
(2021) 08 CESTAT CK 0008

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Excise Appeal No. 50973 Of 2020

Gemscab Industries Ltd

APPELLANT

Vs

Commissioner, Central Goods And Service Tax

RESPONDENT

Date of Decision : 03-08-2021

Acts Referred:

Cenvat Credit Rules, 2004 — Rule 3, 14
Central Excise Act, 1944 — Section 57A(1)

Citation : (2021) 08 CESTAT CK 0008

Hon'ble Judges : Rachna Gupta, J

Bench : Single Bench

Advocate : Hemant Bajaj, Tarun Trehan, Ravi Kapoor

Final Decision : Allowed

Judgement

1. Present appeal has been filed to assail Order in Appeal No. 333/2019 dated 12.12.2019 passed by the Commissioner (Appeals) disallowing the

Cenvat Credit amounting to Rs. 4,67,165/- with interest and the penalty of same amount. The relevant factual matrix in brief is as follows:

2. The appellant is engaged in manufacture of electric wire and cables and are availing the facility of CENVAT Credit under CENVAT Credit Rules,

2004 (CCR hereafter). Initially the returns filed by M/s.

Shiv Industries were scrutinised by Superintendent, Central Excise and Service Tax Range and it was observed that M/s. Shiv Industries have cleared

the goods of PVC Filler Hollow on payment of duty and have wrongly passed on the CENVAT Credit despite the fact that said PVC was

manufactured by PVC waste and scrap and which was unconditionally exempted under Notification No. 12/2012 from payment of Central Excise

duty.

3. Consequent to these observations against M/s. Shiv Industries, a show cause notice bearing No. 668 dated 04.05.2017 was served upon the

appellant being the recipient of 'PVC Filler Hollow' from said

M/s. Shiv Industries proposing the recovery of Rs. 23,75,829/- alleged to be a wrongly availed CENVAT Credit by the appellant passed on the invoices

issued by 7 different manufacturers of the raw material i.e. 'PVC Filler Hollow'. The said proposal of reversing the aforesaid amount of

CENVAT Credit was initially confirmed vide Order in Original dated 23.10.2017. In an appeal against the said order, Commissioner (Appeals), vide

his order dated 10.12.2018 had remanded the matter to the Original Adjudicating Authority for passing a speaking order after ascertaining whether

'PVC Filler Hollow' supplied by suppliers other than M/s. Shiv Industries was reprocessed from the scrap or waste on which the duty was not

required to be paid.

4. Consequent to the said order of remand, the Original Adjudicating Authority vide order dated 26.4.2019, has allowed the CENVAT Credit on

import/ 'PVC Filler Hollow' as was supplied to the

appellant by M/s. 21st Century Packaging, M/s. Sunbeam Electrical Industries and M/s. Chaitanya Polymers, thus dropping the demand of Rs.

19,08,664/- holding the said amount of CENVAT Credit was available to the assessee. However, recovery of Rs.4,67,165/- credit was still confirmed

with interest and the penalty of same amount. An appeal was preferred against the said order which has been decided by the Order under challenge.

Commissioner (Appeals) has allowed the CENVAT Credit for remaining other suppliers of the appellants except for the inputs supplied by M/s. Shiv

Industries thereby confirming the reversal of CENVAT Credit to the extent of Rs. 2,93,035/-.

2. Still being aggrieved the appellant is before this Tribunal.

3. I have heard Shri Hemant Bajaj and Shri Tarun Trehan, learned Counsels appearing for the Appellant and Shri Ravi Kapoor, Authorised

Representative appearing for the Department.

4. It was submitted on behalf of the appellant that the appellant is the manufacturer of wire and cables. One of the important raw material is 'PVC

Filler Hollow'. It has received the said raw material from 7 different supplier against the appropriate invoices which shows the amount of duty

paid on the material supplied. It otherwise has nowhere been denied by the Department that the supplier of the appellant had paid duty and on â??PVC

Filler Hollowâ?? at the time of its clearance from their premises. It is impressed upon that these facts are sufficient to show that the appellant has

rightly availed the Cenvat Credit for an amount of Rs. Rs. 23,75,829/-. It is further submitted that the supply from M/s. Shiv Industries is held to be of

said â??PVC Filler Hollowâ?? which has been manufactured from PVC scrap and waste and that the same is unconditionally exempted from

payment of Central Excise duty in terms of Boardâ??s Circular No. 940/1/2011-CX dated 14.1.2011 which stand amended by Notification No. 12/12

