

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

WEST ZONAL BENCH

EXCISE APPEAL NO: 88682 OF 2013

[Arising out of Order-in-Original No: 12/MAK(12)COMMR/RGD/13-14 dated 7th June 2013 passed by the Commissioner of Central Excise, Customs & Service Tax, Raigad.]

Mehta Intertrade Steels P Ltd

501-B Gokul, 80-A Baroda Street, Masjid (E)
Mumbai - 400009

... Appellant

versus

Commissioner of Central Excise

Raigad

4th Floor, Utpad Shulk Bhavan, Plot No.1
Sector 17, Khandeshwar, Navi Mumbai – 410 206

...Respondent

APPEARANCE:

Ms Shamita Patel, Advocate for the appellant

Shri P K Acharya, Superintendent (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)

HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: A / 87073/2023

DATE OF HEARING:

03/07/2023

DATE OF DECISION:

01/11/2023

PER: C J MATHEW

The proceedings, culminating in the impugned order¹ of

¹ [order-in-original no. 12/MAK(12)COMMR/RGD/13-14 dated 7th June 2013]

Commissioner of Central Excise, Customs & Service Tax, Raigad, initiated against the appellant, a manufacturer of 'mild steel (MS) pipes', has its roots in the allegation that M/s Mehta Intertrade Steels P Ltd had, though registered under Central Excise Rules, 2002, not deployed any equipment for production and the both elements in the demand, arising from denial of CENVAT credit availed by them between May 2007 and June 2011, may be considered as inevitable fallout of confirmation of lack of such facility during investigations.

2. Allegedly, the appellant had been procuring 'hard rolled (HR) coils/sheets' along with other inputs to be supplied to 'job-workers' for production and return of 'mild steel (MS) pipes' to them and had been availing credit thereof to be utilized for clearing the finished goods from their premises. In addition, they had also procured "'mild steel (MS) pipes' manufactured by some of these 'job-workers' on their own account and by others that were subjected to processes like 'end-cutting' and 'varnishing' which, according to central excise authorities, did not amount to manufacture despite which they had not only been clearing these as though excisable but also availed credit of duty paid on such purchases. Demand of ₹ 39,73,256 for the disputed period was confirmed on the ground that the procured 'mild steel (MS) pipes' were not inputs as defined in rule 2(k) of CENVAT Credit Rules, 2004 and, hence, ineligible in terms of rule 3 of CENVAT Credit Rules, 2004. The second element of the demand, of

₹ 14,55,597 towards credit availed of duty paid on procurement of ‘angles’, ‘beams’ and ‘channels’, was confirmed on the ground that these were neither ‘inputs’, as defined in rule 2(k) of CENVAT Credit Rules, 2004, used in manufacture of excisable goods nor finding fitment as required for manufacture of ‘capital goods’, as defined in rule 2(a) of CENVAT Credit Rules, 2004, as permitted in *Explanation 2* below the former definition. Inevitably, applicable interest was ordered to be recovered under section 11AB of Central Excise Act, 1944 besides penalty of ₹ 54,28,853 under section 11AC of Central Excise Act, 1944 being imposed in the impugned order.

3. The notice came to be issued on 11th June 2013 and it is on record that ₹ 14,55,597 had been reversed by the appellants on 22nd October 2008. Learned Counsel for the appellant submitted that, insofar as the availing of credit on unfinished ‘mild steel (MS) pipes’ is concerned, it was not open to the central excise authorities in proceedings under the authority of rule 14 of CENVAT Credit Rules, 2004 to decide on the excisability of a product on which duty liability had been duly discharged upon clearance from place of removal. She contended that it is not in dispute that some ‘processing’ had, indeed, been undertaken on the pipes procured by them. Notwithstanding the assertion of excisability, it is further submitted that, in a *catena* of judicial decisions, it has been held that once duty has been accepted, it would be incorrect to deny entitlement to applicability of CENVAT

Credit Rules, 2004; she cited decision of the Hon'ble High Court of Gujarat in *Commissioner of Central Excise & Customs, Surat-III v. Creative Enterprises* [2009 (235) ELT 785 (Guj)], of the Hon'ble High Court of Bombay in *Commissioner of Central Excise, Pune-III v. Ajinkya Enterprises* [2013 (294) ELT 203 (Bom)], of the Hon'ble High Court Karnataka in *Commissioner of Central Excise, Bangalore-V v. Vishal Precision Steel Tubes & Strips Pvt Ltd* [2017 (349) ELT 686 (Kar)] and of the Tribunal in *IVP Ltd v. Commissioner of Central Excise, Thane-II* [2012-TIOL-1505-CESTAT-MUM]. Attention was also drawn the decision of the Tribunal in *Commissioner of Central Excise & Customs, Aurangabad v. Fine Packaging Pvt Ltd* [2016 (335) ELT 117 (Tri-Mumbai)].

