IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT No. I

APPEAL No. E/1974/2010
E/CO/25/2011

(Arising out of Order-in-Original No. 167/07/V/2010/COMMR/KS dated 29.7.2010 passed by Commissioner of Central Excise, Mumbai-V)

Commissioner of Central Excise, Mumbai-V **Appellant**

Vs.

Shri Hari Extrusion Ltd. **Respondent**

Appearance:

Shri N.N. Prabhudesai, Superintendent (AR), for appellant
Shri Anil Mishra, Advocate, for respondent

CORAM:

Hon'ble Dr. D.M. Misra, Member (Judicial)
Hon'ble Mr. Sanjiv Srivastava, Member (Technical)

Date of Hearing: 12.11.2018
Date of Decision: 12.11.2018

ORDER No. **A/88304/2018**

Per: Sanjiv Srivastava

This appeal has been filed by the revenue against the order dated 29.07.2010 of Commissioner Central Excise Mumbai V. By the said order Commissioner has held as follows:

"The demand of CENVAT credit of Rs 70,22,939/- raised vide Show Cause Notice No V. Adj (Ch 74) 15-73/ M-05/2009 dated 03.06.2009 against M/s Shri Hari Extrusion Limited is hereby dropped."

2.1 The respondents in the present case have been issued the show cause alleging that they have taken credit against certain invoices issued by M/s Hindustan Copper Limited (HCL). The goods covered by the said invoices were never received by the respondents in their factory at Kandivali and hence the credit taken by the appellants was not available to them. Thus respondents were asked to show cause as to why-

“(1) CENVAT Credit of Rs 70,22,939/- (Rs 68,18,367/- Basic Excise duty + Rs 2,04,552/- Education Cess) (Rupees Seventy Lakhs Twenty Two Thousand Nine Hundred and Thirty Nine only), as detailed in Annexure to this notice should not be demanded and recovered from them under Rule 14 of the CENVAT Credit Rules, 2004 read with proviso to sub-section (1) of Section 11A of the Central Excise Act, 1944;

(2) Interest at appropriate rate should not be demanded and recovered from them under Rule 14 of the CENVAT Credit Rules, 2004 read with Section 11AB of the Central Excise Act, 1944:

(3) penalty should not be imposed on them under sub-rule (2) of Rule 15 of the CENVAT Credit Rules, 2004 read with Section 11AC of the Central Excise Act, 1944”

2.2 After considering the submissions made by the respondents, Commissioner have adjudicated the case dropping the demand.

2.3 Aggrieved by the order of the Commissioner, revenue has filed this appeal.

3.1 In their appeal appellant revenue has raised the following grounds:

i. The show cause notice has been issued in respect of twelve invoices issued by HCL for against which the goods had not been received by the respondents in their factory at Kandivali.

ii. The allegations have been made on the basis of details forwarded by Assistant Commissioner Central Excise, Sikar Rajasthan along with invoices issued by M/s HCL, corresponding transport documents and also the depositions of drivers of vehicles, who were concerned with transportation of the said goods.

iii. Shri Vijay Agarwal, Director of Respondent failed to produce any octroi documents as octroi may not have been fully paid and deposed that they-

   a. purchased raw materials with or without the available CENVAT benefits at their manufacturing premises at Kandivali;
   b. they have a rented godown at Bhiwandi;

c. the only record maintained by them for the receipt and consumption of the raw material was their RG23A part-I register;

d. the raw material was generally stored in their godown and later shifted to factory, as per the requirements;

e. even non CENVAT able raw material was entered in their RG23A part-I register;

f. they do not have any permission from the department to store the raw material against which CENVAT Credit has been taken in godown outside the factory;

g. no delivery challan or any other document for movement of part consignments was made;

h. though the raw material in respect of the twelve invoices of HCL was received in piecemeal, the entries have been made for the entire invoiced quantity;

i. no piecemeal entries were made in RG23A part-I register which do not reflect the actual date of receipts of invoiced raw materials;

iv. Shri Nirmal Kumar Sharma, Accountant with respondents stated that the procured raw material was first unloaded at Bhiwandi godown and subsequently transported to the factory in the vehicles of M/s Gangar Transport.