CE. It is submitted that irrespective the duty is admittedly been paid and once the same has been paid on the import of material which is input for the

appellant to manufacture its final product, the CENVAT Credit is rightly been availed by the appellant. Learned Counsel has laid emphasis upon

settled law that the assessment made at the supplierâ??s end cannot be reopened at the end of recipient of the goods. Learned Counsel has placed

reliance upon the decision of Apex Court in the case of Sarvesh Refractories (P) Ltd. vs. Commissioner of Central Excise & Customs, reported in

[2007 (218) ELT 488 (SC)]. It is submitted that Rule 3 CCR entitles the manufacturer to avail CENVAT Credit on valid duty paid imports. There is

no provision in entire CCR which disallows availment of CENVAT Credit despite the duty paid on inputs. Learned Counsel has relied upon the

decision of Madras High Court in the case of CCE, Chennai-I vs. CEGAT, Chennai reported in [2006 (202) ELT 753 (Mad)] to impress upon that for

the purpose of availment of CENVAT Credit, duty actually paid is relevant and concept of duty payable is not relevant for availing the CENVAT

Credit.

5. It is further impressed upon by the learned Counsel on behalf of the appellant that the issue about the applicability of Boardâ??s Circular No.

940/1/2011-CX dated 14.1.2011 as amended by Notification No. 12/12 CE, was also considered by the Bangalore Bench of this Tribunal in the case

of Neuland Laboratories Ltd. vs. CCE, Hyderabad reported in [2015 (317) ELT 715 (Tri-Bang)] wherein it was held that when the Boardâ??s

Circular which has been issued without taking into consideration the implications of the provision and that too instructions on the assessee cannot be

applied blindly to arrive at a conclusion against the assessee. This finding have mentioned to have been confirmed by Honâ??ble High Court of

Andhra Pradesh. It is mentioned that entire onus was on the Revenue to distinguish the manufacturing process of M/s. Shiv Industries from that of six

other suppliers while allowing the CENVAT Credit with regard to the inputs received from six suppliers and denying the availment of CENVAT

Credit on the inputs supplied by M/s. Shiv Industries. There is no evidence that M/s. Shiv Industries was manufacturing â??PVC Filler Hollowâ??

from the PVC waste and scrap. Order of Commissioner (Appeals) is not at all sustainable. Finally, it is submitted that the judgement as relied upon by

the Commissioner (Appeals) in the order under challenge are having absolutely different facts from the facts of the present appeal. All those decisions

are about the amount of rebate claim whereas the present appeal involves the issue of availment of CENVAT Credit on â??PVC Filler Hollowâ??.

The order under challenge is accordingly, prayed to be set aside and appeal is prayed to be allowed.

6. While rebutting the submissions, learned Authorised Representative impressed upon that the Commissioner (Appeals) has reasonably distinguished

the case of M/s. Shiv Industries from that of other six suppliers of the appellant. There has been letter from Jurisdictional Authorities of Central

Excise Sikar to the fact that M/s. Shiv Industries are manufacturing â??PVC Filler Hollowâ?? out of scarp and waste of the goods and as such has

wrongly paid duty on the said product. The CENVAT Credit availed on said duty paid by the appellant therefore, has been held to be irregular, for rest

of the manufacturer. Paragraph 10 and 14 of the order under challenge is impressed upon to be a reasonable and judicious decision about the finding

arrived at by the Commissioner (Appeals). It is further mentioned that since the product of M/s. Shiv Industries was exempted from payment of duty,

payment of excise duty by said manufacturer M/s. Shiv Industries cannot be called as duty, it shall always be voluntary payment. Since Rule 3 CCR

only talks about credit of duty paid. Commissioner (Appeals) has revealed no wrong while disallowing the credit to the appellant on the ground that the

payment made by M/s. Shiv Industries cannot be called as duty, irrespective of the settled law that classification cannot be reopened at the end of

recipient of goods. From that angle, there is no infirmity in the order under challenge, the appeal is accordingly prayed to be dismissed.

