
(2024) 10 CESTAT CK 1196

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

Case No : Excise Appeal No.2579, 2580 of 2010

M/s Sharp Mint Ltd and Anr. @APPELLANT @Hash Commissioner, Central Excise @RESPONDENT

Date of Decision : 16-10-2024

Acts Referred:

Central Excise Act, 1944 — Section 9D, 9D(1), 11A, 11A(1), 11AC, 35E
CENVAT Credit Rules 2004 — Rule 4(1), 9(2), 14, 15(2)
Central Excise Rules 2002 — Rule 26

Citation : (2024) 10 CESTAT CK 1196

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

Bench : Division Bench

Advocate : Prakash Shah, Mohit Raval, Mihir Ranjan Kumar

Final Decision : Allowed

Judgement

Dilip Gupta, J

1. Excise Appeal No. 2579 of 2010 has been filed by Sharp Mint Ltd., the appellant to assail the order dated 17.05.2010 by which the Commissioner of Central Excise, Delhi-I, the Commissioner has denied the CENVAT credit of Rs. 7,92,89,505/- 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 and has also imposed a penalty under rule 15(2) of the 2004 Credit Rules read with section 11AC of the Central Excise Act.
2. Excise Appeal No. 2580 of 2010 has been filed by Sanjay Singhal, Managing Director of the appellant, to assail that part of the order dated 17.05.2010 passed by the Commissioner that imposes a penalty of Rs. 50,00,000/- lacs upon him.
3. The appellant is engaged inter-alia in the manufacture and export of Menthol Crystal and Essential Oils (Pharmaceutical grade) falling under Chapter 30 and Chapter 33 of Central Excise Tariff Act, 1985, the Tariff Act. The said Menthol Crystal and Essential Oils are substantially exported by the appellant on payment of duty, under a claim for rebate.

4. For manufacturing the above products, the appellant procures raw material namely, Menthols and its derivatives, De-terpenated/fractioned Mentha Oil, DFSSO & DFPO from manufacturers in Jammu, including Amarnath Industries who were operating under a Notification No. 52/2008-CE dated 14.11.2002, the Notification dated 14.11.2002. The dispute in the present appeal pertains only to the raw materials received from Amarnath Industries.

5. In terms of the Notification dated 14.11.2002, the duty paid by the said manufacturers in cash on the raw materials cleared to the appellant was refunded/ granted as self-credit to them. Basis the invoice issued by Amarnath Industries and other raw material manufacturers, CENVAT credit was claimed by the appellant of the duty paid on the raw materials purchased from such suppliers.

6. The DGCEI investigated the premises of the appellant on 23.06.2006 on the basis of an intelligence that the units located in Jammu, including Amarnath Industries, had certain discrepancies in their record. Investigation was carried out by the department for about 26 months, during which statements of various employees and the Director of the appellant were recorded and documents/ information were resumed.

7. The said investigation culminated in the issuance of a show cause notice dated 20.08.2008. The appellant filed number of replies to the above show cause notice. It is the contention of the appellant that despite repeated requests documents which were relied upon were not provided to the appellant.

8. The show cause notice was adjudicated by the Commissioner by an order dated 17.05.2010. The entire CENVAT credit claimed by the appellant from Amarnath Industries was denied and ordered to be recovered with interest and penalty.

9. The Commissioner framed the following three issues for consideration:

(i) Whether the appellant undertook the manufacturing process i.e., Freezing Process of Crude Mentha Oil for manufacture of Menthol and De-Mentholised Oil and also undertook distillation/ fractionation process for deterpenation of essential oils and whether the plant and machinery installed in the factory of the appellant was capable of undertaking both the processes during the period 29.04.2005 to 04.06.2006?

(ii) Whether the appellant cleared the raw material i.e., Crude Mentha Oil, Crude Piperita Oils, Crude Spearmint Oils as it is without subjecting the same to any manufacturing process and irregularly availed the benefit of Notification dated 14.11.2002 during the period 29.04.2005 to 04.06.2002?

(iii) Whether the final products stated to be supplied to the appellant and to various other buyers were raw-material supplied to them as such under the guise of final products during the above period?

10. The findings recorded by the Commissioner in the impugned order are as follows:

Reference to the test reports attached to 3 invoices

(i) The unit of the appellant was capable of manufacturing finished products from the stage of crude oils.

(ii) Crude Mentha Oils contains terpenes varying from 6% to 14%. In test reports attached along with the 3 invoices viz. Invoice No. 71 dated 02.08.2005; Invoice no. 32 dated 26.06.2005 and Invoice no. 48 dated 10.07.2005 the terpene content was found to be in excess of 6%.

(iii) There is no reason as to why incorrect test reports will be kept along with the invoices. However, even otherwise, the appellant has not produced the test report for other invoices for supply of raw materials.

(iv) Failure of the appellant in producing documentary evidences strengthens the belief that the appellant had not received the so called goods manufactured by Amarnath Industries.

(v) During the search of the factory premises of the appellant, Purchase Order for purchase of Mentha Peperita Oil was placed without further processing.

CENVAT credit cannot be denied to recipient once duty is paid by the manufacturer.

(i) The goods which had been received by the appellant were not the goods which were mentioned in the invoices issued by Amarnath Industries.

