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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision : 17.07.2018

+ **CEAC 30/2017**

ICON INDUSTRIES, UNITS-I & II Petitioner
Through Mr. Shashwat Bajpai and Mr. Sankalp
A. Sharma, Advs.
versus
COMMISSIONER OF CENTRAL EXCISE -1 NEW DELHI
..... Respondent
Through Mr. Harpreet Singh, Sr. Standing
Counsel with Mr. Suresh Chaudhary,
Advs.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A. K. CHAWLA

HON'BLE MR. JUSTICE S. RAVINDRA BHAT (ORAL)

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Admit.

Mr. Harpreet Singh, Adv. accepts notice.

With the consent of the learned counsel for the parties, the
appeal was heard finally.

The question of law that arises in this case is:-

*“whether in the given circumstances of the case, the
appellant/assessee was entitled to Cenvat credit in
respect of the countervailing duty paid inputs.”*

For the purpose of this, it would be sufficient to notice that Anti Evasion Branch of Central Excise investigated with respect to the manufacture and sale of the appellant's products; search was conducted in its premises on 07.02.2003 in which various articles and many other documents were seized. Later, on 18.02.2003, the assessee secured registration under the Central Excise Act and deposited ₹50 lakhs towards advance duty. The show cause notice was issued on 08.04.2005 with respect to the seizure of goods. Later, the statement of its proprietor Mr. Amit Madan had been recorded on a number of dates of hearings. Given all these circumstances, the appellant had approached the Customs and Excise Settlement Commission which rejected its request for resolution of the case observing that its manufacturing units have not been registered and were not filing returns. The appellant unsuccessfully approached this Court aggrieved by the order of the Settlement Commission.

On 17.10.2012, adjudicating authority (Commissioner) passed the final order. In that order, *inter alia*, the Commissioner rejected the assessee's submissions with respect to the admissibility of Cenvat credit upon the input i.e. amount of countervailing duty paid by the importer M/s Marvellous Impex (another proprietorship concern of Mr. Amit Madan). The findings of the Commissioner on this aspect are as follows:

“66. Now what differentiates the cases relied upon by the noticee from the present case is the fact that the assessee in those cases were registered with respective revenue authorities and had failed to obtain a prior

permission required under the law whereas in the present case neither the supplier of imported raw material (M/s Marvellous Impex) nor the manufacturer (i.e. the noticee) were registered at the relevant time. I also find that the clearances of finished goods were made in clandestine manner without the accompanying invoices prescribed under the rules and without keeping any account as prescribed under the central excise law.

67. *I observe that all these conditions starting from the basic requirement of getting registered with the central excise authorities, maintenance of the records and clearance on payment of appropriate central excise duty are not merely procedural but are of the kind that the Apex Court in the above referred case has described as "of substantive nature as likely to facilitate commission of fraud and introduce administrative inconveniences.*

68. *Thus in due deference to the observations made in judgement of the -Apex Court cited above, the contention of the noticee cannot be accepted and hence the credit of duty paid on the imported raw material cannot be given to the noticee for the reasons as above."*

The assessee appealed to the Tribunal, which by its impugned order rejected its contention with respect to the admissibility of Cenvat credit. The reasoning of the Tribunal *inter alia* is as follows :

*"7. The appellant relied on certain case laws. We find that none of the case deals with the situation now under consideration. In the case of **Formica India Division Vs. CCE 1995 (77) ELT 511 (SC)**, the Hon'ble Supreme Court was examining the appellant's entitlement for the benefit under notification no. 71/71-CE and benefit under*

*Rule 56 A of the Central Excise Rules. The Hon'ble Supreme Court observed that subject to fulfillment of requirements, the appellant shall be eligible to set off duty in terms of Rule 56 A. The Tribunal in the case of **Well Known Polyesters Ltd. Vs. CCE Vapi, 2011 (267) ELT 221** (Tri-Ahmd.) held that non registration of a unit cannot be held as a bar to deny Cenvat Credit/Modvat Credit. In the said case, the availability of relevant document regarding usage of inputs has been clearly recorded by the tribunal. As already noted, the present case is not relating to denial of any Cenvat Credit due to non registration of the assessee.*

