2020-TIOL-301-CESTAT-KOL

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
EASTERN ZONAL BENCH, KOLKATA
REGIONAL BENCH
COURT NO. II

Excise Appeal No.78564 of 2018

Arising out of Order-in-Appeal No.91-92/HWH/CE/2018-19, Dated: 24.05.2018
Passed by Commissioner of CGST & Central Excise, Appeals-II Commissionerate, Kolkata

Date of Hearing: 18.11.2019
Date of Decision: 04.02.2020

M/s ANMOL STAINLESS PVT LTD
(KANAJULI, NH-2, DURGAPUR EXPRESSWAY, P.O.-GOBARARA
P.S.-GURAP, HOOGHLY-712305

Vs

COMMISSIONER OF CGST AND CENTRAL EXCISE
HOWRAH, COMMISSIONERATE
(M.S. BUILDING, 15/1, STRAND ROAD, KOLKATA)

WITH
Excise Appeal No.78602 of 2018

Arising out of Order-in-Appeal No.91-92/HWH/CE/2018-19, Dated: 24.05.2018
Passed by Commissioner of CGST & Central Excise, Appeals-II Commissionerate, Kolkata

COMMISSIONER OF CGST AND CENTRAL EXCISE
HOWRAH, COMMISSIONERATE
(M.S. BUILDING, 15/1, STRAND ROAD, KOLKATA)

Vs

1) M/s ANMOL STAINLESS PVT LTD
2) SHRI DILIP KR. CHOWDHURY, MANAGING DIRECTOR
(BOTH ADDRESSED AT - KANAJULI, NH-2, DURGAPUR EXPRESSWAY
P.O.-GOBARARA, P.S.-GURAP, HOOGHLY-712305)

Appellant Rep by: Shri Ankit Kanodia, CA
Respondent Rep by: Shri S S Chattopadhyay, AR

CORAM: P K Choudhary, Member (J)

CX - The assessee-company is engaged in manufacturing Cold Rolling of thick stainless sheets, slitting in small sizes & making stainless pipes classifiable under CTH 7304 9000 of the First Schedule to the CETA 1985 - An SCN was issued, alleging contravention of the provisions of Rule 16 of the CER 2002 and certain Rules of CCR 2004 r/w Section 2(f) of the CEA 1944 - The issue arose in respect of three BoE filed for

import of CRSS Coil from Hong Kong - On adjudication, cenvat credit was disallowed and duty demand was raised for reversal of the same & penalty was imposed on the MD of the assessee-company - On appeal, the Commr.(A) sustained the demands but quashed the penalties - Hence the present appeal.

Held -

The short issue that arises for consideration in the instant appeal is with respect to whether the assessee has already reversed the amount of Rs.11,06,691/- as Cenvat credit or not by making an entry in the books of accounts on 30/06/2017 and thereby reducing the amount of Cenvat credit to be transferred in TRAN 1 form in GST - On perusal of the entire case records, it is seen that the assessee has done the said reversal in the books of accounts and has thereby not carried the said Cenvat credit into GST regime - Further, the GST regime has been introduced w.e.f. 01/07/2017 - Thus, there is no further reversal required in the matter - Hence the demand as confirmed by the Commr. (A) in this regard merits being quashed - Besides, 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 in the present proceedings cannot sustain and hence, the same is set aside - The Revenue also filed appeal against the dropping of penalty imposed on the assessee - The appeal is covered in terms of the litigation policy and merits being dismissed as such: CESTAT

Assessee's appeals allowed

Case laws cited:

CCE vs. Bill Forge Pvt Ltd - 2011-TIOL-799-HC-KAR-CX... Para 8

CCE, Bangalore vs. Pearl Insulation Ltd. 2012 (281) ELT 192 (Kar)... Para 9

CCE, Bangalore vs. Gokaldas Images (P) Ltd. 2012 (28) STR 214 (Kar)... Para 9

CCE vs. Strategic Engineering (P) Ltd - 2014-TIOL-466-HC-MAD-CX... Para 10

CCE, Delhi vs. Maruti Udyog Limited - 2006-TIOL-308-HC-P&H-CX... Para 11

Commissioner v. Maruti Udyog Ltd. - 2007 (214) E.L.T. A50 (S.C.)... Para 12

CCE, Ghaziabad vs. Ashoka Metal Decor (P) Ltd.[2011 (21) S.T.R. 469 (All.)] ... Para 12

