(2019) 07 GUJ CK 0011

In the Gujarat High Court

Case No : Letters Patent Appeal No. 132 Of 2000 In Special Civil Application No. 447 Of 1990

Varun Vijay Gupta APPELLANT

Vs

Union Of India RESPONDENT

Date of Decision : 24-07-2019

Acts Referred:

Central Excise Act, 1944 — Section 11A, 37
Customs Tariff Act, 1975 — Section 3(5)
Cenvat Credit Rules, 2004 — Rule 3, 3(1), 3(4)
Central Excise Rules, 2002 — Rule 8, 8(1), 16(2)
Constitution Of India, 1950 — Article 14, 226

Citation : (2019) 07 GUJ CK 0011

Hon'ble Judges : Anant S. Dave, Actg. CJ;Biren Vaishnav, J

Bench : Division Bench

Advocate : Uchit N. Sheth, P.Y. Divyeshvar

Final Decision : Allowed

Judgement

Biren Vaishnav, J

1 . The present petition, under Article 226 of the Constitution of India, is filed with the following prayers:

"32. ...

A. This Hon'ble Court may be pleased to issue a writ of certiorari or a writ declaring circular no. 962/05/2012-CX : MANU/EXCR/0007/2012 dated 28.03.2012 in so far as it discriminates between admitted duty liability arising under Section 11A of the Excise Act for the purpose of discharge through utilization of Cenvat credit to be discriminatory, arbitrary as well as contrary to the provisions of the Excise Act and the rules made thereunder;

B. This Hon'ble Court may be pleased to declare that Cenvat credit balance can be utilized for making payment of outstanding excise duty liability which was admitted in the returns;

C. This Hon'ble Court may be pleased to issue a writ of mandamus or a writ in nature of mandamus or any other appropriate writ or order directing the learned Respondents to drop proceedings for recovery of alleged dues and requiring production of goods by the impugned notices dated 04.04.2018 and 04.05.2018;

D. ..."

2. The facts leading to the filing of the present petition, in short, are as under:

2.1. The petitioner is the Managing Director of Steel Konnect (India) Pvt. Ltd. which is a company engaged in the manufacture and sale of prefabricated steel structures. Facing severe financial crisis, the petitioner had certain unpaid Central Excise liability amounting to approximately Rs. 1,01,00,000/-in the month of January 2016. For such outstanding dues, the Excise Department issued a notice dated 30.09.2016. In connection with such outstanding dues, even a visit of the excise officers was carried out in October 2016.

2.2. An attachment notice was issued on 19.10.2016 and on the petitioner giving an undertaking to produce such goods whenever they were called for, the goods were released. It is the case of the petitioner that on 04.11.2016, the petitioner addressed a letter to the Assistant Commissioner of Central Excise that it was ready and willing to pay the outstanding excise duty liability by utilization of available balance of Cenvat credit. The letter is annexed to the petition at Annexure 'G'. It appears that the Assistant Commissioner raised an objection for utilization of Cenvat credit relying on the circular dated 28.03.2012, which is under challenge in this petition. Such objection was raised by the Assistant Commissioner by a letter dated 23.11.2016.

2.3. Relying on the decision of the Tribunal regarding utilization of Cenvat credit, the petitioner again made a response on 30.11.2016. However, the Assistant Commissioner refused to take into consideration the offer of the petitioner for payment of outstanding excise duty through the Cenvat credit which was unutilized and by a communication dated 12.02.2018 threatened to initiate criminal action. The petitioner company was informed to pay the dues outstanding. Reliance was placed on the circular dated 28.03.2012 by the Assistant Commissioner and it was the case so made out by the Commissioner that utilization of Cenvat credit is not permissible for delayed payment of admitted duty liability.

2.4. Aggrieved by this stand of the authorities, the petitioner is before this Court with the prayers as quoted hereinabove.