v. Shri Pradeep Gangar, Transport Operator stated that they-

a. did not prepare any documents;
b. transported copper & brass products from their Bhiwandi godown to Kandivali factory and also their finished goods namely brass rods from the Kandivali factory to Gulalwadi;
c. a person of the respondents accompanied the vehicle while transporting goods from Bhiwandi godown to factory, who also paid the octroi;
d. he maintained the details of these transportations on piece of paper/ chit which was destroyed after preparation of bills;
e. he charge fare on the basis of trip undertaken and not on the basis of quantity of material transported accordingly quantity was not mentioned on the bills;

vi. Municipal authorities at Octroi Naka forwarded 16 copies of B forms showing the octroi collected in respect of the three vehicles belonging to Gangar Transport. Only in case of one Form B No 00110011180320080746000001151748 dated 18.03.2008 name of the respondents appeared and the commodity mentioned was cathode. No other details such as weight, invoice number and date tallied with the goods transported on that day. In all other form B, name of respondents did not appear and also the material was shown as scrap, waste and powder of hardened rubber, parts, fabric of noil silk, light diesel oil, matti powder, coir mattress fibre, waste foundry matti etc.

vii. After considering the submissions made by the appellants adjudicating authority has held-

a. Respondents had intimated about hiring of the godown at Bhiwandi to revenue in April 2007;

b. The evidences produced by the respondents negated the dispositions made by the drivers of transport vehicle to the effect that the said goods covered by the invoices were transported to factory near Delhi and saw the same being put into furnace;

c. Though clear records have not been maintained for movement of piecemeal quantities from Bhiwandi to Kandivali, but there was evidence of the godown at Bhiwandi and receipt of goods at last 10 & not 8 of the 12 consignments in dispute. Respondents has also shown the ledger of payments made to the transporter.

d. Though the respondents had maintained meager documents to provide complete evidence of physical receipt of the purchased cathodes in their factory, these being in realm of procedural law cannot be the ground for denial of credit once eligibility is established.

viii. The order of adjudicating authority is not legal and proper for the reasons-

a. He has relied upon single document viz BMC Octroi receipt for Rs 43,642/- and Form B No 0142556 attached with it, to hold that the respondent were able to establish that the inputs were received in the factory.

b. There were many in-consistency in the said octroi receipt and Form-B, and Commissioner has without examining the said inconsistencies, held that sufficient evidence for transport of the goods covered by the 12 invoices has been produced.

c. Commissioner has fully discarded the statements of the drivers of vehicle transporting the goods, stating that the goods covered by the said invoices were transported elsewhere than the address mentioned on the invoice.

d. Respondents had submitted transported documents of M/s G J Carriers in respect of invoice No 1688/21.2.08, 1700/22.2.08, 1747/28.2.08 & 1753/29.2.08. These documents were denied by the Manager of the said transport company as not belonging/ issued by them.

e. The dispositions made by the drivers to effect that the goods were transported elsewhere is supported evidence/ document produced BMC Octroi Naka which showed that no such material in the vehicle of M/s Gangar Transport were transported from Bhiwandi to Respondents factory in Kandivali.

f. Commissioner erroneously has held that presumptive satisfaction required under Rule 8 & 9 of CENVAT Credit Rules, 2004 relate only to the satisfaction of nexus theory in Rule 3 & 4 thereof. It is matter of record the Respondents were not having any permission from the jurisdictional Assistant Commissioner under Rule 8 to store goods outside the factory premises.

g. The allegation in show cause notice is not vis a vis the admissibility of CENVAT Credit on the inputs but is for non receipt of the goods against which the credit has been taken.

h. During course of investigation both documentary and oral evidences were collected and put on record which showed that the goods against which credit has been taken were never received by the Respondents. However Commissioner ignored all the evidences and decided the matter in favour of appellant.

i. Adjudicating authority failed to appreciate that alibi. Is not per se, defence rather it is simply evidence that will require as acquittal, if, when all the evidence is considered, reasonable doubt is raised as to the defendants guilt. In the present case where there is total defiance of normal business and commercial transactions and also in following the provisions as laid down by law, such plea of alibi will not be available.

j. Tribunal has in case of Everest Metal works [2009 (2389) ELT 79 (T-Del) held that onus is on the person who claims the credit to show that he has received the goods.

ix. For the above reasons the order of adjudicating authority is not proper and legal and needs to be set aside.