Bombay Dyeing & Manufacturing Company Limited - 2007-TIOL-141-SC-CX... Para 13

Maruti Udyog Limited - 2006-TIOL-308-HC-P&H-CX... Para 13

FINAL ORDER NOS. 75200-75201/2020

Per: P K Choudhary:

The appellants are engaged in the manufacture of cold rolling of thick stainless sheets, slitting in small sizes, making stainless pipes etc. classifiable under chapter 73049000 of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986). A show cause notice dated 27.02.2017 was issued alleging contravention of provisions of Rule 16 of the Central Excise Rules, 2002 and Rule 2, 3(2), 4 of the Cenvat Credit Rules, 2004 read with section 2(f) of the Central Excise Act, 1944. The period of dispute is from October 2012 to March 2013 against 337.443 MT "C.R.S.S. Coil" on the basis of three Bills of Entry for the goods imported from Hong Kong. Subsequently the adjudicating authority disallowed the Cenvat credit taken on C.R.S.S. Coil and confirmed the demand amounting to Rs.32,31,489/- (CVD) and Rs.12,11,838/- (SAD) totaling Rs.44,43,327/- along with interest and imposed a penalty of equal amount on the appellant company and also imposed a penalty of Rs.50,000/- upon the Managing Director of the appellant company. It was observed by the adjudicating authority that since the appellant company had already reversed the amount of Rs.33,36,636/- by way of payment of duty, the same was appropriated against the confirmed demand. On appeal, the learned Commissioner(Appeals) upheld the adjudication order to the extent of confirmation of demand, appropriation of the Cenvat credit already reversed and charging of interest. However, he set aside the penalties imposed on the appellant company and its Managing Director. The appellant assessee is now in appeal before the Tribunal.

Department is also in appeal before the Tribunal against setting aside of the penalties by the learned Commissioner(Appeals) in respect of Excise Appeal No.78602 of 2018.

2. Shri Ankit Kanodia, learned Chartered Accountant appearing on behalf of the appellant company submits that the show cause notice was received only after a lapse of three years and three months and in the meantime during the time of transition of Goods and Services Tax in India, the appellant company had taken a call not to take forward any disputed liability ahead and hence at the time of availment of credit in the GST regime, it had transferred the Cenvat Credit balance after deducting an amount of Rs.11,06,691/- as on 30.06.2017. In support of his claim the appellants had already filed a Certificate from independent Chartered Accountant dated 17.08.2018 which is available on page 181 of appeal paper book and marked as Annexure-A/5, which states as under:-

> ***"We have gone through the Statement of Excise Return (Form ER-1) for the month of April 2017, May 2017 & June 1027 and GST Return from the period 31st July, 2017 to 31st March, 2018 along with Electronic Credit Ledger from the GST Portal and Input Ledger from the Unaudited Books of Accounts for the Financial Year 2017-18 and other relevant records as contained in the Statement of selected Financial Data for the period Mar, 2018 in respect to M/s.Anmol Stainless Private Limited having Registered Office at 229 AJC Bose Road, Cresent Tower, 6th Floor, Kolkata- 700020. On the basis of relevant records and other information provided to us and on the basis of other supporting document we hereby confirm that Rs.11,06,691/- has not being taken as Transitional Input Tax Credit carried forward from the ER-1 Return for the month of June 2018 under section 140(1) of the Central Goods and Service Tax Act, 2017."***