4. On the issue of taking of credit of duties discharged on procurement of 'angles', 'beams' and 'channels', it was contended by Learned Counsel that these had been installed as 'structural support' for 'electric overhead travelling (EOT) cranes' and, therefore, were nothing but 'capital goods' entitled for the availment. Relying on the decisions of the Tribunal in *Mangalam Cement Ltd V Commissioner of Central Excise, Jaipur-I* [2018 (360) ELT 737 (Tri-LB)], of the Hon'ble High Court of Chhattisgarh in *Commissioner of Customs, Central Excise & Service Tax, Bilaspur v. Singhal Enterprises Pvt Ltd* [2018 (359) ELT 313 (Chhattisgarh)] and of the Tribunal in *Commissioner of Customs & Central Excise, Visakhapatnam-II v.*

APP Mills Ltd [2013 (291) ELT 585 (Tri-Bang)], it was contended that ‘structural support’ for any ‘capital goods’ are eligible for availment of credit in terms of rule 2(a)(A)(i) of CENVAT Credit Rules, 2004.

5. According to Learned Authorised Representative, the procurement of ‘mild steel (MS) pipe’ was undertaken without the knowledge of the jurisdictional authorities and discharge of duty thereafter is not tantamount to consent of authorities for acceptance of the claim of the appellant that denial of credit is, thereby, precluded. He submitted that even if that were so, ‘one-to-one correlation’ of availment and utilization as well as of such credit being less than duty paid on clearance would need to be ascertained. Reliance was placed by him on the decision of the Tribunal in *Commissioner of Central Excise, Belapur v. UPM Kymmene India Pvt Ltd [2015 (329) ELT 161 (Tri-Mumbai)]*. He submitted that the ‘angles’, ‘beams’ and ‘channels’ were not, of themselves, ‘capital goods’ and had not been utilized for manufacture of ‘capital goods’ on site thus placing these beyond coverage of rule 2(k) of CENVAT Credit Rules, 2004.

6. Having considered the records and submissions, we find that ‘mild steel (MS) pipes’ procured by them had been cleared on payment of duty after undertaking some processing. It is now settled law that with duty having been paid, it was not open to central excise

authorities to dispute credit availed on the goods procured for the purpose. This is abundantly clear from the decision of the Hon'ble High Court of Gujarat in *re Creative Enterprises* holding that

'4. The Tribunal in the impugned order after recording facts in paragraph No. 2 of its order has noted that in assessee's own case in respect of same issue, for an earlier period, it was held by Tribunal that the assessee cannot be denied modvat credit by observing as under :

4. The learned Advocate appearing on behalf of the respondents submits that in respect of the same issue and in the same assessee's case, the Tribunal has held that the assessee cannot be denied the Modvat credit. Vide final order No. CB/470/03-WZB dated 28-10-2003, the Tribunal held as under :-

"We have perused the records and have considered the submissions made by both sides. The present order is clearly unjust and cannot be allowed to stand. The appellants are right in their contention that the finding regarding manufacture applies equally to levy of duty as well as eligibility to Modvat credit. If there was no manufacture, there could be no payment of duty also. There is no dispute that the appellants had paid a higher amount of duty on the goods than the credit taken. If the credit taken was not eligible, what was required was only to adjust the duty paid against that credit."

and of the Hon'ble High Court of Bombay in *re Ajinkya Enterprises* holding that

'9. It is relevant to note that the Board in its Circular dated 7th September, 2001 had only held that the activity of cutting/slitting of HR/CR coils into sheets or strips constitutes manufacture. Admittedly, the assessee had carried on additional activities such as pickling and oiling on the decoiled HR/CR coils, which is a complex technical process involving huge investment in plant and machinery. Since these additional activities were not considered by the Board

in its Circular dated 7th September, 2001, the withdrawal of the said Circular cannot be a ground to hold that the activity carried on by the assessee did not constitute manufacturing activity. It is only on 24th June, 2010, the Board has issued a Circular to the effect that the process of pickling does not amount to manufacture. Therefore, during the relevant period, that is, during the period from 2nd March, 2005 to 31st December, 2005, it could not be said that the issue was settled and that the assessee paid duty on decoiled HR/CR coils knowing fully well that the same were not manufactured goods. If duty on decoiled HR/CR coils was paid bona fide, then availing credit of duty paid on HR/CR coils cannot be faulted.

