Neutral Citation No.2023:PHHC:086110-DB

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

1. **CEA No.4 of 2022 (O&M)**

The Principal Commissioner, Central Goods
& Services Tax Commissionerate, Ludhiana ... Appellant

Versus

M/s Avon Meters Private Limited ... Respondent

2. **CEA No.5 of 2022 (O&M)**

The Principal Commissioner, Central Goods
& Services Tax Commissionerate, Ludhiana ... Appellant

Versus

M/s Dipika Polymers Private Limited ... Respondent

Date of Decision: 24.05.2023

CORAM: HON'BLE MS. JUSTICE RITU BAHRI
HON'BLE MRS. JUSTICE MANISHA BATRA

Argued by: Mr. Tajender K.Joshi, Senior Standing Counsel,
for the appellant.

Mr. Puneet Bali, Senior Advocate,
with Mr. Surjeet Bhadu, Advocate,
Mr. Sachin Jain, Advocate and
Mr. Vishavjeet, Advocate,
for the respondent(s).

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RITU BAHRI, J.

1. This common judgment shall dispose of the above mentioned two appeals, which have been filed under Section 35 G of the Central Excise Act, 1944 (for short 'Act, 1944') seeking setting aside of common

final order dated 03.12.2019 (Annexure A-2), received on 11.12.2019, passed by Customs, Excise and Services Tax Appellate Tribunal, Chandigarh Bench (for short 'Tribunal') in Appeal No.E/60940/2019 (in CEA No.4 of 2022) and Appeal No.E/61024/2019 (in CEA No.5 of 2022). However, for facility of reference, the facts are being taken from CEA No.4 of 2022.

2. Briefly narrated, the relevant facts of the case are that the assessee Company namely, M/s Avon Meters Private Limited is engaged in the manufacture of Energy Meters. It has been availing CENVAT Credit in terms of provisions of CENVAT Credit Rules, 2004 (for short "Rules, 2004"). On 11.02.2015, on the basis of an information received qua large scale evasion of Central Excise Duty by the assessee, its premises were searched by a preventive team of Central Excise Department. Physical verification of stock of inputs as well as finished goods was conducted. During the search proceedings, it was found that stock of BOPET film (poly film) was short to the extent of 6949.900 kgs and it was showing balance of 6971.900 kgs. The search team also recovered 25 invoices most of which were shown to be issued on the same date i.e. 31.01.2015. Several other irregularities were found by the search team during the course of search which revealed that the assessee Company was engaged in paper transaction without actual receipts on goods qua which cenvat credit had been claimed by it. Statement of Sh. Ramesh Sharma, Incharge, Electronic Store of the assessee was recorded under Section 14 of the Act, 1944 who admitted that no material against the 25 invoices as mentioned above had infact been received by the assessee. A show cause notice was issued against the

assessee on 30.08.2016 and amount of Rs.7,84,04,706/- was demanded as this much amount of cenvat credit was held to be wrongly availed by the assessee. The revenue while issuing this notice invoked its powers under Rule 14 of Rules, 2004 read with Section 11-A of the Act, 1944. Interest was also claimed. The assessee filed reply to the show cause notice. Statements of Directors of the assessee Company, its suppliers and buyers were also recorded. The matter was adjudicated by the adjudicating authority and demand of duty of Rs.6,27,92,944/- was confirmed along with interest and penalty of equivalent amount, vide order dated 12.07.2019 (Annexure A-1).

3. Feeling aggrieved from the order passed by the assessing authority, the assessee Company preferred appeal before the Tribunal. The said appeal was allowed vide order dated 03.12.2019 by the Tribunal. The appellant revenue has filed the appeal bearing CEA No.4 of 2022 against the main assessee Company M/s Avon Meters Private Limited and appeal bearing No.CEA No.5 of 2022 against M/s Dipika Polymers Private Limited who was claimed to be one of the suppliers of goods qua which cenvat credit had wrongly been claimed by the assessee Company.