3. It is the submission of the learned Chartered Accountant that the above Chartered Accountant's Certificate is very clear on the aspect that the amount of Rs.11,06,691/- has been taken by the appellant and has been reversed on 30.06.2017 in the books of accounts. The journal voucher of that entry was also produced before both the lower authorities. Accordingly, he argued that the demand to the extent of Rs.11,06,691/- is not tenable as the same stands paid by the appellant. The learned Chartered Accountant further contends that since the amount has already been reversed and when the credit itself is not irregular, the question of asking for interest on such availment does not arise. In support of his submissions, he relies upon the decision of the Tribunal in the assessee's own case vide
Final Order No.FO/76092/2018 dated 19.03.2018. Para 5 of the aforesaid order is reproduced:-

> ***"5. The ld.Counsel appearing on behalf of the appellant submits that the managing director of the appellant company filed a separate appeal before this Tribunal which was remanded to the Commissioner(Appeals). It is submitted that the Comm (A) vide OIA No.574/HWH/CE/2017-18 dated 20.02.2018 allowed the appeal of the Managing Director in remand proceedings. The ld.Counsel further submitted that as per Rule 14 of Cenvat Credit Rules, 2004, interest can be levied only when Credit has been taken and utilized by the assessee. However, since in the instant case, the appellant had reversed the credit, interest cannot be levied. I find force in the submission of the ld. Counsel."***

4. The learned Authorized Representative appearing on behalf of the department, justifies the impugned order regarding the confirmation of demand and interest and reiterates the grounds of appeal in respect of department's appeal for upholding the penalties imposed by the adjudicating authority. The learned Authorized Representative further submits that though the appellants in their grounds of appeal have mentioned that the differential amount of credit of Rs.11,06,691/- stood reversed in the books of accounts of appellant assessee, but there was no appropriation. He also referred to the second ground taken by the appellant company regarding liability of interest under Rule 14. It is his submission that the dispute pertains to the period October 2012 to March 2013 and the reversal has been done only in the year 2017. Hence the appellant assessee is liable to pay interest for the intervening period. He further submits that the appellant has not brought on record any document to substantiate their claim that they were having sufficient credit balance all along.

5. In his counter the learned Chartered Accountant refers to page 186, 187 and 188 of the appeal paper book being a ledger copy of Basic Excise Duty Register.

6. Heard both sides and perused the appeal records.

7. The short issue that arises for consideration in the instant appeal is with respect to whether the Appellant has already reversed the amount of Rs.11,06,691/- as Cenvat credit or not by making an entry in the books of accounts on 30/06/2017 and thereby reducing the amount of Cenvat credit to be transferred in TRAN 1 form in GST. On perusal of the entire case records, it is seen that the Appellant has done the said reversal in the books of accounts and has thereby not carried the said Cenvat credit into GST regime. Further, the GST regime has been introduced w.e.f. 01/07/2017. Thus in my considered view, there is no further reversal required in the matter. Hence the demand to the extent of Rs. 11,06,691/- as confirmed by the learned Commissioner (Appeals) deserves to be set aside.

8. Now the question that remains to be decided is whether interest is payable by the appellant. I find that the Appellant has asserted that it had sufficient credit balance in its account and also produced a Chartered Accountant certificate for the same. Based on the applicable provisions under Rule 14 of the CENVAT Credit Rules, as was in force during the period from April 2012 to March 2013, I hold that the Appellant is not required to pay any interest. Also, 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. Before utilization of such credit, the entry has been reversed, it amounts to not taking credit. Reversal of cenvat credit amounts to non-taking of credit on the inputs.***
>
> ***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."***

9. 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)***

10. 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."***

11. 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 in fact 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."***

12. 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.)***

13. Further, in ***CCE, Ghaziabad vs. Ashoka Metal Decor (P) Ltd.[2011 (21) S.T.R. 469 (All.)]*** 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 Hon'ble 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), wherein it was held that -

> ***"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..."***

14. 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 in the present proceedings cannot sustain and hence, the same is set aside.

15. Further, it is noted that the department also filed the appeal against the dropping of penalty imposed on the appellant company. I find that the appeal is covered in terms of litigation policy vide Board's instruction being F.No.390/Misc./116/2017-JC dated 22.08.2019. Accordingly, the departmental appeal is dismissed under National Litigation Policy.

16. Thus, both the appeals are disposed of in the above terms.

(Order pronounced in the open court on 04.02.2020)