

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

Excise Appeal No. 88239 of 2019

(Arising out of Order-in-Appeal No. PVNS/16/RGD APP/2019-20 dated 27.08.2019 passed by the Commissioner, Central Tax(Appeals), Raigad

Owens Corning India Ltd.
Plot no. T-28, MIDC, Taloja
Dist. Raigad

.....Appellant

VERSUS

Commissioner of Central Tax, Raigad
4th Floor, Kendriya Utpad Shulk
Bhawan, Plot no.1, Sector 17
Raigad

.....Respondent

With

Excise Appeal No. 85694 of 2020

(Arising out of Order-in-Appeal No. AJV/54/RGD APP/2019-20 dated 24.01.2020 passed by the Commissioner, Central Tax(Appeals), Raigad

Owens Corning India Ltd.
Plot no. T-28, MIDC, Taloja
Dist. Raigad

.....Appellant

VERSUS

Commissioner of Central Tax & GST,
Raigad
Plot no.1, Sector 17, Khandeshwar,
Navi Mumbai, Raigad

.....Respondent

APPEARANCE:

Shri Rajesh Ostwal, Advocate along with Ms. Payal Nahar,
Advocate for the appellant
Shri SBP Sinha, Superintendent (AR) for the respondent

CORAM:
HON'BLE MR. AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER No: A/86083-86064/2023

DATE OF HEARING : 17.01.2023
DATE OF DECISION : 11.07.2023

Per: AJAY SHARMA

These appeals have been filed from the impugned Orders-in-Appeal dated 27.8.2019 & 24.1.2020 respectively passed by the Commissioner (Appeals). Since the issue is common in both the appeals therefore the same are being decided by this common order.

2. The period in dispute are years 2009-10 to 2010-2011 *[for recovery of interest]*, 2011-12 *[demand u/r.3(5B) Cenvat Credit Rules, 2004 alongwith interest]* and also the years 2015-16 to 2016-17 *[demand not quantified]* alongwith penalty. To put it simply, for the years 2009-10 to 2010-11 interest was demanded from the appellants and for the periods 2011-12, 2015-16 & 2016-17 revenue has proposed the reversal of Cenvat credit or equivalent duty u/r. 3(5B) *ibid*. The appellants are engaged in manufacture of glass fiber, chopped strand mats, roving of glass fiber etc. and availing Cenvat credit in respect of inputs, capital goods and input services used in relation to manufacture of final products. During the CERA Audit it was

revealed that they had made '*provision for obsolescence of inventory/stores*' for the period 2009-10 to 2011-12, but had not reversed the Cenvat Credit availed on such inventory/stores during the said period in accordance with Rule 3(5B) *ibid*. Since the inputs, for which provision was made during the year 2009-10 and 2010-11, were subsequently used by the appellant in the manufacture of the final product and the appellant had reversed the provision amount to that extent therefore only interest was proposed for those years. Whereas for the year 2011-12 duty liability of Rs. 10.10 lakhs along with interest was proposed alongwith interest as per the show cause notice dated 28.3.2014. For the years 2015-16 and 2016-17 another periodical show cause notice dated 18.6.2018 was issued proposing duty amounting to Rs.38,13,454/- since the appellant failed to pay an amount equivalent to the cenvat credit taken on the slow moving/obsolete inventory for which provision was made/written off during those years as required u/r. 3(5B) *ibid* alongwith applicable interest and penalty.

3. Learned counsel submits that appellant had not physically removed the inputs from the factory and had made provisions for the inventory in the balance sheet only for the income tax purposes and therefore the cenvat credit is not required to be reversed by them. He also submits that the write off provisions made during the period in issue were written back in the subsequent financial years and the inventory in question were

used subsequently in manufacturing process and cleared on payment of excise duty and therefore Rule 3(5B) has not application. In support of his submission learned counsel placed reliance on the decision of the Hon'ble High Court of Gujarat in the matter of *CCE vs. Ingersoll Rand (India) Ltd.; 2014(300)ELT 347 (Guj.)*. He further submits that the Revenue cannot ask for any interest from them as the same was not there in the statute during the years 2009-11. Per contra learned Authorised Representative appearing for Revenue supported the findings recorded by the authority below and submits that the appellant failed to produce any documentary evidence in support of their claim/submissions and therefore their claim has been rightly rejected by the authorities below.

