CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
REGIONAL BENCH
COURT No. I

Excise Appeal No. 855 of 2007
E/Cross 209 of 2007

(Arising out of Order-in-Original No. 21/MS (10) COMMR/RGD/06-07 dated 28.09.2006 passed by Commissioner of Central Excise, Raigad)

Commissioner of Central Excise, Raigad **Appellant**
Utpad Shulk Bhavan, Plot No.1,
Sector-17, Khandeshwar,
Navi Mumbai 410 206.

Vs.

M/s. Ispat Industries Ltd. **Respondent**
"Victoria House", 2nd floor,
Pandurang Budkar Marg,
Lower Parel, Mumbai 400 013.

Appearance:

Shri S.K. Hattangadi, Assistant Commissioner, Authorised Representative for the Appellant
Shri Vishal Agarwal, Advocate, for the Respondent

CORAM:

HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO. **A/87353/2019**

Date of Hearing: 23.09.2019
Date of Decision: 23.09.2019

PER: SANJIV SRIVASTAVA

This appeal filed by revenue is directed against the order in original No 21/MS (10) COMMR/RGD/06-07 dated 28.09.2006 of the Commissioner of Central Excise, Raigad. By the impugned order, the Commissioner has held as follows:

1. "I confirm and order the assessee to pay an amount of Rs 3,24,48,956/- being wrongly excess CENVAT Credit as discussed above under the provisions of Rule 57 I of Central Excise Rules, 1944 and/ or under rule 12 of the CC Rules 2001 r/w Section 11A of C. Ex Act.

2. I order that interest be paid on the above amount of the disallowed CENVAT Credit under Rule 12 of CC Rules 2001 and/ or Section 11 AB of C Ex Act, 1944 at applicable rates.

3. A penalty of equal amount of Rs 3,24,48,556 is imposed on them under erstwhile rule 173Q of C Ex Rules, 1944 and/ or under rule 25 of c Ex rules, 2002, 2001 and/ or Rule 3(2) of CC Rules, 2001 r/w section 11AC of C Ex Act, 1944.

4. I drop the demand of Rs 5,10,70,719/- being the amount of CENVAT admissible to the assessee."

2.1 Respondents in the present appeal have received Iron Ore pallets from M/s Kudermukh Iron Ore Co Ltd (KIOCL) an 100% EOU operating under the jurisdiction of Mangalore Customs. As per proviso to Section 3 of the Central Excise Act, 1944, KIOCL being a 100% EOU was required to Central Excise Duty equivalent to the aggregate of the Customs duties payable on like goods when imported into India. At the time of clearance, KIOCL, paid the duty without including the additional customs duty (CVD) component in the aggregate. Since KIOCL had not included the CVD component required to be paid, the matter was taken up by Mangalore Customs, and Commissioner of Customs Mangalore, vide his order No 2/2001 dated 4th July 2001, confirmed the demand of Rs 7,78,79,442/- short paid by M/s KIOCL on the clearances made in DTA, without including the additional duty of Customs (CVD) in the aggregate of Custom Duties required to be paid as per the proviso to Section 3(1) of the Central Excise Act, 1944. M/s KIOCL raised supplementary invoices for an amount of Rs 6.86 crores (in November 2001), consequent to the payment of the amount as confirmed by the Commissioner Customs Mangalore on the respondent.

2.2 Respondents took the credit of Rs 1.48 crores approximately on the strength of 19 invoices vide entry no 532 to 550 all dated 10.11.2001, whereas the duty against these invoices had been paid on during July 1999 to April 2001 and material received by the respondents accordingly. This credit was sought to be denied for the reason that

i. credit has been taken after the expiry of six months from the date of invoice in contravention of the provision of Rule 57 G (5).

ii. As the amount paid at the time of clearance against these invoices was not including the CVD Component but was only basic customs duty, surcharge and SAD the credit was not admissible to them.

