

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, MUMBAI**

REGIONAL BENCH - COURT NO. I

Excise Appeal No. 467 of 2012

(Arising out of Order-in-Original No. 40/KLG(40)COMMR/RGD/11-12 dated 03.01.2012 passed by the Commissioner of Central Excise, Raigad)

M/s Venus Wire Industries Pvt. Ltd.

.... Appellant

Atkargaon, Takai Road, Khopoli,
Dist- Raigad-410203

Versus

Commissioner of Central Excise, Raigad

.... Respondent

4th Floor, Utpad Shulk Bhavan, Plot No.1,
Sectir 17, Khandeshwar, Raigad, Navi Mumbai-410 206

Appearance:

Shri Rajesh Ostwal, Advocate for the Appellant

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

CORAM:

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

HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO. A/85244 / 2022

Date of Hearing: 08.10.2021

Date of Decision: 30.03.2022

Per: P. Anjani Kumar

The appellants assail the impugned order dated 3.1.2012 passed by Commissioner of Central Excise and Service Tax, Raigad.

2. Briefly stated the facts of the case are that the appellants procured inputs like stainless steel wire rods from one supplier namely M/s. Viraj Profiles Ltd., a 100% EOU, who paid duty in terms of Section 3(1) of Central Excise Act, 1944, read with the Notification No.23/2003-CE dated 31.3.2003. the department objected to the availment of credit during the period April 2007 to January 2009 on the ground that the appellants are not entitled to first time credit of education cess and secondary higher education cess, in terms of Rule 3(7)(a) of the CENVAT Credit Rules, 2004. A show-cause notice dated 12.4.2010 has

been issued and was adjudicated by the impugned order dated 3.1.2012, hence the appeal.

3. Learned counsel for the appellant submits that the entire issue in the present case is whether ad-valorem rate of CVD should be taken along with the first-time education cess and secondary higher education cess, for arriving at the CVD in terms of the above cited Notification; in the case of import of goods credit of CVD and cess paid on CVD is available as credit. Similarly, goods received from EOU also CVD should be inclusive of EC and SHEC. Further, Section 93(1) of the Finance (No. 2) Act, 2004 and Section 138(1) of the Finance Act, 2007 clearly specify that EC and SHEC shall be a duty of excise calculated at the rate of 2% and 1% respectively; therefore, ad-valorem rate of CVD must be considered as 10.3% i.e. basic excise duty @ 10%, EC @ 2% and SHEC @ 1% thereon and hence, cenvat credit of first time cess shall be available under Rule 3(7)(a).

3.1. Learned counsel for the appellant also submits that in case of imported goods, the Assessee is entitled to credit of CVD under Rule 3(1)(vii). The Assessee is also credit of first time cess in terms of Rule 3(1)(vii) read with Rule 3(1)(vi) and 3(1)(via) of the Cenvat Credit Rules, 2004; the situation cannot be different when goods are procured from EOU instead of import. Hence, credit of cess paid on CVD is available when goods are procured from EOU. He further submits that the issue is no longer *res integra* in view of the Tribunal's decision in the case of Jai Corporation Ltd.: 2015 (317) ELT 489; Hon'ble CESTAT held that where duty was paid under Sr. No. 1 of table to Notification No. 23/2003-CE, entire credit of CVD, including cesses would be admissible to the assessee; further, it was observed that the expression "CVD" would include not only the amount equivalent to excise duty but also the amount equivalent to EC and SHEC on such excise duty. Therefore, Hon'ble CESTAT held that assessee had correctly factored EC and SHEC as CVD paid while calculating admissible cenvat credit under Rule 3(7)(a) of Cenvat Credit Rules, 2004. He relies upon following cases.

- i) CCE Vs. Jumbo Bags Ltd – 2013 (296) ELT 142 (T)

- ii) Shreya Pets Pvt. Ltd. Vs. CCE –2009 (240) ELT 408 (T)
- iii) Flint Group India Pvt. Ltd. Vs. CCE – 2016 (8) TMI 750
- iv) Texbond Nonwovens Vs. CCE – 2018 (2) TMI 915 - CESTAT BANGALORE
- v) CCE Vs. Khanna Paper Mills Ltd. – 2015 (326) ELT 167 (T) - CESTAT CHENNAI

3.2 Learned counsel for the appellant further submits that extended period cannot be invoked in the case as the issue involved is of interpretation and the appellants had bona fide belief that first time cess is also admissible as credit. He relies upon the case of Precision Metals Vs. CCE reported at 2012 (8) TMI 473 - CESTAT MUMBAI. He further submits that for the various reason submitted as above, penalty cannot be imposed and interest cannot be chargeable.

