

(2025) 04 CAL CK 0926

In the Calcutta High Court, Original Side

Case No : CEXA No. 1 Of 2019 IA No: GA No. 1 Of 2019

Commissioner Of Central Excise, Kolkata III Commissionerate

APPELLANT

Vs

M/S. Texmaco Limited

RESPONDENT

Date of Decision : 25-04-2025

Acts Referred:

Central Excise Act, 1944 — Section 4, 4A, 11D, 11DD, 35B

Central Excise Rules, 1944 — Rule 57CC, 57CC(1)

CENVAT Credit Rules, 2004 — Rule 6, 6(3), 6(3)(a), 6(3)(b), 6(3)(c)

Citation : (2025) 04 CAL CK 0926

Hon'ble Judges : T.S. Sivagnanam, CJ;Chaitali Chatterjee (Das), J

Bench : Division Bench

Advocate : Bhaskar Prasad Banerjee, Abhradip Maity, Somak Basu, Swagato Kabiraj

Final Decision : Dismissed

Judgement

T.S. Sivagnanam, CJ

1. This appeal has been preferred by the appellant/revenue under Section 35B of the Central Excise Act, 1944 (the Act), challenging the order passed by the Customs, Central Excise and Service Tax Appellate Tribunal, Kolkata, East Regional Bench in Appeal No. E/176/2009-DB, CO-58/2009 dated 18th May, 2018.

2. This appeal was heard by the Division Bench on 16th January, 2019 and the Hon'ble Division Bench held that no substantial question of law is involved in the appeal. However, the Hon'ble Division Bench set aside the impugned order passed by the Tribunal and directed the Tribunal to re-hear the appeal properly in accordance with law and determine the same with reasons upon hearing the parties within a time frame. The assessee preferred appeal before the Hon'ble Supreme Court in SLP(C) No(s). 1716/2020. The Hon'ble Supreme Court by order dated 14th February, 2024 set aside the order passed by the Hon'ble Division Bench dated 16th January, 2019 with a direction to this Court to dispose

of the appeal in accordance with law as expeditiously as possible. This is how the matter was listed before the Court for consideration.

3. The department upon receiving the order passed by the Hon'ble Supreme Court placed a Lay Note before the Chief Justice dated 4th April, 2024. The Chief Justice by Note dated 4th April, 2024 directed the matter to be placed before the Hon'ble Division Bench as per determination. The department directed the matter to be listed before a particular Hon'ble Division Bench by endorsement dated 5th April, 2024. Subsequently, the matter could not be heard since one of the Hon'ble Judges presiding over the said Division Bench had retired. Therefore the matter was once again placed for appropriate orders before the Chief Justice and the matter was directed to be placed before the Hon'ble regular Bench having determination, that is, this Court. This is how the appeal stands restored and has been taken up by this Court for consideration.

4. We have elaborately heard Mr. Bhaskar Prasad Banerjee, learned Senior Standing Counsel appearing for the appellant/revenue and Mr. Somak Basu, learned Counsel appearing for the respondent/assessee.

5. The Commissioner of Central Excise, Kolkata-III issued show-cause notice to the respondent/assessee dated 16th July, 2008 calling upon the respondent/assessee as to why the amount collected in the name of the central excise duty and the amount collected in the name of education cess from the buyers under separate invoices issued during the period from 14.8.2003 to 04.2.2006 in excess of the duty determined or paid by them to the Central government, shall not be paid/recovered from the assessee under Section 11D of the Act; why interest under Section 11DD should not be paid/recovered from the assessee.

6. The assessee submitted their reply dated 19.8.2008, after which the adjudicating authority took up the show-cause notice for adjudication and by order dated 31.12.2008 accepted the submissions made by the assessee and dropped the proceedings in the show-cause notice dated 16.7.2008. Aggrieved by such order, the revenue preferred appeal before the Tribunal and the learned Tribunal by the impugned order dated 18.5.2018 has dismissed the appeal filed by the revenue and challenging the said order, the present appeal has been filed.

7. The appellant/revenue has raised the following substantial questions of law for consideration:-

"(i) Whether the respondent being the manufacturer of the final products removed the goods without payment of Central Excise Duty as exempted goods and issued invoice for imbursement of Central Excise duty and collected the said amount is liable to pay Central Excise Duty in terms of Section 11D of the Central Excise Act, 1944?

(ii) Whether the amount of reversal of Cenvat Credit in terms of Rule 6(3)(b) of the Cenvat Credit Rules by other unit can be construed as payment of Central Excise duties and the respondent can deny his liability to pay Central Excise duty

by virtue of the said reversal?

(iii) Whether the decision of Unison Metals Limited –Vs- Commissioner of Central Excise, Ahmedabad-I, reported 2006(204) E.L.T 323(Tri. LB) is applicable to the present case?”

