

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

WEST ZONAL BENCH

EXCISE APPEAL NO: 88852 OF 2013

[Arising out of Order-in-Original No: Belapur/15/Taloja/R-VI/COMMR/KA/ 2013-14 dated 31st May 2013 passed by the Commissioner of Central Excise & Customs, Belapur.]

**Commissioner of Central Excise
Belapur**

CGO Complex, CBD Belapur, Navi Mumbai - 400614

... Appellant

versus

KSH International Pvt Ltd

Plot No. J-25, MIDC, Taloja, Tal: Panvel, Dist: Raigad

...Respondent

APPEARANCE:

Shri Sunil Kumar Katiyar, Assistant Commissioner (AR) for the appellant

Shri Vinay Sejpal, Advocate for the respondent

CORAM:

**HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)**

FINAL ORDER NO: A /87090 /2023

DATE OF HEARING:	10/07/2023
DATE OF DECISION:	06/11/2023

PER: C J MATHEW

In this appeal against order¹ of Commissioner of Central

¹ [order-in-original no. Belapur/15/Taloja/R-VI/COMMR/KA/ 2013-14 dated 31st May 2013]

Excise, Belapur, at the instance of the duly empowered review committee in exercise of powers conferred under section 35E of Central Excise Act, 1944, the factual matrix is uncomplicated.

2. M/s KSH International Pvt Ltd, a manufacturer of insulated ‘copper/aluminium’ conductors in which ‘copper’ is an essential ingredient, had been clearing final product, in both the domestic market as well as for exports towards fulfilment of obligation under the ‘advance licence/authorization scheme’ of Foreign Trade Policy (FTP) enabling import of the primary ingredient, viz., copper, without payment of duty. The respondent, instead of sourcing copper from abroad had, in terms of the scheme in the Foreign Trade Policy (FTP), obtained the same from M/s Hindalco Industries Ltd and M/s Sterlite Industries Ltd between October 2004 and March 2009 on payment of duty of ₹ 5,26,47,414/- and upon invalidation of the ‘advance authorization’ to such extent. The availment of these duties as credit was objected to by central excise authorities who proceeded to initiate action for recovery thereof under rule 14 of CENVAT Credit Rules, 2004 on the ground that suppliers of ‘copper’ were entitled to clear those without payment of duty in terms of notification no. 44/2001-CE (NT) dated 26th June 2001.

3. The show cause notice proposed recovery on the ground that the respondent was required to fulfill export obligation either by using

imported raw materials, or by deploying supplies from domestic manufacturers, without payment of duty especially in the light of invalidation of the advance authorization to that extent thus disentitling them to availment of credit on such duty discharged by the supplier of 'copper' to them which was dropped by the adjudicating authority leading to the appeal now before us.

4. According to Learned Authorised Representative, the competent reviewing authority has concluded that the respondent was not eligible for availing CENVAT credit as the procurement of such goods on payment of duty is not in concord with scheme of 'advance licence' in the Foreign Trade Policy (FTP). It is also contended that the adjudicating authority has relied upon the decision of the Tribunal in *Shakun Polymers Ltd v. Commissioner of Central Excise & Customs, Daman* [2009 (241) ELT 250 (Tri.-Ahmd)] which was not binding precedent as appeal of department before the Hon'ble High Court of Gujarat was dismissed not on merit but merely on threshold monetary value and that an identical issue, decided by the Tribunal in *Oleofine Organics (India) Pvt Ltd v. Commissioner of Central Excise, Thane-I* [2014 (299) ELT 91 (Tri.-Mumbai)=2013-TIOL-896-CESTAT-MUM]], was pending in appeal of Revenue before the Hon'ble High Court of Bombay.

5. It is contended by the Learned Counsel for the respondent that

the dispute in *re Oleofine Organics India Pvt Ltd* had found resolution before the Hon'ble High Court of Bombay in *Commissioner of Central Excise & Customs, Thane-I v. Oleofine Organics India Pvt Ltd* by its order dated 13th October 2024 disposing off Central Excise Appeal no. 297 of 2013 thus:

'3. Upon careful perusal of the order and particularly, para 5, we are of the opinion that the anxiety of the revenue is that the appellant should avail of the benefit of this notification only on satisfaction of the conditions therein. Since the supplier who has supplied the goods and which are stated to be excisable, to the assessee before us, he has recovered the price and on such recovery including of the Tax component divested itself completely of the title in the goods, then, the apprehension of the revenue has no basis. In the given facts and circumstances, the anxiety is taken care of. Any larger issue or wider controversy can be gone into and in an appropriate case. Thus, we find that no substantial question of law arises in the present appeals. The appeals fail and are dismissed. No costs.'