4. I have heard learned Counsel for the Appellant and learned Authorised Representative for the Revenue and perused the case records including the written submissions/synopsis alongwith case laws placed on record. In order to understand the issue it is necessary to look into Rule 3(5B) *ibid* which was inserted *vide* Notification No. 26/2007-C.E. (N.T.), dated 11.5.2007 and reads as under:-

"Rule 3(5B) If the value of any, -

(i) input, or

(ii) capital goods before being put to use,

on which CENVAT credit has been taken is *written off fully or where any provision to write off fully* has been made in the books of account, then the manufacturer

shall pay an amount equivalent to the CENVAT credit taken in respect of the said input or capital goods.”

The said rule was amended with effect from 1.3.2011 wherein the requirement to reverse the credit even when partially written off was also incorporated. Rule 3(5B) after its amendment with effect 1.3.2011, reproduced as under:-

“Rule 3(5B) *If the value of any input or capital goods before being put to use on which CENVAT credit has been taken is written off fully or partially or where any provision to write off fully or partially has been made in the books of account then the manufacturer or service provider, as the case may be, shall pay an amount equivalent to the CENVAT credit taken in respect of the said input or capital goods.*

Provided that if the said input or capital goods is subsequently used in the manufacture of final products or the provision of output services, the manufacturer or output service provider, as the case may be, shall be entitled to take the credit of the amount equivalent to the CENVAT credit paid earlier subject to the other provisions of these Rules.

Explanation.- If the manufacturer of goods or the provider of output service fails to pay the amount payable under sub-rules (5), (5A) and (5B), it shall be recovered, in the manner as provided in rule 14 for recovery of CENVAT credit wrongly taken.”

5. The provision of Rule 3(5B) covers the situation where the value of the inputs or capital goods is written off fully or partially

before being put to use. Therefore when the value of capital goods, on which Cenvat credit has been taken, is written off fully or partially before being put to use then only Cenvat credit is required to be reversed. The words '*partially written off*' have been incorporated w.e.f. 1.3.2011 and before that date, unless it is complete written off, rule 3(5B) *ibid* had no application. The entire case rests on the fact whether the inputs which have been written off, are available in the factory and have been used subsequently in the manufacturing operations as claimed by the appellant. It has been brought to my notice that this Tribunal vide order dated 29.11.2017 for the period 2013-14 has decided the issue in favour of the appellant by relying upon the decision of the Hon'ble High Court in the matter of *Ingersoll Rand India Ltd. (supra)*. In the said decision i.e. *Ingersoll Rand (India) Ltd (supra)* the demand was raised by the department on the strength of some circulars dated 22.2.1995 and 16.7.2002 respectively regarding the reversal of modvat credit and the demand therein pertains to the period prior to the year 2003 [*i.e. much before the Cenvat Credit Rules, 2004 (which are in issue in the instant matter) came into operation*] as the show cause notice therein was issued in the year 2003 and therein Hon'ble High Court has held that in the absence of any such authority under the rules, the C.B.E. & C. could not have issued circulars for reversal of the credit. It is very relevant to mention here that the Hon'ble High Court therein while referring to Rule (5B) *ibid*, in para 20 had observed that on the basis of such

statutory provision, it may be open for the Department to insist on reversal of Cenvat Credit under similar circumstances. Admittedly in the instant matter Rule 3(5B) *ibid* itself provides for reversal when the capital goods, on which Cenvat credit has been taken, are not put to use and the total amount related to those goods is written off fully or partially. Otherwise also in that order of the Tribunal for the years 2013-14, which has been cited by learned Counsel, no such objection about insufficiency of documentary proof has been raised by Revenue.

6. Although it has been submitted by learned Counsel that inventory in issue were used subsequently in subsequent years and cleared on payment of excise duty but the claim of appellant has to be substantiated by production of documentary evidences before the authorities concerned to their satisfaction. The show cause notice dated 28.3.2014 pertains to years 2009-10 to 2011-12. Interest was demanded for the periods 2009-10 & 2010-11 as the credit was already reversed by the appellant, however reversal of Cenvat credit was in issue for the period 2011-12 since the same was not reversed. As per learned Counsel, for the years 2009-11 interest cannot be demanded or recovered from them.

