

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 08.12.2017

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR

and

THE HONOURABLE MR.JUSTICE R.PONGIAPPAN

C.M.A.No.3405 of 2017

The Commissioner of Central Excise,
Puducherry Commissionerate,
Beach Road,
Puducherry - 605 001. ... Appellant/Respondent

Vs.

M/s.Wipro Limited, (Unit II),
No.10, Thirubhuvanai
Puducherry. ... Respondent/Appellant

Prayer: Civil Miscellaneous Appeal filed under Section 35 G of the Central Excise Act, 1944, against the Final Order No.41764 of 2016, dated 30.09.2016, on the file of the Customs, Excise and Service Tax Appellate Tribunal, Chennai. Received by Appellant on 07.11.2016.

For Appellant : Mr.A.P.Srinivas

JUDGMENT

(Judgment of this Court was made by S.MANIKUMAR, J.)

Instant Civil Miscellaneous Appeal is filed against the Final Order No.41764 of 2016, dated 30.09.2016, on the file of the Customs, Excise and Service Tax Appellate Tribunal, Chennai.

2. Short facts leading to the appeal are that the respondent M/s.Wipro Ltd, Unit II, Puducherry (hereinafter called 'Wipro') is engaged in the manufacture of Computers and parts of Computer falling under Chapter heading 8471 of the First Schedule to the Central Excise Tariff Act, 1985.

3. Wipro were availing CENVAT credit of duty paid on components/inputs, used in the manufacture of Computer and parts of Computer, as provided under Rule 3 of the CENVAT Credit Rules, 2002 and 2004 (in short CCR), and were paying duty, on Computer cleared from their factory, upto 08.07.2004. With effect from 09.07.2004, full exemption from payment of Central Excise duty was granted, vide Notification No.6/2002-CE dated 01.03.2002, as amended by Notification 23/2004 CE dated 09.07.2004. The total credit involved in the inputs, lying in stock, as such or contained in the finished goods/semi-finished goods, as on 08.07.2004, worked out to Rs.2,06,98,063/-, is not allowable in terms of rule 6(1) of the CCR, 2002, as such inputs have been used or intended to be used in the manufacture of exempted final products.

4. Rule 6(1) of CCR, 2002, as it stood, at the time, read, "Cenvat credit shall not be allowed, on such quantity of input, which is used in the manufacture of exempted goods, except in the circumstances mentioned, in sub-rule (2)". As per rule 6 of the CCR, the benefit of availment of Cenvat credit of the duty paid on inputs, could be availed only, if the final product manufactured suffers duty. As the finished goods, viz. Computer and inputs in stock, intended to be used in manufacture of Computer were to be cleared without payment of duty, after they became exempt with effect from 09.07.2004, the total credit involved on the inputs worked out to Rs.2,06,98,063/-, is payable by Wipro. As it appeared that the credit taken by Wipro on inputs, used in the manufacture of Computer, which were subsequently, exempted and cleared, at 'nil' rate of duty, was liable to be reversed/recovered, in terms of Rule 6(1) of CCR, a SCN dated 17.06.2005 was issued, seeking reversal of Cenvat credit, to the tune of Rs.2,06,98,062/- along with interest, under Section 11AB of the Central Excise Act, 1944 and penalty under Rule 13 of CCR.

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5. After due process of law, the adjudicating authority confirmed the demand for recovery of an amount of Rs.1,75,40,771/-, against a sum of Rs.2,06,98,063/-, proposed in the SCN, under Rule 12 of CCR, 2002 read with Section 11 A (2) of the CEA, 1944, along with interest, under Section 11AB of CEA, 1944 and the adjudicating authority imposed penalty of Rs.10,00,000/-, under Rule 13 of the CCR, 2002, vide Order-in-Original No.19/2005 dated 30.11.2005.