2.3 Respondents took the credit of approximately Rs 6.86 crores on 10.11.2001 on the basis of supplementary invoices issued by M/s KIOCL on 08.11.2001 for the amount of CVD component paid by them as per the order of Commissioner Customs Mangalore. This credit was sought to be denied for the following reasons:

i. the credit was availed by the them without having procured necessary certificate from the Superintendent of Central Excise under Rule 57E(4)/ 57E(5) of Central Excise Rules, 1944;

ii. only a part of such differential duty was towards the CVD component hence credit to the extent of CVD paid was only admissible.

iii. The credit was taken against the invoices issued during July 1999 to April 2000 in spite of the fact that these invoices were only in respect of Basic Custom duty, surcharge and SAD component;

iv. In terms of Rule 57E(2) the credit could have been availed only if the manufacturer had passed on the incidence of differential duty demand to them.

2.4 Commissioner has as per the impugned order referred in para 1, supra, held that CENVAT/MODVAT credit to the tune of Rs 3,24, 48,956/- was inadmissible and hence order its recovery along with interest and also imposed equivalent penalty. Commissioner found that the remaining amount of Rs 5,10,70,719/- was admissible t as credit to the appellants and hence dropped the demand in respect of the same.

2.5 Aggrieved by the order of Commissioner dropping the demand of Rs 5,10,70,719/-, Committee of Chief Commissioners reviewed the impugned order and directed for filing the appeal to tribunal with following prayer

(a) *"Whether after taking into consideration the facts and circumstances stated above read with the show cause notice, the said order of the Commissioner, Central Excise, Raigad in dropping the demand of Rs 5,10,70, 719/- is correct, legal and proper?*

(b) *Whether Commissioner has erred in not confirming the demand and imposing penalty and interest as proposed in the show cause cum Demand notice?*

(c) *Whether by an order passed under Section 35C of the Act, the Hon'ble CESTAT should modify the said order and/ or remand the case back to the adjudicating authority? Or*

(d) *Whether the Tribunal may pass any such order as may be deemed fit?"*

3.1 In their appeal, revenue has challenged the order of Commissioner on following grounds-

- During the period 29.06.1995 to 31.03.2000, Rule 57G(5) provided as follows:

  "Provided further that the manufacturer shall not take credit after six months of the date of issue of any of the documents specified in the first proviso to this sub-rule"

- All the nineteen invoices against which the credit had been taken were issued during the period July 1999 to May 2000, barring two invoices, all other invoices were issued during the period when the embargo of six months as per the rule 57G(5) for taking the credit was there.
- The supplementary invoices against which the credit has been taken on 10.11.2001 were issued in the consequence to invoices, issued during the period when the embargo of Rule 57G(5) was there.
- Respondents had not taken any credit against the nineteen invoices earlier issued during the period July 1999 to May 2000, because these invoices were not in respect of the admissible credit of CVD component. By retrospective

apportioning of the amount on the invoices towards CVD respondent took the credit against these invoices.

- The supplementary invoices do not cover any fresh clearances but were only in respect of the earlier 19 invoices issued during the period July 1999 to May 2000, hence the bar of Rule 57G(5) which barred the availment of credit after six months from the date of document will be applicable and the CENVAT/ MODVAT Credit could not have been taken against these supplementary invoices.
- Supplementary invoices for the purpose of MODVAT/ CENVAT Credit were not the prescribed document during the period of clearance and were included in the category of prescribed documents only from 29.08.2000, hence the same was not the prescribed document during the relevant period of receipt of goods.
- The relevant date for determining the admissibility of credit is receipt of the inputs and not the act of taking the credit as held by tribunal in the case of Eveready Industries India Ltd. [1996 (87) ELT 137 (T)], MRF Ltd [2004 (171) ELT 182 (T-Chennai)]. Since the inputs in the present case were received during the period July 1999 to March 2000, when the embargo of Rule 57G(5) was in force the credit taken after six months from the date of invoice should not have been allowed.
- In view of the above impugned order of Commissioner Central Excise Raigad is not legal and proper and needs to be set aside.

