HIGH COURT OF GUJARAT (*D.B.*)

COMMISSIONER OF C EX & CUSTOMS, SURAT-I
Versus
ESSAR STEEL LTD

Date of Decision: 21 April 2010

Citation: 2010 LawSuit(Guj) 1789

Hon'ble Judges: D A Mehta, H N Devani

Eq. Citations: 2011 269 ELT 331

Case Type: Tax Appeal

Case No: 1608 of 2009

Subject: Customs, Excise

Acts Referred:
Central Excise Act, 1944 Sec 38A, Sec 11A
Central Excise Rules, 1944 R 57AE(3)
Cenvat Credit Rules, 2001 R 7, R 7(1)(b)
Cenvat Credit Rules, 2002 R 9, R 7, R 3(1), R 12

Final Decision: Appeal dismissed

Advocates: Nanavati Associates, R M Chhaya

H.N. Devani, J.

[1] In both these appeals, the appellant-Revenue has challenged the order dated 21-11-2007 made by the Customs, Excise & Service Tax Appellate Tribunal (the Tribunal) [2008 (222) E.L.T. 154 (Tri. - Ahmd.)], proposing the following three questions :

> [i] Whether, in the facts and circumstances of the case, the judgment rendered by the Hon'ble Tribunal, absolving the respondent from fraudulent clearance in view of the provisions of Rule 3(1) of CENVAT Credit Rules, 2002 and Rule 57AE(3) of the Central Excise Rules, 1944 (as applicable), is correct or not?
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> [ii] Whether, in the facts and circumstances of the case, in view of the provision of Rule 3(1) of CENVAT Credit Rules, 2002 and Rule 57AE(3) of the Central Excise

Rules, 1944 (as applicable), if the conditions are not fulfilled, can the benefit of credit be granted terming it as technical ground, as held by the Hon'ble Tribunal?

[iii] Whether, in the facts and circumstances of the case, the Hon'ble CESTAT is correct in coming to the conclusion that even though the goods were cleared before filing of bills of entry and obtaining out of charge, would not attract the provisions of Rule 7 of CENVAT Credit Rules, 2002 and Rule 57AE(3) of the Central Excise Rules, 1944?

[2] The respondent in Tax Appeal No. 1608 of 2009 is a company which is inter alia engaged in the manufacture of excisable goods, whereas the respondent in Tax Appeal No. 609 of 2008 is Manager (Excise) of the said Company. The respondent company imported 1,76,505 MTs of Iron Ore Pellets from Brazil at its captive jetty at Hazira between 17-5-2001 and 19-6-2001. The respondent filed fifteen bills of entry (each seeking clearance of 10 MTs of Iron Ore Pellets) and was in the process of filing another three bills of entry for the balance quantity, when the customs authorities discovered that the entire consignment had been lifted from the jetty and consumed by the respondent company in its factory without waiting for an out of charge order to be passed in fourteen out of fifteen bills of entry. For the balance 2605 MTs of Iron Ore Pellets, the respondent made efforts to file the remaining three bills of entry, but the customs authorities refused to accept the same. Out of the fifteen bills of entry, thirteen bills for entry were assessed provisionally and basic customs duty was paid prior to the detection of offence. Out of these thirteen bills of entry, CVD was paid and out of charge order was passed only in relation to one bill of entry. In relation to twelve bills of entry, no CVD was paid nor out of change order made. The remaining two bills of entry were awaiting assessment. On completion of investigation, show cause notice dated 24-7-2001 demanding customs duty, interest and proposing confiscation of the offending goods, imposition of penalty and fine came to be issue. Subsequently, another show cause notice dated 4-1-2002 was issued in continuation of the earlier show cause notice proposing confiscation of finished goods manufactured from the said 1,66,505 MTs of Iron Ore Pellets.

[3] Against the aforesaid show cause notice, the respondents approached the Settlement Commission. The Settlement Commission vide orders dated 12-6-2003 and 10-11-2003, settled the amount of customs duty at Rs. 6,74,17,619/- and granted full immunity from payment of fine, penalty and prosecution.

[4] Pursuant to the order made by the Settlement Commission, the bills of entry were assessed, and duplicate and quadruplicate copies of the bills of entry were returned to the respondent in the month of January 2004. Thereafter, the respondent vide communication dated 16th March, 2004, informed the concerned Assistant

Commissioner that the CENVAT credit had been taken in respect of 1,66,505 MTs of Iron Ore Pellets imported through the bills of entry.