6. Aggrieved over the abovesaid Order-in-Original, Wipro preferred an appeal before CESTAT, vide Final Order No.41764/2016 dated 30.09.2016, CESTAT, Chennai, has set aside the said order and allowed the appeal. CESTAT, Chennai, observed that when the final product became exempted from payment of excise duty vide Notification No.23/2004 dated 09.07.2004 amending the Notification No.06/2002-CE with effect from 09.07.2004, the indefeasible right of the respondent to claim Cenvat credit, cannot be denied and foregone unless otherwise required by law, for extinguishment of such right. Tribunal held that, abridgment of vested right, is recognized by law, w.e.f. 01.03.2007 incorporating sub-rule 3(2) to rule 11 of the Cenvat Credit Rules.

7. Aggrieved by the Final Order No.41764 of 2016, dated 30.09.2016, passed by the Customs, Excise and Service Tax Appellate Tribunal, Chennai, instant Civil Miscellaneous Appeal is filed by the Commissionerate of Central Excise, Puducherry, on the following substantial question of law:-

"1) Whether the CESTAT is right in holding that credit once validly taken need not be reversed if the final products becomes exempted subsequently in view of Rule 6(1) of CCR, 2002 which mandates reversal of credit in respect of inputs used in exempted final products?"

8. Supporting the substantial question of law, Mr.A.P.Srinivas, learned counsel for the appellant, submitted that the decision of CESTAT that there is an indefeasible right to CENVAT credit, which cannot be denied or foregone, unless otherwise required by law, for extinguishment of such right, and abridgment of the vested, right is recognised by law with effect from 01.03.2007 incorporating sub-rule 3(2) to Rule 11 of CENVAT Credit Rules, 2004, is not legal and proper approach as per CENVAT Credit Scheme.

9. According to him, the basic object of CENVAT Credit Scheme, is to avoid, cascading effect of duties, on the price of the final product. It is in that view only, the duty paid on the inputs is given back to the manufacturer as credit, if the final product, is cleared on payment of duty. Otherwise, inputs used in the final product are taxed, as inputs, as well as part of the value component of the final product when the final product is taxed, which leads to taxing of the same value component, a number of times, till a final product for ultimate consumption is manufactured, which leads to the cascading effect, making the cost of the products, very high for the consumers. However, if the final product is exempt, since there will not be any duty on the final product, the question of cascading effect of taxes does not arise. Even then, if the credit of the duty paid, on inputs is allowed, then it would amount to, not taxing the inputs as well as the final product manufactured, out of those inputs.

10. Mr.A.P.Srinivas, learned counsel for the appellant further contended that Cenvat provisions, are to be read as a whole, as all the Rules together are meant to explain the legislative intent of CENVAT scheme. According to him, reading of each Rule, in isolation, may not convey the real import of that provision, since each Rule is interconnected with the other Rule. Since it is difficult to implement, one to one correlation, and as it would create a lot of hardship to the manufacturing public, credit taken, on the inputs, is allowed to be utilised, on any of the final products manufactured immediately, after taking the credit, without waiting for the actual utilisation of the inputs. Learned counsel for the appellant submitted that this relaxation provided in law, however, doesn't dilute the touch stone of satisfying the condition that the final products are cleared or to be cleared, on payment of duty. Only in that case, even if the credit is allowed to be immediately used, without insisting for one to one correlation, admissibility of the credit, as contained in Rule 6(1) of CCR would be satisfied, and the object of the law is achieved. In other words, credit is allowed to be taken, and utilised immediately, because the final goods manufactured, out of those inputs, are duty paid / going to be duty paid. However, subsequent to taking credit, if the final goods (which are earlier dutiable), become exempt/non-dutiable, the credit related to the inputs used, in those exempted goods and credit related to the inputs lying in stock, needs to be given back, since these inputs have gone into manufacturing of exempted products.

