2019-TIOL-2891-CESTAT-KOL

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
EASTERN ZONAL BENCH, KOLKATA

Appeal No. E/77400/2018

Arising out of Order-in-Appeal No. 40/HWH/XAP-108/2017-18, Dated: 08.03.2018
Passed by the Commissioner of CGST & Central Excise, Kolkata

Date of Hearing: 05.07.2019
Date of Decision: 13.08.2019

M/s HINDUSTAN NATIONAL GLASS AND INDUSTRIES LTD
2, PANCHU GOPAL BHADURIA SARANI, RISHRA, P.O.-PRABHASNAGAR
HOOGHLY-712249

Vs

COMMISSIONER OF CGST AND CENTRAL EXCISE
KOLKATA, HOWRAH CGST & CENTRAL EXCSIE COMMISSIONERATE
M S BUILDING, 15/1 STRAND ROAD, KOLKATA, WEST BENGAL-700001

Appellant Rep by: Shri Ankit Kanodia, CA
Respondent Rep by: Shri H S Abedin, AC (AR)

CORAM: P K Choudhary, Member (J)

CX - The assessee is engaged in manufacture of "Glass & Glassware" viz. Glass Bottles - A fire had broken out in the manufacturing unit of assessee on 10/08/2011 due to which certain packing material required for finished goods were damaged - The assessee had taken CENVAT Credit on such packing material considering them to be inputs - They received certain amount from the insurance company towards the said loss, which was accounted for by assessee in its Books of Accounts - During audit, the Departmental officers observed that the assessee had taken irregular credit as they were liable to reverse the said amount of duty on the packing material destroyed in the fire - The assessee had never stated the fact of having issued the packing material to the production floor prior to the proceedings before this Tribunal - Factual submissions being made for the first time before the Tribunal cannot be entertained - The Tribunal being an Appellate Authority cannot be presented with different or additional set of facts as compared to the facts presented before the lower authorities - Therefore, it is not possible to test the veracity of the additional factual submissions of assessee at this stage - The duty amount of which credit was availed before the fire incident in August 2011, has already been reversed in May 2015 which has been duly recorded in impugned order - Therefore, the duty amount already stands paid by way of reversal of credit which is not in dispute - Since the assessee had sufficient credit balances, in any case, there would be no loss of Revenue to the exchequer - Therefore, the imposition of interest and penalty in the present proceedings cannot sustain and hence, the same are set aside - Duty amount since already paid is not interfered with: CESTAT

Appeal disposed of

Case laws cited:

CCE vs. Bill Forge Pvt Ltd - ***2011-TIOL-799-HC-KAR-CX... Para 14***

CCE, Bangalore vs. Pearl Insulation Ltd. 2012 (281) ELT 192 (Kar)... Para 15

CCE, Bangalore vs. Gokaldas Images (P) Ltd. 2012 (28) STR 214 (Kar)... Para 15

CCE vs. Strategic Engineering (P) Ltd - 2014-TIOL-466-HC-MAD-CX... Para 16

CCE, Delhi vs. Maruti Udyog Limited - 2006-TIOL-308-HC-P&H-CX... Para 17

Commissioner v. Maruti Udyog Ltd. - 2007 (214) E.L.T. A50 (S.C.)... Para 18

CCE, Ghaziabad vs. Ashoka Metal Decor (P) Ltd.[2011 (21) S.T.R. 469 (All.)]... Para 19

FINAL ORDER NO. A/75998/2019

Per: P K Choudhary:

The Appellant is in appeal against the Order-in-Appeal dated 08/03/2018 upholding the decision of the Adjudicating authority vide Order-in-Original dated 26/08/2016 wherein CENVAT Credit of Rs.2,76,514/- has been demanded on account of packing materials destroyed by fire in the factory of the Appellant on 10/08/2011. Vide the said Order-in-Original equivalent amount of penalty has been imposed with applicable interest.

2. Briefly stated, the facts of the case are that the Appellant, Hindustan National Glass & Industries Limited is engaged in the business of manufacture of "Glass & Glassware" viz. Glass Bottles falling under Central Excise Tariff Sub-Heading 70109000 of the Central Excise Tariff Act.

3. A fire had broken out in the manufacturing unit of the Appellant on 10/08/2011 due to which certain packing material required for finished goods were damaged. The Appellant had taken CENVAT Credit on such packing material considering them to be inputs. The Appellant received certain amount from the insurance company towards the said loss, which was accounted for by the Appellant in its Books of Accounts for the FY 2012-13.

