CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
<u>MUMBAI</u>

REGIONAL BENCH – COURT NO. III

Excise Appeal No. E/87383/2018

(Arising out of Order-in-Appeal No. NSK/EXCUS/000/APPL/272/17-18 dated 28/02/2018 passed by the Commissioner (Appeals), GST & Central Excise, Nashik.

........Appellant

M/s. Fasttrack Packers Pvt. Ltd.,
Surve No. 16/2B, GUT No. 62,
Malibhulgaon, Taluka – Patherdi,
Dist. – Ahmednagar, PIN-414 102

VERSUS

Commissioner of Central Excise,
Customs & Service Tax,
Nashik-II

........Respondent

<u>APPERANCE:</u>

Shri Prashant Patanker, Advocate for the Appellant
Shri Sanjay Hasija, SUPDT.(AR), AR for the Respondent

CORAM:

HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

FINAL ORDER NO.

Date of Hearing: 11-12-2018
Date of Decision: 11-04-2019

SUVENDU KUMAR PATI:

1. Duty demand of Rs. 4,65,476 along with interest and equal penalty for non- reversal of CENVAT credit taken previously on capital goods after introduction of compounded levy scheme w.e.f. 27-02-2010 for 18 numbers of packing and levelling Machines under Rule 5(3A) of the CCR, 2004 and subsequent removal is assailed in this appeal.

2. Factual backdrop of the case is that Appellant had cleared 18 packing and levelling Machines during the period from February, 2011 to December, 2011 on which Appellant had availed CENVAT credit before introduction of compounded levy scheme on 27-02-2010. During audit, being pointed out by the audit Officer, Appellant had paid duty of Rs. 18367 on transaction value on 28-2-2014 after declaring those unused machines are scrap and waste in terms of Rule 5A of the CENVAT credit Rules. It was put to show cause notice with duty demand interest and penalty as referred above on the ground that such reversal of CENVAT credit was supposed to be made under the second proviso to Rule 3(5) @ 2.5% for each quarter on used capital goods. Appellant un-successfully challenged it up to the level of Commissioner (Appeals).

3. In the Memo of Appeal and during course of hearing of appeal, Counsel for the Appellant Mr. Prashant Patanker submitted that provision of CENVAT credit Rule 2004 is not applicable to unit operating under compounded levy scheme and the expression "in relation to notified goods" is wide enough to cover capital goods used for manufacturing of notified goods as under Rule 16(1) of Chewing Tobacco and Unmanufactured Tobacco Packing Machines Rule 2010 allows only availment of CENVAT credit on Excise and other ancillary duty paid on inputs on chewing tobacco in bulk packs received in factory on or after 8^{th} March, 2010 and it denies CENVAT credit on the duty paid on any other inputs including capital goods or input services after the said date and Sub Rule - 7 of Rule 16 excludes application of CENVAT credit Rule 2004 in relation to such notified goods. He also challenged the penalty imposed on the Appellant on the ground that no fraud or wilful misstatement for invocation of extended period can be established against Appellant as it had voluntarily intimated in writing to the Respondent department regarding such removal of 18 No. of machines from the factory on the basis of which audit objection was raised. Reliance on Padmini Products Vs Collector of Central Excise reported in 1989 (43) E.L.T. 195SE and Salasar Dying and Printing Mills (P) Ltd. Vs CCE&C, Surat-1 report in 2013(290) E.L.T. 322(Guj) judgments are made to justify non-invocation of such extended period.

4. Learned AR for the Respondent department Shri Sanjay Hasija, supported the reasoning and rationality of the order passed by the Commissioner of Appeal and with reference to decision reported in 2003(162)ELT 353(Tri-Del) the case of Commissioner if C-Ex. Jaipur-1, 2015(320) ELT 634(Tri-Mum) in the case of Unique Processors Vs Commissioner of Central Excise, Thane-1, to substantiate that packing machine being removed from the factory, he agreed that duty is payable against CENVAT credit which is supposed to be reversed upon such removal. In producing Notification 18/2012-CE (ND) dt. 17t March 2012, had clarified that when the capital goods are removed as scrap or waste, the manufacturer shall pay an amount equal to the CENVAT credit taken on the said capital goods reduced by the percentage points i.e. @ 2.5% for each quarter for which the order passed by Commissioner (Appeal) needs no interference.

5. Heard from both the sides and perused the case as well as relevant provisions and rules on the issue. A bare perusal of Rule 16, sub Rule 1 & 7 would make it clear that no CENVAT credit on capital goods can be availed after 8th March, 2010 and no other provision of CENVAT Credit Rule 2004 shall apply in relation to notified goods. If CENVAT credit is not permitted to be availed on capital goods after notified dates and CENVAT credit Rule 2004 will not be applicable in relation to notified goods, which in the present case means manufacturing tobacco, it cannot be said that without an express provision, whatever credit was availed for old and unused machines are to be refunded by applying provision of CENVAT credit rules 2004. Further the contention of AR that notified goods does not include manufacturing machine is not acceptable for the reason that had the Legislator intended the same to be applicable on notified goods alone, the word "in relation to" would not have been prefixed to such notified goods. Further, appellant had paid the required excise duty on those unused machineries discarded as scrap along with interest after objection was raised by Auditor on show cause notice.

6. So far as audit is concern 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 assesse and in the process, the auditor is required to discuss the matter with the assesse 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 some credit availed as inadmissible, suppression of fact is made out. Further it is not established that appellant had any malafide intention to suppress its duty liability from the department.

Hence the order.

7. The appeal is allowed. Order passed by Commissioner of Appeal on 28-02-2018 on Appeal No. **E/87383/2018** is hereby set aside.

(Pronounced in open Court ……………..)

Dr. Suvendu Kumar Pa
MEMBER (JUDICIAL

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