8. *Here we are dealing with the case of transaction without any document relating to duty paid receipt of PVC resin as raw material. If that being the case, the question of duty paid nature of such raw material cannot be ascertained. M/s. Marvellous Impex discharged CV Duty on the import does not automatically entitle the appellant for the credit of such duty. To repeat, Cenvat Credit can be availed, only on documented receipt of duty paid inputs where the receipt for such duty payment on such raw material form evidence in terms of Rule 9 of Cenvat Credit Rules 2004. In the illicit transaction involving the raw material PVC resin the question of having any "documented receipt of such raw material and more importantly, duty payment of such input cannot be established. In the present case, no such attempt is being made by the appellant for obvious reasons. The main plea of the appellant is that since illicit receipt of unaccounted raw material has been confirmed in the adjudication, the credit available on such raw materials should be allowed. We find no legal or factual support in such assertion. Duty paid nature of the input is an*

absolute essential condition for availing credit. Such duty should have been suffered by the person who avails the credit. The same should be supported by documents. None of these conditions are met in the present case.”

Learned counsel for the assessee contends that the sales tax is unsustainable and contrary to the binding decisions of the Supreme Court in *Formica India Division vs. Collector of Central Excise*, 1995(77) ELT 511 (SC) as well as those of Allahabad High Court in *Commissioner of Service Tax Noida vs. Atrenta India Pvt. Ltd.*, 2017 (48) STR 361; *Rukmini Industries vs. Commissioner of Central Excise*, 2014(308) ELT 649 (AP) and that of the Karnataka High Court in *mPORTAL India Wireless Solutions P. Ltd. vs. C.S.T.*, 2012 (27) STR 134.

It is urged that the assessee was in fact given the benefit of an SSI Unit while computing its final tax liability but its claim for Cenvat credit turned down because it did not possess any document. It was submitted that since there was no dispute at least with respect to the countervailing duty – rather revenue’s case and the findings of the Commissioner were that Marevellous Implex was another proprietorship concern of Mr. Amit Madan and that it had imported PVC resin that found its way to the assessee’s unit instead of being utilized by ostensible user M/s Hemant Trading (a fictitious firm), at least, with respect to these inputs i.e. the extent of countervailing duty and the amount paid, there were documents which could not have been ignored. Learned counsel for the revenue relied upon the

findings of the Commissioner to say that the importer M/s Hemant Trading was an entirely fictitious firm. Having regard to these facts, the assessee's arguments with respect to its entitlement to Cenvat credit for the CVD paid in respect of imported items were clearly untenable. Learned counsel relied upon a recent Constitution Bench Judgment of the Supreme Court reported as *Commissioner of Central Excise vs. Hari Chand Shri Gopal*, 2010 (260) ELT 3 (SC).

The issue in *Formica* (supra) was whether the assessee could legitimately claim modvat credit benefit in respect of an intermediary product despite its non-compliance with the concerned norms and regulations which entitled it to avail that benefit. The Supreme Court held that it could not be denied such benefit on technicality, observing as follows:

“2. The High Court, however, took note of the fact that no contention had been raised before the Tribunal that the appellants should be permitted to meet the requirements of Rule 56-A of the Central Excise Rules and, therefore, they cannot be permitted to avail of that benefit in a writ petition brought under Article 226 of the Constitution. That indeed was a technical view to take because if the appellants were entitled to the benefit of the Notification No. 71/71-CE dated 29-5-1971, to deny that benefit on the technical ground of non-compliance with Rule 56-A would be tantamount to permitting recovery of double duty on the intermediary product. The circumstances in which the appellants did not pay the duty on the intermediary product before putting the same to captive consumption for producing that stage, the

appellants contested the correctness of the classification and had, therefore, not paid the duty on the intermediary product. When it was found that they were liable to pay duty on the intermediary product and had not paid the same, but had paid the duty on the end product, they could not ordinarily have complied with the requirements of Rule 56-A. Once the Tribunal took the view that they were liable to pay duty on the intermediary product and they would have been entitled to the benefit of the notification had they met with the requirements of Rule 56-A, the proper course was to permit them to do so rather than denying to them the benefit on the technical ground that the point of time when they could have done so had elapsed and they could not be permitted to comply with Rule 56-A after that stage had passed. We are, therefore, of the opinion that the appellants should be permitted to avail of the benefit of the notification by complying at this stage with Rule 56-A to the satisfaction of the Department.”

