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

REGIONAL BENCH - COURT NO. 01

Excise Appeal No. 152 of 2012

(Arising out of Order-in-Appeal No. AGS(185-186)39,40/2011 dated 08.12.2011 passed by Commissioner (Appeals), Central Excise & Customs, Auragabad)

Commissioner of Central Excise & Service Tax, Aurangabad. **.....Appellant**
Town Centre N-, CIDCO, Aurangabad-431003

VERSUS

Balkrishna Industries Ltd. **.....Respondent**
B-66 MIDC Walunj, Aurangabad-431136.

WITH

Excise Appeal No. 344 of 2012

(Arising out of Order-in-Appeal No. AGS(185-186)39,40/2011 dated 08.12.2011 passed by Commissioner (Appeals), Central Excise & Customs, Auragabad)

Commissioner of Central Excise & Service Tax, Aurangabad. **.....Appellant**
Town Centre N-, CIDCO, Aurangabad-431003

VERSUS

Balkrishna Industries Ltd. **.....Respondent**
B-66 MIDC Walunj, Aurangabad-431136.

Appearance:

Smt A. S. Parab, Authorized Representative for the Applicants
Shri Prakash Shah, Advocate for the Respondents

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO. A/85614-85615/2022

Date of Hearing: 12.05.2022
Date of Decision: 12.05.2022

PER : P. ANJANI KUMAR

Heard both sides and perused the records of the case.

2. The appellants are engaged in the manufacture of tyres and tubes; they have availed and utilized Cenvat Credit of Additional Excise Duty (AED) charged under Goods of Special Importance Act, 1957, during the period March 2003 to February 2004, for payment of excise duty; in terms of Rule 3(6) (b) of Cenvat Credit Rules, 2002 the utilization of Cenvat credit of additional excise duty was permissible only for payment of the said AED; However, vide notification 13/2003-CE (NT) dated 01.03.2003, AED was allowed to be utilized for payment of cenvat; out of the total accumulated credit of AED of Rs. 2,05,62,756/- as on 01.03.2003 the appellants utilized Rs. 2,05,25,868/- for payment of duty for the period 01.03.2003 to 29.04.2004.

2.1 A show cause notice was issued to the appellants proposing to recover this amount has the credit was earn before 01.03.2003; by virtue of further amendment in 2004 credit of AED paid on or after 01.04.2000 was allowed to be utilized for payment of duty of excise. Out of the credit of Rs. 2,05,25,868/-, an amount of Rs.1,39,71,940/- pertained to credit of AED availed before 01.04.2000 the period; Accordingly, the amount was confirmed by the Commissioner vide Order-in-Original dated 30.09.2004; on an appeal filed by the assessee CESTAT vide order dated 17.06.2005 has permitted the appellants to discharged the duty confirmed in 36 installments with interest; the same was paid by the assessee.

2.2 As the assessee has paid back the Cenvat Credit, availed on AED utilized for payment of Cenvat Credit, filed refund claims for Rs. 1,39,71,960/- and Rs.25,71,804/-. Deputy Commissioner vide orders dated 13.06.2011 and 15.06.2011, has sanctioned the refunds and such sanctioned of refunds was upheld by the Commissioner (Appeals) vide order dated 08.12.2011 on an appeals filed by the Department. Revenue filed the present appeals challenging the order-in-appeal on the grounds that as per the amendment carried out in Rule 3 (6) (b) by Finance Bill, 2004, the credit of AED availed prior to 01.04.2000 was permitted to be utilized for payment of Cenvat credit; therefore, Learned Commissioner was right in disallowing the Cenvat credit of AED of Rs. 1,39,71,940/-; the affect of amendment was to provide that additional AED paid on inputs on or after 01.04.2000 alone would be eligible for utilization towards payment of Cenvat duty and that the order of CESTAT was appeal against before Hon'ble High Court, Bombay at Aurangabad.