3.2 Respondents have filed cross objections in the matter which are in support of the order of Commissioner, allowing the credit of Rs 5,10,70,719/- in the impugned order.

4.1 We have heard Shri S K Hattangadi, Assistant Commissioner, Authorized Representative, for the appellant revenue and Shri Vishal Agarwal, Advocate for the respondents.

4.2 Arguing for the appellants, learned Authorized Representative while re-iterating the submissions made in appeal submitted that-

- Respondents have taken the credit of the duty paid on inputs, much after the prescribed period of 6 months as per the Rule 57G(5) of the Central Excise Rules, 1944.
- The issue in respect of such credit taken after the prescribed period was considered by the larger bench of Tribunal in case of Kusum Ingots [2000 (120) ELT 214 (T-LB)] and tribunal has held against the admissibility of such credit.
- Rule 3(1) of the Cenvat Credit Rules, 2001, provide that credit is allowed only on the inputs received by the manufacturer on or after 01.07.2001. Hence the provisions of CCR 2001 are not relevant for determining eligibility to MODVAT credit of inputs received prior to 01.07.2001.
- As per the following decisions it has been held that eligibility to MODVAT/ CENVAT Credit is to be reckoned as per the law prevailing on the date of receipt of inputs and Capital Goods and not thereafter.
  - Grasim Industries Ltd [2004 (176) ELT 265 (T)] affirmed at [2005 (179) ELT A 38 (SC)]
  - Spenta International Ltd [2007 (216) ELT 133 (T-LB)]
  - Surya Roshni Ltd [2003 (155) ELT 481 (T)]
  - Saurashtra Chemicals Ltd [2007 (212) ELT 7 (SC)]
- In following decisions it has been held that no credit can be availed on the basis of invoices, 6 months after their date of issue.
  - Osram Surya (P) Ltd [2001 (142) ELT 5 (SC)]
  - Rathi Ispat Ltd [2010 (251) ELT 199 (ALL)]
- It is also settled as per the following decision that the provisions relating to documents on the basis of which MODVAT/ CENVAT Credit may be availed are to be mandatorily adhered to.
  - Marmagoa Steel Ltd [2008 (229) ELT 481 (SC)]
  - MRP Ltd [2007 (208) ELT 19 (T-LB)]
  - Wipro Ltd [1997 (94) ELT 470 (SC)]
  - Ashok Leyland [2002 (148) ELT 453 (T)]

- Thus in view of the above settled position in law, the decision of Commissioner allowing the impugned credit needs to be set aside.

4.3 Arguing for the respondents learned counsel submitted that:

- Against the impugned order, they had also preferred an appeal challenging the disallowance of credit to tune of Rs 3,24,48,956/- which has been allowed by the tribunal vide its order No A/106/07/C-1/EB.
- The only ground taken in the appeal filed by the revenue for challenging the credit allowed by the Commissioner in impugned order, that differential duty was paid in November 2011, which was after six months from the date of original clearances. As per revenue embargo of six months as per Rule 57G(5) should apply and the credit should have been denied. Thus as per the revenue only the credit can be taken if the differential duty was paid within six month of the invoice.
- The time limit of six months as per Rule 57G(5) does not apply to cases where the process of taking the credit has been initiated within six months by making relevant entries in RG 23A part 1 register, as has been held in following cases:
  - BHEL [2016 (332) ELT 411 (MP)]
  - Aurobindo Pharma [2001 (127) ELT 786 (T)]
  - Crystal Cable Industries Ltd [2003 (159) ELT 465 (T)]
- It is also settled as per the following decisions that the time limit of six months shall not apply in cases of allowing the credit against the supplementary invoices:
  - Andhra Petrochemicals [2005 (183) ELT 377 (T-Bang)]
  - IPCL [2014-TIOL-1066-CESTAT-AHM]
- In view of the above settled position in law the decision of Commissioner cannot be faulted with and the appeal of revenue needs to be dismissed.