4.1 We have heard Shri N N Prabhu Desai, Superintendent (Authorized Representative) for the appellant Revenue and Shri Anil Mishra Learned Advocate for the respondents.

4.2 Respondents have file Cross Objections in the matter but these cross objections are nothing but submissions made by them in favour of the order.

4.3 Arguing for the revenue learned Authorized Representative while reiterating the submissions made in the appeal submitted that-

i. Adjudicating authority has totally misdirected himself while determining the issue under consideration.

ii. The allegation in the show cause notice was in respect of the goods cleared by M/s HCL Khetri against which CENVAT Credit was taken by the respondents without actual receipt of the said goods by the appellant in their manufactory.

iii. Plethora of evidence in form of, statement of the concerned persons of transporters, the drivers and documents collected from BMC Octroi Naka were recovered during the course of investigation to show that the goods claimed to be received by the appellants were never received by them. However adjudicating authority instead of appreciating the evidences in proper perspective discarded them and allowed the credit.

iv. The respondents plea that they were storing the goods first in godown at Bhiwandi and then transporting the goods to their factory at Kandivali is not tenable as the respondents were not having any permission from the jurisdictional Assistant/ Deputy Commissioner to store the goods outside the factory premises as required under rule 8.

v. It is settled law that procedural condition can be mandatory and directory also. Thus not following the proper procedure cannot be condoned for allowing inadmissible credit. In this case procedure has not been followed and credit claimed in respect of inadmissible goods even without the receipt of goods.

vi. Com missioner has failed to appreciate the evidences in proper perspective and dropped the demand, in respect of CENVAT Credit availed by the respondents in respect of the goods not received by them.

vii. Since Commissioner has not appreciated the evidences recorded during the investigation, the order of Commissioner is bad in law and needs to be set aside.

4.4 Arguing for the respondents, learned advocate submitted that-

i. During the course of proceedings before Commissioner they had produced evidences to show that the goods had been actually received by them. Commissioner has considered those evidences while deciding the matter. Appeal of revenue, without disclosing the reasons for discarding those evidence cannot be sustained;

ii. The evidences produced by the revenue to allege that goods have not been received by them are incomplete and uncorroborated circumstantial evidences.

iii. CENVAT Credit has been availed only after the receipt of goods under particular invoice of supplier and the entries were made in stock only after receipt of complete goods under the invoice.

iv. Rule 8 is applicable only after the CENVAT Credit has been taken. In their case only the goods against which no credit has been taken were stored in Bhiwandi and subsequently transported to Kandivali factory.

v. The documents against which the goods were cleared by M/s HCL Khetri are valid documents in terms of Rule 9 for taking the CENVAT Credit.

vi. They have not defied any norms of goods business and commercial practices or any provisions of Central Excise Law. Appeal filed do not specify the ground of defiance.

vii. Regular returns of the receipt and consumption of raw material and clearance of finished goods have been filed by them stand unchallenged.

viii. Statements revenue sought to rely upon are uncorroborated and frivolous.

ix. CENVAT Credit is admissible, if the goods are duty paid and used in the factory of manufacture.

x. No evidence in respect of any monetary transactions for the goods diverted elsewhere.

xi. They rely on the following authorities in their support:

   a. Lloyds Metal Engineering Ltd [2004 (175) ELT 132 (T-Mum)];

   b. Bhandary Industrial Metals Pvt Ltd. [2009 (245) ELT 0613 9T-Mum)];

   c. Farfield Atlas Ltd.[2009 (241) ELT 0049 (T-Mum)];

   d. Vadilal Industries Ltd [1998 (199) ELT 513 (T)];

   e. Shakti Roll Cold Strips Pvt Ltd [2007 (80) RLT 267 9T-Del)].

xii. The appeal filed by the revenue needs to be dismissed.

5.1 We have considered the submissions made in appeal and during the course of arguments.

5.2 Liberator Cathodes (Secondary) were cleared by the M/s HCL Khetri under 12 invoices as detailed in table 1 and appellants have claimed the credit in respect of the duty paid against each invoice. The goods covered by all the invoices were transported by New Haryana Transport.