4. Learned Authorised Representative for the department reiterates the findings of the impugned order and submits that

- In terms of the Rule 3(7) of CCR, 2004 w.e.f. 1/3/2006 the credit admissible to the recipient in respect of goods received from 100% EOU was equal to the amount calculated by the formula as detailed in the said Rule during the relevant period. However, the Appellants M/s Venus Wire were availing full Cenvat credit of CVD, Education Cess and Secondary and Higher Education Cess.
- The appellants contended by way of an example that they have correctly taken credit as per the formula. However, on being asked to explain as to how the annexure prepared for the purposes of show-cause notice was at variance with the calculations arrived by them.
- The case of Jai Corp. (Supra) relied upon by the appellant is not applicable to them; however, in this case the Tribunal has allowed credit only in respect of duty paid by EOU under Sl. No. 1 of Notification No. 23/2003-C.E. Further the Tribunal held that the credit was taken as per formula and only factored EC and SHEC.
- In the instant case, the EOU paid duty under Sl.No.2 of Notification No. 23/2003-C.E. and the Appellants have taken credit more than they were eligible as per the formula.
- The case of Jumbo Bags Pvt. Ltd.: 2013 (296) E.L.T. 142 (Tri. - Chennai) the supplier has not availed exemption under Notification No. 23/2003-C.E. (S. No. 2) and thus the case is not relevant in the present matter.

4.1 Learned Authorised Representative relies upon the following cases:

- J.K. Lakshmi Cement Ltd. Versus Commissioner of Central Excise, Jaipur-II [2018 (12) GSTL 330 (Tri.-Del)]
- Muscat Polymers Pvt Ltd Vs CCE Rajkot [2009-TIOL-2252-CESTAT-AHM]
- J.K. Cement Works Versus Commissioner of Central Excise, Jaipur [2018 (363) ELT 1195 (Tri.-Del)]
- Encore Healthcare Pvt Ltd Versus Commissioner of Central Excise, Aurangabad [2017 (5) TMI 1379 (E/87791/2013-Mum)]
- Union of India Versus Ind-Swift Laboratories Ltd. [2012 (25) S.T.R. 184 (S.C.)]
- Commissioner of Central Excise, Pune-I Versus GL & V India Pvt. Ltd. [2015 (321) E.L.T. 611 (Bom.)]
- Tetra Pak India Pvt. Ltd. Vs CCE, [2021(5) MI 852-CESTAT Mumbai]

5. Heard both sides and have given careful consideration to records of the case. We find that the brief issue that requires consideration by this Bench is to see whether the formula, prescribed for availment of CENVAT credit, by the domestic manufacturers in cases of procurement from EOUs, should be inclusive of education cess and secondary higher education cess, in terms of Rule 3(7) of CENVAT Credit Rules.

5.1 It will be beneficial to extract the Rule. The said Rule reads as follows:

Rule 3(7)(a) of Cenvat Credit Rules, 2004 is extracted below:

(7) Notwithstanding anything contained in sub-rule (1) [, sub-rule (1a)] and sub-rule (4), -

(a) CENVAT credit in respect of inputs or capital goods produced or manufactured, by a hundred per cent. export-oriented undertaking or by a unit in an Electronic Hardware Technology Park or in a Software Technology Park other than a unit which pays excise duty levied under section 3 of the Excise Act read with serial numbers 3, 5, 6 and 7 of Notification No. 23/2003-Central Excise, dated the 31st March, 2003 [G.S.R. 266(E), dated the 31st March, 2003] and used in the manufacture of the final products or in providing an output service, in any other place in India, in case the unit pays excise duty under section 3 of the Excise Act read with serial number 2 of the Notification No. 23/2003-Central Excise, dated the 31st March, 2003 [G.S.R. 266(E), dated the 31st March, 2003], shall be admissible equivalent to the amount calculated in the following manner, namely :-

Fifty per cent. of $[X \text{ multiplied by } \{(1 + \text{BCD}/100) \text{ multiplied by } (\text{CVD}/100)\}]$, where BCD and CVD denote *ad valorem* rates, in per cent of basic customs duty and additional duty of customs leviable on the inputs or the capital goods respectively and X denotes the assessable value :

Provided that the CENVAT credit in respect of inputs and capital goods cleared on or after 1st March, 2006 from an export

oriented undertaking or by a unit in Electronic Hardware Technology Park or in a Software Technology Park, as the case may be, on which such unit pays excise duty under section 3 of the Excise Act read with serial number 2 of the Notification No. 23/2003-Central Excise, dated 31st March, 2003 [G.S.R. 266(E), dated the 31st March, 2003] shall be equal to $[X \text{ multiplied by } [(1+BCD/200) \text{ multiplied by } (CVD/100)]]$:

