CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
REGIONAL BENCH
COURT No. 5

Excise Appeal No. 85541 of 2015

(Arising out of Order-in-Original No. 48/AC/COMMR/Th.II/2014 dated 23.12.2014 passed by the Commissioner of Central Excise, Thane-II)

Vijay S. Nair **Appellant**
Managing Director,
Visen Industries Ltd.,
K-30, 31 & 32, MIDC Industrial Area,
Tarapur, Boisar, Dist. Thane
(Now Palghar), Boisar 401 506.

Vs.

Commissioner of Central Excise, Thane-II **Respondent**
3rd Floor, Navprabhat Chambers,
Ranade Road, Dadar (W), Mumbai 400 028

AND

Excise Appeal No. 85542 of 2015

(Arising out of Order-in-Original No. 48/AC/COMMR/Th.II/2014 dated 23.12.2014 passed by the Commissioner of Central Excise, Thane-II)

M/s. Visen Industries Ltd. **Appellant**
Visen Industries Ltd.,
K-30, 31 & 32, MIDC Industrial Area,
Tarapur, Boisar, Dist. Thane
(Now Palghar), Boisar 401 506.

Vs.

Commissioner of Central Excise, Thane-II **Respondent**
3rd Floor, Navprabhat Chambers,
Ranade Road, Dadar (W), Mumbai 400 028

Appearance:

Shri S.S. Gupta, Chartered Accountant, for the Appellant
Shri Mahesh Patil, Joint Commissioner, Authorised Representative for the Respondent

CORAM:

HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)
HON'BLE MR. ANIL G. SHAKKARWAR, MEMBER (TECHNICAL)

Date of Hearing: 01.02.2024
Date of Decision: 27.02.2024

FINAL ORDER NO. 85221-85222/2024

PER: ANIL G. SHAKKARWAR

Above stated two appeals are taken together for decision since both of them are arising out of common impugned order-in-original dated 23.12.2014.

2. Brief facts of the case are that one of the two appellants is a manufacturing unit and the other appellant is Managing Director of the said unit. The manufacturing unit is engaged in manufacture of polymer emulsions falling under Chapter 39, used in paint, textiles and adhesive industry. Vinyl acetate monomer is one of the main raw material used for manufacture of final product. Appellant imported vinyl acetate monomer and stored the same in Customs Bonded Warehouse at Mahul Village, Chembur, Mumbai. Appellant cleared vinyl acetate monomer to their customers directly from the said Customs Bonded Warehouse, but maintained the records in such a manner that the record indicated that the said inputs were received in the factory and subsequently cleared from the factory as clearance of inputs as such as provided under sub-rule (5) of Rule 3 of Cenvat Credit Rules, 2004. Appellant without bringing the said goods into the factory used to take cenvat credit of the admissible duties and issued central excise invoice for clearance of the same to their customers by debiting the cenvat credit account and passed on the credit to their customers. Further, the appellant also availed cenvat credit of various input services and utilized the said input services for manufacture of final product as well as for trading. Appellant also reversed some part of the availed cenvat credit of input services. The above circumstances were not appreciated by Revenue and Revenue issued both the appellants with a show cause notice dated 05.09.2014. It was alleged in the said show cause notice that the appellant was not bringing the inputs into the factory and still availing the credit of duties in their cenvat account and as a result, during the period from August 2009 to September 2012, the appellant availed inadmissible cenvat credit of Rs.5,63,66,047/- and the same was proposed to be recovered under the provisions of Rule 14 of Cenvat Credit Rules. Through the said show cause notice, it was alleged that during the said period though the appellant had reversed cenvat credit of Rs.3,44,773/- attributable to trading activity, the appellant was

liable to pay an amount of Rs.1,18,45,107/- as an amount equivalent to 6% of the total value of goods traded during the said period. There was proposal for imposing penalty on the other appellant. Both the appellants contested the said show cause notice. The contention of the appellant was that immediately after taking the cenvat credit, the same cenvat credit was reversed and, therefore, the appellant is not liable for any recovery of cenvat credit under Rule 14 as proposed in the show cause notice. Appellant also contended that they have chosen the option of reversing the proportionate credit attributable to trading activity and, therefore, they are not liable to pay the amount demanded in the show cause notice. The said show cause notice was adjudicated through the impugned order-in-original. Learned original authority has observed that the appellant has contended that they have reversed the credit and, therefore, they were not liable to pay the said demanded amount whereas the fact was that despite availing inadmissible cenvat credit, the appellant had passed the said credit to their customers and, therefore, the said demand of Rs.5,63,66,047/- was confirmed by the original authority. In respect of the other demand, learned original authority has held that the alternative of reversing proportionate cenvat credit attributable to services is to be specifically chosen and declared before being adopted and that procedure was not followed by the appellant and, therefore, he has confirmed the demand of an amount of Rs.1,18,45,107/-. The original authority appropriated an amount of Rs.3,44,773/- which was already paid by the appellant. The appellant was imposed with penalty. The other appellant who is Managing Director was imposed with a penalty of Rs.7,00,000/- under sub-rule (2) of Rule 26 of Central Excise Rules, 2002. Aggrieved by the said order, both the appellants are before this Tribunal.

