(2024) 10 CESTAT CK 1195

In the Customs, Excise And Service Tax Appellate, New Delhi

Case No : Excise Appeal No.2686 of 2010

M/s Neeru Enterprises @APPELLANT @Hash Commissioner, Customs & Central Excise @RESPONDENT

Date of Decision : 16-10-2024

Acts Referred:

Central Excise Act, 1944 — Section 9D, 9D(1), 11A, 11A(1), 11AB, 11AC, 35E
CENVAT Credit Rules 2004 — Rule 4(1), 9(3), 9(5), 14, 15(2)

Citation : (2024) 10 CESTAT CK 1195

Hon'ble Judges : Dilip Gupta, President (J);P. V. Subba Rao, Member (T)

Bench : Division Bench

Advocate : Rajesh Kumar Yadav, Mihir Ranjan Kumar

Final Decision : Allowed

Judgement

Dilip Gupta, J

This appeal has been filed by M/s. Neeru Enterprises, the appellant to assail that part of the order 17.05.2010 passed by the Commissioner that denies CENVAT credit of Rs. 4,00,101/- availed by the appellant on Crude Mentha Oil and for recovery of the said amount under rule 14 of the CENVAT Credit Rules, 2004, the 2004 Credit Rules read with the first proviso to section 11A(1) of the Central Excise Act, 1944, the Central Excise Act. The order also imposes penalty under rule 15(2) of the 2004 Credit Rules read with section 11AC of the Central Excise Act with interest.

2. The appellant is a manufacturer of Mentha Products namely-Menthol Crystal, menthol Powder, Peppermint Oil and Menthone. These final products are chargeable to excise duty. The appellant used Menthol as a raw material for the manufacture of Mentha products and availed CENVAT credit of the excise duty paid by the appellant.

3. The appellant purchased one consignment of 5400 Kgs. of Menthol (inputs) from Amarnath Industries, a manufacturer-supplier situated in Jammu, through Invoice No. 09 dated 14.05.2002. According to the appellant this was received in

the factory and used for manufacture of the final product. The appellant, therefore, availed CENVAT credit of duty amounting to Rs. 4,00,101/- paid on the said inputs.

4. A show cause notice dated 20.08.2008 was issued to the appellant. This was a common show cause notice issued to as many as eight entities, including the appellant (Noticee No. 5), M/s. Amarnath Industries (Noticee No. 1) and M/s. Sharp Mint Ltd. (Noticee No. 2). The show cause notice called upon the appellant to show cause why CENVAT credit availed by the appellant on Menthol (inputs) purchased from Amarnath Industries through the Invoice dated 14.05.2005 should not be denied and recovered. The relevant paragraphs 87, 88 and 96 of the show cause notice are reproduced below:

"87. The investigatin conducted has revealed that both the noticees i.e. M/s. SMIL and M/s. SAIL used to procure their raw materials from various manufacturers of Menthol and its derivatives in Jammu & Kashmir including M/s. Amarnath Industries, Kathua (J&K). On scrutiny of the records of M/s. AL, it is seen that they had supplied their entire products to M/s. SMIL & SAIL except a few consignments, the details of which are appended below:-

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Name of the consignee

No. & Date of invoice

Name of the goods

Qty. received

1.

Siva Export Corporation, Baddi

03/04.05.05

DFPO (Shivalik)

3600

2.

Neeru Enterprices, Rampur

09/14.05.06

Menthol

5400

3.

Shri Ashok Kumar Gangyal, Jammu

61/22.07.05

Terpenes

2160

4.

Diamond Paint and Chemicals, Kathua

179/08.02.06

Terpenes

700

5.

Diamond Paint and Chemicals, Kathus

183/11.02.06

Terpenes

720

The investigation conducted against M/s. AI and the facts emerged out thereof as discussed in the forgoing paras, warrants further investigation at the recipients end.

88. M/s. Siva Export Corporation and M/s. Neeru Enterprises:

It has been observed from the table at para 87 above that M/s. AI had supplied one consignment of goods said to be DFMO (Shivalik) to M/s. Shiva Export Corporation Baddi (herein after referred to as SEC) and another consignment said to be Menthol to M/s. Neeru Enterprises (herein after referred to as NE), Rampur. Investigations as discussed in paras Supra have proved conclusively that the consignment supplied to the abovesaid concern were only Crude Oil. Investigations was also extended to the said purchasers end under summons proceedings (RUD-33). In response to the summons none of them appeared. However they have informed that they had received the materials from M/s. Amarnath Industries, Kathua and the Central Excise duty involved on the said supplies of goods has been taken as Cenvat credit and utilized the same for the purpose of clearance of finished products.