[5] In the aforesaid background, a show cause notice dated 2nd March, 2005 came to be issued against the respondent seeking to disallow CENVAT credit of duty availed by it on the strength of twelve assessed bills of entry, bills of entry which were pending assessment against TR-6 challans of payment of CVD for which bills of entry were accepted by the Revenue after the Settlement Commission's order and assessed thereafter. The main grounds stated in the notice were that the assessee did not maintain proper records as required under Rule 57AE(3) of the erstwhile Central Excise Rules, 1944, Rule 7 of Cenvat Credit Rules, 2001 and Rule 7 of the Cenvat Credit Rules, 2002, showing the actual date of receipt, disposal, consumption and inventory in respect of the said imported iron ore pellets during the relevant period; that the respondent was not entitled to avail of CENVAT credit of Rs. 5,79,12,820/- in relation to 1,66,505 MT of DR Grade Imported Iron Ore Pellets as the said duty became recoverable from the assessee by reason of fraud, collusion, wilful mis-statement, suppression of facts with intent to evade payment of duty; that Cenvat credit was availed in March 2004 whereas the inputs were received in the factory prior to 1-3-2003; and that the respondents had availed credit without prior approval of the Commissioner.

[6] The aforesaid show cause notice came to be adjudicated vide Order in Original dated 30th August, 2006 made by the Commissioner, Central Excise and Customs, Surat-1, whereby CENVAT credit of Rs. 5,79,12,820/- came to be disallowed and the assessee was ordered to pay the said CENVAT credit under Rule 12 of the CENVAT Credit Rules, 2002 read with Section 11A of the Act. Penalty of Rs. 25,00,000/- was imposed under Rule 13 of the Rules on the respondent company and penalty of Rs. 2,50,000/- was also imposed upon the Manager, that is, the respondent in Tax Appeal No. 809 of 2008.

[7] The respondents carried the matter in appeal before the Tribunal and succeeded.

[8] Mr. R.M. Chhaya, learned Senior Standing Counsel for the appellant-Revenue invited attention to the order made by the adjudicating authority, to point out that the Settlement Commission had vide order dated 12th July 2003 ordered that the aspect of availability of CENVAT credit in relation to the consignment in question was to be decided by the concerned Commissioner in accordance with law as applicable to the duty paid. It was submitted that the respondent assessee had, without obtaining any permission from the Jurisdictional Commissioner, availed of the credit on its own disregarding the direction issued by the Settlement Commission. In the circumstances, the adjudicating authority had rightly disallowed the CENVAT credit. It was submitted

that the respondents had lifted the goods without completing the customs formalities for which they were penalized. Hence, the Tribunal was not justified in holding that CENVAT credit cannot be denied to the respondents. It was, accordingly, submitted that the impugned order of the Tribunal does give rise to substantial questions of law, as proposed or as may be otherwise deemed fit.

[9] As can be seen from the impugned order of the Tribunal, on behalf of the respondents it had been contended that insofar as fourteen bills of entry were concerned, CENVAT credit was availed on the strength of such bills and as such could not be denied to them, the customs authorities upon detection of offence did not allow them to file the balance three Bills of Entry and the said bills were assessed and copies were given only after settlement of dispute before the Settlement Commission; there was nothing recorded in the order of the Settlement Commission about fraud, wilful mis-statement with intent to evade payment of duty; that as they had paid the duty, the substantive benefit should not be denied to them on technical objections.

[10] The Tribunal after considering the submissions advanced on behalf of the respective parties and after appreciating the evidence on record has recorded that the dispute which related to clearance of goods without payment of duty and without obtaining out of charge was settled by the respondents before the Settlement Commission vide order dated 16-10-2003. The Tribunal has observed that the Commissioner had agreed that bills of entry cannot be considered to be supplementary invoices as there was no sale of goods involved. That the respondents were importers of the goods and had used the same in the manufacture of their final product. The Commissioner had also agreed with the respondents that the entire disputed amount paid by them had to be treated as payment made against bills of entry; and that three bills of entry covering the balance of the goods were not allowed to be filed by the department. He however, denied credit on the ground of fraud, collusion, suppression etc. In the background of the aforesaid factual matrix the Tribunal was of the view that mere filing of a petition before the Settlement Commission cannot be considered as the respondent's tacit admission of guilt. The Tribunal found that there was no finding of the Settlement Commission or any competent authority of the respondent's guilty mind; that though goods were cleared from the respondent's jetty before filing of bills of entry and obtaining out of charge, there was no evidence that such clearance was with the intention to evade payment of duty; that the respondents efforts to file bills of entry in respect of such removals was made ineffective by the Customs authorities themselves for which purpose they had to approach the Settlement Commission and that it was only as a result of the directions of the Settlement Commission that the respondent had filed the remaining bills of entry and paid duty. The Tribunal was

accordingly of the view that as such it could not be said that the bills of entry were not filed on account of fraud, collusion, wilful mis-statement etc.