4. During audit of the Appellant's records for the relevant period, the Departmental officers observed that the Appellant had taken irregular credit of Rs.2,76,514/-, as the Appellant was liable to reverse the said amount of duty on the packing material destroyed in the fire. Accordingly, the Appellant was issued Show Cause Notice dated 28/07/2015, which was confirmed by Order-in-Original dated 26.08.2016. The Appellant preferred an appeal before the Commissioner (Appeals), which was rejected. Hence, the present appeal before the Tribunal.

5. The Ld. C.A. appearing for the appellant submitted that the packing material, which were damaged in the fire, were kept at the Production Floor, as such material had already been issued from the Appellant's stores. It was contended that on a conjoint reading of Rule 3 and Rule 2(k) of Cenvat Credit Rules, 2004, it is clear that all those goods which are used in or in relation to the manufacture of final product qualify for credit. Therefore, the inputs used or kept for use towards Work-in- Progress (WIP) goods are eligible to Cenvat credit. Hence, there is no requirement for the Appellant to reverse the Cenvat credit availed on the inputs destroyed in the fire. In support, the Ld. CA has referred to various judgments wherein it has been held that when inputs have been issued for production, no reversal of credit is required when the said inputs are destroyed in fire inasmuch as the said inputs would be considered as having been used in the manufacture of final goods.

6. A Chartered Engineer certificate was also submitted showing the process of manufacturing glass bottles and the place of packaging of the same. The Ld. C.A. has also produced documents showing movement of goods in SAP (software) from its store to the production floor. He further submitted that no penalty should be imposed in the instant case as the issue relates to interpretation of law and that the loss of inputs were due to an incident of fire, which was beyond the control of the Appellant. The Appellant has submitted that though they had reversed the CENVAT Credit amount before the issuance of Show Cause Notice, the Department yet went on to issue the Notice alleging non-reversal and proposed recovery of the amount along with interest and penalty. He also contested the levy of interest on the ground that sufficient credit balance had always been lying in their credit register. On the same count, he also contested the imposition of penalty.

7. On the other hand, the learned Authorized Representative for the Revenue submits that the said packing material on which the Appellant had availed credit were destroyed in fire, without being used in or in relation to the manufacture of the finished goods and therefore, no Cenvat credit could be available to them. He also stated that the submission of the Appellant that the input material were already kept on the production floor was a new fact and has been presented before this Tribunal for the first time. This fact was never narrated before both the authorities below. He submitted that the veracity of the said submission cannot be ascertained at this stage inasmuch as the fire incident took place in August 2011. He accordingly, submitted that the Tribunal should not take into cognizance the submissions being made on the factual

aspect which was never before the lower authorities. Further, he reiterated the observations of the lower authorities.

8. Heard both sides and perused the appeal records.

9. The short issue that arises for consideration in the instant appeal is with respect to availment of CENVAT Credit of excise duty paid on the packing material destroyed in the fire at the Appellant's factory on 10/08/2011. On perusal of the appeal records, it is seen that the Appellant had never stated the fact of having issued the packing material (goods in question) to the production floor prior to the proceedings before this Tribunal. I agree with the submissions made by the Ld. DR that factual submissions being made for the first time before the Tribunal cannot be entertained. The Tribunal being an Appellate Authority cannot be presented with different or additional set of facts as compared to the facts presented before the lower authorities. Therefore, it is not possible to test the veracity of the additional factual submissions of the Appellant at this stage. The Chartered Engineer's report and SAP records do not aid the case of the Appellant in view of the above reasons.

10. I find the duty amount of which credit was availed before the fire incident in August 2011, has already been reversed in May 2015 which has been duly recorded in the impugned order on Page no 6. Therefore, the duty amount already stands paid by way of reversal of credit which is not in dispute.

11. Now the question that remains to be decided is whether interest and/or penalty are payable by the appellant. I find that the Ld. Commissioner has recorded that the Appellant had sufficient credit balance in its account. Based on the applicable provisions under Rule 14 of the CENVAT Credit Rules, as was in force during the period April 2012 to February 2015, I hold that the Appellant is not required to pay any interest.