Table 1: details of Invoices in respect of which credit is sought to be denied.

Invoice		Truck No	Transport Doc		Weight 'MT	RG 23A part 1		Credit Taken
No	**Date**		**No**	**Date**		**Entry No**	**Date**	
1687	21.2.08	RJ132G1839	1295	21.2.08	16.32	293	27.2.08	623515
1688	21.2.08	RJ142G5235	1296	21.2.08	21.74	289	26.2.08	830589
1700	21.2.08	RJ142G3632	1297	21.2.08	17.48	301	1.3.08	667833
1706	23.2.08	RJ14GA6458	1298	23.2.08	17.04	303	4.3.08	651023
1707	23.2.08	RJ141G8124	1299	23.2.08	9.81	305	5.3.08	374796
1708	23.2.08	RJ14GA8485	1300	23.2.08	16.42	307	9.3.08	627326
1727	26.2.08	RJ18G3266	809	26.2.08	16.81	315	25.3.08	642236
1728	26.2.08	RJ18GA0956	810	26.2.08	16.45	3	1.4.08	628482
1741	27.2.08	RJ141G5314	811	27.2.08	15.49	5	2.4.08	591804
1742	27.2.08	RJ18G3555	812	27.2.08	15.31	17	17.4.08	584928
1747	28.2.08	RJ18GA1829	813	28.2.08	15.77	19	19.4.08	602502
1753	29.2.08	RJ18GA0531	814	29.2.08	5.18	309	18.3.08	197905
					183.82			7022939

5.3 Intelligence was received that goods covered by the above mentioned invoices never reached the designated buyer/ consignee, but were delivered at or near GT-Karnal Road.

5.4 Enquiries made with transporter, M/s Haryana Transport Company Gothra (Khetrinagar) [Transporter] and M/s Kisan Truck Union [Provider of Vehicles to transporter] revealed that in 8 out of twelve cases the destination was Bhiwandi an d in remaining four cases the transporter had given instructions on the consignment notes to the effect "As per party's instruction material will be unloaded at G J Carriers Delhi UP Border Ghaziabad."

5.5 Statements of the driver of the truck No RJ142G3632 (Shri Sahiram s/o Shri Bhataram), RJ 142G5235 9Sri Radheyshyam s/o Shri Sardararam), RJ18GA1829 (Shri Krishna Kumar s/s Shri Hari Singh), RJ 18G 3555 (Shri Sandeep s/o Shri Harinarayan) and RJ 18GA0956 (Shri Mahavir s/o Shri Ramchandra) were recorded. All five of them stated that the goods were delivered at places other than the consignee premises mentioned on the invoices.

5.6 The goods in respect of the other invoices were delivered at Bhiwandi godown and from there they were said to be transported to factory premises of respondent in piecemeal. But no separate document for such transportation was made. The goods were transported from Bhiwandi to Kandivali by Gangar Transport. The statement of Shri Pradeep Nanjee Gangar, Transport operator was recorded and he deposed as stated in 3.1 (v).

5.7 On the basis of information provided by Shri Gangar in respect of the Trucks, used for transportation of goods information was sought in respect of the transportation of goods through Dahisar Octroi post by vehicle No MH04 BG 1628, MH04 BG 1630, & MH 04 BU 8829 belonging to Gangar Transport. Information furnished by the Octroi authorities showed that only in one case out of 16 Form B forwarded, i.e. Form B No 00110011180320080746000001151748 dated 18.03.2008, company name of respondents appeared and the goods mentioned were cathodes. No other details mentioned matched with invoice no etc. All other Form B were in respect of some other Company and the goods carried were also some other goods stated in para 3.1 (vi)

5.8 In respect of the four consignments off loaded at G J Road Carriers, respondents submitted the copies of G R issued by the G J Road Carriers for transportation of the said goods from Delhi to Bhiwandi. The details of such transport documents are in table 2 below:

Table 2: Details provided for transport from Delhi to Bhiwandi

S No	G R		Invoice		Weight 'MT	Freight 'Rs
	No	Date	No	Date		
1	2017	22.02.2008	1688	21.2.2008	21.74	17400
2	2020	23.02.2008	1700	22.2.2008	17.48	14000

3	2026	02.03.2008	1747	28.2.2008	15.77	12625
4	2027	02.03.2008	1753	29.2.2008	5.18	4160

5.9 On subsequent enquiries made from the M/s G J Road Carriers, in respect of the documents submitted by the respondents, the said G R were disowned by the purported transporter.