5.1 We have considered the impugned order along with the submissions made in appeal and during the course of argument.

5.2 As per the Annexure A & B to the show cause notice and recorded below it is evident that the appellants have taken credit in their RG 23A Pt – 1 within six months of the invoice.

S No	**Invoice No/Date**		**RG 23 A entry**		**Credit' Rs**
	Original	Supplementary	Pt-1 Date	Pt-2, Entry No/ Date	2821591
1	17/24.12.99	47/08.11.01	31.12.99	532/10.11.01	2761255
2	05/07.07.99	36/08.11.01	13.07.99	533/10.11.01	4152291
3	15/19.11.99	46/08.11.01	13.12.99	534/10.11.01	2723820
4	06/12.07.99	37/08.11.01	23.07.99	535/10.11.01	2708774
5	07/21.07.99	38/08.11.01	29.07.99	536/10.11.01	2710390
6	08/28.07.99	39/08.11.01	06.03.99	537/10.11.01	2693980
7	09/05.08.99	40/08.11.01	14.08.99	538/10.11.01	2641479
8	11/12.08.99	41/08.11.01	20.08.99	539/10.11.01	3435181
9	12/18.09.99	42/08.11.01	22.09.99	540/10.11.01	2709374
10	13/24.09.99	43/08.11.01	07.10.99	541/10.11.01	3449833
11	14/12.10.99	44/08.11.01	28.10.99	542/10.11.01	2817149
12	18/02.01.00	48/08.11.01	16.01.00	543/10.11.01	2843674
13	19/03.01.00	49/08.11.01	31.01.00	544/10.11.01	2849645
14	20/03.02.00	50/08.11.01	05.02.00	545/10.11.01	4920992
15	22/29.02.00	51/08.11.01	05.03.00	546/10.11.01	7268585
16	23/07.03.00	52/08.11.01	13.03.00	547/10.11.01	7296631
17	24/07.03.00	53/08.11.01	20.03.00	548/10.11.01	11451390
18	02/25.04.00	54/08.11.01	27.05.00	549/10.11.01	11263641
19	03/25.04.00	55/08.11.01	30.04.00	555/10.11.01	2821591

5.3 As is evident from the table above in case of each of invoice the credit has been taken in the RG 23A Pt 1 register immediately on the receipt of the goods by the respondent, within six months from the date of original invoice evidencing the clearance of goods by M/s KIOCL and receipt by the respondents. Since the credit has been taken in the Part 1 account about the receipt of the goods within six months of the date of invoice, there is substantial compliance with the provisions of the Rule 57G(5) of the Central Excise Rules, 1944 as it existed then. In such a situation the appeal filed by the revenue seeking for denial of credit for the reason that credit has been taken in part II register beyond the period of six months in contravention of Rule 57 G(5) is not maintainable.

5.4 Hon'ble High Court of Madhya Pradesh has in case of BHEL, relied upon by the respondents in similar set of facts, has held as follows:

"3. The assessee is engaged in manufacturing of various excisable goods. They are availing the facility of Modvat credit of duty paid on inputs, in terms of the provisions of 57A of the Central Excise Rules. It was found on the basis of the duty paying documents that in the months of July, August and September, 1995, the assessee had taken Modvat credit to the tune of Rs. 35,07,645/- on the strength of duty paying documents which was found to have been issued more than six months prior to the date on which credit was taken. It was the case of the Revenue that under Rule 57G(2), the manufacturer is required to file a declaration under Rule 57G(1) after obtaining the dated acknowledgement, take credit of the duty paid on inputs received and in accordance to the second proviso to sub-rule, the manufacturer is restrained from taking credit after six months of the date of issuance of any documents specified. It was found that in the entries made in the documents maintained under RG-23A - Parts-I & II, even though in Part I the entry is made showing date of taking availment of Modvat credit within the stipulated period of six months, but in Part-II as the date was beyond six months, the Tribunal held that the facility of Modvat cannot be extended as the assessee has not shown availing of the benefit in accordance to the requirement of the Rule.