8. After we have elaborately heard the learned Advocates for the parties, we find that the issue which falls for consideration in the instant case lies in a very narrow compass. The contention of the appellant/revenue is that the assessee has a unit at Belgharia which manufactures couplers/bogies and supplies to their another unit at Agarpara as well as to other manufacturers. The revenue contended that the assessee collected a particular sum of amount under the invoices describing the amount as central excise duty without depositing the same. Similarly, they also collected the education cess. Therefore, it was contended that the assessee was required to pay the said amounts collected in the name of central excise duty and education cess.

9. The contention of the assessee was that it is not in dispute that from the Belgharia unit, the couplers/bogies were removed to the Agarpara unit without payment of duty as provided under Notification No.6/2002-CE and after remitting 8% or 10% of the price of the same in terms of Rule 6(3)(b) of the CENVAT Credit Rules, 2002/04. Further, the assessee contended that the Agarpara unit manufactures railway wagons with inputs namely, couplers and bogies received from their Belgharia unit as well as their own manufacture of couplers and bogies. Further, the allegation that the assessee collected the amount from the railways under invoices describing the same as central excise duty was denied as being incorrect. In this regard, relevant invoices were referred to wherein the assessee has claimed for reimbursement of total price of couplers and bogies as per procurement invoices. Further, paragraph 2(iv) of the contract dated 9.7.2003 and contract dated 21.5.2004 with the Railway Board and the Clarification issued by the Railway Board vide letter dated 07. 12.2006 were referred to wherein the amount of 8% or 10% remitted by the manufacturer of the bogies and couplers as per Rule 6(3)(b) of the Rules, would be reimbursed by the railway as part of cost of wagons supplied by the assessee company against submission of documentary evidence of payment of 8% or 10%. Therefore, the assessee contended that there is no dispute that the assessee company is not liable to pay duty on either couplers, bogies or wagons and therefore, question of collection of any amount in excess of the duty paid does not arise at all. In support of their contention, the assessee placed reliance on the decision of the larger Bench of the Tribunal in the case of Unison Metals Ltd. vs. Commissioner of Central Excise, Ahmedabad-1, [2006 (204)ELT 323 (Tri.LD)]. The learned Tribunal considered the factual position and found that the reversal of the amount was done by the assessee's Belgharia unit from where the couplers and bogies were collected without payment of duty by the assessee and there was no dispute about the reversal of 8% or 10%. Furthermore, the Tribunal on facts noted that the amounts were duly debited by the Belgharia unit

in terms of Rule 6(3) of the Rules and it was not alleged that the Belgharia unit raised any demand for recovery of the said amount separately from where it was recovered through the bill and they have been paid. Furthermore, the Tribunal noted that in the assessee's own case in Excise Appeal No.465/2007, dated 13.5.2016, the appeal was allowed by relying upon the decision of the larger Bench in the case of Unison Metals Ltd. Therefore, the learned Tribunal accepted the case of the assessee and dismissed the appeal filed by the revenue.

10. Further, it is relevant to take note of the Circular issued by the Central Government being Circular No. 870/08/2008-CX, dated 16.5.2008, wherein reference was made to an earlier Circular being Circular No. 599/36/01-CX, dated November, 2001, wherein the issue of applicability of the provisions of Section 11D of the Act in cases of payment made under the erstwhile Rule 57CC(1) of the Central Excise Rules, 1944 was examined. It was brought to the notice of the Central Board that there are some decisions of the Tribunal contrary to the said Circular. Further, Rule 6 of the CENVAT Credit Rules, 2004 has been amended with effect from 1.4.2008, which necessitated the Board to re-examine the earlier Circular in the light of the subsequent developments. The Board took note of the decision of the larger Bench of the Tribunal in the case of Unison Metals Ltd., wherein it was held that Section 11D provides that any amount which has been collected as excise duty and not paid to the credit of the Central Government shall be liable to be recovered. The Central Board pointed out that the scheme of law is that the manufacturer shall collect amount falsely representing them as central excise duty and retained them, thus, unjustly benefitting themselves. However, in case of payments made under the erstwhile Rule 57CC(1), Section 11D of the Act is not applicable since the amount of 8% or 10% has already been paid to the revenue and no amount is retained by the assessee. To be noted, that the decision of the larger Bench of the Tribunal in Unison Metals Ltd. was accepted by the department.

11. In the light of the same, the matter was re-examined by the Central Government. It is noted that Sub-rule (3) of Rule 6 of the CENVAT Credit Rules, 2004 has been amended with effect from 1.4.2008 to provide for payment of an amount equal to 10% of the value of the exempted goods, instead of 10% of the exempted goods as provided earlier. The value is to be determined as per Section 4 or Section 4A of the Central Excise Act, 1944 read with the Rules made thereunder.