10. Apart from the above, in the present case, the assessment on decoiled HR/CR coils cleared from the factory of the assessee on payment of duty has neither been reversed nor it is held that the assessee is entitled to refund of duty paid at the time of clearing the decoiled HR/CR coils. In these circumstances, the CESTAT following its decision in the case of Ashok Enterprises - 2008 (221) E.L.T. 586 (T), Super Forgings - 2007 (217) E.L.T. 559 (T), S.A.I.L. - 2007 (220) E.L.T. 520 (T) = 2009 (15) S.T.R. 640 (Tribunal), M.P. Telelinks Limited - 2004 (178) E.L.T. 167 (T) and a decision of the Gujarat High Court in the case of CCE v. Creative Enterprises reported in 2009 (235) E.L.T. 785 (Guj.) has held that once the duty on final products has been accepted by the department, CENVAT credit availed need not be reversed even if the activity does not amount to manufacture. Admittedly, similar view taken by the Gujarat High Court in the case of Creative Enterprises has been upheld by the Apex Court [see 2009 (243) E.L.T. A121] by dismissing the SLP filed by the Revenue.'

7. In *re Fine Packaging Pvt Ltd*, the Tribunal has taken note of these decisions, and the provisions of scheme in the context of Central Excise Rules, 2002, to hold that

‘4. We have carefully considered the submission made by both the sides. We find that the facts of the case is not much in dispute inasmuch as the respondent have availed the credit on inputs which was used in the process of printing and lamination processes of the Polyester/BOPP Film and this activity was held to be non-manufacture. We find that Id. Commissioner has allowed the credit on the following reasons :

“(i) The present case is covered in the Tribunal’s decision in the case of PSL holding Ltd. v. CCE, Rajkot - 2003 (156) E.L.T. 602 (Tri.-Mum.) and in a case reported in 2006-TIOL-667-CESTAT-Mumbai involving Ajay Metachem Pvt. Ltd. v. Commr. of CE, Pune-III.

(ii) It is seen that the appellant has utilized credit to the tune of Rs. 28,38,345/- for payment of duty to the tune of Rs. 36.36 lakhs as reported by Dy. Commissioner, Aurangabad which was not required to be paid.

(iii) Credit thus was effectively reversed and Revenue cannot ask for reversal of credit.

(iv) Further Hon’ble Supreme Court in a case as reported in 2005 (179) E.L.T. 276 (S.C.) has held that when credit amount allegedly wrongly availed is exactly equivalent to the amount of Excise duty paid, the consequence is revenue neutral and demand on this count cannot be sustain.”

We find that besides the above finding, even if it is accepted that the activity of the respondent does not amount to manufacture, Cenvat credit on the inputs cannot be denied as per the provisions of Rule 16 of the Central Excise Rules, 2002 which is reproduced below :

*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.

(2) If the process to which the goods are subjected before being removed does not amount to manufacture, the manufacturer shall pay an amount equal to the Cenvat credit taken under sub-rule (1) and in any other case the manufacturer shall pay duty on goods received under sub-rule (1) at the rate applicable on the date of removal and on the value determined under sub-section (2) of Section 3 or Section 4 or Section 4A of the Act, as the case may be.

Explanation. - The amount paid under this sub-rule shall be allowed as Cenvat credit as if it was a duty paid by the manufacturer who removes the goods.

(3) If there is any difficulty in following the provisions of sub-rule (1) and sub-rule (2), the assessee may receive the goods for being re-made, refined, reconditioned or for any other reason and may remove the goods subsequently subject to such conditions as may be specified by the Commissioner.