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96. M/s SMIL, M/s. SAIL, M/s. SEC & M/s NE thus has violated/contravened the following rules.

(a) Rule 4(1) of the Cenvat Credit Rules 2004 in as much as the Cenvat credit availed in respect of inputs mentioned in the accompanied invoices were different than that of actually received by them.

(b) Rule 9(3) of Cenvat Credit Rules 2004 in as much as they had not taken all reasonable steps with regard to the inputs in which they had taken the Cenvat Credit on the basis of the invoices accompanied the goods.

(c) Rule 9(5) of Cenvat Credit Rule 2004 in as much as they had not taken proper care regarding the admissibility of the Cenvat credit in respect of the goods they have received."

(emphasis supplied)

5. The extended period of limitation under the proviso to section 11A(1) of the Central Excise Act was also invoked. The relevant paragraph of the show cause notice dealing with this aspect is reproduced below:

"It has been conclusively proved that a part manufacturing through freezing process and no manufacturing through distillation process had taken place in M/s. AL. So the receipt of Crude Mentha Oil (Shivalik) and Crude Mentha Oil by M/s SEC and M/s. NE respectively showing them as DFMO (Shivalik) and Menthol have proved the intention of the purchasers only to avail the Cenvat Credit. They have been summoned to appear to explain their stand, which they avoided and simply stated that they had received the DFMO (Shivalik) and Menthol. This avoidance to explain amounts to an intention not to disclose the fact before the investigating authorities. This also proves their intention to evade payment of duty and thus the duty credit thus availed is recoverable under proviso to Section 11A(1) of Central Excise Act read with Rule 14 of Cenvat Credit Rules 2004.

M/s SEC and M/s NE for their act of their commission of the offence as aforesaid are liable to penalty under Section 11AC read with Rule 15(2) of Cenvat Credit Rules 2004.

Further interest at appropriate rate under Section 11AB read with Rule 14 of Cenvat Credit Rules 2004."

(emphasis supplied)

6. The appellant filed a detailed reply to the show cause notice and denied the allegations. The appellant also submitted documentary evidences to show actual receipt of the goods.

7. The Commissioner, however, by order dated 17.05.2010 disallowed the CENVAT credit availed by the appellant.

8. Shri Rajesh Kumar Yadav, learned counsel for the appellant, made the following submissions:

(i) Amarnath Industries had a manufacturing facility and they were undertaking manufacturing of goods. It is evident that they had manufactured at least certain quantity of goods. As the appellant had received only single consignment, the burden was on the revenue to adduce direct evidence to show that the consignment of the said goods sent to the appellant was not the manufactured goods. The show cause notice does not indicate anything to show that the consignment received by the appellant was from the batch of unprocessed goods, if any;

(ii) The Commissioner has not discussed cogent evidence adduced by the appellant in the form of the test report;

(iii) The demand against the appellant has been confirmed on the basis of allegations made against the supplier. The Commissioner failed to appreciate the vital fact that the supplier was manufacturing goods partially and in that event it cannot be concluded in definite terms that what was received by the appellant was Crude Mentha Oil and not processed goods viz. Menthol;

(iv) The appellant had taken all reasonable steps, as required under rule 9(3) of the 2004 Credit Rules, to ensure the identity and address of the supplier-manufacturer and it was confirmed that the said manufacturer existed and was a registered manufacturer of the said product;

(v) In fact, the monthly returns filed by the supplier-Amarnath Industries, were assessed and that refund of the duty (cash component) paid by them was processed and paid by the department. Therefore, there was absolutely no reason for the appellant to doubt the existence of the supplier and the fact of payment of duty on the goods sold by the supplier-manufacturer to the appellant. Thus, the findings recorded by the Commissioner that the appellant had contravened the provisions of rule 9(3) of the 2004 Credit Rules by not taking reasonable steps with regard to the goods received by the appellant is vitiated;

(vi) It is a settled proposition of law that if the buyer has received the goods on a valid and proper invoice and the supplier manufacturer exists, recovery cannot be effected from the buyer;

(vii) The statements of various persons are not relevant and inadmissible as they failed to comply with the provisions of section 9D of the Central Excise Act and denial of cross examination of the said persons has vitiated the order. To support this contention learned counsel placed reliance upon the following decisions:

(a) Sukhwant Singh vs. State of Punjab, 1995 (3) TMI 468 – Supreme Court;

