

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

APPEAL NO: ST/89468/2014

[Arising out of Order-in-Original No: PUN-EXCUS-001-COM-014-14-15 dated 9th July 2014 of Commissioner of Central Excise, Pune – I.]

For approval and signature:

**Hon’ble Shri C J Mathew, Member (Technical)
Hon’ble Shri Ajay Sharma, Member (Judicial)**

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1. Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982? : Yes
 2. Whether it should be released under Rule 27 of CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not? : Yes
 3. Whether Their Lordships wish to see the fair copy of the Order? : Seen
 4. Whether Order is to be circulated to the Departmental authorities? : Yes
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Veena Industries Ltd

... Appellant

versus

Commissioner of Central Excise
Pune – I

...Respondent

Appearance:

Shri S Narayanan, Advocate for appellant

Shri MK Sarangi, Joint Commissioner (AR) for respondent

CORAM:

Hon'ble Shri C J Mathew, Member (Technical)
Hon'ble Shri Ajay Sharma, Member (Judicial)

Date of hearing: 19/09/2018
Date of decision: 18/01/2019

ORDER NO: A/85126 / 2019

Per: C J Mathew

We are compelled to observe that a simple dispute of imposition of penalty under section 78 of Finance Act, 1994 has been wantonly complicated by the unconscionable exercise of jurisdiction by the adjudicating authority in the impugned proceedings. Appellant, M/s Veena Industries Ltd, provider of 'management, maintenance and repair service' and 'erection, commissioning and installation service', had failed to discharge the liability of ₹1,26,60,447 to tax on the consideration received from customers in 2010-11 and 2011-12. Upon being pointed out, the tax liability was discharged by debit of CENVAT credit account to the extent of ₹1,15,47,609 in June 2012 with the remaining amount deposited *vide* challan dated 9th July 2012. Interest liability was also discharged in three instalments between October 2012 and February 2013.

2. Convinced that the assessee was in breach of first *proviso* to

rule 3(4) of CENVAT Credit Rules, 2004 by consolidated debit of ₹1,26,60,447 in CENVAT credit account instead of separate retrospective debits for each month of liability which may also have breached the provisions of Rules owing to admitted lack of sufficient balance during the relevant months, proceedings were initiated by notice of 1st January 2014 for recovery of the tax, along with appropriate interest, and for imposition of penalty under section 78 of Finance Act, 1994.

3. The notice, and impugned order-in-original no. PUN-EXCUS-001-COM-014-14-15 dated 9th July 2014 of Commissioner of Central Excise, Pune-I, have erred in their premise as Central Board of Excise & Customs in circular no. 962/05/2012-CX8 dated 28th March 2012, has clarified that discharge of arrears through CENVAT credit mechanism is not barred by any legal provision. As retrospective debit is an impossibility, the circular, impliedly, permits consolidated debit of the arrears in the CENVAT credit account. To contrive the circumstances as one in which the assessee was deficient and, hence, in contravention, credit already availed was held as ineligible thus endeavouring to preclude exercise of that option. This disentitling of CENVAT credit so availed was engineered without investigation, without conscious ascertainment and without proposing such denial in a show cause notice. We perceive from the records that details of credit availment was sought on 17th June 2014, without the pre-

requisite of notice and during the adjudication proceedings, even though the adjudicating authority was aware even upon issue of notice that appellant had taken recourse to CENVAT credit for discharge of substantial portion of the arrears.

4. In its grounds of appeal against the impugned order, M/s Veena Industries Ltd primarily challenge the denial of CENVAT credit availed by them. We have heard Learned Counsel for appellant and Learned Authorized Representative. We must concede that we are unable to proceed to decide, in appeal, the merit of an impugned order that is partially in excess of jurisdiction vested in the adjudicating authority who, according to the show cause notice, was to restrict itself to deciding on the taxable dues and recovery thereon. Insufficiency of credit may, at a stretch, be ground for ordering recovery of non-appropriated portion of confirmed amount. It is beyond the sanction of law to decide on availment of CENVAT credit without a notice, proposing to deny and without disclosing intent to order recovery, based on the facts available at the time of issue. That which is beyond the competence of the original authority is not amenable to appellate jurisdiction on the merit of liability.

5. The next issue that arises is whether the appellant is liable to be imposed with penalty under section 78 of Finance Act, 1994. From the manner in which the adjudicating authority has arrived at its

conclusions, we are unable to ascertain if the ingredients of section 78 are apparent in the matter of inadequacy of credit or in the failure to discharge service tax upon the rendering of the taxable service. The grounds of appeal appear to focus on the legality and propriety of the course of action adopted by appellant and in the plea for relief it is claimed that interpretation of rule 3(4) of CENVAT Credit Rules, 2004 erases the scope for invoking the provision. Owing to the confusion, now further confounded, we are unable to decide on acceptance of the grounds preferred against the imposition of penalty.

6. The liability to tax and the quantum of liability are not in dispute. The confirmation of these is not objected to. In the absence of any challenge in the notice to the availment of the credit, utilisation of credit is also beyond controversy. Keeping open the issues in notice, other than these, we set aside the impugned order to enable fresh adjudication. We also adjure the original authority to restrict the proceedings to the show cause notice.

(Pronounced in Court on 18/01/2019)

(Ajay Sharma)
Member (Judicial)

(C J Mathew)
Member (Technical)