5.10 On the basis of the above evidences and on scrutiny of returns filed by the respondents, it was found that they had taken CENVAT Credit against these twelve invoices without actual receipt of the goods in their premises. Since prima facie there was sufficient evidence to conclude that the credit against the invoices of M/ HCL Khetri has been taken by the appellants without actual receipt of the goods by them show cause notice was issued to them for denying the credit taken by them. Commissioner adjudicated the case and dropped the demand.

5.12 The basic reason for dropping the demand being that Commissioner found on the basis of two octroi documents submitted by the respondents to evidence movement of 5.1 MT of liberator cathode purchased from HCL under invoice N 1753/ 29.02.2008 from Bhiwandi to Kandivali. On the basis of this he negated all the evidences adduced by the revenue to show that the goods have not moved to the premises of the respondents in Kandivali. The approach of

Commissioner appears to be erroneous evidence in respect of movement of each consignments and its receipt in the factory premises was needed to be examined and specific finding recorded. In absence such finding the order of Commissioner fails the test of reasonability and needs to be set aside on this ground only and matter remanded back to him for consideration of the evidences put forth in the show cause notice for alleging that the goods have not been received by the respondents in their factory premises.

5.13 Commissioner has sought to bring in the concept of "alibi" to establish that guilt is negated. It is not clear as to how that concept is relevant in such a matter were the evidences have been adduced to show that goods have not been received by the appellants.

5.14 Commissioner has in para 74 of his order recorded that "*The Clear records may have been not available for movement of the piecemeal quantities from Bhiwandi to Kandivali, but they do evidence existence of the noticee's godown at Bhiwandi, and receipt of, now at least, 10 and not 8 of the 12 consignments therein.*" The said finding do not lead the case any forward in the favour of respondents. The receipt of the goods in Bhiwandi Godown, owned/ rented by the respondents cannot be accepted as evidence for receipt of the goods in the factory premises of the respondents. It is responsibility of the person claiming the credit to satisfy the requirements in law, and show that the goods covered by the invoices against which credit has been taken were actually received by the him in his factory premises. Tribunal has in case of M/s Everest Metal Works [2009 (239) ELT 79 (T-Delhi)] held as follows:

"2. *I do not wish to make comments on the correctness of either of the two orders. If the appellate authority was of the view that the order of the adjudicating authority was not based on cogent evidence, the matter could have been sent for de novo adjudication. The onus to prove that the goods in question were actually received is clearly on the person who claims to have purchased and received the goods. If the person claims some benefit he has to prove the foundational facts. The Commissioner (Appeals) was not correct in fastening the onus on the Department and on the ground that the Department has failed to establish the non-receipt of the goods by the respondent, set aside the order without consequential order of remand. Clearly the Department cannot prove the non-receipt, the assessee has to prove by positive evidence the receipt of goods so as to enable him to take cenvat credit."*

5.15 Since Commissioner has not examined the evidences gathered by the revenue during course of investigation and rendered finding categorical finding in respect of them and the receipt of the goods covered by the said invoice by the respondent, we are without expressing any opinion on the evidences and submissions made by the appellants remand the matter back to Commissioner for reconsideration of entire issue afresh.

6.1 Thus appeal filed by revenue is allowed and the matter remanded back to the adjudicating authority for reconsideration of entire issue. Needless to say since the matter is quite old, Commissioner should adjudicate the matter in remand proceedings within four months from the date of receipt of this order. Respondents will also cooperate by not seeking any un-necessary adjournments in the adjudication proceedings to be undertaken by the Commissioner.

6.2 Cross objections filed by the respondents are also disposed accordingly.

(Pronounced in court)

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

(Sanjiv Srivastava)
Member (Technical)

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