(2020) 12 CESTAT CK 0002

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Excise Appeal No. 50633 Of 2019

Commissioner, Central Excise And GST Indore APPELLANT

Vs

Dwekam Electrodes Pvt. Ltd RESPONDENT

Date of Decision : 08-12-2020

Acts Referred:
Central Excise Rules, 2002 — Rule 16

Citation : (2020) 12 CESTAT CK 0002

Hon'ble Judges : Dilip Gupta, J;P. Anjani Kumar, Technical Member

Bench : Division Bench

Advocate : O.P. Bisht, Hemant Bajaj

Final Decision : Dismissed

Judgement

1. The Department has filed this appeal to assail the order dated December 12, 2018 passed by the Commissioner (Appeals) Indore The

Commissioner (Appeals) by which the appeal filed by M/s. Dwekam Electrodes Private Limited, Indore the respondent to assail the order dated

September 12, 2018 passed by the Additional Commissioner has been allowed and of the order passed by the Additional Commissioner has been set

aside.

2. The period of dispute in the present appeal is from April 2016 to June 2017. The show cause notice was issued on April 3, 2018.

3. The respondent is engaged in manufacture of welding electrodes, saw flux, saw wire, filler wire and carbon dioxide wire along with flux cored wire,

ever since its inception. With effect from October 1, 2012, a portion of the factory of the respondent was leased to D&H Secheron Electrodes (Pvt.)

Ltd. Unit 2, whereby certain manufacturing facilities for manufacture of welding electrodes, saw flux, saw wire, filler wire and carbon dioxide wire went to Unit-2. Thus, the manufacturing facility with the respondent was remained only in relation to the flux cored wire. It has been stated by the

respondent that the process of manufacture of each of the finished products involves ovenizing and packing, for which the requisite paraphernalia is

available in both the units. Thus, even after lease of the part of its area to Unit 2 by the respondent, if any product which is being produced in Unit-2, is

required by the customers of respondent, then the same in semi-finished form (pending only ovenizing and packing) is sourced from Unit-2 and is

subjected to the aforesaid processes to convert the same into finished products and supplied to the customers.

4. The respondent took CENVAT credit of duty paid by Unit-2 and discharged the excise duty on the clearance to its customers, which were at

enhanced prices on account of value addition done by it. Thus, the duty liability discharged on finished goods cleared by respondent was always more

than the CENVAT credit availed by it on the semi-finished goods received from Unit-2.

5. The Department initiated an investigation into the availment of CENVAT credit by the respondent. It was alleged by the Department that the

respondent never received any goods in semi-finished condition from Unit-2, since it did not have the facility to manufacture the finished goods from

them. On the contrary, what was received by the respondent from Unit-2 was fully finished goods which were cleared as such by the respondent to

its customers.

6. It transpires that a show cause notice dated July 7, 2016 was earlier issued to the respondent for the previous period from October 2012 to March

2016 seeking to recover CENVAT credit with interest from the respondent on the ground that the invoiced goods were finished goods on which no

process was undertaken by the respondent in its factory and thus the said goods were merely traded by respondent. The show cause notice also

proposed to impose penalty on the respondent, Unit-2 and M.D. Khatri, Managing Director of Unit-2. After considering the reply filed both by the

respondent and Unit-2, the Principal Commissioner, Central Excise, Indore by order dated January 16, 2017 confirmed the demand of CENVAT credit

to the respondent with interest and penalty and also imposed penalties on Unit-2 and M.D. Khatri. The said order was assailed by the respondent and

Unit-2 before this Tribunal in Central Excise Appeal Numbers 50627 of 2019, 50628 of 2019 and 50629 of 2019. The Tribunal by order dated

September 18, 2018 allowed the benefit of CENVAT credit to the respondent on the ground CENVAT credit cannot be denied to the respondent,

irrespective of the fact whether such procedure / activity would amount to manufacture or not since excise duty was paid and accepted by

Department while clearing the goods which were received from Unit-2 in semi-finished state. It was further held that the respondent paid excise duty

more than CENVAT credit availed, and thus there is no loss to the Department. Consequently, the penalties imposed upon Unit-2 and M.D. Khatri

were set aside by Tribunal. The relevant portion of the order is reproduced below:

â??8. After hearing both the parties, we are of the opinion as follows:-

8.1 That Appellant No.1 who was initially manufacturing the impugned goods, leased out the entire manufacturing set up of these products

to Appellant No.2 w.e.f. 01.10.2012 except for the manufacture of Flux Cord Wire. In addition, Appellant No.1 still retained the mechanism

or set-up for converting the semi-finished goods into the finished products by conducting ovenizing and packing thereupon. It is apparent

from the record with no apparent objection of the Department that these finished products were being cleared by Appellant No.1 after

payment of the excise duty. It is also apparent from the agreement between both the appellants that irrespective plant & machinery licenses

and brand-name qua the impugned products were allowed to be used by Appellant No.2 but the products manufactured by Appellant No.2

were still allowed to be marketed by Appellant No.1 only under its own brand-name and it was Appellant No.1 from whom the Department

was collecting the duty on the finished products. It is also apparent from the record that during the period of dispute Appellant No.1 has

paid a total duty of Rs.2,20,67,060/-.