In *Rukmini Industries* (supra), like in the present case, the issue involved was denial of credit on the ground of suppression of manufacture and clearance of duty of goods. The High Court even while rejecting the assessee's grievance with respect to the invocation of the extended period of limitation, nevertheless proceeded to permit the benefit of credit that could be availed in respect of purchase of intermediary products or inputs. The observations of the High Court in fact refer to the law declared by the Supreme Court in *Formica* (supra) and read as follows :

“16. The very premise on which a show-cause notice was issued resulting in the adjudication order fastening liability of the excise duty, is that appellant had in fact purchased raw material in 27 third parties names and utilized the said raw material in manufacture of a dutiable product and cleared the finished product without payment of duty. In the process of adjudication the authorities recorded a finding that in fact the appellant was involved in procurement of raw material and manufacture and sale of dutiable product and demanded tax. It is not in dispute that in normal circumstances the appellant would have been eligible to avail modvat credit on the purchase of LAB, raw material, which was used in the manufacture of the dutiable product. The modvat credit is sought to be denied to the appellant on the ground that the appellant had involved in suppressing the turnover. A perusal of the Rules would show that there is no rule prohibiting extending the benefit of modvat credit in a case where it is found that there was a suppression of manufacture and clearance of dutiable goods. Though in the context of the Income Tax Act, we may refer to the judgment of the Supreme Court referred to above, wherein the Honble Supreme Court held as follows:-

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Likewise, the Allahabad High Court in *Atrenta India Pvt. Ltd.* (supra) and Karnataka High Court in *mPORTAL India Wireless Solutions P. Ltd.* (supra) followed the reasoning in *Formica*. In the last mentioned decision *mPORTAL India Wireless Solutions P. Ltd.* (supra), the only issue was entitlement of the assessee to Cenvat credit for a period of time when it was not registered. The Court held as follows :

“7. The assessee is a 100 per cent export oriented unit. The export of software at the relevant point of time was not a taxable service. However, the assessee had paid input tax on various services. According to the assessee a sum of Rs. 4,36,985 is accumulated Cenvat credit. The Tribunal has categorically held that even though the export of software is not a taxable service but still the assessee cannot be denied the Cenvat credit. The assessee is entitled to the refund of the Cenvat credit. Similarly insofar as refund of Cenvat credit is concerned, the limitation under section 11B does not apply for refund of accumulated Cenvat credit. Therefore, bar of limitation cannot be a ground to refuse Cenvat credit to the assessee.

8. Insofar as requirement of registration with the Department as a condition precedent for claiming Cenvat credit is concerned, learned counsel appearing for both parties were unable to point out any provision in the Cenvat Credit Rules which imposes such restriction. In the absence of a statutory provision which prescribes that registration is mandatory and that if such a registration is not made the assessee is not entitled to the benefit of refund, the three authorities committed a serious error in rejecting the claim for refund on the ground which is not existence in law. Therefore, said finding recorded by the Tribunal as well as by the lower authorities cannot be sustained. Accordingly, it is set aside.”

From the above discussion, it is clear that the question of granting of benefit of input credit or input tax adjustment towards final tax liability of an assessee has engaged the attention of the Court on

many occasions. The context of these disputes have been many fold; in one class of cases, the benefit was claimed for a pre-excise registration period; in the other class of cases, it was when the benefit of exemption notification could not be given to the manufacturer; in yet another category, the issue involved like in the present case, was clandestine removal.