4. Learned counsel for the revenue vehemently argued that the order passed by the Tribunal was not sustainable in the eyes of law and was perverse as it had gravely erred in recording findings to the effect that cenvat credit was admissible on the goods which were found in the stock of the respondent-assessee as it had not been ascertained whether such goods were inputs of the respondent-assessee or not. It had wrongly observed that it was not the case of the revenue that there was any shortage of inputs

though it was specifically alleged in the show cause notice that there was shortage of 6949.900 kgs of BOPET film. No entries qua the specific raw material were found to be made in the stock register of the respondent which proved that it had camouflaged the actual receipt and use of plastic granules of different varities. The respondent had not shown stock of wires and cables though it was shown to be purchased by it. Fraudulent paper transactions were proved to have been made. The revenue had not only relied upon the statements of the officials of the assessee but also suppliers, buyers and transporters which proved that the respondent-assesse had been indulged in bogus transactions and had been availing cenvat credit on goods which were not actually purchased. The learned Tribunal committed a grave error by holding that the statements of different persons could not be taken into consideration as the revenue had not allowed the assessee Company to cross-examine them. He further argued that the allegations as levelled against the assessee were found to be correct not only on the basis of the statements of its Directors, suppliers and buyers etc. but also on the basis of other material available on record but this fact had been wrongly ignored by the Tribunal. He further argued that the adjudicating authority had based its findings supported by credible and corroborative evidence collected not only from the buyers, transporters and suppliers but also upon the test report of samples drawn from the buyers which proved that only polycarbonate was being used by the assessee for the manufacture of energy meter body parts and the other plastic granules which were shown to be purchased by the assessee and qua which the cenvat credit had been claimed, were infact not been used and the assessee had indulged in paper transaction to show purported purchase of these goods. Learned counsel for the revenue further argued that the actual receipts of raw materials in form of plastic granule of different categories had not been established and in the absence of the same, the respondent-assessee was not entitled to avail cenvat credit merely on the basis of fraudulent paper transactions but while ignoring this fact, the Tribunal had allowed the appeal filed by the assessee. With these broad arguments, it was submitted that the impugned order as passed by the Tribunal was liable to be set aside, the same being a non-speaking and perverse order and the appeals filed by the revenue deserved to be allowed.

5. Per contra, it was argued by learned counsel for the respondent-assessee that the findings as given by the Tribunal were well reasoned and did not warrant any interference. He submitted that the dispute as raised by the revenue was purely on facts and no substantial question of law was involved in the cases in hand. The revenue had failed to establish any suppression of facts, fraud or contravention of statutory provisions on the part of the respondent-assessee. It had conducted a faulty investigation. No efforts were proved to have been made by the revenue to ascertain as to how much quantity of polycarbonate was required to manufacture the energy meters and at the time of search, exactly how much quantity had been consumed. The copies of statements of transporters, suppliers and buyers of the respondent-assessee had not been supplied to it nor opportunity to cross-examine such persons had been provided to the assessee despite request being made and, therefore, principles of natural justice were violated by the revenue. The revenue and the adjudicating authority had wrongly concluded that the goods qua which cenvat credit had been claimed by it had not been

received by it. He further argued that the information received from the expert from CIPET Chennai, regarding feasibility of mixing of polycarbonate granules with granules of polymers etc. was not conclusive and as the expert had also opined that polycarbonate could be mixed up with granules of polymers of ethylene (PE), granules of polymers of propylene (PP) or granules of polymers of styrene (PS). He further argued that the goods qua which cenvat credit had been claimed by the respondent-assessee were proved to have been passed through Information Collection Centres (for short "ICC") of the State of Punjab at different points of time but this fact had been ignored by the adjudicating authority. It was further argued that the revenue had failed to produce any material on record to show that the goods qua which the cenvat credit had been claimed, were diverted to any third party or that the amount of money shown in the invoices through which they had been purchased was returned to the respondent. It was further argued that this Court even otherwise could not reappreciate the evidence and conclude that the findings of fact as recorded by Tribunal were incorrect. Hence, it was argued that the appeal was devoid of any merits and was liable to be dismissed. To fortify his arguments, learned counsel for the respondent has placed reliance upon authorities cited as **Commissioner, Central Excise, Ludhiana v. M/s Pee Jay International Limited Village Jaspalon, Ludhiana**, passed in CEA No.187 of 2005 decided on 21.04.2010 by a Division Bench of this Court; **D.Dasappa (D) Tr. LRS and another v. Arakaiah (D) By LRS and others**, passed in Special Leave to Appeal (Civil) No.19202 of 2010 decided on 31.01.2011; **Commissioner of Central Excise & Customs,**

Aurangabad v. Ador Welding Ltd., 2015 (325) E.L.T. 6 (S.C.); **Commissioner of Central Excise, Hyderabad v. Electronics Corpn. of India Ltd.**, 2015 (322) E.L.T. 804 (S.C.); **Commissioner of Central Excise, Ludhiana v. Malwa Cotton Spinning Mills Ltd.**, 2009 (244) E.L.T. 503 (P&H); **Commissioner of Central Excise, Jaipur-I v. Welcure Drugs & Pharmaceutical Ltd.**, 2015 (317) E.L.T. 436 (Raj.); **Commissioner v. Meghmani Dyes & Intermediates Ltd.**, 2013 (288) E.L.T. 514 (Guj.) & **Andaman Timber Industries v. Commissioner of Central Excise, Kolkata-II**, 2015 (324) E.L.T. 641 (S.C.).