3 . Mr. Uchit Seth, learned advocate for the petitioner submitted that the circular dated 28.03.2012 which makes distinction between admitted duty liability and duty liability raised in proceedings under Section 11A of the Excise Act is discriminatory and contrary to the provisions of the Excise Act and the Rules made thereunder. According to Mr. Seth, the circular has erroneously laid undue

stress on the first proviso to Rule 3(4) of the Cenvat Credit Rules, 2004. According to Mr. Seth, the issue is now concluded in view of the judgement of the Division Bench of this Court in the case of Advance Surfactants India Ltd. vs. Union of India: 2017(358) ELT 53(Guj.). According to him, in the said case proviso to Rule 3(4) was under scrutiny as the vires thereof was challenged. The proviso restricting utilization of credit up to an amount as available on the last date of the month or the quarter to which duty payment pertains was held contrary to Rule 8(1) of the Central Excise Rules, 2002. In his submission, since the proviso to Rule 3(4) was held to be bad, the circular issued and which is impugned in this petition, based on such a proviso should also therefore fail the scrutiny of legality and should be held as illegal.

4 . Mr. Divyeshvar, learned Assistant Solicitor General, appearing for the Union of India has extensively supported the stand of the Assistant Commissioner and submitted that unutilized Cenvat credit cannot be used for paying outstanding liability of excise duty. He has drawn our attention to the affidavit-in-reply filed by the Suresh Nandanwar, Commissioner, CGST, Ahmedabad South. Drawing our attention to the affidavit, Mr. Divyeshvar pointed out that there was an outstanding duty liability of Rs. 1,35,25,360/-. There was an unutilised Cenvat credit of Rs. 35,05,813/-. There was therefore a default in payment of Rs. 1,00,19,547/-.

4.1. Pressing into service Rule 3(4) of the Cenvat Credit Rules read with the circular dated 28.03.2012, it was the stand of the excise authorities that Cenvat credit cannot be utilized for payment of outstanding excise duties and the Cenvat credit can only be utilized to such extent as the credit is available on the last date of the month of the quarter. Thus, it was the stand of the authorities that the effect of proviso to Rule 3(4) is that though a manufacturer was obliged to discharge his excise duty liability by the first week of the next month, the Cenvat credit taken by the manufacturer only to the end of the month to which the excise duty related could be utilized and the Cenvat credit legally availed during the subsequent months could not be utilized for paying duty of excise for the goods cleared in the previous month. It was in accordance with this proviso that the circular dated 28.03.2012 was issued. Mr. Divyeshvar, therefore, submitted that once proviso to Rule 3(4) did not permit set off of the outstanding excise duty through utilization of Cenvat credit of previous months, the circular stood the test of time and the authorities were right in rejecting the request of the petitioner by the impugned communication dated 12.02.2018.

5 . Having considered the submissions of the learned advocates appearing for the respective parties, the impugned circular dated 28.03.2012, the relevant portion of which hurts the petitioner is reproduced as under:

"Circular No. 962/05/2012-CX : MANU/EXCR/0007/2012

F. No. 267/96/2009-CX 8

Government of India

Ministry of Finance (Department of Revenue)

Central Board of Excise & Customs, New Delhi

New Delhi, dated the 28th March, 2012

To,

All Director Generals,

All Chief Commissioners of Central Excise (including LTU),

All Commissioners of Central Excise (including LTU)

Sir/Madam

Subject : Payment of arrears from Cenvat Credit earned at a later date.

Reference was received from the field formation seeking clarification on the issue as to whether the arrears of duty can be paid by utilizing the cenvat credit which has accrued subsequent to the period to which the arrears pertained. Such clarification has been sought in view of first proviso to rule 3(4) of the Cenvat Credit Rules, 2004. As per this proviso, "while paying duty of excise or service tax, as the case may be, the cenvat credit shall be utilized only to the extent such credit is available on the last day of the month or quarter, as the case may be, for payment of duty or tax relating to that month or the quarter, as the case may be."

2 . Doubts have been raised whether these restrictions will be applicable to duty payable in terms of Section 11A or duty paid after due date in terms of rule 8 of the Central Excise Rules, 2002.

3 . The matter has been examined in the Board. Practice ascertained from field formations points out that in majority of cases the payment of demands confirmed under Section 11A are being permitted to be paid by utilizing cenvat credit without linking the same to the period to which these demand pertain.

4. A harmonious reading of rule 8 of Central Excise Rules' 2002 and first proviso to rule 3 (4) of the Cenvat Credit Rules, 2004 indicates that the restriction with regard to the utilization of cenvat credit is relating to the normal payment of duty in terms of rule 8 of the Central Excise Rules, 2002, where duty for a particular month or quarter is to be discharged by the 5th of the next month. For this proviso, the cenvat credit allowed to be used is what was in balance on the last date of that month or quarter and not what accrued thereafter. Even in case of duty paid late in terms of rule 8, the credit available for utilization will remain same I.e. the credit in balance on the last date of month or quarter, as the case may be.