In the present case, this Court notices that the Commissioner in fact found that there is a complete identity with respect to *Icon Industries* (assessee on the one hand and M/s Marvellous Impex, the importer which had procured the PVC resin). The only finding was that M/s Marvellous Impex had imported the goods for use of M/s Hemant Trading (another firm created by the assessee proprietor). That firm did not carry on any activity and appear to be fictitious one. Nevertheless the product in question, PVC resin, was used to manufacture PVC battery separator by the assessee. The findings of the Commissioner in this regard are as follows:

“38. From the foregoing it appeared that:

- i) Shri Amit Madan was the proprietor in both units of M/s Icon Industries located at A44, Mangolpuri (Unit - I) and T-2/182, Mangolpuri -Industrial Area, Phase-I , Delhi (Unit II);*
- ii) the party suppressed the facts of manufacture and clearance of battery separators from the department in order to evade Central Excise duty;*

iii) M/s. Icon Industries at both of its units was engaged in the clandestine manufacture & clearance of excisable goods i.e. PVC battery separators;

iv) the party manufactured and cleared the battery separators or. kacha private records without accountal, without issuance of proper invoice, without payment of Central Excise duty and without following the Central Excise procedure;

v) the party had generated a fictitious firm working in the name and style of M/s. Oasis Enterprises, 435, Panja Sarif, Kashmeeri Gate, Delhi, 110006 and was transporting the goods manufactured in their factories at Unit-I&II to the outstation parties under the invoices issued from M/s Oasis Enterprises to suppress their production and clearance so as to evade Central Excise duty and to avoid detection of manufacturing unit by the govt. authorities during transportation of the goods;

vi) M/s. Marvellous Impex, also a proprietorship concern of Sh. Amit Madan, proprietor of M/s. Icon Industries which was engaged in importing and trading of a special type of PVC Resin used in the manufacturing of Battery Separators created a fictitious firm in the name and style of M/s Hemant Trading Co., Hissar, which exists only on paper to which they were showing sale of the said PVC Resin to keep the account of imported material but in fact the said PVC Resin was being consumed in units I & II of M/s ICON industries for the manufacture and clearance of PVC battery separators without accounting and without payment of Central Excise duty;

vii) The party was also misleading-the govt. agency by showing their address in the invoices as 84A, Badli

Extension, Delhi.. 42 for the goods manufactured and cleared from the units I & 2 located at Mangolpuri Industrial Area;

viii) No proper records were maintained either in unit-I or in unit-II for Purchase of raw material and clearance of finished goods.

39. Since both the manufacturing units belong to the same firm i.e. M/s. Icon Industries having the same proprietor manufacturing the same product in the same name, the clearances of both the units was clubbed and Central Excise duty is being demanded from both the units as kacha private records were recovered from both the units evidencing the surreptitious manufacture and clearance of excusable goods further.

40. Shri Amit Madan was also the proprietor of M/s Marvellous Impex, Delhi who were engaged in the import of PVC Resin, a raw material for PVC battery separators. By showing the PVC Resins imported by M/s Marvellous Impex sold to M/s Hemant Trading Co Hissar (a fictitious firm which exists only on paper) but actually consumed in the units I & II of M/s Icon Industries (Mr. Amit Madan, was the proprietor in both the units), and also diverted the PVC Resin to M/s Icon Industries (unit I & II) by way of showing cash sales to un-identified customers they have rendered themselves liable for penal action”.

In view of the above findings, there is no dispute that the inputs used i.e. PVR resin was by the assessee M/s Icon Industries; in fact, the basic duty liability and penalty have been imposed on the basis of these findings. However, it is equally a matter of record that certain

quantity of PVR resin too was used as a raw material. There may be no doubt that with respect to other inputs the assessee did not possess any document. However, that ought not have blinded the authority taking note of material which did exist on record (in the form of the payments made towards CVD) which can be legitimately claimed as input credit by the assessee. The record as it stands today also points to the assessee being given the benefit of SSI status and its consequential entitlement to such exemptions as are permissible. Given these circumstances and findings, the denial of Cenvat credit benefit to the assessee, was not justified. The impugned order of the Tribunal is therefore set aside. The respondent-Central Excise Authorities are directed to proceed to grant such Cenvat credit as is permissible to the appellant/assessee, having regard to the documents which are on record and which may be relevant and can be produced by it for the purpose. The question of law is answered in favour of the assessee and against the Revenue.

The appeal is allowed in the above terms.

S. RAVINDRA BHAT, J

A. K. CHAWLA, J

JULY 17, 2018

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