6. We have heard learned counsel for both the parties at considerable length and have gone through the record carefully.

7. On perusal of record, it emerges that the revenue had proceeded against the respondent-assessee mainly on the ground that during the period from 2011 to 2015, it had wrongly availed cenvat credit on inputs in the form of plastic granules other than polycarbonate by showing that these inputs were used and consumed in relation to manufacturing of energy meters, electric wires, cables, electronic parts and battries. At the outset, it may be stated that Rule 2 (k) of the Rules, 2004, defines "input" as under:-

> “(k) “input” means -
>
> (i) all goods used in the factory by the manufacturer of the final product; or
>
> (ii) any goods including accessories, cleared along with the final product, the value of which is included in the value of the final product and goods used for providing free warranty for final products; or
>
> (iii) all goods used for generation of electricity or steam [or

pumping of water] for captive use; or

(iv) all goods used for providing any [output service, or];

(v) all capital goods which have a value upto ten thousand rupees per piece."

8. Rule 4 of the Rules, 2004 is also relevant as per which the cenvat credit in respect of the inputs may be taken immediately on receipt of the inputs in the factory of the manufacturer or in the premises of the provider of output services or in the premises of job worker, in case goods are sent directly to the job worker on the direction of the manufacturer.

9. The claim of the respondent assessee is that it had been purchasing inputs which are different forms of plastic granules for the purpose of manufacturing of energy meters and its allied products and had actually purchased and used these inptus whereas according to the appellant from the statements given by the suppliers of these inputs, it stood proved that no such inputs had infact been purchased by the respondent assessee and only paper transactions had been done. Further as per the appellant, the final product i.e. energy meters, the samples of which were sent for testing were proved to have been manufactured by use of polycarbonate only and not by use of other inputs i.e. plastic granules etc. qua which credit had been claimed. The revenue had also raised a contention that even the statements of transporters of the assessee confirmed that no such inputs were sent to the respondent on their transport vehicles and received by it. The Tribunal had observed that since the persons whose statements had been recorded during the course of search and investigation and had been relied upon by the appellant, were not allowed to be cross-examined by the

adjudicating authority and this opportunity was denied to the respondent assessee, therefore, all such statements could not be relied upon. The Tribunal in this regard had referred to Section 9-D of the Act, 1944. It may be mentioned that as per Section 9-D, a statement made and signed by a person before any Central Excise Officer of a gazetted rank during the course of any inquiry or other proceedings under the Act, 1944, will be relevant and admitted in evidence when the person who made such statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable. In this case, it was observed by the Tribunal and it has also been noticed that the persons whose statements had been relied upon by the adjudicating authority while coming to the conclusion that the inputs qua which cenvat credit had been claimed by the respondent assessee had infact not been purchased, received and used by it, were not put to examination-in-chief during the adjudicating proceedings and no opportunity of cross-examination of such witnesses who were stated to be suppliers of the goods/inputs, officials of the respondent assessee, transporters of the inputs and even buyers, was granted to the assessee. It was neither the case of the appellant nor any material has come on record to show that it was not possible for the appellant revenue to procure the attendance of some of these witnesses without undue delay or expense or due to any other reason such person could not be produced for cross-examination. Since the revenue had chosen to heavily rely upon the statements of such persons, therefore, it was for the revenue to make such persons available for cross-examination for their evidence or statements to be considered and as it was not done so, therefore, in our considered opinion, the learned Tribunal had rightly ignored the statements of such persons for arriving at a conclusion that the order passed by the adjudicating authority was liable to be set aside.