3. Learned Authorized Representative for the Department reiterates the grounds of appeals.

4. Shri Prakash Shah, Advocate appearing for the respondents submit that the issue is no longer *res-integra* and has been decided in favour of the appellants by the Tribunal in the case of CEAT Ltd., 2010 (254) E.L.T. 349 (Tri. Bombay) which also dealt with the appeal filed by the appellants. Bombay High Court, 2013 (298) E.L.T. 525 (Tri. Bombay), while dismissing the appeal of Ms. CEAT Ltd. on in the grounds of delay, upheld the principal enunciated by the Tribunal.

5. Brief issue that requires our consideration in the case is as to whether an assessee is entitled to claim the credit of AED back once the assessee pays back in cash the duty which

was earlier paid utilizing the Credit of AED availed prior to 01.04.2000. We find that CESTAT vide order cited above held that once the utilization of Modvat/Cenvat credit for payment of duty was found to be irregular and the duty was then paid from PLA, the assessee became automatically entitled to credit of equivalent amount in RG23A account. We find that Hon'ble High Court, Bombay while dealing with the appeal filed by CEAT Ltd. (supra) held that

> *Apart from the above, we have also looked into the merits of the order of the CESTAT. By the impugned order the CESTAT upheld the order of Commissioner of Central Excise dropping the show cause notice demanding an amount of Rs.6.83 crores from the respondent-assessee being the amount of suo motu credit of Additional Excise Duty (AED) after having paid the same to the Revenue as the credit on AED could not be utilized for payment of Basic duty of Excise but only be utilized for payment of AED. This was done by retrospective amendment in 2004. Therefore, the AED credit utilized was paid into the revenue through PLA and the original AED credit for payment of Basic Excise Duty was suo motu taken by the respondent and upheld by the Commissioner of Central Excise. The CESTAT in the impugned order holds as follows:-*
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> *"The impugned credit had been legitimately earned by the assessee on procurement of inputs on payment of duty and used for payment of duty following the amendment of Cenvat Credit Rules under Budget 2003. Vide Circular No. 7/16/2003-Cx., dated 06.03.2003, the C.B.E. & C. had also clarified that it was considered appropriate not to put any cap on the use of the AED (GSI) credit accruing prior to 01.03.2003. In terms of the provisions enacted in Finance Act, 2004, the debits were held not amounting to payment of duty and the assessee was required to meet the same obligation by payment from PLA. In the instant case, the debits we held to be of no consequence when the assessee was required to pay duty initially discharged using AED (GSI) credit. Therefore, the credit needed to be restored and was correctly ordered so by the Commissioner. We find considerable merit in the finding of the Commissioner that but for the statutory changes introduced with effect from 01.03.2003 following which the assessee had discharged the duty liability on tyres using AED (GSI), it would have continued to have the impugned credit in its account. We also find that the Commissioner correctly held that the respondent had taken the impugned credit under valid duty paying documents under cover of which inputs had been received. Accordingly, we sustain the impugned order and reject the appeal filed by the Revenue.*

6. In view of the above we find that the issue is already settled by this Tribunal and High Court in favor of the appellants. Hon'ble High Court though dismissed the appeals filed by CEAT on grounds of delay have upheld the principal that when the wrongly utilized credit is paid through PLA the assessee shall be entitled for credit back of such wrongly utilized credit as the credit was originally availed legally on the basis of the input receives and the duty paying documents. Moreover, the impugned orders follow the order of this Tribunal and the refunds upheld or consequential refunds. We find that Hon'ble High Court has not given any stay in the appeal filed by the Department against the original order passed by Commissioner. Thus, the refunds cannot be denied on the ground that the appeal is pending before the Hon'ble High Court. Moreover, as seen above the appeal filed by CEAT Ltd. Hon'ble High Court Bombay upheld the Principle adapted by CESTAT. Therefore, we are of the considered opinion that the impugned order do not required any intervention. Consequently, the appeals filed by the Revenue are liable to be rejected.

7. In the result both the appeals filed by the Revenue are rejected.

(Pronounced in the open court)

(S. K. Mohanty)
Member(Judicial)

(P. Anjani Kumar)
Member (Technical)

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