From the plain reading of the above Rule it can be seen that under this provision Cenvat credit is allowed on the duty paid material treating it as inputs for the purpose of various processes and after processing if the activity is not amount to manufacture the assessee is required to clear such processed goods on payment of duty which is equal to Cenvat credit and if the activity is amount to manufacture then excise duty is required to be paid on transaction value. As per this clear provision, even if, activity does not amount to manufacture the credit is permissible. As per the above discussion, we are of the considered view that Cenvat credit on the inputs used in the process which does not amount to manufacture, is admissible. Therefore, the impugned order is upheld and the Revenue's appeal is dismissed. Cross-objection also stands disposed of.'

Per contra, the decision in re UPM Kymmene India Pvt Ltd [2015

(329) *ELT 161 (Tri-Mumbai)*], cited by Learned Authorized Representative, was rendered without the benefit of these decisions and, unlike in the facts of that case, the impugned order has taken note of the discharge of duty liability on the final clearance. Moreover, it was not alleged in the notice that the appellant was at any time deficient in credit availability at any point in time during the period of dispute; to allow the plea of remand would be nothing but authorizing contemplation of proceedings beyond the period of limitation by bringing new charges against the assessee. There is, thus, no ground for sustaining the disallowance of credit of ₹ 39,73,256.

8. For the claim of the appellant that ‘angles’, ‘beams’ and ‘channels’ were covered within definition of ‘capital goods’ in rule 2(a) of CENVAT Credit Rules, 2004, reliance was placed on the decision of the Tribunal in *re Mangalam Cement Ltd* and in *re APP Mills Ltd* [2013 (291) *ELT 585 (Tri-Bang)*] as well as of the Hon’ble High Court of Chhattisgarh in *re Singhal Enterprises Pvt Ltd*. It is, however, on record that the appellant had not yet procured the ‘cranes’ for whose support the said goods had been purportedly deployed. The facts being, thus, at variance with the cited decisions and, the ‘capital goods’, not having been installed the claim of eligibility of goods used for installing ‘structural support’ is not tenable. The benefit available to such goods, in terms of rule 2(k) of CENVAT Credit Rules, 2004 when used for ‘on-site’ manufacture of

‘capital goods’ is extendable only when the site happens to be the alternative location for manufacture of the said ‘capital goods’; it is not clearly intended for facilitation of deployment of ‘capital goods’ on site after clearance from factory. In the light of these facts and circumstances, the disallowance of credit of ₹ 14,55,597 is in accordance with the scheme of CENVAT.

9. CENVAT Credit Rules, 2004 offers the framework and the mechanics for neutralization of duty discharged at preceding stage of ‘value addition chain’; it is, therefore, procedural enunciation in which ‘availment’, as is ‘reversal’, is in the hands of ‘assessee’ while ‘restoration’, as is recovery, of credit is left to the jurisdictional authorities. While rule 14 of CENVAT Credit Rules, 2004 enables recourse to section 11A of Central Excise Act, 1944 as does rule 15 of CENVAT Credit Rules, 2004 enabling recourse to section 11AC of Central Excise Act, 1944, the latter cannot be drawn upon in the absence of the former. Legislative intent is amply clear that recourse to rule 14 and rule 15 of CENVAT Credit Rules, 2004 will have the effect, and consequence, of section 11A and section 11AC of Central Excise Act, 1944 respectively and not *vice versa*. It is, therefore, moot if every case of credit erroneously availed must necessarily be visited with penal consequence of section 11AC of Central Excise Act, 1944 that follows from invoking section 11A of Central Excise Act, 1944. Indeed, as reversal of credit is also within the competence of assessee

without pre-requisite of approval by central excise authorities, it would appear that it is only recovery compelled by inaction on the part of assessee that lends itself to invoking of rule 14 and, thereby, rule 15 of CENVAT Credit Rules, 2004.

10. It is on record that the credit of ₹ 14,55,597 had been reversed well before issue of notice. There was, thus, no cause to initiate proceedings under rule 14 of CENVAT Credit Rules, 2004; it would appear that absurdity of ‘appropriating’ credit already reversed, and not restorable without prior approval from jurisdictional central excise authorities, does not seem have occurred to the adjudicating authority as an exercise in futility. In the light of this legal position, the notice itself was void *ab initio* and, thereby, the penalty.

11. Accordingly, appeal is allowed to the extent of setting aside recovery of ₹ 39,73,256 and of the penalty in full.

(Order pronounced in the open court on 01/11/2023)

(AJAY SHARMA)
Member (Judicial)

**/as*

(C J MATHEW)
Member (Technical)