

IN THE HIGH COURT OF KERALAAT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE ANTONY DOMINIC
&
THE HONOURABLE MR. JUSTICE SHAJI P.CHALY

MONDAY, THE 20TH DAY OF JULY 2015/29TH ASHADHA, 1937

C.E.Appeal.No. 2 of 2013 ()

(AGAINST ORDER NO.587/2012 DATED 21.8.2012 IN APPEAL NO.E/1080/2010
OF CESTAT, BANGALORE)

APPELLANT(S)/RESPONDENT:

THE COMMISSIONER OF CENTRAL EXCISE
CUSTOMS AND SERVICE TAX, CALICUT COMMISSIONERATE
C.R BUILDING, MANACHIRA, KOZHIKODE.

BY ADV. SRI.JOHN VARGHESE,SC,CEN.BOARD OF EXCIS

RESPONDENT(S)/APPELLANT:

M/S.APOLLO TYRES LTD.
PERAMBRA, CHALAKUDY, THRISSUR DISTRICT. 680 689.

R1 BY ADV. SRI.JOSEPH KODIANTHARA (SR.)
R1 BY ADV. SRI.V.ABRAHAM MARKOS
R1 BY ADV. SRI.BINU MATHEW
R1 BY ADV. SRI.ABRAHAM JOSEPH MARKOS
R1 BY ADV. SRI.TOM THOMAS (KAKKUZHIYIL)
R1 BY ADV. SRI.ISAAC THOMAS

THIS CENTRAL EXCISE APPEAL HAVING BEEN FINALLY HEARD ON
02-07-2015, ALONG WITH CEA. 3/2013, THE COURT ON 20-07-2015 DELIVERED THE
FOLLOWING:

APPENDIX IN CEA.2/13

APPELLANT'S EXHIBITS:

ANNEXURE A1: TRUE COPY OF THE SHOW CAUSE NOTICE NO.4/2009 CE DT.30.01.2009 ISSUED BY THE DEPARTMENT TO THE RESPONDENT.

ANNEXURE A2: TRUE COPY OF THE ORDER IN ORIGINAL NO.2/2010 CE DT.25.03.2010 ISSUED BY THE ADJUDICATING AUTHORITY.

ANNEXURE A3: TRUE COPY OF THE FINAL ORDER NO.587/2012 DT.21.08.2012 ISSUED BY THE CESTAT, BANGALORE.

/TRUE COPY/

PS TO JUDGE

ANTONY DOMINIC & SHAJI P. CHALY, JJ.

C.E.A.Nos.2 & 3 of 2013

Dated this the 20th day of July, 2015

JUDGMENT

Antony Dominic, J.

1. These appeals are filed by the Commissioner of Central Excise, Customs and Service Tax, Kozhikode and Kochi. They are aggrieved by the orders passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Bangalore in Appeal Nos.E/298/2010 & E/1080/2010.
2. We heard the Standing Counsel for the appellants and the learned Senior Counsel appearing for the respondents.
3. Before we deal with the respective contentions of the parties, it is necessary to take note of the relevant facts. The respondents are engaged in manufacture of automotive tyres. One of the raw materials used by them is Nylon Tyre Cord Fabric ('NTCF' for short), which is procured from various sources. NTCF is further processed in the factory of the respondents to make Dipped Nylon Tyre Cord Fabric ('DNTCF' for

short), which is captively consumed in the manufacture of tyres.

4.Respondents were taking CENVAT credit of the Additional Excise Duty ('AED' for short) paid on NTCF under Section 3 of the Additional Duties of Excise (Good of Special Importance) Act, 1957. Prior to 01.03.2003, credit of AED could be used only for payment of AED on any final product manufactured and cleared from their factories. Since AED was not payable on their final product, viz., tyres, the respondents were having accumulated credit of AED. In so far as the respondent in C.E.Appeal No.2/13 is concerned, they had accumulated credit of ₹9,39,19,737/- and in so far as the respondent in C.E. Appeal No.3/13 is concerned, they had accumulated credit of ₹5,41,28,449/-.

5.While so, as a result of an amendment to the CENVAT Credit Rules 2002, the respondents were entitled to utilise the accumulated credit of AED for payment of Basic Excise Duty (BED) and Special Excise Duty (SED) on their final product, from 01.03.2003.

Accordingly, the respondents utilized the accumulated credit of AED for payment of BED and SED payable on tyres. However, the relevant rule was further amended by Finance Act (No.2), 2004 to provide that AED paid on NTCF on or after 01.04.2000 alone was available to the credit of the respondents for utilization in the payment of BED and SED on the final product.