5 . Further duty payable under rule 8 is on a different footing from duty payable under Section 11A. Duty under Rule 8 is paid after self determination by the assessee unlike Duty payable under Section 11A where generally the duty is

determined by the Central Excise officer and the payment is mandated after such determination. There is no time limit prescribed under Section 11A I.e., monthly or quarterly unlike the date prescribed under Rule 8 (I.e., 5th of the next month). Therefore, the restriction on the utilization of the cenvat credit accruing subsequent to the last date of the month or quarter in which the arrears arise, is not applicable to the demands confirmed under Section 11A of the Central Excise Act, 1944.

6. Trade & Industry as well as field formations may be suitably informed.

7. Receipt of this circular may kindly be acknowledged.

8. Hindi version will follow.

..."

[Emphasis Supplied]

6. What is therefore in issue before this Court is the stand of the respondents which they have so expressly stated in the impugned communication dated 12.02.2018. The company which is paying excise duty, however, as a result of some financial difficulties, it has an outstanding credit of excise duty of about Rs. 1 crore. Letter at Annexure 'G' makes it clear that the company had an intention to make payment of the outstanding dues of the excise duty from the Cenvat credit account out of the balance which was available as on that date, as according to the company though the first proviso of Rule 3(4) of the Cenvat Credit Rules provides that while paying duty of excise or service tax, as the case may be the Cenvat credit shall be utilized only to the extent of such credit as is available on the last day of the month or the quarter, as the case may be, for payment of such duty or tax relating to that month of the quarter, according to the company, it could make payment of the defaulted amount out of the Cenvat balance available on the submission that freezing of Cenvat credit was done away with.

6.1. Based on this they had already debited an amount of Rs. 1,00,19,000/- vide debit entry dated 30.10.2016 from their Cenvat credit balance. However, this was disagreed to by the Assistant Commissioner. The Assistant Commissioner while rejecting the request of the petitioner by his communication dated 12.02.2018, communicated as under:

"...

Your attention is again invited to Rule 3(1) of the Cenvat Credit Rules, 2004 which provides that only the cenvat credit as on last day of month can be used for the payment of duty of said particular month and therefore, the cenvat credit accumulated on a letter dated is not allowed for the past duty payment as has been clarified by the Board Circular No. 962/05/2012 CX : MANU/EXCR/0007/2012 dated 28.03.2012 and Circular No. 1053/02/2017 CX : MANU/EXCR/0002/2017 dated 10.03.2017 as the self assessed duty under Rule 8 of the

Central Excise Rules 2002 is recoverable as arrears and is thus distinguished from the duty demanded under section 11A of Central Excise Act, 1944.

Therefore you are hereby directed to pay the defaulted duty amount along with interest and penalty as applicable in cash by 27.02.2018 and submit payment particulars to this office as soon as you make the payments.

It may be noted that sufficient time has been given to you and in case you fail to make payment in cash, by above said date recovery would be initiated by ways of auctioning of the attached goods without further intimation which may please be noted.

..."

6.2. On reading of the aforesaid quoted portion, it is clear that it was the stand of the Assistant Commissioner that since Rule 3 provided only the Cenvat credit as on the last day of the month can be used for payment of duty of the said particular month, Cenvat credit accumulated on a later date is not allowed for the past duty payment. The stand was so based by virtue of the circular dated 28.03.2012.

6.3. From the quoted portion of the circular dated 28.03.2012 read with the impugned communication dated 12.02.2018, what is evident is that the stand of the authorities that the Cenvat credit cannot be utilized for later payment is based on the reading of the proviso to Rule 3(4) of the Cenvat Credit Rules, 2004. In the decision of this Court in the case of Advance Surfactants India (supra), this Court had extensively considered the proviso to Rule 3(4) of the Cenvat Credit Rules. The issue before the Court therein was that by virtue of the first proviso to Rule 3(4) of the Cenvat Credit Rules, a restriction is placed on utilization of Cenvat credit by laying down that the Cenvat credit shall be utilized only to the extent such credit was available on the last day of the month or the quarter, as the case may be, for payment of duty relating to that month. Therefore, under scrutiny was the stand of the authorities whether Cenvat credit can be utilized which has accumulated on a later date for payment of past duty. Based on this proviso to Rule 3(4), the circular dated 28.03.2012 was issued. Rule 3(4) of the Cenvat Credit Rules reads as under:

RULE 3. CENVAT Credit (1) A manufacturer or producer of final products or a [provider of output service] shall be allowed to take credit (hereinafter referred to as the CENVAT Credit) of -

...