11. Learned counsel for the appellant submitted that the same reasoning, is followed in SSI the exemption notification. When an unit is availing SSI exemption, CENVAT credit, on the inputs and inputs services, is not allowed, since the final goods, are to be cleared under exemption, without payment of duty. But once the exemption limit of Rs.1.50 crore is crossed, the manufacturer is allowed to take credit of the duty on inputs, lying in stock or contained, in the semi-finished/finished goods, as transitional credit, since from that point of time, the finished goods will be cleared on payment of duty. Again, when the manufacturer opts to avail SSI exemption for the next year, he will have to expunge the credit relating to the inputs lying in the stock or contained in the semi-finished/finished goods, at the time of re-opting for SSI exemption.

12. Mr.A.P.Srinivas, learned counsel for the appellant contended that this is the essence and mainstay of the CENVAT credit scheme. He therefore, submitted that when the final product, becomes exempt from duties, the manufacturer's entitlement to avail the CENVAT credit, ceases.

13. Learned counsel for the appellant submitted that As per Rule 6(1) of CENVAT Credit Rules, 2004 "CENVAT credit shall not be allowed on such quantity of inputs, used in the manufacture of exempted goods", and this implies that, even though the manufacturer is eligible to avail credit on inputs immediately on receipt, the eligibility extinguishes, when the inputs contained in the goods are cleared without payment of duty.

14. According to the learned counsel for the appellant that Rule 11(3) of the CENVAT Credit Rules, 2004, introduced with effect from 01.03.2007, makes reversal of credit of the duty pertaining to inputs lying stock and inputs contained in the exempted finished good, as mandatory, and does not change the legal position of the erstwhile sub-rule 6(1) of CENVAT Credit Rules, 2002. Thus, according to him, Rule 6(1) ibid, clearly disallows credit, in respect of the exempted final products, in terms of which credit has been taken against the inputs used, in the exempted final products, and thus become an irregular credit, and hence require reversal of the same. According to him, Rule 11(3), was introduced only to remove the possibility of any other interpretation, and hence to be considered, as only explanatory.

15. According to the A.P.Srinivas, learned counsel for the appellant, provision under Rule 6(1) ibid, was identical to the erstwhile provision, Rule 57AD of the Central Excise Rules 1944, and this provision was scrutinised by CESTAT, Madras, in the case of Brook Bond Lipton India Ltd Vs CER reported in 2012 (283) ELT 336(AII) wherein, it was held, that allowing Modvat Credit on inputs, brought into the factory, and for which, credit was taken before the date, when the final product, became exempted lying un-utilised, as raw material, the same would amount to unjust enrichment.

16. Learned counsel for the appellant submitted that CESTAT, Madras, has failed to appreciate the above decision of the Allahabad High Court.

17. According to the learned counsel for the appellant, CESTAT, Madras, ought to have considered the decision of the Allahabad High Court, in the case of Super Cassettes Industries Ltd Vs Union of India reported in 1997(94) ELT 302 (All), wherein it has been held under para 9, that the argument of the learned counsel for the petitioner therein was that the credit, once taken, in accordance with the aforesaid rules, is final and since Rule 57G, does not make any provision for reversing the credit the debit entry, the same was wrong.

18. Mr.A.P.Srinivas, learned counsel for the appellant further submitted that CESTAT, Madras, ought to have considered the decision of Delhi Tribunal, in the case of Albert David Ltd Vs CCE, Meerut reported in 2003 (151)ELT 443 (Tri. Del) wherein, it has been held, under para 5 that "there is specific provision in Rule '57AD which clearly provides that, CENVAT credit shall not be allowed on such quantity of inputs, used in the manufacture of exempted goods. Rule 57AH contains provision, for the recovery of CENVAT credit utilised wrongly. As the inputs have been utilised in the manufacture of wholly exempted goods, credit taken, in respect of such inputs, is recoverable".