6.As a result of this retrospective amendment, department issued show cause notices to the respondents alleging that the credit of AED accrued prior to 01.04.2000 was not available for utilization for payment of BED and SED on tyres and that therefore, ₹9,97,11,819/- and ₹5,41,28,449/- were liable to be recovered. In terms of the procedure for recovery introduced by the Finance Act 2005, the respondents paid back the entire amount with interest thereon in 36 monthly installments from July 2005 to June 2008. Upon payment of each installment, equivalent credit of AED was restored by them to their CENVAT account and this was reflected in the relevant returns.

7. Thereafter, the respondent in C.E. Appeal No.2 of 2013 utilised the accumulated credit of AED for payment of AED on DNTCF manufactured from NTCT prior to 01.04.2000. In so far as the appellant in C.E. Appeal No.3 of 2013 is concerned, out of the accumulated credit of AED, an amount of ₹16,76,148/- was utilized by them. Further as DNTCF was used captively in the manufacture of tyres, the credit of AED paid on DNTCF was also taken by them and utilised for payment of BED and SED on tyres.

8. In this factual background, show cause notices were issued to the respondents alleging wrong restoration of AED credit in the CENVAT Credit Account and also its wrong utilization for payment of AED on DNTCF. Replies were filed by them disputing the allegations and also relying on order dated 28.02.2007 passed by the Commissioner of Central Excise, Mumbai III in the case of M/s. CEAT Ltd., and also on the Tribunal's decision in Good Year (India) Ltd. v. CCE, Faridabad [2006 (199) E.L.T 842 (Tri.Del.)].

9. The adjudicating authority confirmed the show cause notices it was these orders which were challenged by the respondents in their appeals before the Tribunal. The Tribunal by the impugned order held that the issue involved is fully covered in favour of the respondents by the Tribunal's order in the Good Year case and allowed the appeals. These appeals are filed by the department which is aggrieved by the orders passed by the Tribunal.

10. A reading of the order passed by the Tribunal shows that it has placed total reliance on the order of the Tribunal, Mumbai in the case of CCE Mumbai v. CEAT Ltd. [(2010) 254 ELT 349]. The impugned order also shows that the department's representative before the Tribunal

'fairly acknowledged that the two issues were covered by the Tribunal's decision in the case of CEAT Tyres'.

11. The relevant part of the Tribunal's order extracted in the impugned order, reads thus:

"5. We have perused the case records and carefully considered the rival submissions. The common case of the parties is that the assessee-CEAT had procured tyre cord fabrics paying AED (GSI) and used in the manufacture of its final product automotive tyres. As tyres and flaps did not attract AED (GSI) and since the relevant modvat/cenvat provisions prohibited utilization of AED (GSI) for discharge of BED payable on tyres and flaps, credit of such AED paid on inputs could not be utilized and accumulated in its account. As per Rule 3(6)(b) of CCR, Cenvat credit in respect of, inter alia, Additional Duty of Excise leviable under Sec. 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957, shall be utilized only towards payment of duty of excise leviable under the said AED (GSI) Act. By issue of Notification No. 13/2003-C.E. (N.T.), dated 1-3-03, this prohibition was relaxed and the assessee was allowed use of AED (GSI) to discharge BED payable on tyres. The assessee had accumulated credit of Rs. 32,78,21,329/- which it utilized for payment of BED. Vide Sec. 88 of the Finance Act, 2004, Government restricted use of AED (GSI) for payment of BED and barred use of such AED (GSI) earned prior to 1-4-2000. Vide Sec. 124 of Finance Act, 2004, Government issued detailed directions for payment of BED discharged by the assessee along with interest @13% in 36 equal instalments. The assessee accordingly paid an amount of Rs. 65,54,373/- every month from July, 2005 to June, 2006. On payment of BED from PLA

the appellant took suo motu credit of equal amount in the AED (GSI) account. Through the impugned proceedings, the department sought to disallow credit taken by the assessee under AED (GSI) account on the ground that the same was taken against TR.6 Challans and not against valid documents prescribed under the Rules. The proper procedure to take re-credit of Cenvat credit wrongly used was to file refund claim under Section 11B of the Central Excise Act. Vide the impugned order, the Commissioner held that the appellants were entitled to restoration of the AED (GSI) equal to the amount it paid towards BED on tyres, which had been initially discharged using accumulated credit under AED (GSI) available as on 1-3-2003.

6. Under Sec. 88 of the Finance Act, 2004, the following Explanation was introduced in Rule 3(6) (b) of Cenvat Credit Rules, 2004 effective from 1-3-03 :

"Explanation - For the removal of doubts, it is hereby declared that the credit of the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957) and paid on or after the 1st day of April, 2000, may be utilized towards payment of duty of excise leviable under the First Schedule or the Second Schedule to the Central Excise Tariff Act, 1985 (5 of 1986)."

