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GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)
8th Floor, World Trade Centre,
Centre - I, Cuffe Parade,
Mumbai-400 005

F.No.195/787/12-RA

Date of Issue

ORDER NO. 07/2017-CX (WZ) / ASRA / MUMBAI/ DATED 28.11.2017 OF THE GOVERNMENT OF INDIA PASSED BY SHRI ASHOK KUMAR MEHTA , PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35EE OF THE CENTRAL EXCISE ACT, 1944.

Applicant : M/s. True Pack Thermo Products.

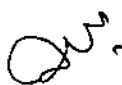
Respondent : Commissioner (Appeals), Central Excise, Mumbai Zone-I.

Subject : Revision Application filed, under Section 35EE of the Central Excise Act, 1944 against the Order-in-Appeal No. YDB/66/TH-I/2012 dated 29.05.2012 passed by the Commissioner of Central Excise (Appeals), Mumbai Zone-I.

ORDER

The instant Revision Application is filed by M/s. True Pack Thermo Products (hereinafter referred to as "the Applicant") against from the Order-in-Appeal No.YDB/66/TH-I/2012 dated 29.05.2012 in which the Commissioner (Appeals) has upheld the Order-in-Original No.24/2011-12 dated 04.01.2012.

2. The issue briefly is that the Applicant was issued Show Cause Notice (SCN) dated 17.01.2011 as it appeared that they had contravened the provisions of Rule 4 & 8 of the Central Excise Rules, 2002 inasmuch as that during the course of the EA-2000 Audit, it was noticed that Applicant had paid Central excise duty at 8% instead of 10% in respect of clearance of Excisable goods valued at Rs. 1,61,146.00 during the period from 27.02.2010 to 28.02.2010 which resulted in short payment of Central excise Duty. It was further stated in the SCN dated 17.01.2011 that the Applicant had availed Cenvat credit in respect of Capital goods to the extent of Rs. 1,71,862.00 (Cenvat basic) + 3,438.00 (ED Cess) + 1,718.00 (SHE Cess) totalling to Rs. 1,77,018.00 during the period from December 2007 to October 2008 and also simultaneously availed depreciation on the same amount under Section 32 of Income tax Act, 1961 in contravention of Rule 4 (4) of Cenvat Credit Rules, 2004. It was further stated that on the above being pointed out, the Applicant partly paid wrongly availed credit to the extent of Rs. 66,574.00 (Cenvat Basic) + Rs. 1331.00 (ED Cess) + Rs. 666.00 (SHE Cess) totaling to Rs. 68570.00 but failed to pay the remaining amount of Rs. 38714.00 (Cenvat Basic)- + Rs. 774.00 (ED Cess) + Rs. 387.00 (SHE Cess) totaling to Rs. 39,875.00 and the interest on the total amount of Rs. 1,77,018.00. Thus, the Applicant appeared to have contravened the provisions of Rule 3 read with Rule 4 (4) of the Cenvat credit Rules, 2004 with intent to avail Cenvat credit fraudulently and evade payment of Central Excise Duty. As a result, provisio to Section 11 A (1) of Central Excise 1944 read with Rule 14 of Cenvat credit Rules 2004 was invokable for recovery of irregular Cenvat credit. Besides, interest was also chargeable as per Section 11 AB of Central Excise Act 1944 and the appellant was also liable for penalty under Rule 15 of Cenvat Credit Rules 2004 read with Section 11 AC of Central Excise Act 1944.



3. The Deputy Commissioner, Central Excise, Kalyan-I Division (adjudicating authority) vide Order in Original No 24/2011-12 dated 04.01.2012 confirmed the demand of Cenvat Credit of Rs.1,77,018/- against the Applicant under Rule 14 of Cenvat Credit Rules, 2004 read with the proviso to Section 11 A (1) of Central Excise 1944, ordered recovery of interest from the Applicant Rule 14 of Cenvat credit Rules, 2004 read with Section 11 AB of Central Excise Act 1944 and also imposed a penalty of Rs. 1,77,018/- on the Applicant under Rule 15 of the Cenvat Credit Rules, 2004 read with Section 11 AC of Central Excise Act 1944. During the course of adjudication, the adjudicating authority found that apart from Rs.68570/-, the Applicant had also paid Rs.39,875/- through PLA in the month of May-2010 and accordingly he appropriated the amount of Rs.1,08,445/- already paid by the Applicant against total conformed demand of Rs.1,77,018/-.