7. After hearing the rival contentions of the parties and perusing the entire record, I find that the appellant who are engaged in the manufacture of electric wire and cable were availing the benefit of Cenvat Credit of duty paid on the input i.e. "PVC Filler Hollow" so received from 7 different suppliers/ manufacturers thereof. However, the Revenue seek to deny the CENVAT Credit availed on the invoices of one supplier out of said seven supplier i.e. M/s. Shiv Industries on the ground that the inputs / "PVC Filler Hollow" supplied by him are exempted from payment of duty in terms of Board Circular No.940/1/2011-CX dated 14.1.2011 and Notification No. 12/12 CE, and the manufacturer thereof i.e. M/s. Shiv Industries has wrongfully paid the duty on the said product. Accordingly, the duty paid by M/s. Shiv Industries and availed as CENVAT Credit by the appellant stand denied to the appellant along with imposition of penalty of identical amount.

8. Thus the moot controversy to be adjudicated here is as to whether the CENVAT Credit availment can be denied to the assessee on the ground that the supplier of raw material was not liable to pay the duty on the goods supplied. Following facts apparent on record are opined to be relevant for the said adjudication.

1. The input supplied to the appellant falls under Chapter heading 3904 which covers polymers of vinyl chloride or other halogenated olefins, in primary forms and the Chapter Note do not specify that the goods covered under Chapter Heading 3904 are those which have been manufactured out of scrap and waste by the chapters specified in Notification No.12/2012-CE.

2. The inputs have been received by the appellant against the genuine invoices which shows goods falling under Chapter 3904 and that duty at appropriate rate thereupon as has already been paid.

3. The notification does not exempt "PVC Filler Hollow" from duty except for such PVC which has been manufactured from PVC waste and scrap.

4. There is no evidence about the "PVC Filler Hollow" supplied by M/s. Shiv Industries to have been manufactured by waste and scrap except for the letter from Jurisdictional authorities of Central Excise.

8. In view of the above admission of duty being paid by M/s. Shiv Industries and that there is no cogent evidence that PVC of M/s. Shiv Industries is

covered under Notification No. 12/2012, the relief in respect of the said duty paid including the availment of CENVAT Credit by the recipient of the

goods on which the duty was paid, cannot be denied. This has been the settled law that once the raw material has suffered the excise duty, then the

relief should be granted in respect of duty payable on final products. The perusal of the provisions of CCR makes it abundantly clear that the

terminology used in the relevant provisions in Rule 3 erstwhile Section 57A (1) is 'paid' and not 'payable'. Hon'ble High Court at

Madras in the departmental matter reported as [2006 (202) ELT 753 (Mad)] has held that the said terminology is sufficient to consider the factual

state of affairs that as to whether the duty has actually been paid on the raw material and not whether duty was payable or not. The decision of

Bangalore Bench of this Tribunal in Neuland Laboratories Ltd. vs. CCE, Hyderabad [2015 (317) ELT 705 (Bang)] has held :

4. .. that the assessing officer in-charge of the assessee who has taken the credit cannot sit in judgment as to whether the duty was

payable or not on the goods supplied. What is required to be examined is whether duty has been paid or not and if duty has been paid by

the supplier/assessee, the receiving assessee cannot be found fault with if he takes Cenvat credit of the duty paid so long it is used as input

and Cenvat credit is admissible. I find that the decision of Hon'ble High Court of Madras in the case of Commissioner of Central

Excise, Chennai-I v. CEGAT, Chennai [2006 (202) E.L.T. 753 (Mad.)] is applicable to the facts of this case. In that case, the Hon'ble

High Court came to the conclusion that Rule 57A(1) of Central Excise Rules, 1944 provides for availment of Cenvat credit of duty paid and

not payable. The High Court observed that this distinction is very important and which indicates that what is to be taken into account is the

factual state of affairs. Thereafter, the Hon'ble High Court observed that once the duty has actually been paid on the raw material, the

credit is admissible. In this case also, it is not the case of the Revenue that duty was not paid. Therefore, the decision of the Hon'ble

High Court of Madras is clearly applicable to the facts of this case. Even the amended Cenvat Credit Rules have similar provisions and

provide for Cenvat credit of duty paid on inputs and therefore the appeal has to be allowed.

