguishable and the order of the Commissioner (Appeals) is required to be modified in the following manners since duty liability exist with effect from 19.12.2011 which it has partly discharged. However, considering the fact that such an exercise was carried out by the appellant is in exercise of erroneous legal interpretation of the provisions of the Cenvat Credit Rules 2004 and credit was availed by reflecting the same in the cenvat credit accounts, no mala fide can be attributed to the appellant so as to call for imposition of any penalty. Accordingly while upholding the demand along with interest, the penalty is set aside and the OIA is modified as follows.

10. The appellant is liable to pay balance duty amount of ₹6,04,090/-/- along with applicable interest with effect from 19.12.2011. Penalty under section 11AC(c) is hereby set aside.

11. The appeal is accordingly allowed in part with modification as referred above.

(Pronounced in Court on 11.01.2019)

Dr. Suvendu Kumar Pati
Member (Judicial)