(b) Commissioner of Central Excise, Meerut-I vs. Parmarth Iron Pvt. Ltd., 2010 (260) E.L.T. 514 (All.);

(c) Jindal Drugs Pvt. Ltd. vs. Union of India, 2016 (340) E.L.T. 67 (P & H);

(d) Additional Director General (Adjudication) vs. Its My Name Pvt. Ltd., 2021 (375) E.L.T. 545 (Del.);

(e) Swiber Offshore Construction Pvt. Ltd. vs. Commr. of Cus., Kandla, 2014 (301) E.L.T. 119 (Tri. - Ahmd.); and

(f) Gaurav Mungad vs. Commissioner of CGST, Ex. & CUS., Bhopal, 2021 (376)

E.L.T. 69 (Tri. - Del.).

(viii) The extended period of limitation could not have been invoked in the facts and circumstances of the case;

(ix) Neither penalty nor interest could have been imposed upon the appellant.

9. Shri Mihir Ranjan Kumar, learned special counsel appearing for the department, however, supported the impugned order and made the following submissions:

(i) The request for cross examination was denied for good and valid reason. The departmental officers merely verified the facts that had been declared by the appellant in the statutory records submitted from time to time. As there was no reason to doubt the genuineness of test reports/analysis reports, the request of cross-examination is devoid of merits.

(ii) The appellant is not justified in asserting that the show cause notice has been adjudicated only on the basis of assumptions and presumptions. The Commissioner had examined all the evidence on record to arrive at the findings;

(iii) The records indicate that no manufacturing activity in relation to the goods supplied to the appellant was carried out in the factory premises of Amarnath Industries;

(iv) The benefit of the Notification dated 14.11.2002 has been wrongly availed;

(v) The availment of CENVAT credit has been correctly denied to the appellant; and

(vi) The extended period of limitation was correctly invoked and the penalty was also correctly imposed.

10. The submissions advanced by the learned counsel for the appellant and the learned special counsel appearing for the department have been considered.

11. It is seen that the appellant is engaged in the manufacture and export of Menthol Crystal and Essential Oils, which are exported by the appellant on payment of duty. For the manufacture of the aforesaid goods, the appellant procured raw material from Amarnath Industries in Jammu which took benefit of the operated the Notification dated 14.11.2002. Under this Notification, the duty paid by Amarnath Industries in cash on the raw materials cleared to the appellant was refunded/granted as self credit to Amarnath Industries. It is on the basis of the invoice issued by Amarnath Industries that CENVAT credit was claimed by the appellant of the duty paid on the raw materials purchased from Amarnath Industries.

12. Learned counsel for the appellant submitted that Amarnath Industries has been granted refunds on the basis of orders passed by the Jurisdictional Assistant Commissioner and these orders were not challenged. The CENVAT credit could not have, therefore, been denied to the appellant.

13. This submission advanced by the learned counsel for the appellant deserves to be accepted in view of the decision of the Gauhati High Court in Commissioner of C. Ex., Shillong vs. Jellalpore Tea Estate, 2011 (268) E.L.T. 14 (Gau.), wherein it was held:

"14. Insofar as the present case is concerned, the prescription of law required that the order of the Assistant Commissioner passed on 29-4-2002 could be challenged only by resorting to Section 35-E of the Act. The Revenue could not initiate collateral proceedings to set aside the order dated 30-4-2002 by resorting to the enabling power under Section 11A of the Act.

15. Consequently, we are of the opinion that : (i) Section 11A of the Act is not applicable to the facts of the case since the issue raised did not concern any approval, acceptance or assessment relating to the rate of duty on or valuation of any excisable goods. The issue raised by the assessee related to its entitlement to the benefit of Notification No. 33/99-C.E., dated 8-7-99, (ii) Even otherwise, the Revenue could not take recourse to Section 11A of the Act when it had a statutory remedy available to it to challenge the order dated 29-4-2002 passed by the Assistant Commissioner of Central Excise, Silchar by resorting to the revisional power available under Section 35-E of the Act."

14. Learned counsel for the appellant also submitted that once duty paid by Amarnath Industries was accepted by the department, the CENVAT credit of the same could not have been denied to the appellant who is the recipient.