4. Accordingly, by making the following observations -

"In support of this contention, the appellants cited and relied upon the judgment of the Hon'ble Supreme Court in the case of Eicher Motors. We find that RG 23A - Part-I and Part-II is a consolidated record. There are columns of credit and debit of duty only in Part-II of RG-23A and not in Part-I of RG-23A. Thus, we note that the entry in RG-23A Part-II is the entry which is to be taken as the entry for computing the period of six months.

The contention of the appellant that a right accrues, there is no denial of this contention. The right no doubt accrues but here the limited question is from which date the period of six months is to be counted. Since date of entry of credit taken is provided for only in RG-23A Part-II and, therefore, this entry is material for our purpose. In the present case, the duty paying documents when examined in the light of entry in RG-23A Part-II go beyond a period of six months. Therefore, following the ratio of the decision of the Larger Bench of this Tribunal in the case of Kusum Ingots & Alloys Limited, we hold that no Modvat credit will be admissible on the duty paying documents in the present case. The appeal is, therefore, dismissed."

the appeal was dismissed. Now, in this reference, we are required to consider the questions as referred to.

5. Having heard learned counsel for the parties, we find that Section 57A of the Central Excise Rules, 1945 provides for admissibility of credit on duty paid on specific inputs used in manufacturing of a specified final product. The second proviso to sub-rule 57G(1) inserted with effect from 29-6-1995 contemplates as under :

"....The manufacturer shall not take credit after six months from the date of issue of any of the documents specified in the first proviso to this sub-rule". (Emphasis supplied)

For availing of the aforesaid benefit, consequential accounting entries are to be made about the running total of the credit balance and the account input credit entries in RG-23A Part-I & Part-II respectively.

6. In this case, it is found that all the requirements of the statutory rules are met with by the assessee-company, but it is only with reference to accounting and making entries in the RG-23A - Part-II that the dispute has risen. Even though in the entries made under Part-I with regard to account of inputs, the entry is made showing a date within six months, but in Part-II - the entry number showing the date is beyond six months aid it is *only because of this entry made in Part-II that Modvat credit has been denied to the assessee.*

7. Admittedly, the Tribunal in its order on 17-10-2000 and in the portion reproduced hereinabove, has clearly held that RG-23 A Part-I & Part-II is a consolidated record, but it refused to grant Modvat credit to the assessee because of the entry made in Part-II, which was beyond six months.

8. In the case of Eicher Motors Limited v. Union of India, 1999 (106) E.L.T. 3 (S.C.), it has been held that the provisions for facility of credit is as good as tax paid till adjustment of tax on future goods based on various commitments are made. It has been held that the provision for facility of credit granted to an assessee is a right accrued to the assessee on the date when they paid the tax on the raw material or the inputs and this right would continue until the facility available thereto gets worked out or until those goods existed. In paragraph 6, the Hon'ble Supreme Court has dealt with the matter in the following manner :

"6. ... Thus a right accrued to the assessee on the date when they paid the tax on the raw materials or the inputs and that right would continue until the facility available thereto gets worked out or until those goods existed. Therefore, it becomes clear that Section 37 of the Act does not enable the authorities concerned to make a rule which is impugned herein and, therefore, we may have no hesitation to hold that the rule cannot be applied to the goods manufactured prior to 16-3-1995 on which duty had been paid and credit facility thereto has been availed of for the purpose of manufacture of further goods."