(4) The CENVAT credit may be utilized for payment of

(a) any duty of excise on any final product; or

(b) an amount equal to CENVAT credit taken on inputs if such inputs are removed as such or after being partially processed; or

(c) an amount equal to the CENVAT credit taken on capital goods if such capital goods are removed as such; or

(d) an amount under sub rule (2) of rule 16 of Central Excise Rules, 2002; or

(e) service tax on any output service:

Provided that while paying duty of excise or service tax, as the case may be, the CENVAT credit shall be utilized only to the extent such credit is available on the last day of the month or quarter, as the case may be, for payment of duty or tax relating to that month or the quarter, as the case may be:

Provided further that the CENVAT credit of the duty, or service tax, paid on the inputs, or input services, used in the manufacture of final products cleared after availing of the exemption under the following notifications of Government of India in the Ministry of Finance (Department of Revenue),-

(i) No. 32/99-Central Excise, dated the 8th July, 1999 G.S.R. 508(E), dated 8th July, 1999;

(ii) No. 33/99-Central Excise, dated the 8th July, 1999 G.S.R. 509(E), dated 8th July, 1999;

(iii) No. 39/2001-Central Excise, dated the 31st July, 2001 G.S.R. 565 (E), dated the 31st July, 2001;

(iv) No. 56/2002-Central Excise, dated the 14th November, 2002 G.S.R. 764(E), dated the 14th November, 2002;

(v) No. 57/2002-Central Excise, dated 14th November, 2002 G.S.R... 765(E), dated the 14th November, 2002;

(vi) No. 56/2003-Central Excise, dated the 25th June, 2003 G.S.R. 513 (E), dated the 25th June, 2003; and

(vii) No. 71/2003-Central Excise, dated the 9th September, 2003 G.S.R. 717 (E), dated the 9th September, 2003,

shall, respectively, be utilized only for payment of duty on final products, in respect of which exemption under the said respective notifications is availed of:

Provided also that no credit of the additional duty leviable under sub-section (5) of section 3 of the Customs Tariff Act, as amended by clause 72 of the Finance Bill, 2005, the clause which has, by virtue of the declaration made in the said Finance Bill under the Provisional Collection of Taxes Act, 1931, the force of law, shall be utilised for payment of service tax on any output service:

Provided also that the CENVAT credit of any duty mentioned in sub-rule (1), other than credit of additional duty of excise leviable under clause 85 of the said Finance Bill, the clause which has, by virtue of the declaration made in the said Finance Bill under the Provisional Collection of Taxes Act, 1931, the force of law, shall not be utilised for payment of said additional duty of excise on final products".

[Emphasis Supplied]

6.4. This Court while deciding the legality of the proviso to Rule 3(4) in the case of

Advance Surfactants India (supra) specifically held as under:

"... Considering Rule 3 of the CENVAT Credit Rules, 2004, which are framed in exercise of powers under Section 37 of the Central Excise Act, 1944 it provides for CENVAT Credit allowable to the manufacturer or producer of final products. A manufacturer or producer of the final product is entitled to CENVAT Credit under Rule 3. However, while allowing CENVAT Credit allowable under Rule 3 of the CENVAT Credit Rules first proviso to Sub Rule (4) of Rule 3 restricts utilization of CENVAT Credit for discharging the duty liability incurred by the manufacturer and as per the said provisions CENVAT Credit shall be utilized only to the extent such credit is available on the last day of the month or quarter, as the case may be, for payment of duty relating to that month or quarter, as the case may be. Thus, the effect of the said proviso would be that though a manufacturer is obliged to discharge excise duty liability by 5th or 6th day of the next month, the CENVAT Credit taken by the manufacturer only till the end of the month to which the excise duty related, could be utilized and CENVAT Credit legally availed during the first 5 days or 6 days of the subsequent months is not permitted to be utilized for paying the duty of excise for the goods cleared in the previous month, and therefore, on one hand manufacturer is allowed as per Rule 8(1) of the Central Excise Rules, 2002 to pay the duties on the goods removed from the factory during the month by the 6th day of the following month. On the other hand, though the manufacturer may have CENVAT Credit in his account the same cannot be permitted to be utilized after the end of the month, more particularly, between the last day of the month and the 6th day of the following month, and therefore, proviso to Sub Rule (4) of Rule 3 of the CENVAT Credit Rules would be just contrary and/or in conflict with Rule 8(1) of the Central Excise Rules, 2002. A manufacturer can be and should be permitted to utilize the CENVAT Credit legally availed during the first 5 days or 6 days of the subsequent month for paying the duty of the excise for the goods cleared in the previous month.

