(2021) 11 CESTAT CK 0034

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Excise Appeal No. 75617, 75618 Of 2017

M/s Texmaco Rail And Engineering Ltd. APPELLANT

Vs

Commissioner Of CGST And Excise, Kolkata North RESPONDENT

Date of Decision : 10-11-2021

Acts Referred:

Cenvat Credit Rules, 2004 — Rule 6(3), 14
Central Excise Act, 1944 — Section 11A, 11B
Finance Act, 1994 — Section 73, 75

Citation : (2021) 11 CESTAT CK 0034

Hon'ble Judges : P. K. Choudhary, J;P. Venkata Subba Rao, Technical Member

Bench : Division Bench

Final Decision : Allowed/Dismissed

Judgement

1. Both the appeals filed against the same Adjudication Order dated 17.01.2017 are taken up for disposal by this common order. Appeal No. E/75617/2017 has been filed by the assessee, M/s. Texmaco Rail & Engg. Ltd, whereas Appeal No. E/75618/2017 has been filed by the Department against the aforesaid adjudication Order. The period in dispute in the present appeals ranges from May 2005 to February 2011.

2. The assessee is a Heavy Engineering and Steel Foundry Division of Texmaco Ltd which got demerged and transferred to Texmaco Rail & Engineering Limited w.e.f. 01.04.2010 in terms of the Order dated 06.09.2010 passed by the Hon'ble Calcutta High Court. Hence, the present proceedings initiated by issuance of the impugned Show Cause Notice on "Texmaco Limited" stands transferred in the name of "Texmaco Rail & Engineering Limited" (assessee) accordingly.

3. The assessee is engaged in the manufacture of excisable goods which are dutiable as well as exempted from payment of central excise duty during the aforesaid period in dispute. The assessee has also availed the benefit of CENVAT credit in terms of the provisions of the CENVAT Credit Rules, 2004 (the Credit Rules). The dispute in the present case only pertains to availment of credit

without maintenance of separate records for manufacture of dutiable as well as exempted goods.

4. It is the case of the Department that since the assessee has not opted for claiming credit on proportionate basis by filing the required declaration and that due to non-observance of the procedure as prescribed in Rule 6 of the Credit Rules, the assessee is statutorily liable to pay / reverse credit of the amount calculated @ 5% or 10% of the value of exempted goods as per the extant provisions in the Credit Rules during the relevant period.

5. Heard Sri Pulak Saha, Chartered Accountant for the assessee and Sri H S Abedin, Authorised Representative for the Revenue through video conferencing. Appeal records as well the written submissions filed by both sides have been carefully perused in detail.

6. The Ld. Commissioner vide the impugned order has concluded the proceedings for the period May 2005 to March 2008 on the ground that the assessee has made an application on 12.11.2010 (pursuant to amendment made in the Finance Act, 2010) for allowing reversal of proportionate credit of Rs 53,57,862/-. The said calculation is also supported by a certificate issued by a Chartered Accountant. The assessee made the reversal of credit of above amount and also made payment of interest of Rs, 39,12,505/-. On the basis of above, the Ld. Commissioner has concluded the proceedings and dropped the remaining demand for the aforesaid period against which the Department has preferred the instant appeal. The grievance of the Department is basically on two counts - (i) that the application for seeking reversal of proportionate credit, as aforementioned, has been made beyond the prescribed period of 6 months i.e. beyond 7th November 2010 and therefore, the benefit of reversal of proportionate credit should not be allowed and (ii) dispute with regard to quantification of demand.

7. For the remaining period April 2008 to February 2011, the Ld. Commissioner has confirmed the demand as proposed in the impugned SCN of the amount calculated @ 5% or 10%, as the case may be, of the value of exempted goods since the required declaration has not been made by the assessee although the assessee has subsequently reversed the proportionate credit on the basis of their own calculation.

8. The Ld. Chartered Accountant for the assessee has relied on the plethora of decisions of the Tribunal to buttress his arguments that when the assessee has reversed the credit amount pertaining to its use in the manufacture of exempted goods, the assessee should not be saddled with the huge duty liability by invoking Rule 6(3) of the Credit Rules so as confirm the demand of the amount calculated @ 5% / 10% of the value of exempted goods. He further submitted that the assessee has already reversed the credit amount of Rs. 1,84,87,400/- and that the demand of Rs. 57,34,46,257/- for the period April 2008 to February 2011 is not justified. He relied on various decisions incl. the following:

? Tiara Advertising vs. UOI 2019 (30) GSTL 474 (Telangana)

? CCE vs. Maize Products 2009 (234) ELT 431 (Guj)

? Tuticorin Alkali Chemicals & Fertilizers Ltd vs. CCE 2009 (248) ELT 514 (Tri-Chennai)

? Hello Minerals Water (P) Ltd vs. UOI 2004 (174) ELT 422 (All)

9. He also relied on the CBEC (now, CBIC) Circular no.1063/2/2018-CX dated 16th February, 2018, wherein the Board has accepted the decision of Hon'ble Gujarat High Court in the case of CCE vs. Dashion Ltd wherein it has been held that substantial benefit of credit should not be denied for procedural irregularity.