12. However, for the period from March 2015 to May 2015 (till date of reversal of credit), applying the amendments introduced in the above rule in March 2015, the ld. Commissioner observed that credit will be deemed to be utilized in May 2015 from the opening balance in March 2015. The amended provisions under Rule 14 as introduced vide Notification no. **6/2015-C.E. (NT)** dated 01.03.2015 w.e.f. 14.05.2015 is as below:

> ***"14. Recovery of CENVAT credit wrongly taken or erroneously refunded. -***
>
> ***(1) (i) Where the CENVAT credit has been taken wrongly but not utilised, the same shall be recovered from the manufacturer or the provider of output service, as the case may be, and the provisions of section 11A of the Excise Act or section 73 of the Finance Act, 1994 (32 of 1994), as the case may be, shall apply mutatis mutandis for effecting such recoveries;***
>
> ***(ii) Where the CENVAT credit has been taken and utilised wrongly or has been erroneously refunded, the same shall be recovered along with interest from the manufacturer or the provider of output service, as the case may be, and the provisions of sections 11A and 11AA of the Excise Act or sections 73 and 75 of the Finance Act, 1994, as the case may be, shall apply mutatis mutandis for effecting such recoveries.***
>
> ***(2) For the purposes of sub-rule (1), all credits taken during a month shall be deemed to have been taken on the last day of the month and the utilisation thereof shall be deemed to have occurred in the following manner, namely : -***
>
> ***(i) the opening balance of the month has been utilised first;***
>
> ***(ii) credit admissible in terms of these rules taken during the month has been utilised next;***
>
> ***(iii) credit inadmissible in terms of these rules taken during the month has been utilised thereafter.".***

The aforesaid provision contained in sub-rule (2) of Rule 14 got omitted from the statute, w.e.f. 01.04.2016, vide Notification no. **13/2016-C.E (NT)** dated 01.03.2016.

13. On perusal of the above provisions, I find that the Ld. Commissioner has committed a fundamental error in applying the said amended provisions since the same would apply in those cases where it is to be ascertained whether the credit is deemed to be utilized in March 2015 in respect of the credit amount availed in March 2015, i.e. both availment and utilization of credit during the period after the amendment took place. The aforesaid provisions brought into effect on 14th March, 2015 cannot be applied (retrospectively) for the credit amount already shown in the returns prior to March 2015 (i.e. August 2011 when the fire incident occurred).

14. Be that so as it may, the concept as to "when can it be said that credit has been taken", has been lucidly explained by the Hon'ble Karnataka High Court in the case of ***CCE vs. Bill Forge Pvt Ltd. 2012 (26) STR 204 (Kar) = 2011-TIOL-799-HC-KAR-CX*** as below:

> ***"..20. From the aforesaid discussion what emerges is that the credit of excise duty in the register maintained for the said purpose is only a book entry. It might be utilised later for payment of excise duty on the excisable product. It is entitled to use the credit at any time thereafter when making payment of excise duty on the excisable product. It matures when the excisable product is received from the factory and the stage for payment of excise duty is reached. Actually, the credit is taken, at the time of the removal of the excisable product. It is in the nature of a set off or an adjustment. The assessee uses the credit to make payment of excise duty on excisable product. Instead of paying excise duty, the cenvat credit is utilized, thereby it is adjusted or set off against the duty payable and a debit entry is made in the register. Therefore, this is a procedure whereby the manufacturers can utilise the credit to make payment of duty to discharge his liability. ..***
>
> ***21. Interest is compensatory in character, and is imposed on an assessee, who has withheld payment of any tax, as and when it is due and payable. The levy of interest is on the actual amount which is withheld and the extent of delay in paying tax on the due date. If there is no liability to pay tax, there is no liability to pay interest. Section 11AB of the Act is attracted only on delayed payment of duty i.e., where only duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded, the person liable to pay duty, shall in addition to the duty is liable to pay interest. Section do not stipulate interest is payable from the date of book entry, showing entitlement of Cenvat credit. Interest cannot be claimed from the date of wrong availment of CENVAT credit and that the interest would be payable from the date CENVAT credit is taken or utilized wrongly."***

15. The above decision in Bill Forge (Supra) has been further followed by the Karnataka High Court in the following cases:

> ***- CCE, Bangalore vs. Pearl Insulation Ltd. 2012 (281) ELT 192 (Kar)***
>
> ***- CCE, Bangalore vs. Gokaldas Images (P) Ltd. 2012 (28) STR 214 (Kar)***

16. Relying on the above decisions, the Hon'ble Madras High Court in ***CCE vs. Strategic Engineering (P) Ltd 2014 (310) ELT 509 (Mad)*** = ***2014-TIOL-466-HC-MAD-CX*** has observed that :-

