2020-TIOL-906-CESTAT-KOL

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
EAST REGIONAL BENCH, KOLKATA

Excise Appeal No.78936 of 2018

Arising out of Order-in-Appeal No.327-328/HWH/CE/2018-19, Dated: 24.09.2018
Passed by Commr. of CGST & Central Excise (Appeals II), Kolkata

Date of Hearing: 14.11.2019
Date of Decision: 05.02.2020

M/s ANMOL STAINLESS PVT LTD
CRESCENT TOWER, 229, AJC BOSE ROAD
2ND FLOOR, KOLKATA-700020

Vs

CGST AND CENTRAL EXCISE
HOWRAH, 15/1 STRAND ROAD, KOLKATA-700001

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

CORAM: P K Choudhary, Member (J)

CX - The assessee is engaged in business of manufacture of cold rolling of thick stainless sheets, slitting in small sizes and making stainless pipes - A SCN was issued alleging irregular availment of Cenvat credit along with interest and penalty - The assessee has done the reversal from opening balance of Cenvat credit in ER-1 return of the month of May 2014 which has already been verified and hence there is no further reversal required in the matter - Hence, the demand to the extent of Rs.94,120/- as confirmed by Commissioner (A) deserves to be set aside accordingly - The assessee 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 CENVAT Credit Rules, as was in force during the period from April 2012 to March 2013, assessee 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 Karnataka High Court in case of ***Bill Forge Pvt Ltd.*** ***2011-TIOL-799-HC-KAR-CX*** **-** 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 cannot sustain and hence, the same is set aside: CESTAT

Appeal disposed of

Case laws cited:

CCE vs. Bill Forge Pvt Ltd - 2011-TIOL-799-HC-KAR-CX... Para 9

CCE, Bangalore vs. Pearl Insulation Ltd. 2012 (281) ELT 192 (Kar)... Para 10

CCE, Bangalore vs. Gokaldas Images (P) Ltd. 2012 (28) STR 214 (Kar)... Para 10

CCE vs. Strategic Engineering (P) Ltd - 2014-TIOL-466-HC-MAD-CX... Para 11

CCE, Delhi vs. Maruti Udyog Limited - 2006-TIOL-308-HC-P&H-CX... Para 12

Commissioner v. Maruti Udyog Ltd. - 2007 (214) E.L.T. A50 (S.C.)... Para 13

CCE, Ghaziabad vs. Ashoka Metal Decor (P) Ltd.[2011 (21) S.T.R. 469 (All.)]... Para 14

Commissioner of Central Excise, Mumbai-I v. Bombay Dyeing & Manufacturing Company Limited - 2007-TIOL-141-SC-CX... Para 14

Commissioner of Central Excise, Delhi-III v. Maruti Udyog Limited, reported in 2007 (214) E.L.T. 173 (P & H)... Para 14

FINAL ORDER NO. 77061/2019

Per: P K Choudhary:

1. The appellant assessee is in appeal against the Order-in-Appeal dated 24/09/2018 for confirmation of demand of Rs.94,120/- as irregular Cenvat credit of Cess on custom duty and interest on an amount of Rs.9,51,500/- as confirmed by the Ld. Commissioner (Appeals—II), Kolkata on alleged irregular Cenvat credit availed and reversed by the appellant.

2. Briefly stated, the facts of the case are that the appellant, M/s.Anmol Stainless Private Limited, is engaged in the business of manufacture of cold rolling of thick stainless sheets, slitting in small sizes, making stainless pipes etc. classifiable under Chapter No.73049000 of the First Schedule to the Central Excise Tariff Act, 1985.

3. Based on an E.A. 2000 audit of the excise and service tax records of the Appellant for the period 2012-13, it was issued with a Show cause notice dated 03/08/2017 alleging irregular availment of Cenvat credit to the tune of Rs.10,41,110/- along with interest and penalty and appropriating certain amount already paid by the Appellant before the issuance of the SCN. The said SCN culminated into Order-in-Original dated 28/02/2018 wherein the Adjudicating authority confirmed the total demand as proposed and also appropriated the amount of Rs.317,593/- as Cenvat and Rs.41,452/- as interest paid by the Appellant and also imposed a penalty of equivalent amount on the Appellant and a penalty of Rs. 5,00,000/- on the director of the Appellant company. On Appeal before the Commissioner(Appeals), the Ld. Commissioner (Appeals), dropped the demand of Rs.6,29,397/- out of the total demand of Rs.10,41,110/- along with setting aside of total penalty on both the appellant company and its director. He however confirmed the interest on amount of Rs.9,51,500/-. Hence, the present appeal before the Tribunal for the confirmation of demand of Rs.94,120 (Rs.4,11,713 – Rs.3,17,593) and interest on the amount of Rs.9,51,500/- .

4. Shri Ankit Kanodia, C.A., appeared on behalf of the appellant and Shri S.Mukhopadhyay, Ld.D.R. appeared on behalf of the respondent department.

5. The Ld. C.A. appearing for the appellant submitted that the amount of Rs.94,120/- as confirmed by the Ld. Commissioner (Appeals) has already been reversed by the Appellant by reducing the amount of opening balance of Cenvat credit in ER 1 of May 2014 vis-àvis the closing balance of ER 1 of April 2014. He made the Bench go through the relevant figures in both the returns which establish the fact that the Appellant has reversed the said amount by reducing the opening balance of Cenvat credit and not by showing the same as reversal of Cenvat credit. Further, as regards interest on the total amount of Rs.9,51,500/- as confirmed by the Commissioner (Appeals), he stated that when demand to the extent of Rs.4,11,713/- has only been confirmed than the question of interest on amount of Rs.9,51,500/- is not tenable at all. Further, he stated that the Appellant has already paid an interest of Rs.41,452. As regards interest, he further stated that the Appellant has not paid interest on an amount of Rs.2,27,983/- on account of irregular availment of Cenvat credit in certain input services during October 12 to March 13 which was reversed by the Appellant in May 2014 and Irregular availment of Rs.5,39,787/- as Cenvat Credit availed in excess on capital goods in the first year itself i.e. on 30/03/2013 instead of on 01/04/2013 on the ground that there was always sufficient balance in the Cenvat credit ledger of the Appellant and that the said amounts were not utilised for payment of duty and hence interest under Rule 14 of CCR, 2004 cannot be made applicable. For this the Ld. CA has also produced a CA certificate showing the closing balances of Cenvat credit from availment of Cenvat credit till the date of reversal thereof.

6. The learned Authorized Representative for the Revenue justified the impugned orders.

7. Heard both sides and perused the appeal records.

8. The short issue that arise for consideration in the instant appeal is with respect to whether the Appellant has already reversed the amount of Rs.94,120/- as Cenvat credit or not. On perusal of the entire case records, it is seen that the Appellant has done the said reversal from the opening balance of Cenvat credit in ER-1 return of the month of May 2014 which has already been verified and hence in my considered view, there is no further reversal required in the matter. Hence the demand to the extent of Rs.94,120/- as confirmed by the ld. Commissioner (Appeals) deserves to be set aside accordingly.

9. 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."***

10. 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)***

11. 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."***

12. 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."***

13. 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.).***

14. 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) 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..."***

15. 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.

16. The appeal is thus disposed of in above terms with consequential benefits, if any.

(Pronounced in the open Court on 05.02.2020)