9. The matter was again considered by the Supreme Court in the case of Collector of Central Excise, Pune v. Dai Ichi Karkaria Limited, 1992 (112) E.L.T. 353 (S.C.), and after relying upon the judgment in the case of Eicher Motors Limited (supra), in paragraphs 17 and 18, the principle has been so crystallized :

"17. It is clear from these Rules, as we read them, that a manufacturer obtains credit for the excise duty paid on raw

material to be used by him in the production of an excisable product immediately it makes the requisite declaration and obtains an acknowledgement thereof. It is entitled to use the credit at any time thereafter when making payment of excise duty on the excisable product. There is no provision in the Rules which provides for a reversal of the credit by the excise authorities except where it has been illegally or irregularly taken, in which even it stands cancelled or, if utilized, has to be paid for. We are here really concerned with credit that has been validly taken, and its benefit is available to the manufacturer without any limitation in time or otherwise unless the manufacturer itself chooses not to use the raw material in its excisable product. The credit is, therefore, indefeasible. It should also be noted that there is no co-relation of the raw material and the final product; that is to say, it is not as if credit can be taken only on a final product that is manufactured out of the particular raw material to which the credit is related. The credit may be taken against the excise duty on a final product manufactured on the very day that it becomes available.

18. It is, therefore, that in the case of Eicher Motors Limited (supra) this Court said that a credit under the Modvat Scheme was 'as good as tax paid'." (Emphasis supplied)

10. Therefore, in the case of Baroda Rayon Corporation Limited v. Union of India, 2014 (306) E.L.T. 551 (Guj.), the Gujarat High Court has considered question identical in nature as is posed before us. In the case of Baroda Rayon Corporation Limited also, the benefit of Modvat credit was denied to the assessee only because of an entry made in RG-23A Part-I & Part-II, showing a date beyond six months. In the said case, the principle of law governing grant of Modvat credit; the requirement of Rules 57A and 57G; the law laid down in the case of Eicher Motors Limited (supra) and Dai Ichi Karkaria Limited (supra) have all been considered and it has been held by the Gujarat High Court in the aforesaid case has held that merely because the entry of date made in Part-II is beyond six months, the benefit of Modvat credit cannot be denied when from all other material available, *including the entry made in Part-I, it is found that the benefit can be granted to the assessee.*

11. We are in full agreement with the principle laid down by the Gujarat High Court wherein also under similar circumstances, identical action has been quashed and Modvat credit extended. We agree with the Gujarat High Court when it says that the right to avail all credit conferred under Rule 57A and Rule 57G only provides the procedure to be observed by the manufacturer. Therefore, when power is exercised under Rule 57G, the Central Government is not empowered to curtail any right conferred by the substantive provision of Rule 57A and, therefore, the notification issued under Rule 57G prescribing the time limit for taking the credit as found by the High Court of Gujarat is found to be ultra vires, as it is beyond the power and is in conflict to the impugn provision of Rule 57A, these are based on the principle laid down by the Hon'ble Supreme Court in the cases of Eicher Motors Limited (supra) and Dai Ichi Karkaria Limited (supra).

12. Accordingly, in the facts and circumstances of the case, we are of the considered view that when the assessee was entitled to avail the Modvat credit under Rule 57A, merely because of the time frame fixed in making the entries in Part-II of RG-23A, and only because of some error in making the entry, denial of the benefit cannot be permitted.

13. As such, we answer the question formulated and referred to us by hold that the right to the credit under the Modvat Scheme accrued to the assessee on the date when they paid the tax on the raw material or inputs and when such a right gets crystallized in their favour once the input is received in the factory on the basis of the existing scheme.

14. We further hold that the act of the assessee in making such receipt of input in Part-I of a single comprehensive RG-23A action is evidence enough with regard to crystallization of right to Modvat credit and merely because in second accounting entry of Part-II, there is some inconsistency, the right accrued already to receive the credit cannot be taken away."

5.5 The principles of law laid down in the decisions relied upon by the learned Authorized representative is not disputed, but those decisions are clearly distinguishable as no case has dealt with the situation where the receipt of inputs in the premises of assessee has been duly recorded in RG23A part 1 register within six months of the date of document/ invoice and the credit entry in part II was made subsequently after six months. Since those decisions are distinguishable on facts we do not find them applicable.

6.1 In view of the discussions as above, appeal filed by the revenue is dismissed. The cross objection filed is also disposed accordingly.

(Order pronounced in the open court)

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

(Sanjiv Srivastava)
Member (Technical)

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