

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

REGIONAL BENCH - COURT NO. 02

Excise Appeal No. 88943 of 2018

(Arising out of Order-in-Appeal No. NSK/EXCUSS/000/APPL/155/18-19 dated 05.07.2018 passed by Commissioner of GST and Central Excise (Appeals), Nashik)

M/s Shri Dnyaneshwar SSK Ltd.

.....Appellant

Dnyaneshwarnagar,
Post-Bhende SK-414605,
Taluka: Newasa,
Dist.: Ahmednagar

VERSUS

**Commissioner of Central Excise
& Service Tax, Nasik**

.....Respondent

Kendra Rajaswa Bhawan,
Old Agra Road, Gadkari Chowk,
Nasik - 422002

Appearance:

Shri Abhay Prabhakar Kolte, Advocate for the Appellant

Shri N.N. Prabhudesai, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)

FINAL ORDER NO. A/85658 / 2020

Date of Hearing: 06.03.2020

Date of Decision: 06.03.2020

Per: S.K. MOHANTY

This appeal is directed against the impugned order dated 05.07.2018 passed by the Commissioner of GST and Central Excise (Appeals), Nashik.

2. Briefly stated, the facts of the case are that the appellant is engaged *inter alia*, in the manufacture of sugar and molasses falling under Chapter 17011490 & 17031000 of the Schedule to the Central Excise Tariff Act, 1985. During the course of audit of records under EA-2000, the department observed that the appellant had availed Cenvat credit amounting to Rs.30,00,000/- on the strength of the invoice issued by M/s Dnyaneshwar Trust.

On verification of the said invoice, the department further observed that the amount mentioned therein was paid as per the stay order NO. S/375/14/CSTB/C-I dated 21.04.2014. Taking up Cenvat credit of such amount was disputed by the department on the ground that pre-deposit made pursuant to stay order dated 21.04.2014 cannot be considered as “service tax” and as such, availment of Cenvat credit is not in conformity with Rule 3(1)(ix)(b) of the Cenvat Credit Rules, 2004. On the basis of the audit observations, the department initiated show cause proceedings against the appellant, which has culminated into the adjudication order dated 31.07.2017, wherein the proposals made in the notice were confirmed. On appeal, the learned Commissioner (Appeals) vide the impugned order dated 05.07.2018 has upheld the adjudged demands confirmed on the appellant.

3. The learned Advocate appearing for the appellant submits that the amount pre-deposited by the appellant in terms of Section 35F of the Central Excise Act, 1944 pursuant to the stay order dated 21.04.2014 should be construed as “deposit of service tax” and as such, payment of the tax amount should be eligible for Cenvat benefit. In this context, he has relied upon the decision of this Tribunal in the case of Commissioner of Central Excise, Jaipur-II Vs. Hindustan Zinc Ltd., 2013 (290) E.L.T. 398 (Tri.-Del.).

4. On the other hand, the learned AR appearing for the Revenue reiterates the findings recorded in the impugned order. He further submits that Rule 3 of the Cenvat Credit Rules, 2004 permits a manufacturer or a service provider to avail Cenvat credit of various duties and service tax paid on the goods/services. By referring to the said rule, the learned AR submits that pre-deposit made under Section 35F of the Central Excise Act, 1944 is not finding any place in Rule 3 *ibid*, entitling a manufacture/service provider to avail credit of the amount of pre-deposit made pursuant the order passed by the appellate forum. Thus, he submits that taking of Cenvat credit on the pre-deposit amount by the appellant is not in conformity with the

Cenvat statute. To support such stand, the learned AR has relied upon the judgment of Hon'ble Bombay High court in the case of Suvidhe Ltd. Vs. Union of India – 1996 (82) E.L.T. 177 (Bom.), Nelco Limited Vs. Union of India – 2002 (144) E.L.T. 56 (Bom.) and the decision of this Tribunal in the case of Hindustan Zinc Ltd. Vs. Commissioner of Central Excise, Jaipur-II – 2013 (292) E.L.T. 260 (Tri.-Del.).

5. Heard both sides and perused the records.

6. The short question involved in this appeal for consideration by the Tribunal, is whether amount paid as pre-deposit under Section 35F *ibid* pursuant to the stay order passed by the Tribunal, should be considered as “deposit of duty/service tax” for the purpose of availment of Cenvat credit.

7. Rule 3 *ibid* is the enabling provision, which entitles a manufacturer or a service provider to take Cenvat credit of various duties and service tax mentioned therein. The said rule nowhere prescribes that amount deposited under Section 35F *ibid* should be considered as either duty or service tax for the purpose of taking the Cenvat benefit. Since, payment made under 35F is not specifically finding any place in Rule 3 *ibid*, taking of such amount as Cenvat credit is contrary to such statutory provision and hence, denial of Cenvat benefit in the present case by the authorities below is in conformity with the statutory provisions. The decision relied upon by the learned Advocate for the appellant in the case of Hindustan Zinc Ltd. (supra) is distinguishable from the facts of the present case inasmuch as the amount in question deposited in the said decided case was in fact admitted and considered as “duty of excise”. Whereas, contrary is the situation in the case in hand inasmuch as M/s Dnyaneshwar Trust contested the service tax liability confirmed against it on the ground that services provided by it should not fall under the scope or ambit of Finance Act, 1994 for levy of service tax there on. The plea made by such appellant before the Tribunal was upheld vide the Final order dated 03.08.2017, holding that the services provided by M/s Shri

Dnyaneshwar Trust is not confirming to the definition of taxable service provided under the Finance Act, 1994 for consideration as provision for the output service. In view of the fact that Rule 3 of the rules does not consider the amount of pre-deposit as service tax for availment of Cenvat credit by the manufacturer/service provider, taking of such credit by the appellant is not proper and justified. Thus, the service tax demand confirmed by the original authority and upheld in the impugned order cannot be faulted with.

8. I find that the department has invoked the provisions of Section 11AC of the Central Excise Act, 1944 for imposing mandatory penalty on the appellant. Insofar as invocation of the said statutory provision is concerned, the department has to specifically allege and prove with substantial evidence that there is element of fraud, collusion, willful misstatement, suppression of facts etc., with intent to evade payment of central excise duty/service tax. From the averments made in the appeal memorandum as well as the submissions made by the learned Advocate at the time of hearing of appeal, it transpires that the ingredients mentioned in Section 11AC *ibid* are absent and as such, the provisions of Section 11AC *ibid* cannot be invoked inasmuch as taking of Cenvat credit of the pre-deposit amount in question by the appellant was not owing to the reason of fraud, collusion, willful misstatement etc. I find that the appellant had *bona fide* believed that the amount paid by the service provider should be entitled as credit to the appellant. It is not the case of Revenue that the amount whatsoever has not been deposited by the service provider and no proper and valid documents were issued by it. Thus, availment of credit based on the valid and proper document cannot invite for the penal consequences by reason of fraud, collusion etc., with intent to evade Government revenue. Thus, I am of the considered view that imposition of penalty under Section 11AC *ibid* by the department cannot stand for judicial scrutiny.

9. In view of the foregoing discussions, the appeal is partly allowed in favour of the appellant by setting aside the penalty imposed on it under Section 11 AC *ibid*.

(Dictated and pronounced in the open court)

(S.K.Mohanty)
Member (Judicial)

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