6. It is the fact that he is not required to determine the duty payable since what is provided in Rule 3 is that he shall be eligible to take credit

of the duty paid. He is not required to determine the duty payable which is a part of assessment and is required to be done by the supplier of

the goods. If the arguments advanced by learned AR are accepted, the duty payable is also to be determined by the receiver of the goods and

he has to determine that aspect first and then take credit, the assessee is required to assess all the goods/services received which is

definitely not contemplated by the statute. It is... The responsibility of the receiver of the inputs/capital goods is to ensure that duty has

been paid and the same has been received by him, accounted for by him and utilized by him properly. I do not think that law requires the

receiver of the inputs/capital goods to undertake this activity and therefore, even though there is no specific discussion on this aspect in the

decision of the Hon'ble High Court of Madras, yet, I feel that the decision would be applicable to the facts of the case before me.

7. It is. The Board assumes that if an assessee takes credit of duty which was not required to be paid but paid, availment of credit would

attract the provisions of Rule 14 of the Cenvat Credit Rules. The conclusion is that the credit which was taken wrongly would arise when an

assessee is required to determine whether the inputs/capital goods received by him are liable to duty or not and whether duty is payable or

not. There is no rule which puts an obligation on the receiver of goods. When we take note of the fact that the assessee may receive

inputs/capital goods/services classifiable under almost all the headings, it is... the Board's Circular which has been issued without taking

into consideration and considering the implications of the provisions and implications of the instructions on the assessee cannot be applied

blindly to arrive at a conclusion against the assessee.

Thus the issue is no more res integra as has been settled for the availment of CENVAT Credit on the duty which stand actually paid. Commissioner

(Appeals) has neglected the settled law while not extending the benefit of this settled law in favour of M/s. Shiv Industries despite invoking the settled

law with respect to remaining six suppliers.

9. Coming to another aspect that classification of the goods cannot be changed

at the recipient's end, the issue is again settled and is no more res integra as is apparent from the decision of Hon'ble Apex Court in the case of Sarvesh Refractories (P) Ltd. vs. Commissioner of Central Excise & Customs (supra) wherein it has been held that the classification by the manufacturer only has to prevail, the same cannot be altered at the buyer's end. Once M/s. Shiv Industries has classified its PVC under Chapter Heading 3904 and admittedly Chapter heading 3904 is not merely for such PVC which is manufactured by scrap and is exempted from duty. The said classification cannot be denied by the appellant specially when the invoices received by him shows the payment of duty by his supplier. The Hon'ble Apex Court in another decision of Commissioner of Central Excise & Customs vs MDS Switchgear Ltd. has held that while considering availability of CENVAT Credit to manufacturer in respect of some inputs procured by him from another manufacturer, the quantum of duty already determined by the jurisdictional officers of supplier unit cannot be contested or challenged by officer in charge of recipient unit specially when there is no evidence produced that the assessment of duty at the end of domestic supplier is reviewed and the duty paid by them is reviewed by them. In such a situation, in given facts and circumstances, there is no question arises for denying the CENVAT Credit to the appellant. Hon'ble High Court at Punjab and Haryana has followed this decision in the case of Commissioner of Central Excise, Chandigarh vs Ranbaxy Labs Ltd. reported in [2006 (203) ELT 213 (P&H)].

10. In view of the observed admission and settled law, the question of adjudication is answered in negative holding that CENVAT Credit cannot be denied on the ground that the supplier was not liable to pay the duty on the goods supplied. Also it is observed that the finding of Commissioner (Appeals) about M/s. Shiv Industries that the product supplied by them was exempted from payment of duty is based merely on the letter from the Jurisdictional Incharge. There is no further investigation about the manufacturing process of M/s. Shiv Industries. Said letter of the concerned officer is also silent about it. There is no discussion in the impugned order about any mention in the letter of Jurisdictional officer about manufacturing process of M/s. Shiv Industries and about using the scrap for manufacture of their PVC Filler Hollow. Nor there is any iota of evidence about the

manufacturing process of six other supplier. In the absence thereof, I hold that the Revenue has failed to discharge its onus. Otherwise also allowing

the availment of Credit on the same product supplied by other suppliers and denying the credit with respect to one single supplier amounts to disparity.

There is no reasonable justification apparent in the order. The case law relied upon by the Adjudicating Authority below is not relevant to the facts and

circumstances of the present case. The order under challenge is accordingly, hereby set aside. Consequent thereto, appeal stands allowed.

Consequential benefits to follow.

(Pronounced in the open Court on 03.08.2021)