10. Proceeding further, the adjudicating authority had also placed reliance upon the testing report/opinion given by one Dr. K. Prakalathan, Manager (Testing), CIPET, Chennai regarding the inputs used for manufacturing of the energy meters, the samples of which were sent to him for the purpose of testing. The adjudicating authority had observed that it was revealed from the report of the CIPET Chennai that the samples of energy meters were manufactured with polycarbonate only. It is relevant to mention here that the report of the Manager (Testing) as such has not been produced on record but it is revealed from the order passed by the adjudicating authority that the expert had opined that the mixing of polycarbonate with non polar plastic granules like granules of polymers of ethylene (PE), granules of polymers of propylene (PP) or granules of polymers of styrene (PS) was difficult. The Tribunal had observed that this report could not be considered to be conclusive on the point that the body part of energy meter could not be manufactured by mixing polycarbonate with plastic granules of the type which were of the inputs in dispute in this case. The Tribunal had relied upon the admission made in the opinion so given by Dr. K. Prakalathan to the effect that polycarbonate could be mixed with granules of polymers of ethylene (PE), granules of polymers of propylene (PP) or granules of polymers of styrene (PS) if some additive

compatibilizer was added into the mixture, which pointed out that on mixing some additive compatibilizer, meter body could be manufactured by using polycarbonate as well as plastic granules of polymers of ethylene (PE), granules of polymers of propylene (PP) or granules of polymers of styrene (PS). On perusal of the record, we see no reason to differ with the observations as made by the Tribunal on this point as the report of the testing officer cannot be stated to be conclusive on the point that energy meter could not be manufactured by mixing of the inputs in dispute i.e. plastic granules of polymers of ethylene (PE), granules of polymers of propylene (PP) or granules of polymers of styrene (PS) and especially when all these inputs in quesiton undisputedly qualified as engineering materials. Therefore, the observations made by the Tribunal on this point also deserve to be affirmed.

11. The Tribunal had also taken note of the fact that in most of the instances of showing purchase of inputs, entries were shown to have been made qua reaching of those goods in the factory of the respondent assessee through the ICC of the State of Punjab wherein the factory of the respondent assessee is existing which was also sufficient indication of the fact that inputs in question had been sent to and received in the factory premises of the respondent assessee. The adjudicating authority had also observed that the invoices showing purchase of goods/inputs in dispute from various suppliers were paper transactions and this observation was made by relying upon statements of the suppliers. As also observed, such statement could not be considered to be relevant and admissible and hence had rightly not been relied upon by the Tribunal. The revenue failed to produce any

material on record to show that either the goods qua which invoices were issued by the suppliers had been diverted to some third party or there was any instance of the money being received back in cash by the assessee as shown to be paid on account of purchase of the disputed inputs. The appellant-revenue had also failed to ascertain as to how much quantity of the inputs was required for manufacturing finished goods which were found at the time of the search. The Tribunal analyzing the material placed on record before it had found that the appellant had failed to prove that the inputs in question were not utilized by the respondent assessee for manufacturing of final product. The dispute which has been raised by the appellant before us is purely of facts and no substantial question of law can be stated to be involved in the same. It is well settled that in an appeal under Section 35 G of the Act, 1944, this Court cannot re-appreciate the evidence and conclude that the finding of fact is incorrect so the appeal can only be maintained on the substantial question of law. Since the findings recorded by the Tribunal are essentially the findings of fact recorded on appreciation of material brought on record the same cannot be gone into by this Court under Section 35 G of the Act, 1944. In this regard, we place reliance upon the observations made by High Court of Gujarat in **Meghmani Dyes & Intermediates Ltd.'s** case (Supra); by Hon'ble Apex Court in **Andaman Timber Industries's** case (Supra) and by Coordinate Benches of this Court in **M/s Pee Jay International Limited's** case (Supra) and **Malwa Cotton Spinning Mills Ltd.'s** case (Supra).

12. In view of the discussion as made above, we find no merit in the appeal filed by the revenue against the main assessee M/s Avon Meters

Private Limited. Accordingly, the same is dismissed. Since CEA No.5 of 2022 has been filed by the revenue against M/s Dipika Polymers Private Limited on the allegation that it being supplier of goods to the main assessee i.e. M/s Avon Meters Private Limited had wrongly passed cenvat credit to the respondent assessee and against the same common order dated 03.12.2019 which was passed qua the main assessee as well and as the respondent assessee has not been held liable to pay the cenvat credit amount or penalty thereby therefore, in our opinion, the respondent in CEA No.5 of 2022 cannot also be held liable to pay any penalty. Accordingly, the CEA No.5 of 2022 also does not deserve to be allowed and hence the same is also dismissed. There is no order as to costs.

13. All miscellaneous application(s), if any, also stand disposed of.

(RITU BAHRI)
JUDGE

(MANISHA BATRA)
JUDGE

24.05.2023
manju

Whether speaking/reasoned Yes/No
Whether reportable Yes/No