> "***11. It is an admitted fact that Rule 14 of the Cenvat Credit Rules as been subsequently amended, wherein it has been clearly stated as "taken and utilised". Therefore, it is quite clear that mere taking itself would not compel the assessee to pay interest as well as penalty. Further, as pointed out earlier, the subsequent amendment has given befitting answer to all doubts existed earlier. Since, the subsequent amendment has cleared all doubts existed earlier in respect of Rule 14 of the said Rules, it is needless to say that the argument advanced by the learned counsel appearing for the appellant/Department is erroneous, whereas the argument advanced on the side of the respondent is really having merit and the substantial questions of law settled in the present Civil Miscellaneous Appeal are not having substance and altogether the present Civil Miscellaneous Appeal deserves to be dismissed."***

17. Further in ***CCE, Delhi vs. Maruti Udyog Limited [2007 (214) E.L.T. 173 (P & H)]*** = ***2006-TIOL-308-HC-P&H-CX*** , the Hon'ble High Court upheld the findings of the Tribunal that the assessee was not liable to pay interest as the credit was only taken as an entry in the Modvat record and was not infact utilised. The Tribunal held that in absence of utilisation of credit, the assessee was not liable to pay interest. The relevant para of the decision is quoted below:-

"3. We have heard learned Counsel for the appellant.

4. Learned Counsel for the appellant is unable to show as to how the interest will be required to be paid when in absence of availment of Modvat credit infact, the assessee was not liable to pay any duty. The Tribunal has clearly recorded a finding that the assessee did not avail of the Modvat credit in fact and had only made an entry.

5. In view of this factual position, we are unable to hold that any substantial question of law arises."

18. The above decision of the Hon'ble Punjab & Haryana High Court has been upheld by the Hon'ble Supreme Court as reported in ***Commissioner v. Maruti Udyog Ltd. - 2007 (214) E.L.T. A50 (S.C.)***

19. It is also relevant to take note of the above Allahabad High Court decision in
CCE, Ghaziabad vs. Ashoka Metal Decor (P) Ltd.[2011 (21) S.T.R. 469 (All.)]
wherein the Hon'ble High Court held that when the wrong credit is not utilized for payment of final output duty on final products, neither the assessee gets any advantage nor there is any Revenue loss to the Government. The Hon'ble High Court followed the legal principles upheld by the Supreme Court in CCE vs. Maruti Udyog Ltd (Supra)

"..Such amount credited in the Cenvat account was available for the payment of duty but the same was not utilized for payment of duty and subsequently, the Assessee has reversed the Cenvat Credit entry in the Cenvat account. The Apex Court in the case of Commissioner of Central Excise, Mumbai-I v. Bombay Dyeing & Manufacturing Company Limited, reported in 2007 (215) E.L.T. 3 (S.C.) = 2007-TIOL-141-SC-CX has held that where before the utilization of the credit amount if the entry is reversed it amounts to not taking credit. Once the credit is reversed before its utilization in the Cenvat account it does not amount to taking of credit. Thus, the provisions of Rule 14 of Cenvat Credit Rules and Section 11AB of the Act are not attracted and neither the penalty nor the interest is chargeable. The Division Bench of Punjab & Haryana High Court in the case of Commissioner of Central Excise, Delhi-III v. Maruti Udyog Limited, reported in 2007 (214) E.L.T. 173 (P & H) = 2006-TIOL-308-HC-P&H-CX has held that the Assessee is not liable to pay interest as the credit was only taken as an entry in the Modvat record and was not in fact utilized. Against the above decision of the Punjab & Haryana High Court, Special Leave to Appeal (Civil) No. CC3915/2007 filed by Commissioner of Central Excise, Delhi-III has been rejected by the Apex Court on 14-5-2007 [2007 (214) E.L.T. A50 (S.C.)]. The decisions cited by the learned Additional Chief Standing Counsel are distinguishable and do not apply to the facts of the present case. In the case of Commissioner of Central Excise, Pune v. M/s. SKF India Ltd. (supra) it has been held that on revision of prices retrospectively invoices were issued and differential duty was paid. It has also been held by the Apex Court that payment of differential duty clearly falls under Section 11A(2B) of the Act and hence interest is chargeable under Section 11AB of the Act. Similar view has been taken in the case of Commissioner of Central Excise v. M/s. International Auto Limited (supra).

10. For the reasons stated above, we are of the view that there is no error in the order of the Tribunal. The appeal is accordingly dismissed summarily..."

20. In view of the above factual perspective and the precedent decisions of various High Courts, I am of the view that since the appellant had sufficient credit balances as noted above, in any case, there would be no loss of Revenue to the exchequer. Therefore, the imposition of interest and penalty in the present proceedings cannot sustain and hence, the same are set aside. Duty amount since already paid is not interfered with.

21. The appeal is thus disposed of in above terms.

(Pronounced in the open court on 13.08.2019)