CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
REGIONAL BENCH

Excise Appeal No. 87346 of 2013

(Arising out of Order-in-Appeal No. P.III/RP/65/2013 dated 08.03.2013 passed by the Commissioner of Central Excise (Appeals), Pune-III)

M/s. Kalyani Forge Ltd. **Appellant**
Gat No. 914/1&2, Sanaswadi,
Pune-Nagar Road,
Tal. Shirur, Pune 412 208.

Vs.

Commissioner of Central Excise, Pune-III **Respondent**
ICE House, 41-A, Sassoon Road,
Opp. Wadia College, Pune 411 001.

Appearance:

None for the Appellant
Shri Sanjay Hasija, Superintendent, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO. **A/87085/2021**

Date of Hearing: 03.11.2021
Date of Decision: 03.11.2021

This appeal is directed against order in appeal No. P.III/RP/65/2013 dated 08.03.2013 of the Commissioner of Central Excise (Appeals), Pune-III. By the impugned order, the Commissioner (Appeals) has upheld the order in original No. PVIII/CEX/ADJ/09/12-13 dated 31.07.2012 of the Deputy Commissioner of Central Excise, Pune Division - VIII, holding as follows:

"ORDER

(i) *I confirm the demand of Rs 2,44,406/- (Rs 2,37,232/- + Ed Cess Rs 4753/-+Rs 2421/-) to be recovered from them under the provisions of Rule 14 of CENVAT Credit Rules, 2004 read with section 11A of the Central Excise Act, 1944 read with Rule 16(1) & 16 (2) of the Central Excise Rules, 2002*

(ii) *I confirm the demand of interest, at appropriate rate, on above to be recovered from them under Rule 14 of CENVAT Credit Rules, 2004 read with Section 11AA (erstwhile Section 11AB) of the Central Excise Act, 1944.*

(iii) *I impose penalty of Rs 2,44,406/- upon them under the provisions of Rule 15 (2) of CENVAT Credit Rules, 2004 read with section 11AC of the Central Excise Act, 1944."*

2.1 The appellants manufacture excisable goods such as forgings of iron and steel, machined components etc. falling under Chapter 73, 82, 87 of the schedule to the Central Excise Tariff 1985. They received back their finished goods on rejection by their customers on detection of certain defects. They took Cenvat credit against the customers' invoices in respect of these returned defective goods. They were scrapping the rejected goods on which Cenvat was taken, which were beyond repair.

2.2 A show cause notice dated 06.01.2012 was issued to the appellants asking them to show cause as to why:

(i) Cenvat Credit amounting to Rs 2,44,406/- (Rs 2,37,232/- + Ed Cess Rs 4753/-+Rs 2421/-) should not be demanded and recovered from them under the provisions of Rule 14 of CENVAT Credit Rules, 2004 read with section 11A of the Central Excise Act, 1944 read with Rule 16(1) of the Central Excise Rules, 2002.

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

(iii) Penalty should not be imposed upon them under the provisions of Rule 15 (2) of CENVAT Credit Rules, 2004 read with section 11AC of the Central Excise Act, 1944

2.3 The show cause notice was adjudicated by the Deputy Commissioner by his order in original referred to in para 1, above.

2.4 Aggrieved by the order in original, the appellants preferred an appeal before the Commissioner (Appeals), which has been dismissed by the impugned order. Hence this appeal.

3.1 Matter was listed for hearing on 3rd November 2021, Appellant chose to abstain. Records suggest that the appellants have been abstaining from the hearing on the last ten occasions when the matter got listed on 20.02.2018, 15.03.2019, 03.05.2019, 02.07.2019, 26.07.2019, 22.11.2019, 05.02.2020, 08.04.2021, 06.08.2021, & 21.09.2021. So the matter was taken up for hearing and consideration ex-parte.

3.2 I have heard Shri Sanjay Hasija, Superintendent, Authorized Representative for the revenue.

3.3 Learned authorized representative submits that the issue involved in this appeal is no longer res-integra, and has been decided against the appellants in following decisions:

- ➢ Kalyani Forge Limited [2007 (211) E.L.T. 129 (Tri. - Mumbai)]
- ➢ International Tobacco Co Ltd. [2020 (371) ELT 470 (ALL)]

Following these decisions the appeal should be dismissed.