[5.2] Even otherwise, proviso to Sub Rule (4) of Rule 3 of the CENVAT Credit Rules can be said to be ultra vires to Rule 3(1) of the CENVAT Credit Rules as it does not have any nexus with the object sought to be achieved by the Rules and in fact runs contrary to the principles of CENVAT Credit Rules. At this stage, it is required to be noted that as per catena of decisions of the Hon'ble Supreme Court as well as this Court and other High Courts, CENVAT Credit is indefeasible and there is no correlation of the raw-material and the final product. It is not as if credit could be taken on a final product, which is manufactured out of a particular raw material to which the credit was related. The Credit may be taken against excise duty on the final product manufactured on the very day that it becomes available. Thus, as such, credit under the CENVAT Scheme is as good as tax paid. If any decision is needed on the aforesaid, decision of the Hon'ble Supreme Court in the case of Dai Ichi Karkaria Ltd. (Supra) and Eicher Motors Ltd. (Supra) are required to be referred to. In the aforesaid decision, it is specifically held that utilization of legally availed CENVAT Credit is a right vested in the manufacturer the moment duty paid inputs or input services are received by him because there is no one to one correlation between input/inputs services on one hand and the final excisable product on the other hand. Therefore, proviso to Sub Rule (4) of Rule 3 of the CENVAT Credit Rules, which disentitles the manufacturer utilization of CENVAT Credit availed in a particular month for the goods manufactured in the preceding month can be said to be contrary to the law laid down by the Hon'ble Supreme Court in the aforesaid decisions as well as contrary to the CENVAT Credit Scheme, and therefore, the same is invalid and unconstitutional."

7 . Considering Rule 3 of the Cenvat Credit Rules, framed in the exercise of powers under Section 37 of the Central Excise Act, 1944, and considering the first proviso to sub rule (4) of Rule 3 which restricted the utilization of Cenvat credit for discharging the duty liability incurred by the manufacturer and as per the said provision, Cenvat credit was to be utilized only to the extent such credit is available on the last day of the month, the effect of which that though the manufacturer is obliged to discharge excise duty liability, the Cenvat credit taken by the manufacturer only till the end of the month to which the excise duty would be utilized under Cenvat credit legally availed during the first five or six days of the month is not permitted to be utilized, this Court held that the proviso to Rule 3(4) which disentitles the manufacturer as aforesaid can be contrary to law laid down by the Apex Court in the case of Collector vs. Dai Ichi Karkaria Ltd. reported in 1999 (112) ELT 353 (SC).

8 . Having considered the substantial position of law, once this Court in the judgement of Advance Surfactants (supra) has categorically held the proviso to Rule 3(4) which restricts or disentitles the manufacturer utilization of Cenvat credit in the particular manner so provided under sub-rule (4) of Rule 3 as bad, consequentially, it falls without fail that the impugned circular dated 28.03.2012 which draws support from this rule also should naturally fail the test of legality.

9 . Accordingly, the prayer of the petitioner to hold and declare the circular no. 962/05/2012-CX : MANU/EXCR/0007/2012 dated 28.03.2012 as being discriminatory and arbitrary is allowed. The circular is declared as violative of Article 14 of the Constitution of India. It is further declared that in view of the decision of this Court in Advanced Surfactants (supra), the petitioner is entitled to have his Cenvat credit balance to be utilized for making payments of his outstanding excise duty liabilities. The respondents are therefore directed to drop the proceedings for the recovery of dues which have been so initiated by virtue of the impugned notices dated 04.04.2018 and 04.05.2018. The request of the

petitioner so expressed in the letter dated 04.11.2016 intending to make payment of outstanding dues from the Cenvat credit amount out of the balance available deserves to be accepted and the stand of the respondents relying on the circular dated 28.03.2012 is held to be bad in view of the fact that we hold the circular to be contrary to law. Petition is accordingly allowed. No costs.