12. In the light of the above position, it was clarified by the Central Board that as long as the amount of 8% or 10% is paid to the Government in terms of the erstwhile Rule 57CC of the Central Excise Rules, 1944, or Rule 6 of the CENVAT Credit Rules, 2004, the provisions of Section 11D shall not apply even if the amount is recovered from the buyers. Therefore, it was further clarified that the CENVAT credit of the said amount of 8% or 10% cannot be taken by the buyer since such payment is not a payment of duty in terms of Rule 3(1) of the CENVAT Credit Rules, 2004. With the above clarification, Circular No. 599/36/01-CX,

dated November, 2001, was withdrawn.

13. In the instant case, the assessee has adopted the CENVAT credit account and has remitted the amount. Whether this procedure can be followed would be another issue. Such issue came up for consideration before the Hon'ble Division Bench of this Court in the case of Kesoram Spun Pipes And Foundries Ltd. vs. Commissioner of Central Excise & Ors., APO No.391 of 2017, GA No.2872 of 2017 in WPO No.681 of 2014 and by judgment dated 15.3.2019 the assessee's appeal was allowed and the order passed in the writ petition was set aside. At this juncture, it would be relevant to take note of the following paragraphs of the said judgment.

"The matter pertains to Rule 6 of the CENVAT Credit Rules, 2004. Such Rule pertains to the obligation of the manufacturer to make a distinction in maintaining accounts relating to the use of inputs in taxable and exempted goods if inputs on which CENVAT credit has been availed of are used in the manufacture of both exempted goods and taxable goods. Broadly speaking, if the manufacturer avails of CENVAT credit in respect of inputs and manufactures final products which are chargeable to duty or tax as well as final products that are exempted goods, then the manufacturer is required to maintain separate accounts for receipt, consumption and inventory of inputs for use in the manufacture of dutiable final products and separate accounts for similar purpose for use of the exempted inputs in the manufacture of exempted goods. Rule 6(3) (a) of the said Rules of 2004 provides a scheme. However, since the appellant in this case did not follow such scheme, the same is not relevant for the present purpose. Rule 6(3)(b) of the said Rules of 2004 provides as follows:

"if the exempted goods are other than those described in condition (a), the manufacturer shall pay an amount equal to ten per cent of the total price, excluding sales tax and other taxes, if any, paid on such goods, of the exempted final product charged by the manufacturer for the sale of such goods at the time of their clearance from the factory;"

There are Explanations which apply to the entirety of Rule 6(3) of the said Rules, including the following first Explanation:

"The amount mentioned in conditions (a) and (b) shall be paid by the manufacturer or provider of output service by debiting the CENVAT credit or otherwise.""

"According to the appellant, the appellant calculated the 10% in terms of Rule 6(3)(b) of the said Rules of 2004 and passed it on to the purchasers of the relevant goods from the appellant; but instead of depositing such amount of 10% collected from the purchasers of the appellant's exempted goods, the appellant debited the equivalent amount from the CENVAT credit obtained by the appellant. There is no dispute that the debit of the CENVAT credit matched the amount recovered by the assessee on account of excise duty from its vendors."

"It is clearly such position which was addressed at paragraph 8 of the judgment of the larger Bench of the Tribunal in Unison Metals Limited. Though such judgment dealt with the 8% duty that was relevant at that point of time under Rule 57CC of the 1944 Rules, the legal principle enunciated was that if there was several modes of making the payment and one of them was adopted, that would do. That appears to have been the ratio in Unison Metals Limited as accepted by the authorities in the circular of May 16, 2008. That the circular of May 16, 2008 came after the judgment of the adjudicating authority was delivered makes no difference since such circular is clarificatory in nature and does not change the position at all.

Since the appellant in the present case adopted the scheme under Rule 6(3)(c) of the Rules of 2004 to which the first Explanation to the sub-rule was also attracted, there was an option available to the appellant to either make over the amount that was realized by the appellant by way of excise duty from the appellant's purchasers or to debit the CENVAT credit obtained by the appellant by the equivalent amount. There is no dispute that the appellant did, in fact, debit the CENVAT credit by the equivalent amount. If the CENVAT credit can be seen as money in the hands of the assessee in some other form, the debiting of the CENVAT credit by an equivalent amount, tantamounts to such amount having made over to the excise authorities or refunded to the excise authorities or the like."

14. The above legal position has been rightly taken note of by the Tribunal apart from noting that in the assessee's own case in Excise Appeal No. 465 of 2007, dated 13.5.2016 following the decision of the larger Bench of the Tribunal in the case of Unison Metals Ltd., granted stay of the demand.

15. In the light of the above discussion, we find the Tribunal was fully justified in dismissing the revenue's appeal and we find no questions of law, much less substantial questions of law, arising for consideration.

16. The appeal thus fails and is dismissed.

17. Consequently, the stay application, IA No: GA/1/2019, also stands dismissed.