3. Heard the learned counsel for the appellant. Learned counsel for the appellant has agreed that the input vinyl acetate monomer was stored in Customs Bonded Warehouse and was sold to customers directly from Customs Bonded Warehouse and that the appellant has been showing the entry of receipt of goods in the factory premises and availed the credit in cenvat

account and they reversed the said credit on the very same day by preparing excise invoice on customer and this is how credit taken was reversed on the same day. In respect of the other demand, learned counsel has submitted that the appellant had reversed proportionate amount of credit considering trading as exempt service and the only reason why their contention was not accepted by the original authority is that the appellant has not filed the declaration under Rule 6(3A) of the said Rules. He has submitted that there are large number of decisions of this Tribunal wherein it has been held that the appellant can reverse proportionate credit as provided in Rule 6(3)(ii) of Cenvat Credit Rules, 2004. He has relied on the following decisions:-

a) Mercedes Benz India (P) Ltd. reported at 2015 (40) STR 381 (Tri.-Mumbai).

b) Aster Pvt. Ltd. reported at 2016 (43) STR 411 (Tri.-Hyd.).

c) Commissioner of Central Excise, Puducherry vs. CESTAT Chennai reported at 2015 (323) ELT 323 (Mad.).

d) Eaton Power vs. CCE, Pune-I reported 2023-(12)-TMI-172-CESTAT Mumbai.

d) Accura Valves Pvt. Ltd. vs. CGST& CE, Nashik 2018-12-TMI-428-CESTAT, Mumbai.

In respect of the other appellant who is Managing Director, learned counsel has submitted that since the reversal of credit was made immediately on the same day and the credit was taken, the company did not have any gain and, therefore, penalty on the Managing Director cannot be imposed. In respect of the first issue, learned counsel for the appellant also relied on the decision of this Tribunal affirmed by Hon'ble Bombay High Court, in the case of Ajinkya Enterprises vs. CCE, Pune reported at 2013 (288) ELT 247 (Tri-Mumbai).

4. Heard the learned AR. Learned AR has submitted that reversal of credit and utilization of credit are two different aspects. In the present case, the appellant has availed

inadmissible cenvat credit since the goods did not enter the factory and the said credit was unutilized by the appellant. However, the appellant is claimed to have reversed the same. The fact is that the inadmissible cenvat credit was availed and utilized and it was not reversed.

5. We have carefully gone through the record of the case and submissions made. We note that under Cenvat Credit Rules, credit of specified duties can be allowed to be taken on receipt of inputs into the factory. If the inputs are received in the factory, then such inputs can be cleared as such on debit of cenvat credit. In the present case, inputs were not received in the factory and credit was availed and utilized for clearance of inputs as such which never reached the factory. The appellant has contended that they have reversed the cenvat credit whereas the fact is that the cenvat credit was utilized by debiting the same through the invoices issued by the appellant for sale of inputs directly from the Customs Bonded Warehouse. We have also gone through the decision of this Tribunal in the case of Ajinkya Enterprises (supra). In the said case, cenvat credit was availed and after processing of inputs, the same was utilized towards payment of duty and subsequently it was held that the process which was undertaken did not amount to manufacture and, therefore, the said clearances did not attract central excise duty. Under those circumstances, it was held that since the duty payment was accepted by Revenue, the availed cenvat credit cannot be reversed. Such circumstances are not available in the present case. Therefore, the ruling in the said case is not applicable in the present case. Insofar as the impugned order is concerned in respect of the allowance of cenvat credit of Rs.5,63,66,047/- is concerned, we do not find any infirmity with the same. We, therefore, do not interfere with that part of the impugned order through which cenvat credit of Rs.5,63,66,047/- was disallowed and ordered to be recovered along with interest and equal penalty.

6. Insofar as the other demand of Rs.1,18,45,107/- is concerned, we find that the appellant was eligible to debit proportionate cenvat credit attributable to trading activity and

we also find that such debited amount of Rs.3,44,773/- was appropriated by the original authority. We, therefore, set aside the impugned order in respect of demand of Rs.1,18,45,107/-, interest and penalty on the same.

7. We set aside the penalty imposed on Shri Vijay S. Nair, Managing Director, as we do not find any omission or commission on his part in causing any loss to the exchequer.

8. In above terms, appeal No. E/85541/2015 is allowed and appeal No. E/85542/2015 is allowed in part.

(Order pronounced in the open court on 27.02.2024)

(Anil G. Shakkarwar)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

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