15. The payment of duty at the time of clearance of goods to Amarnath Industries is not in dispute. The credit of the duty paid, therefore, could not have been denied to the appellant. This issue was examined by the Bombay High Court in Nestle India. The issue that arose was that if excise duty is levied on an assessee at place "A" and Modvat credit is sought to be availed at place "B", is it open to the Authorities at place "B" to deny credit on the ground that no duty was payable at place "A". This issue was answered by the Bombay High Court in the following manner:

"5. Mr. Ferreira, learned Assistant Solicitor General for the appellant, submitted that the scheme of law is that if, excise duty is collected, a person at subsequent place is entitled to claim Modvat credit. According to Mr. Ferreira, learned Assistant Solicitor General, this can be so if, duty is validly collected at an earlier stage. In this case duty was not payable at all at the place outside Goa, since no duty can be levied on job work but only on manufacture and, therefore, the respondents are not entitled to claim any Modvat credit. Though this submission appears to be reasonable and in accordance with law, we find it not possible to entertain this submission in the facts of the present case since at no point of time the Revenue questioned the applicability of the excise duty at the place outside Goa. Those assessments have been allowed to become final and the goods have been removed from the jurisdiction of the Excise Officer at that place and brought to Goa. Now, in Goa it will not be permissible to allow the Revenue to raise the contention that the assessee in Goa cannot claim Modvat credit in Goa because duty need not be paid outside Goa.

6. As we have observed that the assessment is allowed to be final, it would not be legal and proper to allow the Revenue to raise the question on the basis of Modvat credit. Indeed, now the payment of excise duty must be treated as valid, therefore, the claim of Modvat credit must be treated as excise duty validly paid."

(emphasis supplied)

16. The same view was taken by the Bombay High Court in Commissioner of Central Excise, Pune-III vs. Ajinkya Enterprises, 2013 (294) E.L.T. 203 (Bom.). It was held:

"10. Apart from the above, in the present case, the assessment on decoiled HR/ CR coils cleared from the factory of the assessee on payment of duty has neither been reversed nor it is held that the assessee is entitled to refund of duty paid at the time of clearing the decoiled HR/CR coils. In these circumstances, the CESTAT following its decision in the case of Ashok Enterprises - 2008 (221) E.L.T. 586 (T), Super Forgings- 2007 (217) E.L.T. 559 (T), S.A.I.L. - 2007 (220) E.L.T. 520 (T) = 2009 (15) S.T.R. 640 (Tribunal), M.P. Telelinks Limited - 2004 (178) E.L.T. 167 (T) and a decision of the Gujarat High Court in the case of CCE v. Creative Enterprises reported in 2009 (235) E.L.T. 785 (Guj.) has held that once the duty on final products has been accepted by the department, CENVAT credit availed need not be reversed even if the activity docs not amount to manufacture. Admittedly, similar view taken by the Gujarat High Court in the case of Creative Enterprises has been upheld by the Apex Court [see 2009 (243) E.L.T. A121] by dismissing the SLP filed by the Revenue."

(emphasis supplied)

17. In view of the aforesaid decisions, it has to be held that CENVAT credit of the duty paid by Amarnath Industries could not have been denied to the appellant.

18. Learned counsel for the appellant also submitted that the statement of various persons like Employees/Directors of Amarnath Industries and the appellant were relied upon though they were inadmissible since they failed to comply with the provisions of section 9D of the Central Excise Act and denial of cross examination of the said persons has also vitiated the order.

19. This submission advanced by learned counsel for the appellant also deserves to be accepted.

20. The Allahabad High Court in Parmarth Iron examined this issue in detail and on a perusal of section 9D of the Central Excise Act observed:

"16. We, therefore, have no hesitation in holding, that there is no requirement in the Act or Rules, nor do the principles of natural justice and fair play require that the witnesses whose statements were recorded and relied upon to issue the show cause notice, are liable to be examined at that stage. If the Revenue choose not to examine any witnesses in adjudication, their statements cannot be considered as evidence. However, if the Revenue choose to rely on the statements, then in that event, the persons whose statements are relied upon have to be made available for cross-examination for the evidence or statement to be considered."

21. The Punjab and Haryana High Court in Jindal Drugs also observed as follows:

"9. A plain reading of sub-section (1) of Section 9D of the Act makes it clear that clauses (a) and (b) of the said sub-section set out the circumstances in which a statement, made and signed by a person before the Central Excise Officer of a gazetted rank, during the course of inquiry or proceeding under the Act, shall be relevant, for the purpose of proving the truth of the facts contained therein.

10. Section 9D of the Act came in from detailed consideration and examination, by the Delhi High Court, in J.K. Cigarettes Ltd. v. CCE, 2009 (242) E.L.T.189 (Del.). Para 12 of the said decision clearly holds that by virtue of sub-section (2) of Section 9D, the provisions of sub-section (1) thereof would extend to adjudication proceedings as well.