4.1 I have considered the impugned order along with the submissions made in appeal and during the course of arguments.

4.2 In a submission made by the appellant on 03.08.2017, they have submitted that they do not dispute the demand of duty and interest but would pray for setting aside the penalty imposed on them, by relying on the following decisions:

- ➢ Hindalco Industries [2007 (215) ELT 547 (T-Mum)]
- ➢ S & H Gears Pvt Ltd [2007 (213) ELT 680 (T-Del)]
- ➢ Shimoga Technologies Ltd [2007 (208) ELT 31 (T-Bang)]

4.3 Thus there seems to be no dispute on the issue involved in the matter. For the past period, in the appellants own case, referred to by the authorized representative, tribunal has held as follows while dismissing the appeal filed by the appellants, holding as follows:

"2. *I have heard both sides. No process amounting to manufacture has been carried out in respect of the goods on* *which the credit of the amount involved in the present case has been taken. The submission of the Id. counsel of the appellants is that when the inspection carried out by them on the returned goods, it was revealed that certain goods would be repaired by removal of the defects and sent back, they were returning the goods to their customers only on payment of duty, and they rely upon the Tribunal's decision on Golden Iron and Steel Works v. CCE, 2003 (155) E.L.T. 330 to support their submission that the process of subjecting the returned goods to further inspection and test would result in process of manufacture of goods returned to the customer once again on payment of duty. However, in the present case, there is no material to show that any rejected goods were returned once again to their customers and that too on payment of duty.*

3. *In the light of the above, I hold that the appellants are not eligible to credit, uphold the impugned order and reject the appeal."*

4.4 In case of International Tobacco Co Ltd, Hon'ble Allahabad High Court held as follows:

"19. Rule 16(1) is germane to the controversy and thus needs careful consideration. For ease of reference, Rule 16(1) of the Central Excise Rules, 2002, is being extracted in its entirety :

"Rule 16. Credit of duty on goods brought to the factory. - (1) Where any goods on which duty had been paid at the time of removal thereof are brought to any factory for being re-made, refined, re-conditioned or for any other reason, the assessee shall state the particulars of such receipt in his records and shall be entitled to take CENVAT credit of the duty paid as if such goods are received as inputs under the CENVAT Credit Rules, 2002 and utilise this credit according to the said rules."

20. Rule 16 states the procedure and eligibility to avail credit of duty on goods brought to the factory. Various ingredients of Rule 16(1) will now be discussed.

21. Rule 16(1) is applicable to goods on which duty had been paid at the time of removal of such goods and the same are brought back to the factory. The goods are brought back to the factory for being "re-made, refined, re-conditioned or for any *other reason". The assessee is also required to state the particulars of such receipt of goods in his records.*

22. Once the above conditions are fulfilled, the assessee becomes entitled under Rule 16(1) to take Cenvat credit of the duty paid on the returned goods as if such goods are received as inputs under the Cenvat Credit Rules, 2002. The credit shall be utilised by the assessee according to the latter Rules.

23. The purpose of manufacture of goods in this case is sale. Bringing the goods back to the factory after they have been removed for sale does not ordinarily make good business sense. However, at times for some valid reasons, the goods cannot be sold or they are not fit for retention in the market. In such circumstances, the goods may be recalled and brought to the factory. In terms of Rule 16(1), these goods are brought to the factory for being "re-made, refined, re-conditioned or for any other reason". After being subjected to said processes, the goods are again removed having become saleable commodities and worthy of acceptance in the market.

24. The phrase "or for any other reason", in Rule 16(1) of the Central Excise Rules, 2002, has to be necessarily read on the construction canon of ejusdem generis. Any other rule of interpretation would make the Rule unworkable and defeat the clear intention of the legislature.

25. The Learned Customs, Excise & Service Tax Appellate Tribunal (CESTAT), proceeded to give a wide interpretation to the phrase "or for any other reason" and thus included the offending transaction within its scope. The legislative intent was not to read the phrase in isolation and give it such a wide berth. Otherwise, there would be no necessity to precede the phrase "or for any other reason" by the three processes of "re-made", "refined" and "re-conditioned". The three preceding phrases depicting three similar processes qualify and restrict the scope of the phrase "or for any other reason".

26. While explaining the concept of ejusdem generis this Court in Special Appeal No. 33 of 2019 in Gyanwati Devi v. State of U.P. and 5 Others held :

"The reason is, when a general word or phrase follows a list of specifies, the general word or phrase will be interpreted to include only items of the same class as those already listed."