7. For the identical period, in earlier round, an Appeal being Appeal No. E/86328/16-Mum was filed by the appellant before this Tribunal which, vide *Order No. A/91633/2017 dated 19.12.2017*, was remanded to the Adjudicating Authority for

deciding the issue afresh as during the course of hearing the appellants admitted that they did not produce any evidence in support of their claim. The relevant portion of the said order is reproduced hereunder:-

"3.....The demands have been raised on the appellant on the ground that the appellant had during the period 2009-10 to 2011-12 made provisions for obsolete inventory/stores and did not reverse Cenvat credit availed on such inventory and stores, in accordance with the provisions of Rule 3(5B) of the Cenvat Credit Rules, 2004. It is the case of the appellant that they have been making such provision and were subsequently reutilizing these stores or selling on discharge of payment of duty. On a specific query from the Bench as to whether evidence was produced before the lower authorities, learned counsel submits that this evidence was not produced before the authorities. Since the entire issue revolves around the appreciation of the factual matrix whether the said obsolete stock was used and written back into the records, on being sold on discharge of payment of duty needs to be verified from the records, which in my considered view, better be left to the adjudicating authority to do so." [Emphasis supplied].

8. A perusal of the aforesaid order shows that the matter was remanded for the specific purpose of enabling the appellant to produce evidence before the adjudicating authority in support of their claim. But despite specific direction, the appellant instead of producing the evidence, have produced Chartered Accountant's certificates dated 26.6.2018 & 2.12.2019

respectively before authorities below alongwith SAP entries. If the appellant is claiming that those goods have been used subsequently then the same has to be proved through documentary evidence to the satisfaction of the lower authorities and mere chartered accountant's certificate is not sufficient. If they can produce the documentary evidences before the chartered accountant for getting the certificate they could have produced them before the authorities below also. The Chartered Accountant in his certificate (supra) has specifically mentioned that they have verified the records submitted by the appellant with regard to the provision for inventory obsolesce created in respect of finished goods, chemicals, consumables, spares and packing material. The Chartered Accountant's certificate is not corroborated by any documentary evidence except the *inventory obsolesce account* and/or *SAP system* on the basis of the which, the chartered accountant has certified that the items for which the provision for obsolesce of inventory made in FY 2011-12 has been written back in the subsequent years 2012-13 or 2013-14 or the period subsequent to 2015-2017 as covered by another periodical show-cause notice. Time and again it has been held that the Chartered Accountant's certificate is not primary document. The SAP entry, as per the learned counsel, itself shows the intention to use such disputed items in manufacturing process subsequently but as per the Tribunal's order dated 19.12.2017 the appellant was required to show, to the adjudicating authority, from the records that the obsolete stock

was used and written back into the records on being sold on discharge of payment of duty. The appellants are under obligation to produce documentary evidence before the adjudicating authority as per the order (supra) of this Tribunal, which they failed to produce.

9. Similarly another periodical show cause notice dated 18.6.2018 pertaining to years 2015-16 and 2016-17 was issued to the appellant for denial of an amount of Rs.38,13,454/- and recovery of the same alongwith appropriate interest and penalty and the same culminated into the Order-in-Original dated 10.5.2019 confirming the demand of duty alongwith interest and penalty and the appeal against the said adjudication order was disposed of by the learned Commissioner vide impugned Order-in-Appeal dated 24.1.2020. Here also a specific finding has been recorded by the learned Commissioner that no documentary evidence has been produced by the appellant and only a certificate issued by the chartered accountant was produced.

10. Learned counsel for the appellant tried to show some chart being copy of documents showing item wise working of the provision as was existing during the periods in issue, but I am of the view that it is proper to leave it to the lower authority who is the appropriate authority to see whether this or the inventory obsolescence account are sufficient evidence/proof. Therefore, in the interest of justice, for the purpose of producing documentary evidence before the lower authority, I am inclined to grant

another opportunity to the appellant and remanding the matter to the first appellate authority to decide the appeal afresh after following the principle of natural justice.

11. Accordingly the impugned orders, to the extent of their challenge herein, are set aside and the appeals to that extent are remanded to the learned Commissioner (Appeal) for a fresh decision after giving sufficient opportunity to the appellants for placing on record the documentary evidence in support of their claim. All the contentions of the Appellant are left open including the contention regarding the imposing/recovery of interest. It is needless to mention that the learned Commissioner (Appeal) shall pass the order after considering all such documentary evidences that may be furnished by the appellant in this regard without being influenced by any of the observations made herein or by the authorities below in the earlier round.

(Pronounced in open Court on 11.07.2023)

(Ajay Sharma)
Member (Judicial)

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