5.2 We find that the above Rule says that credit shall be limited to Fifty per cent. of $[X \text{ multiplied by } \{(1+BCD/100) \text{ multiplied by } (CVD/100)\}]$, where BCD and CVD denote *ad valorem* rates, in per cent of basic customs duty and additional duty of customs leviable on the inputs or the capital goods respectively and X denotes the assessable value. Show-cause notice relies upon the words and expressions 'BCD and CVD' used in the Rule and contends that the formula does not give any scope for education cess and secondary higher education cess. We find that learned Commissioner relies on Rule 3(1) of CENVAT Credit Rules and finds that it is crystal clear that whatever duty specified hereinabove is available as credit under CENVAT Credit Rules, 2004 and the total such credit availed is referred to in these rules as CENVAT Credit. The above referred rule provides that a manufacturer or producer of final products or a provider of taxable service shall be allowed to take credit (hereinafter referred to as the CENVAT credit). Hence, wherever the term CENVAT credit appears in these rules, they refer to the credit of duty as specified in rule 3 as supra and entirely include in the terms CENVAT credit. It is not merely talking about Basic Excise Duty and for that other duties individually. Thus, learned Commissioner concludes that CENVAT Credit as appears in the Rules is not limited to basic excise duty and for other duties also. Learned Commissioner appears to mean thereby, that the Rules do not contemplate any credit of cesses payable and paid. Learned Commissioner further relies on the Supreme Court judgment in the case of S.P. Gupta v. UOI AIR 1982 SC; State of Punjab V Balbir Singh 1994(70) ELT 481(SC) and holds that "*.... the statute should be interpreted on the face of the language itself without adding, subtracting or omitting words there from. Where the language is plain, and unambiguous the Court is not entitled to go behind the language so as to add or supply omissions and thus play the role of a political reformer or a wise counsel to the legislature.*"

6. We find that the appellants have relied upon the Tribunal decision in the case of Jai Corporation (supra) Tribunal in this case refers to the decision of the Tribunal in Commissioner v. PVN Fabrics — 2013 (289) E.L.T. 327 (Tribunal) and extracts as follows from the above judgment. However, as pointed out by the learned Authorised Representative, the facts being not similar the ratio cannot be relied upon. During the course of the arguments, both parties agree that the credit was restricted to 50% of the availed credit in terms of Rule 3(7) of CENVAT Credit Rules. On being questioned to falsify the claim of the department and to substantiate that the credit availed by the appellants was correct, learned counsel for the appellants could not specify by way of any particular example. We find that the excess availment of credit was accepted by Shri Sadashivamudu Shetty in his statement recorded on 24.2.2009; there is an endorsement on the invoices received from the supplier EOU that the credit availed is inclusive of customs duty and cess under Sl. No.02 of Notification No.23/2003 dated 1.3.2003 as amended; this endorsement indicates that credit of duty as calculated as per the formula given under Rule 3(7) was taken and also the credit of cess was taken. We also find that the appellants have reversed the credit wrongly availed on being pointed out by the audit.

7. We find that this Tribunal had gone into the very same issue in the case of Encore Healthcare Pvt. Ltd.: 2017 (5) TMI 1379 and have held that credit admissibility in such circumstances should be as per Rule 3(7) of CENVAT Credit Rules. Therefore, we are of the considered opinion that the impugned order does not require any interference inasmuch as the admissibility of credit of duty is concerned. We find that the appellants have wrongfully availed excess credit which they have reversed subsequently on being pointed out. However, as submitted by the learned Authorised Representative, interest requires to be paid in view of the Apex Court's decision in the case of Ind-swift Laboratories Ltd(supra). However, we find that the contention of the appellant that penalty may not be imposed as the issue involved is about the interpretation of the provisions

of a statute and no mala fides can be imputed per se. Moreover, the appellants have immediately reversed the credit on being pointed out by the investigation team and there is no mention of protest whatsoever. For this reason, we find that the department has not made out any case for imposition of penalty. We also find that Tribunal in the case of Encore Healthcare Pvt. Ltd. (supra) also held that the availment of ineligible credit had arisen from appellant confusion about the nature and composition of levy and that there are various decisions in this regard by Tribunal, there are reasons to believe that the appellant had active in bona fide belief. Therefore, we set aside the penalty imposed.

8. In the result, the appeal is partly allowed as follows:

- (i) the denial of excess credit availed by the appellant is upheld along with interest; and
- (ii) penalty is set aside.

(Pronounced in open court on 30.03.2022)

(S.K. Mohanty)
Member (Judicial)

(P. Anjani Kumar)
Member (Technical)

Sinha