There can, therefore, be no doubt about the legal position that the procedure prescribed in sub-section (1) of Section 9D is required to be scrupulously followed, as much in adjudication proceedings as in criminal proceedings relating to prosecution.

11. As already noticed hereinabove, sub-section (1) of Section 9D sets out the circumstances in which a statement, made and signed before a gazetted Central Excise Officer, shall be relevant for the purpose of proving the truth of the facts contained therein. If these circumstances are absent, the statement, which has been made during inquiry/investigation, before a Gazetted Central Excise Officer, cannot be treated as relevant for the purpose of proving the facts contained therein. In other words, in the absence of the circumstances specified in Section 9D(1), the truth of the facts contained in any statement, recorded before a Gazetted Central Excise Officer, has to be proved by evidence other than the statement itself. The evidentiary value of the statement, insofar as proving the truth of the contents thereof is concerned, is, therefore, completely lost, unless and until the case falls within the parameters of Section 9D(1).

12. The consequence would be that, in the absence of the circumstances specified in Section 9D(1), if the adjudicating authority relies on the statement, recorded during investigation in Central Excise, as evidence of the truth of the facts contained in the said statement, it has to be held that the adjudicating authority has relied on irrelevant material. Such reliance would, therefore, be vitiated in law and on facts.

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19. Clearly, therefore, the stage of relevance, in adjudication proceedings, of the statement, recorded before a Gazetted Central Excise Officer during inquiry or

investigation, would arise only after the statement is admitted in evidence in accordance with the procedure prescribed in clause (b) of Section 9D(1). The rigour of this procedure is exempted only in a case in which one or more of the handicaps referred to in clause (a) of Section 9D(1) of the Act would apply. In view of this express stipulation in the Act, it is not open to any adjudicating authority to straightaway rely on the statement recorded during investigation/ inquiry before the Gazetted Central Excise Officer, unless and until he can legitimately invoke clause (a) of Section 9D(1). In all other cases, if he wants to rely on the said statement as relevant, for proving the truth of the contents thereof, he has to first admit the statement in evidence in accordance with clause (b) of Section 9D(1). For this, he has to summon the person who had made the statement, examine him as witness before him in the adjudication proceeding, and arrive at an opinion that, having regard to the circumstances of the case, the statement should be admitted in the interests of justice.

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22. Clearly, if this procedure, which is statutorily prescribed by plenary Parliamentary legislation, is not followed, it has to be regarded, that the Revenue has given up the said witnesses, so that the reliance by the CCE, on the said statements, has to be regarded as misguided, and the said statements have to be eschewed from consideration, as they would not be relevant for proving the truth of the contents thereof."

(emphasis supplied)

22. The Commissioner found that since the departmental officers had verified the facts which had been declared by the appellant in the statutory records and the test reports also indicated that the goods would be Crude Mint Oils, the genuineness of test report conducted after receipt of the goods from Amarnath Industries, cannot be doubted and so the request for cross examination of departmental officers and other persons should not be granted. The Commissioner also observed that the case against the appellant is not only on the basis of statements of employees of Amarnath Industries, but also on circumstantial test reports and, therefore, denying the right of cross examination would not be violative of principle of natural justice.

23. These observations made by the Commissioner in the impugned order are clearly contrary to the principles enunciated by the Allahabad High Court in Parmarth Iron and the Punjab and Haryana High Court in Jindal Drugs. In the first instance, under section 9D of the Central Excise Act it is clear that a statement made during investigation/enquiry before a central excise officer cannot be relied upon unless it is first admitted and for this the person who made the statement has to be summoned and examined as a witness in adjudication proceedings. Failure to do so would mean that the adjudicating authority has relied upon an irrelevant material and, therefore, the order would be vitiated. The question of cross examination would arise only after examination of the

person who makes statement before the central excise officer.

24. The Commissioner has placed reliance upon the statements without following the procedure prescribed under section 9D of the Central Excise Act. The order passed by the Commissioner deserves to be set aside for this reason also.

25. The penalties imposed upon the Managing Director of the appellant cannot also, for the same reasons, be sustained.

26. The impugned order dated 17.05.2010 passed by the Commissioner so far as it concerns the appellant deserves to be set aside and is set aside. The appeal is, accordingly, allowed with consequential relief(s), if any, to the appellant.

(Order Pronounced on 16.10.2024)