4. Being aggrieved, the Applicants filed appeal against the impugned order-in-original No. 24/2011-12 dtd. 04.01.2012, confirming the demand of duty before Commissioner (Appeals) Central Excise on the grounds that:

- (i) the adjudicating authority have failed and neglected to appreciate the correct factual position that although depreciation on full cenvat credit of Rs. 1,77,018/- on capital goods was availed by the appellant, the appellant had actually availed only 50% of the Cenvat Credit i.e. Rs. 108445/- in respect of capital goods shown at Sr. No.1,2, 4, 5 of the audit findings dated 12.04.2010;
- (ii) the adjudicating authority have failed and neglected to appreciate the correct factual position in respect of inadmissible availment of cenvat credit on capital goods;
- (iii) they have regularly filed the ER-1 wherein under Sr. no.5 the details of cenvat credit availed and utilized, the details of cenvat credit taken on capital goods on invoices issued by manufacturers were disclosed;

- (iv) the self assessment on the part of tax payee is only a facility and cannot be and must not be treated as dilution of statutory responsibility of central excise officers in ensuring the correctness of duty payment;
- (v) the main function of the department is to scrutinize or examine the tax return by the assessee on monthly basis; ,
- (vi) the adjudicating authority failed and neglected to appreciate that there was no intent on the part of the appellant to avail cenvat credit fraudulently and to evade payment of central excise duty;
- (vii) the entire record show that the infraction of excise rules was due to inadvertence and bona fide as the appellant was genuinely not aware that it was irregular to avail cenvat credit on capital goods if depreciation is also availed on the cenvat amount;
- (viii) the appellant is a sole proprietary concern and small scale enterprise and is functioning in a remote backward area the appellant therefore prayed that a lenient view may please in the matter;
- (ix) in view of the above, the penalty of Rs 1,77,018/- imposed vide the impugned order may please be set aside.

5. Commissioner (Appeals) in his impugned order observed that the Applicants have wrongly availed the cenvat credit on the capital goods by contravening the provisions of Rule 3 read with Rule 4(4) of Cenvat Credit Rules, 2004. In case of availment of cenvat credit of the duty paid on capital goods, Rule 3 of Cenvat Credit Rules, 2004 read with Sub-Rule (4) of Rule 4, provides for taking of credit of duty so paid on the such capital goods received by the manufacturer of final product for use in or in relation to manufacture of final product. He further observed that from the reading of Sub-Rule 4 of Rule 4 of Cenvat credit Rules 2004, the manufacturer of final product cannot simultaneously avail the Cenvat credit as well as claim depreciation of that part of the value of capital goods which represents the amount of duty on such capital goods, under section 32 of the Income-tax Act, 1961 (43 of 1961). From the findings of adjudicating authority, Commissioner (Appeals) also observed

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that the Applicant have availed the credit of duty paid on such capital goods i.e. Rs 1,77,018/- and have simultaneously availed the depreciation of that part of the value of capital goods which represented the amount of duty on such capital goods, Rs 1,77,018/- under Section 32 of the Income-Tax Act, 1961 (43 of 1961) and therefore, the same is inadmissible and is recoverable along with interest. The Commissioner (Appeals) further observed that the Applicant even though filed their returns along with their cenvat statement but failed to disclose that they have availed the credit of duty paid on the said capital goods by simultaneously availing the depreciation on that part of value that part of the goods which represents the amount of duty on such capital goods, Rs 1,77,018/-under Section 32 of the Income Tax Act, 1961. Had this not been noticed by the department during the course of verification of their records the same would have remained unnoticed and caused a loss to the exchequer. Commissioner (Appeals) also observed that the Applicants have knowingly, with an intent to evade payment of central excise duty on their finished goods, have availed the inadmissible credit of duty paid on the said capital goods by claiming the double benefit and utilized the same for the payment of Central Excise duty for the clearance of finished goods and thereby contravened the provisions of Rule 3 read with Rule 4(4) of the Cenvat Credit Rules, 2004 with intent to evade payment of duty and to avail inadmissible Cenvat Credit. Therefore, Commissioner (Appeals) held that the provision to Section 11A (1) have been correctly invoked and applied in the instant case and accordingly, the Applicants are liable to interest and penalty also as imposed on them in vide Order in Original No.24/2011-12 dated 04.01.2012 and upheld the same and rejected the appeal of the Applicants.