(ii) Amarnath Industries had not manufactured the goods but supplied the raw material as it is on which no duty was leviable and had subsequently obtained refund of the duty paid under Notification dated 14.11.2002. The appellant had received crude oils, other than the goods mentioned in the invoices issued by the appellant with malafide intention of availing CENVAT credit. The ratio of judgment of the Supreme Court in CCE vs. MDS Switchgear, 2008 (229) E.L.T. 485, does not apply in the instant case.

(iii) The facts of the cited cases are different to the present case as the goods on which duty was allegedly paid by the seller-manufacturer in those cases had been actually manufactured, though in some cases the activity/ process carried out did not amount to manufacture.

(iv) The appellant had received the goods, which were not subjected to any manufacturing process in the factory of Amarnath Industries and hence, the appellant was not entitled to avail CENVAT Credit in terms of rule 9(2) the 2004 Credit Rules. Therefore, the ratio of the cited judgments would not apply to the present case.

Cross-examination of persons whose statements were recorded

(i) It is observed that the departmental officers had verified the facts what had been declared by the appellant in their statutory records submitted from time to time.

(ii) The outcome of Test/Analysis conducted in the factories of appellant of the finished goods purchased from Amarnath Industries during investigation, in addition to admission of Shri Kamal Kumar, HOD Quality and Production of appellant, indicates that the goods related to the test reports are Crude Mint Oils.

(iii) If there is no reason for doubting the genuineness of test report/analysis reports conducted after receipt of the goods from Amarnath Industries, the request for cross examination of departmental officers and other persons, including the employees is devoid of merits.

(iv) The present case has not been booked only on the statements of employees of Amarnath Industries but also on the circumstantial evidence of reports of the test conducted in the factory premises of the appellant after arrival of the so-called manufactured goods.

(v) Non allowing of cross examination is not violative of principle of natural justice, as has been held by the Supreme Court in the case of Surjeel Singh Chhabra vs. Union of India, 1997 (89) E.L.T. 646 (S.C.).

Previous procurements

(i) Prior to procuring the raw materials from Amarnath Industries, the appellant was procuring the same goods from various farmers and was engaged in manufacturing of various processed products stated to be procured from Amarnath Industries.

(ii) The difference was only that instead of procuring the crude mint oils directly from farmers, the appellant made arrangements to receive the said goods through Amarnath Industries as manufactured products so as to enable it to claim CENVAT credit under the 2004 Credit Rules of the duty paid by Amarnath Industries and Amarnath Industries was also the beneficiary, as the duty paid from current account was refunded to Amarnath Industries under the Notification dated 14.11.2002.

Extended period of limitation

(i) The entire activity of such fraudulent transaction i.e. supply of non-manufactured products under the guise of manufactured products, were made in the complete knowledge and connivance of the appellant and its Director.

(ii) Had the officers of the Revenue not visited the premises of Amarnath Industries and the appellant, the said modus-operandi would never have been exposed and the malpractice would have continued unabated. Hence, the extended period under proviso to section 11A(1) of the Central Excise Act is invokable in the present case.

Penalty under section 11AC of the Central Excise Act.

(i) Since the extended period under the proviso to section 11A is applicable in the instant case, penalty under section 11AC of the Central Excise Act is also imposable.

(ii) There is no scope for any discretion and the levy of penalty is mandatory under the Central Excise Act and the Regulations framed thereunder. Mens-rea is not an essential ingredient for imposition of penalty.

Penalty under rule 26 on Managing Director of the appellant

(i) Company is an independent legal person working through its Directors.

(ii) In addition to the penalty which can be imposed on the company/firm, penalty can be imposed on the person who was actually involved in committing the offence.

11. Shri Prakash Shah, learned counsel for the appellant assisted by Shri Mohit Raval made the following submissions:

(i) The appellant had correctly availed CENVAT credit of the duty paid on inputs/raw-materials received from Amarnath Industries;

(ii) The findings recorded by the Commissioner that Amarnath Industries had no infrastructure/ capacity to manufacture goods is contrary to the record;

(iii) The entire proceedings initiated against the appellant are based on assumptions and presumption;

(iv) Refunds granted to Amarnath Industries remain unchallenged and have attained finality;

(v) Once the duty paid by Amarnath Industries was accepted by the department, the credit of the same cannot be denied to the appellant (the recipient). To support this contention learned counsel placed reliance upon the following decisions:

(a) Commissioner of Central Excise, Goa vs. Nestle India Ltd., 2012 (275) E.L.T. 49 (Bom.);

(b) Commissioner of Central Excise & Customs vs. MDS Switchgear Ltd., 2008 (229) E.L.T. 485 (S.C.)

(vi) The statements of various persons are not relevant and inadmissible as they failed to comply with 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.).

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

(viii) Interest and penalty under section 11AC of the Central Excise Act could not have been levied; and

(ix) The imposition of penalty under rule 26 of the Central Excise Rules 2002, the 2002 Rules on the Director of the appellant is bad in law.

12. 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.

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

14. 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 procures raw material from Amarnath Industries in Jammu which took benefit of 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.

15. 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.

16. 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. Jellalpure 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."

17. 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.

18. 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)

19. 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 does 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)

20. 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.

21. 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.

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

23. 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."

24. 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.

xxxxxxxxxxxx

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.

xxxxxxxxxxxx

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)

25. 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.

26. 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.

27. 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.

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

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

(Order Pronounced on 16.10.2024)