6. The Tribunal, in *re Oleofine Organics India Pvt Ltd*, had held that

'5. We have considered the submission of the both the sides. There is no dispute that appellants had taken invalidation letter/ARO. These documents were handed over to the suppliers who in turn would have taken the benefit available to them. These have not been cancelled or withdrawn by the appellants. However, it is also observed from the impugned orders itself that the suppliers have not availed the refund of terminal excise duty. We also find from the documents

submitted along with the appeal papers that the suppliers have in the relevant years paid very substantial duty from PLA and, therefore, the Revenue's contention regarding shifting of credit does not hold water. We have asked the Id. AR to show any specific provisions under Central Excise law requiring the appellants to clear the goods in the said situation under Notification No. 44/2001-C.E. (N.T.), dated 26-6-2001 only. We have also seen the Notification and the connected rules. These rules do not require the appellants to necessarily clear the goods duty free by following the procedure under Notification No. 44/2001-C.E. (N.T.), dated 26-6-2001. We also note that overall there is no loss to the Revenue as the credit is being taken of the duty paid. If the appellants could have followed the Notification No. 44/2001-C.E. (N.T.), dated 26-6-2001, no duty would have been paid by the suppliers and appellants would also have not got any credit. We also note that in the impugned order, Tribunal judgment in the case of M/s. Reliance Industries Ltd. reported in 2009 (244) ELT 254 (Tri.-Ahd.) have been cited with lot of force. We have gone through the said judgment and we find that the issue involved in the said judgment was different and are not relevant to the facts of the present case. In fact, in the case of M/s. Reliance Industries Ltd., duty was being paid by the supplier and no objection was raised by the Department. Objection raised was relating to valuation of supplies made. We also find the issue is exactly the same as decided by the Tribunal in the case of Shakun Polymers Ltd. v. CCE reported in 2009 (241) ELT 250 (Tri.-Ahd.). We do not find any reason not to follow the same.'

7. We find that the factum of payment of duty by the appellant on procurement of copper is not in dispute. In terms of rule 3 of CENVAT Credit Rules, 2004, with duty liability having been

discharged and the procured goods conforming to definition of 'inputs' in rule 2(k) of CENVAT Credit Rules, 2004, there is no ground for disallowance of the said credit.

8. Furthermore, the goods cannot be said to be exempt inasmuch as the notification relied upon in the appeal of Revenue is a non-tariff notification which does not have the effect of section 5A of Central Excise Act, 1944 and is merely procedural and conditional. Furthermore, as pointed out by Learned Counsel for the respondent, rule 19 of Central Excise Rules, 2002 also affords option to a manufacturer to remove goods either on payment of duty or, subject to such procedure incorporated in the approval by the competent authority, without payment of duty. It is also settled law that it is not open to the central excise authorities having jurisdiction over the buyer to determine leviability to duty of a seller in another jurisdiction. On this very issue, in relation to the very same notification, the Tribunal in *Shree Shyam Filaments v. Commissioner of Central Excise & Service Tax, Jaipur – I* [2014 (310) ELT 801 (Tri.-Del.)] had held that

'7. The appellant had been issued Advance Authorization and since they did not use those Advance Authorization for duty free import of inputs, they got the same invalidated and obtained invalidation letters in favour of certain domestic suppliers for duty free supply of the inputs. However, domestic suppliers instead of supplying the inputs duty free in

terms of Notification No. 44/2001-C.E. (N.T.), dated 26-6-2001 supplied those inputs on payment of duty. The appellant took Cenvat credit of that duty. The Department's contention is that the domestic suppliers in whose favour the invalidation letters had been obtained by the appellant from DGFT for duty free supply, should have supplied the inputs without payment of duty, but since they have paid the duty on these inputs, the amount paid towards duty cannot be treated as Central Excise duty and hence the appellant would not be eligible for its Cenvat credit. We find that this very issue has been considered at length of the Tribunal in the case of M/s. Oleofine Organics (India) Pvt. Ltd. & M/s Fine Organics (India) Pvt. Ltd. v. CCE, Thane-I (supra) and the same stands decided in the favour of the appellant. Not only this, as held by the Apex Court in the case of CCE & CUS v. MDS Switchgear Ltd. (supra), while considering availability of Cenvat credit to a manufacturer in respect of some inputs procured by him from another manufacturer, the quantum of duty already determined by the jurisdictional officers of the supplier unit cannot be contested or challenged by the officials incharge of the recipient unit. In this case, there is no evidence produced that the assessment of duty at the end of the domestic suppliers had been reviewed and the duty paid by them has been refunded to them. When this is so, there is no question of denying the Cenvat credit to the appellant. In view of this, the impugned order is not sustainable. The same is set aside. The appeal as well as stay application are allowed.'

9. The duty having been discharged by manufacturers of copper who had supplied 'inputs to the respondent, there is no ground for denial of eligibility for CENVAT credit. Furthermore, the primary

contention in the appeal of Revenue is that on identical matter was pending resolution, in their appeal, before the Hon'ble High Court of Bombay in *re Oleofine Organics India Pvt Ltd*. With the disposal of that appeal, discarding the challenge mounted by Revenue against the order of the Tribunal permitting availment of credit, the grounds of appeal itself ceases to exist.

10. In view of the above facts and circumstances, the appeal lacks merit and is, accordingly, dismissed.

(Order pronounced in the open court on 06/11/2023)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*