6. Aggrieved by the impugned Order in Appeal, the Applicant filed the present Revision Application on following Grounds of Appeal:

- (i) Since the Order in Appeal No. YDB/66/Th-I/2012 dated 29.05.2012 is passed by the Commissioner (Appeals) Central Excise, Mumbai Zone-I is in gross breach of guidelines prescribed for passing of orders after the conclusion of the hearing in as much as the same is passed after 21 days from the date of conclusion of the personal hearing, a reasonable inference can be easily drawn that the Order

passed by the Commissioner (Appeals), may have been influenced. Hence the above Order in Appeal is Void-ab-initio.

- (ii) The contention of the Commissioner (Appeals) that the appellant by taking Cenvat Credit on Capital Goods (Since depreciation also availed simultaneously), which they were not entitled to, being contrary to the law and as such have contravened the provisions of Rule 3 read with Rule 4(4) of the Cenvat Credit Rules, 2004 with intent to evade payment of duty and to avail inadmissible Cenvat Credit and therefore the provisions to Section 11 A (1) have been correctly invoked and applied in the appellant's case is wholly misconceived and entirely unjustified. The same can be seen from the facts and circumstances pointed out in the Statement of Facts given above. Commissioner (Appeals) has clearly failed and neglected to appreciate that there was no intention to evade duties in the facts and circumstances of the case. Therefore, the penalty under Section 11 (A) (1) is not warranted looking at the nature of contravention and the fact that the duty is paid, there may be no ground made out for imposing maximum penalty equal to the duty liability at all.
- (iii) Commissioner (Appeals), the appellate authority has failed and neglected to take note of the fact that Rule 14 of Cenvat Credit Rules, 2004 is amended to substitute the word "or" with "And" so that interest is not payable on credit wrongly taken unless the same is utilized.

In view of the above, the Applicant has prayed for setting aside the Order in Appeal No. YDB/66/Th-I/2012 dated 29.05.2012.

7. A personal hearing in the matter was fixed on 23.11.2017 before Revisionary Authority, however, the Applicant vide his letter dated 18.11.2017 waived the right of personal hearing and requested to decide the Revision Application on the basis of facts and evidence submitted in its entire details in the Revision Application itself. In view of this, the Government proceeds to decide the case on the basis of available records.

8. Government has carefully gone through the records of the case grounds of application and the submissions made.

9. Government finds that the issue involved before it is whether the confirmation of demand on recovery of inadmissible Cenvat credit of Rs.1,77,018/- against the Applicant under Rule 14 of Cenvat Credit Rules, 2004 read with the proviso to Section 11 A (1) of Central Excise 1944, recovery of interest from the Applicant Rule 14 of Cenvat credit Rules, 2004 read with Section 11 AB of Central Excise Act 1944 and imposing a penalty of Rs. 1,77,018/- on the Applicant under Rule 15 of the Cenvat Credit Rules, 2004 read with Section 11 AC of Central Excise Act 1944 by the adjudicating authority and upheld by the Commissioner (Appeals) is legal and proper.

10. Since the issue relates to recovery of inadmissible Cenvat Credit, Government finds it proper to first examine the issue of jurisdiction. Hence, Government proceeds to discuss relevant statutory provisions.

10.1 Section 35EE of Central Excise Act, 1944.

“Section 35EE. Revision by Central Government. - (1) The Central Government may, on the application of any person aggrieved by any order passed under Section 35A, where the order is of the nature referred to in the first proviso to sub-section (1) of Section 35B, annul or modify such order :”

10.2 Section 35B(1) of Central Excise Act, 1944.

“35B. Appeals to the Appellate Tribunal. - (1) Any person aggrieved by any of the following orders may appeal to the Appellate Tribunal against such order -

- (a) a decision or order passed by the [Commissioner of Central Excise] as an adjudicating authority;
- (b) an order passed by the [Commissioner (Appeals)] under section 35A;
- (c)
- (d)

[Provided that no appeal shall lie to the Appellate Tribunal and the Appellate Tribunal shall not have jurisdiction to decide any appeal in respect of any order referred to in clause (b) if such order relates to, -