19. Learned counsel for the appellant submitted that CESTAT, Madras, has come to the conclusion that CENVAT credit is an indefeasible right to the manufacturer, in terms of para 17 of the Hon'ble Apex Court's decision, in the case of CCE, Pune Vs Dai Ichi Karkaria Ltd reported in 1999 (112) ELT 353 (SC) where in the issue decided by the Hon'ble Apex Court was with regard to the cost of the raw material, which required to be taken into account in determining the assessable value of an intermediate product. According to him, the question considered was, whether the cost of the raw material, the price paid by the manufacturer to its seller, as contended by the revenue, or it the price of the raw material, less the excise duty thereon, paid by the seller and for which, the manufacturer is entitled to credit, under the Modvat scheme, to be utilised against payment of excise duty on the products manufactured by him, Include the intermediate product, as contended by the manufacturer"?

20. According to the learned counsel for the appellant, the observation in that context, that "indefeasible right of the manufacturer, to CENVAT credit, cannot be denied or foregone, while deciding the above issue, was discussed by the Allahabad High Court, in the case of Brook bond Lipton India Ltd Vs CER reported in 2012 (283) ELT 336 (All.), the decision of Tribunal's Large Bench, in the case of Khanbhai Esoofbhai & Others Vs CCE, Calcutta and Others reported in 1999 (107) ELT 557 (Tri-LB) that, Modvat Credit taken, in respect of inputs, in stock, will have to be reversed, when the final product, become exempt, at a date subsequent to the receipt of inputs, held that the Hon'ble Supreme Court's observation, was in the context of the specific issue, decided in that context and the decision, should not to be understood, to mean that credit would still be admissible, even if the excisable final product becomes exempt, subsequent to its utilisation.

21. We have heard, Mr.A.P.Srinivas, learned counsel for the appellant and perused the materials available on record, and also perused the decision of the Hon'ble Division Bench of this Court, in C.M.A.No.2737 of 2015 dated 19.06.2017, in the matter of the Principal Commissioner of Central Excise, Chennai Vs. M/s. TVS Electronics Limited, Chennai.

22. In the said decision, after considering, a similar substantial questions of law raised in the instant appeal, at Paragraph Nos.2 to 4, the Hon'ble Division Bench of this court, ordered, as hereunder:-

"2.The appeal was admitted on 17.12.2015 when the following question of law was framed for consideration by this Court:

"Whether the CESTAT is right in holding that credit once validly taken need not be reversed if the final products becomes exempted subsequently in view of the Rule 6(1) of CCR, 2002 which mandates reversal of credit in respect of inputs used in exempted final products ?"

3. Even according to Mr.Srinivas, the learned counsel appearing for the Revenue, the question of law raised is covered by the Division Bench of this Court rendered in Tractor and Farm Equipment Ltd. Vs. Commissioner of Central Excise, Madurai - II [2015 (320) E.L.T.357 (Mad)].

4. We are informed that SLP preferred against the said Judgment was dismissed by the Supreme Court. Accordingly, this appeal will have to be dismissed. It is ordered accordingly. The question of law is answered in favour of the Assessee and against the Revenue."

23. Though, Mr.A.P.Srinivas, learned counsel for the appellant, made submissions of above, going through the material on record, and the decisions relied on, we are of the view that the decision of Hon'ble Court in C.M.A.No.2737 of 2015, dated 19.06.2017, in the matter of Principal Commissioner of Central Excise, Chennai Vs. M/s.TVS Electronics Limited, Chennai, is squarely applicable to the facts of the case on hand. Decision of this Court, is binding on us. Following the same, instant Civil Miscellaneous Appeal is dismissed. No Costs. Substantial questions of law, is answered against the revenue.

-s/d-

Assistant Registrar

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Sub-Assistant Registrar

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To

The Commissioner of Central Excise,
Puducherry Commissionerate,
Beach Road,
Puducherry - 605 001.

+1 CC to Mr.A.P.Srinivas, Advocate Sr.No.87914

C.M.A.No.3405 of 2017

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PVS(CO)
KP(06/02/2018)

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