27. The phrase "for any other reason" has to be interpreted in light of the preceding expressions of "re-made, refined, re-conditioned". The processes coming under the category of "for any other reason", have to be in the likeness of the processes which immediately precede the aforesaid phrase. All the processes should have such similarities so as to be constituted into the same class.

28. The legislature has employed the words "re-made", "refined", "re-conditioned" and the phrase, "or for any other reason" and eschewed the phrase "for being scrapped". Understanding this distinction is the key to interpreting the scope of "re-made", "refined", "re-conditioned" and the phrase, "or for any other reason".

29. The essential characteristics of the brought back goods survive even after they are "re-made", "refined" or "re-conditioned". The original identity of the goods is retained even after the goods undergo the said processes.

30. When goods are scrapped, all the constituent components of the goods may be reclaimed. After scrapping, the original identity of the manufactured goods completely perishes. Scrapping of goods is done for various purposes, including cannibalisation and extraction of vital or valuable parts of the original goods.

31. "Re-made", "refined" and "re-conditioned" are processes akin to manufacture; while scrapping involves destruction of the original identity of the goods. Scrapping is neither a species nor in the likeness of "re-made", "refined" or "re-conditioned". Consequently, when goods are scrapped, it cannot be stated that the said goods were brought to the factory for being "re-made", "refined", "re-conditioned", "or for any other reason" provided in Rule 16(1). Scrapping of goods does not fall within the ambit and scope of Rule 16(1).

32. Ordinary business prudence requires that valid commercial reasons must exist for bringing the goods back to the factory.

The validity of these reasons is the test of the bona fides of the assessee. These can be ascertained from authentic records, relating to receipts of goods and particulars contained therein. Scrutiny of such records and the contents of the receipts will help determine the bona fides of the assessee to bring back the goods.

33. Offending transactions and the findings of the Assessing Officer as well as Learned Appellate Tribunal have to be examined in the light of the true scope and correct interpretation of Rule 16(1), as stated in the preceding paragraphs of this judgment.

34. We find that the Learned Appellate Tribunal, while interpreting the phrase, "any other reason", in Rule 16(1) and held that the same was "wide enough to cover the case of the appellants". Consequentially, the Learned Appellate Tribunal included scrapping within the fold of Rule 16(1).

35. It is evident that the Learned Appellate Tribunal has incorrectly interpreted the scope of Rule 16(1) by bringing scrapping within the embrace of Rule 16(1) and has proceeded to legitimise the benefit of Cenvat availed by the respondent-assessee. These fault-lines vitiate the judgment of the Learned Customs, Excise & Service Tax Appellate Tribunal (CESTAT), Allahabad. The judgment of the Learned Customs, Excise & Service Tax Appellate Tribunal (CESTAT), Allahabad, is therefore unsustainable in law.

36. The findings of facts returned by the Assessing Officer thus attain finality since they were not successfully impeached by the Learned Appellate Tribunal. These findings extracted in extenso in the earlier part of the judgment are set forth, in brief, hereinafter to take the discussion forward and to its logical conclusion.

37. The cartons containing cigarettes were not even opened and found in packed condition. The alleged defects in goods, as claimed by the assessee, thus could not be ascertained without opening the cartons. The goods were actually sent back to the same purchasers in the self-same condition in which they were received.

38. The receipts were not found to be reliable. There are no records of the reasons given by the purchasers for rejecting the consignments of goods. On this foot, the reasons for bringing back the goods to the factory, as adduced by the assessee, were disbelieved.

39. The scrapping of the goods stood established by reliable evidence and cogent findings in the record. The assessee, in fact, scrapped the goods and tried to pass it as "refining" the goods.

40. Clearly, the goods were not brought back to the factory by the assessee to be "re-made", "refined", "re-conditioned", "or for any other reason" as contemplated in Rule 16(1) of the Central Excise Rules, 2002. The transactions were devices to illegally avail Cenvat credit. The intent to illegal avail Cenvat credit and escape duty was fully established."

4.5 In view of the above decision of Hon'ble Allahabad High Court, and also the decision of Hon'ble Apex Court in the case of Rajasthan Spinning and Weaving Mills [2009 (238) ELT 3 (SC)], I do not find any merits in the submissions made by the appellants challenging the penalty imposed on them.

5.1 In view of the discussions as above the appeal filed by the appellants is dismissed.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

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