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- (a) a case of loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory, or from one warehouse to another, or during the course of processing of the goods in a warehouse or in storage, whether in a factory or in a warehouse;
- (b) a rebate of duty of excise on goods, exported to any country or territory outside India or on excisable materials used in the manufacture of goods which are exported to any country or territory outside India;
- (c) goods exported outside India (except to Nepal or Bhutan) without payment of duty;
- 9[(d) credit of any duty allowed to be utilised towards payment of excise duty on final products under the provisions of this Act or the rules made thereunder and such order is passed by the Commissioner (Appeals) on or after the date appointed under section 109 of the Finance (No. 2) Act, 1998:]

Provided further that the appellate Tribunal may, in its discretion, refuse to admit an appeal in respect of an order referred to in clause (b) or clause (c) or clause (d) where -

- (i) in any disputed case, other than a case where the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment is in issue or is one of the points in issue, the difference in duty involved or the duty involved; or
- (ii) the amount of fine or penalty determined by such order."

11. From the above, it is clear that if the Order-in-Appeal relates to availment of the credit of duty paid on capital goods and simultaneous availment of the depreciation of that part of the value of capital goods which represented the amount of duty on such capital goods under Section 32 of the Income-Tax Act, 1961 (43 of 1961) and therefore, the same is inadmissible and is recoverable alongwith interest. It appears that the applicant has taken recourse to file the present revision application before Central Government in terms of Section 35EE of the Central Excise Act, 1944 based on the clause (d) above which reads as under:

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9[(d) "credit of any duty allowed to be utilised towards payment of excise duty on final products under the provisions of this Act or the rules made thereunder and such order is passed by the Commissioner (Appeals) on or after the date appointed under section 109 of the Finance (No. 2) Act, 1998:"]".

12. Government finds it pertinent to note here that number 9 appearing before clause (d) indicates foot note and foot note at Sr. No. 9 states

"To be inserted from a date to be notified by s.109 of Finance Act, 1998 (21 of 1998)"

This indicates that this clause will be effective on or after the date to be appointed under section 109 of the Finance Act, 1998 and no such date has been notified so far.

13. As a consequence, Government further notes that Revision Application under Section 35 EE of the Central Excise Act, 1944 shall lie before the Revisionary Authority Government of India in respect of order passed by the Commissioner (Appeals) under section 35A, if such order relates only to,

(a) a case of loss of goods, where the loss occurs in transit from a factory to a warehouse, or to another factory, or from one warehouse to another, or during the course of processing of the goods in a warehouse or in storage, whether in a factory or in a warehouse;

(b) a rebate of duty of excise on goods exported to any country or territory outside India or on excisable materials used in the manufacture of goods which are exported to any country or territory outside India;

(c) goods exported outside India (except to Nepal or Bhutan) without payment of duty.

14. Thus, cases relating to clause (d) referred in para 11 above will effectively fall under the ambit of Revisionary Authority only on or after the date to be appointed/notified under section 109 of the Finance Act, 1998.

15. In view of above discussions, Government is of opinion that the issue involved in this case does not fall within the jurisdiction of this authority and hence, the issue is required to be agitated before proper legal forum, i.e. Tribunal if the Applicant deemed fit to do so. The revision application is thus not maintainable before this authority for want of jurisdiction in terms of Section 35EE read with 35(B)(1) proviso of Central Excise Act, 1944.

16. The revision application thus stands rejected being non-maintainable for lack of jurisdiction.

17. So, ordered.

Ashok Kumar Mehta
28/11/2017

(ASHOK KUMAR MEHTA)
Principal Commissioner & ex-officio
Additional Secretary to Government of India

ORDER No. 07 /2017-CX (WZ) /ASRA/ DATED 28.11.2017

To,

M/s True Pack Thermo Products.,
D-26/27, 1st Floor, Nxt to Aryan Hospital,
S.G. Barve Marg, Nehrunagar,
Kurla (East), Mumbai 400 024

Copy to:

1. The Commissioner, CGST & Central Excise Commissionerate, Thane (Rural).
2. The Commissioner (Appeals-II), CGST & Central Excise, Mumbai.
3. The Deputy Commissioner (Rebate), CGST & Central Excise Commissionerate, Thane(Rural).
4. Sr. P.S. to AS (RA)
5. Guard File.
6. Spare Copy.