9. The said entire arrangement has duly been deposed by Shri K.K.Kale, the Technical Director of Appellant No.1 but it is observed that the

Adjudicating Authority below has utilized the said statement in piecemeal manner ignoring the gist of the said entire statement. The record

about receipt of goods in the factory of Appellant No.1 alongwith the record of Appellant No.2 was well produced on record. It appears that the adjudicating authority is miserably silent about scrutinising the said record. It is, therefore, opined that the adjudicating authority

has committed an error while merely relying upon the lease agreement about manufacturing setup to have been leased out to the Appellant

No.2. The factum of converting the semifinished goods into finished one by the Appellant No.1 itself and the factum of presence of the set-up

about ovenizing and packing required for converting the products into finished states with Appellant No.1 as well has miserably been

ignored. Hence we are of opinion that ld. Principal Commissioner has definitely committed an error, while confirming the impugned

demand.

10. Irrespective that the process of said ovenizing and packing may not amount to manufacture but the apparent and admitted fact remains

is that Appellant No.1 only had paid the Excise duty while clearing the goods which were received from Appellant No.2 in semifinished state.

Once the Department has accepted the duty on goods, Cenvat Credit ought not to be denied by them irrespective the procedure is not that of

the manufacture as was appreciated by the Honâ??ble Apex Court in Creative Enterprises (Supra) case. The Honâ??ble Apex Court in

this case has mentioned that even if the activity done by the assessee is not of the manufacture, if the duty paid is accepted by the

Department and the same is more than the credit availed, in such case, the assessee is not required to reverse the credit availed by them. The

situation stands clarified by the Departmentsâ?? own Circular No.911/01/2010 â?" CX dated 14.01.2010. In the present case, the Cenvat

Credit availed is Rs.2,05,59,139/- against the Central Excise duty of Rs.2,20,67,060/- on the goods cleared by the Appellant No.1. The duty

paid stands more than the credit availed. Seen from this angle also, there is no loss to the Revenue. This has also been overlooked by the

adjudicating authority below.

11. Further, Rule 16 of Central Excise Rules, 2002 comes to the rescue of the Appellant in term thereof;

- If any duty paid goods are brought to any factory for being re-made, refined or re-conditioned or for any other reason, then, the assessee

can avail the Cenvat Credit thereon.

- Further, if the goods are subjected to the process of manufacture, then, at the time of removal, the manufacturer is liable to pay excise

duty thereon.

- However, if the goods are not subjected to the process of manufacture, then, the assessee is required to reverse the Cenvat Credit availed

on the goods at the time of receipt.

12. Tribunal Mumbai in the case of Apollo Tyres Ltd. vs. CCE, Pune - 2011 (272) ELT 84 has held that even if the goods are received in the

factory and are cleared as such after storage, the said Rule 16 permits availment of credit at the time of receipt and requires reversal of

credit availed at the time of clearance thereof. Since Appellant No.1 has availed the Cenvat Credit on the goods at the time of receipt and

has paid a higher amount as duty at the time of clearance thereof, thus, it appears that he has complied with the provisions of said Rule

16.â??

7. The present appeal relates to demand, raised against the respondents, for a subsequent period from April 2016 to June 2017. The show cause notice

dated April 3, 2018 in this appeal for the subsequent period April 2016 to June 2017 contains allegations that are identical to those contained in the

previous show cause notice dated June 7, 2016 issued for the period October 2012 to March 2016. After considering the replies filed by the

respondent, including Unit-2 and M.D. Khatri, the Additional Commissioner by order dated September 10, 2018 confirmed the denial of CENVAT

credit amounting to Rs. 76,74,458/- against the respondent with interest and also imposed penalty of Rs. 38,50,000/- upon the respondent. Further,

penalty of Rs.12,00,000/- and Rs.6,00,000/- were also imposed upon Unit-2 and M.D. Khatri, respectively.

8. However, the Commissioner (Appeals) by order dated December 12, 2018, after noticing that the issue had been settled in favour of the respondent

for the previous period by the Tribunal by order dated September 18, 2018, allowed the benefit of CENVAT credit to the respondent by setting aside

the order dated September 10, 2018 passed by the Additional Commissioner. The penalties imposed upon Unit-2 and M.D. Khatri were also set aside.

9. It is against the aforesaid order passed by the Commissioner (Appeals) allowing CENVAT credit in favour of the respondent that the Department

has filed the present appeal.

10. A preliminary submission has been raised by Shri Hemant Bajaj, learned counsel appearing for the respondent that the appeal filed by the

Department is liable to be dismissed for the reason that the issue raised in this appeal has already been decided by the Tribunal and the order passed

by the Tribunal in favour of the respondent has not been set aside in any proceedings.

11. Learned authorised representative appearing for the appellant states that he is not aware whether any appeal was filed by the Department against

the order dated September 18, 2018 passed by the Tribunal or whether the order has been set aside.

12. The order passed by the Tribunal was against the Department and, therefore, the Department should be aware as to whether any appeal has been

filed or not. In any view of the matter as the Department has not placed on record any decision setting aside the aforesaid order of the Tribunal, the

present appeal filed by the Department deserves to be dismissed for the reasons stated by the Tribunal in the order dated September 18, 2018.

13. The appeal filed by the Department is accordingly, dismissed.

(operative part of the order pronounced in the open court)