As per these provisions, the appellants were barred from using the accumulated AED (GSI) credit earned on procurement of tyre cord fabrics prior to 1-4-2000. As on 1-3-2003, the assessee had a total credit of about Rs. 32,78,21,329/-, out of which an amount of Rs. 20,49,01,087/- had been earned prior to 1-4-2000. Had the Rule 3(6)(b) of C.C.R. not been amended with effect from 1-3-2003, the assessee would have continued to have a balance of Rs. 32,78,21,329/- including Rs. 20,49,01,087/- earned prior to 1-4-2000. Since the Finance Act, 2004 prohibited use of AED (GSI) for payment of BED, the credit balance of AED (GSI) would remain undisturbed in its account. During July, 2005 to June, 2006, the assessee had paid an amount of Rs. 65,54,373/- every month from AED (GSI) and later discharged the same liability by payment of duty from PLA. We find that credit is intended to be spent only to pay duty. The department had not recognized debits from AED (GSI) as payment of BED. Therefore, such debits cannot be held to have affected the balance of AED (GSI) in the accounts of the assessee. Therefore, once the appellant discharged the duty liability on tyres by debiting PLA, the appellants account stood credited with the debits initially made. A refund claim is warranted when duty is excess paid. In the instant case, the payment from AED (GSI) was not recognized as payment of duty. Therefore, there was no question of the assessee claiming refund of the same. The transaction utilizing AED (GSI)

should be held to have been cancelled. We find that that the Commissioner properly allowed the appellant to retain the AED (GSI) credit and maintain status-quo ante once the debits made towards BED during July, 2005 to June, 2006 was held to be not payment of duty.

7. We have considered the case laws cited by the Id. counsel for the respondents. We discuss them below seriatim.

(i) In the Friends Wire Industries case the appellant had utilized Modvat credit for payment of duty on a final product which was not declared under Rule 57G of the Central Excise Rules. While upholding demand of duty due on the final product cleared by debiting Modvat credit, the Tribunal held that duty was to be paid from PLA or in cash. When the duty was so paid, the Modvat credit which was utilized wrongly had to be restored. Its utilization for payment of duty for an eligible product could not be objected to.

(ii) In the Mahindra & Mahindra Ltd. case, dealing with a similar case of utilization of Modvat credit towards payment of duty on I.C. engines and M.V. parts, which had not been declared as final product by the assessee, the Tribunal held that while duty involved on I.C. engines and M.V. parts could be ordered to be paid through PLA that had to be simultaneous with restoration of an equivalent amount in RG-23A Part II for

utilization towards the duty on the declared final product viz. motor vehicles.

(iii) In Punjab Maize Products case supra, the Tribunal granted the relief of restoration of the credit which had been held by the authorities to have been wrongly utilized for payment of duty on glucose for which the particular raw material in question had not been declared as the input. The Tribunal held that the application made for restoration of the credit which had been admittedly utilized wrongly should be allowed once the respondents had rectified the error by payment of duty from PLA.

(iv) In Kumar Auto Cast Limited case supra, the Tribunal found that the respondents had wrongly availed Modvat credit for payment of duty on MCI inserts by debiting their RG 23A Part II account. The Tribunal ordered that once they had regularized such wrong utilization of Modvat credit by payment of duty from their PLA, the RG. 23A account had to be credited with the amount debited earlier.

8. We find that the judicial authorities cited by the appellants are to the effect that once the utilization of Modvat/Cenvat credit for payment of duty was found to be irregular and the duty was then paid from PLA, the assessee became automatically entitled to credit of equivalent amount in its RG 23A account.

11. We find that the Tribunal had dealt with a different dispute in Final Order No. M/159/08/SMB/C-I, dated 9-7-2008 in the case of BDH Industries Ltd. [2008 (229) E.L.T. 364 (Tri. - LB)]. In the said decision, the Tribunal had considered two cases :

(a) Motorola India Pvt. Ltd. [2006 (193) E.L.T. 468 (T) = 2007 (7) S.T.R. 613 (T) = 2005 (71) RLT 334]

In this case the appellant had paid excess duty by mistake and thereafter sought permission to take credit of the amount paid by mistake. The Tribunal held that the amount involved was not duty and limitation did not apply for its refund.

(b) Comfit Sanitary Napkins (I) Pvt. Ltd. - 2004 (174) E.L.T. 220.