10. The Ld. A.R. appearing for the Revenue has contested the appeal filed by the assessee and reiterated the observations made by the Ld. Commissioner in the impugned order and submitted that when the assessee has not followed the due procedure of law by not filing the required declaration, the assessee cannot be given immunity from payment of credit amount as prescribed in Rule 6(3) of the Credit Rules. He accordingly requested that the appeal of the assessee be rejected being devoid of any merit.

11. We find that the issue has been settled by the Hon'ble Telangana High Court in favour of the assessee in the case of Tiara Advertising wherein it has been held that in case the assessee has not chosen to maintain separate accounts, the Credit Rules do not authorize the departmental authorities to choose one of the options on behalf of the assessee so as to demand the amount of 5% or 10% as per Rule 6(3) of the Credit Rules. In that event, the authorities can utmost disallow the credit, if at all, wrongly availed or utilised by invoking the provisions of Rule 14 of the Credit Rules. The relevant portion of the decision is reproduced below:-

"14. Further, we may reiterate that Rule 6(3) of the Cenvat Credit Rules, 2004, merely offers options to an output service provider who does not maintain separate accounts in relation to receipt, consumption and inventory of inputs/ input services used for provision of output services which are chargeable to duty/ tax as well as exempted services. If such options are not exercised by the service provider, the provision does not contemplate that the Service Tax authorities can choose one of the options on behalf of the service provider. As rightly pointed out by Sri S. Ravi, Learned Senior Counsel, if the petitioner did not abide by the provisions of Rule 6(3) of the Cenvat Credit Rules, 2004, it was open to the authorities to reject its claim as regards the disputed Cenvat Credit of Rs. 17,15,489/-

15. We may also note that in the event the petitioner was found to have availed Cenvat Credit wrongly, Rule 14 of the Cenvat Credit Rules, 2004 empowered the authorities to recover such credit which had been taken or utilised wrongly along with interest. However, the second respondent did not choose to exercise power

under this Rule but relied upon Rule 6(3)(i) and made the choice of the option thereunder for the petitioner, viz., to pay 5%/6% of the value of the exempted services. The statutory scheme did not vest the second respondent with the power of making such a choice on behalf of the petitioner. The Order-in-Original, to the extent that it proceeded on these lines, therefore cannot be countenanced."

12. Applying the ratio of the above decisions, we are of the view that the demand of the duty amount calculated @ 5% or 10% of the exempted value cannot be made even though the assessee has not followed the prescribed procedures. We also find that Rule 14 of the CENVAT Credit Rules, 2004 under which the demand was proposed in the Show Cause Notice reads as follows :-

Rule 14 : Recovery of CENVAT Credit wrongly taken as erroneously refunded. - where the CENVAT Credit has been taken or utilized wrongly or has been erroneously refunded, the same alongwith interest shall be recovered from the manufacturer or the provider of the output service and the provisions of Sections 11A and 11B of the Excise Act or Sections 73 and 75 of the Finance Act, shall apply mutatis mutandis for effecting such recoveries Section 11A of the Central Excise Act provides for recovery of duty not paid, not levied or short paid or short levied. While Rule 14 provider for recovery of wrongly availed CENVAT Credit.

There is no legal provision under which an amount equal to 5% or 10% of the value of the exempted goods can be recovered. The reason is that payment of an amount of 5% or 10% is one of the choices under Rule 6 and is not a mandatory payment. This choice cannot be foisted upon the appellant nor can such an amount be recovered under Rule 14. The Ld. A/R for the Revenue has not been able to distinguish the above decision at the time of the hearing. Neither in the written submissions filed by him, the said Ruling of the High Court has been dealt with or distinguished.

13. In view of the above factual matrix and the legal position laid down by the Hon'ble High Court, the Show Cause Notice demanding an amount equal to 5% or 10% of the value of the exempted products under Rule 14 is not supported by law. It is not possible to sustain the impugned demand based on such Show Cause Notice and therefore, the appeal filed by the assessee deserves to be allowed. Penalty imposed in the impugned order also needs to be set aside. In so far as the appeal filed by the Revenue is concerned, the ground taken with regard to the delayed filing of declaration after the amendments in the Credit Rules in 2010 has no bearing inasmuch as the assessee has duly paid back the proportionate credit amount which the Commissioner has also accepted. In any case, no further demand can be raised in view of the judgement of Hon'ble Telangana High Court as referred above and the Show Cause Notice itself was issued without the authority of law, the appeal filed by the Revenue is liable to be rejected.

14. The impugned order is set aside and the appeal filed by the assessee is allowed with consequential relief. Revenue's appeal is rejected.

(Pronounced in the Open Court on 10.11.2021)