In this case it was held that the assessee cannot suo motu take credit without applying for refund, when excess duty was paid. The conflict of views entailed the following reference to a Larger Bench of the Tribunal :-

"If an assessee avails suo motu credit of the amount of duty paid in excess by him, whether the view taken by the Tribunal in the case of Comfit Sanitary Napkins (I) Pvt. Ltd. - 2004 (174) E.L.T. 220 will apply or the views taken by the Tribunal in the case of Motorola India Pvt. Ltd. - 2006 (193) E.L.T. 468 (Tri.) = 2007 (7) S.T.R. 613 (Tri.) = 2005 (71) RLT 334 will apply"

The Tribunal answered the reference holding that all types of refund have to be filed under the Central Excise Act and Rules made thereunder and no suo motu credit of the duty paid in excess may be taken by the assessee. We find that the ratio of the BDH Industries Ltd. case relates to excess duty paid and the procedure to be followed for getting back such excess duty paid. Ratio of that case does not apply to the subject case.

9. The impugned credit had been legitimately earned by the assessee on procurement of inputs on payment of duty and used for payment of duty following the amendment of Cenvat Credit Rules under Budget 2003. Vide Circular No. 7/16/2003-C.X., dated 6-3-03, the CBEC had also clarified that it was considered appropriate not to put any cap on the use of the AED (GSI) credit accruing prior to 1-3-2003. In terms of the provisions enacted in Finance Act, 2004, the debits were held not amounting to payment of duty and the assessee was required to meet the same obligation by payment from PLA. In the instant case, the debits were held to be of no consequence when the assessee was required to pay duty initially discharged using AED (GSI) credit. Therefore, the credit needed to be restored and was correctly ordered so by the Commissioner. We find considerable merit in the finding of the Commissioner that but for the statutory changes introduced with effect from 1-3-03 following which the assessee had discharged the duty

liability on tyres using AED (GSI), it would have continued to have the impugned credit in its account. We also find that the Commissioner correctly held that the respondent had taken the impugned credit under valid duty paying documents under cover of which inputs had been received. Accordingly, we sustain the impugned order and reject the appeal filed by the Revenue."

12. Reading of the above paragraphs of the Tribunal's order in CEAT Tyres' case shows that the issues raised in these appeals, were exactly similar and therefore the Tribunal justified in proceeding on the basis that the controversy raised before it was covered by the Tribunal's order in CEAT Tyres case. It is also seen that the order of the Delhi Tribunal in Good Year India's case was confirmed by the High Court of Punjab and Haryana in C.E.A.No.140 of 2006, by its judgment dated 25.01.2007. Though, SLP was filed by the department against this judgment of the High Court that was rejected by the Apex Court on the ground of delay and keeping the question of law opened, by its order dated 10.03.2008.

13. Learned counsel for the appellants relied on explanation added to Rules 3(7)(b) of the CENVAT Credit Rules 2004 and contended that the utilization of accumulated credit on AED for payment of AED is regular. To answer this contention, reference to Explanation to the Rule has to be made and the explanation added reads thus:

"Explanation - For the removal of doubts, it is hereby declared that the credit of the additional duty of excise leviable under Section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1956 (58 of 1957) paid on or after 1st day of April, 2000, may be utilized towards payment of duty of excise leviable under the first schedule or the second schedule to the Excise Tariff Act".

14. Reading of the above explanation shows that credit of AED paid on or after 01.04.2000, is permitted to be utilized towards payment of duty of excise leviable under the first schedule or the second schedule to the Excise Tariff Act. In other words, the restriction introduced by the explanation was only in the utilization of the accumulated credit of

AED towards payment of duty under the schedules of Excise Tariff Act. This means that this restriction applied only in the payment of BED and SED, which alone is payable under the Excise Tariff Act and not to AED payable under Section 3 of Act 58 of 1957. Therefore, this contention raised by the counsel for the appellants cannot be accepted.

15. Learned counsel for the appellants contended that the order passed by the Delhi Tribunal which was confirmed by the High Court of Punjab and Haryana, was challenged before the Supreme Court and that while dismissing the SLP on the ground of delay, the question of law raised was kept open. He had also produced before us the order passed by the Apex Court to substantiate this contention. According to him, therefore, the order of the Tribunal and the judgment of the Punjab and Haryana High Court has lost its efficacy. We are unable to agree. When dismissing the SLP, if the question of law raised is kept open by the Apex Court, that does not mean that the conclusion of the Tribunal or the principles laid down by the High Court, are set at naught. Instead,

it only means that it is open to the appellant to raise the same issue before the Apex Court, without being constrained by the earlier order dismissing the SLP. Therefore, we cannot accept the contention that the order of the High Court of Punjab and Haryana or the order of the Tribunal which was confirmed by the High Court, could not have been of any value.

16.This therefore means that the conclusions of the Tribunal, based on the earlier orders of the Tribunal itself, are factually and legally tenable. Therefore, we do not find any merit in these appeals.

Appeals fail and are hence dismissed.

Sd/-
ANTONY DOMINIC, Judge.

Sd/-
SHAJI P. CHALY, Judge.

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