[11] As regards the stand of the adjudicating authority that credit cannot be availed of in March 2004 when the goods had arrived in 2001, the Tribunal was of the view that the said stand was not justified in view of the fact that the Customs authorities were themselves not accepting the bills of entry and that the duty was paid by the respondents and the credit became available on the basis of TR-6 challans; that Revenue cannot not be allowed to take advantage of its own refusal. The Tribunal further found that it was an admitted position that the entire duty had been paid by the respondents and the inputs were used by them in the manufacture of final product cleared on payment of duty, and was accordingly of the view that the respondent company could not be denied its substantive right on hyper technical grounds. The Tribunal was also of the view that the respondents having cleared the goods from their captive jetty without completing customs formalities, they could be penalized in respect of the same, but Modvat credit of duty paid by them (may be subsequently in terms of the order of the Settlement Commission) cannot be disallowed. The Tribunal further held that the Settlement Commission had not imposed any penalty for the alleged offence of clearance of goods without filing bills of entry; that bills of entry are prescribed documents for the purpose of availment of credit in terms of Modvat Rules and when the same have been assessed and the duty has been paid, the respondents cannot be deprived of their right to avail the credit of the same; that even in respect of balance bills of entry, duty was paid by the respondents while awaiting assessment and credit availed on the basis of TR-6 challans, which in any case is also a prescribed document in terms of Rule 57AE(3) of the erstwhile Central Excise Rules, 1944 and Rule 7(1)(b) of the Cenvat Credit Rules, 2001.

[12] The Tribunal was of the view that the three bills of entry could not be filed by the respondents on account of resistance by the Revenue and as such it was not permissible for the Revenue to now contend that the credit had been availed against TR-6 challans or that credit had been availed late. That the amended provision of Modvat Rules with effect from 4-2000 or the subsequent CENVAT Credit Rules, 2001 do not prescribe any maximum time limit for allowing credit. Reliance was placed upon CBEC's Supplementary Instructions Manual and Boards Circular dated 29-8-2000 wherein it has been clarified thus :

> Cenvat credit may be taken immediately on receipt of inputs in the factory. This however does not mean, nor is it even intended that if the manufacturer does not take credit as soon as inputs are received in the factory he would be denied the benefit thereof.

Under the Cenvat Credit Rules, a manufacturer can take credit the minute the inputs are received in the factory. This however, does not mean, nor is it intended that if the manufacturer does not take credit as soon as inputs are received in the factory he would be denied the benefit of Cenvat Credit. Such an interpretation is not tenable.

[13] The Tribunal was of the view that even otherwise the respondent's right to avail of CENVAT credit is protected by virtue of Section 38A of the Central Excise Act, 1944 which specifically provides that if a Rule is superseded as in the instant case whereby the Central Excise Rules, 1944 were superseded by Cenvat Credit Rules 2001, which in turn were superseded by Cenvat Credit Rules, 2002, the rights which had accrued under the erstwhile Rules are protected/saved. That Rule 9 of the Cenvat Credit Rules, 2002 contains a transitional provision which provides that when Cenvat Credit has been earned under the erstwhile Rules, the same would be allowed to be utilized under the subsequent Rules, that is, Cenvat Credit Rules, 2002. Besides, the Board in its Circular No. F.No. 345/2/2000-TRU, dated 28-8-2000, has clarified that in a situation where inputs are received in a factory prior to supersession of the Central Excise Rules, however, credit has not been availed of for any reason, such credit earned, can be availed in terms of the transitional provisions under the subsequent rules.

[14] As regards the findings of the adjudicating authority that proper records showing receipts, consumption and inventory of inputs had not been maintained as required under the Cenvat Credit Rules, the Tribunal has noted that with effect from 1-7-2000, all statutory records had been dispensed with and that only private records were required to be maintained. The Tribunal further noticed that in Show Cause Notice F.No. VIII/10-83/COMMR/2001, dated 24-7-2001 in the customs proceedings, the Department had agreed to the fact that due records had been maintained by the respondent. The Tribunal was, accordingly, of the view that on the basis of the aforesaid findings, the denial of credit was not substantiated by any evidence and was against the facts recorded in another show cause notice, and accordingly, allowed the appeals and granted consequential relief to the respondents.

[15] From the facts noted hereinabove, it is apparent that the main contention of the appellant Revenue is that the respondent has not complied with the directions issued by the Settlement Commission in its true spirit. That despite the Settlement Commission having directed that the Jurisdictional Commissioner shall have to take a view on the admissibility of the CENVAT credit, yet the respondents assessees had on their own availed the credit. However, it is an undisputed position that the respondents have paid the entire duty on the inputs received by them and have used the same in the manufacture of final product cleared on payment of duty. There was no evidence that the clearance of goods was with the intention to evade payment of duty. The

Tribunal upon appreciation of the evidence on record has come to the conclusion that it is not as if the bills of entry were not filed on account of fraud, collusion, wilful mis-statement etc., but due to non-acceptance by the Department. Under the statutory provisions there was no bar against the respondents from availing the benefit of CENVAT duty in March 2004 despite the goods having arrived in 2001. In the circumstances the Tribunal has rightly held that objection raised by the Revenue regarding non-obtaining of the approval of the Commissioner prior to availment of CENVAT credit is merely a technical objection inasmuch as it is not even the case of the Revenue that the respondents are otherwise not entitled to avail of the CENVAT credit on the duty paid by them on the goods used in the manufacture of the final product. Merely because there was non-compliance with some directions issued by the Settlement Commission, it would not affect the rights of the respondents to avail of the benefit of the CENVAT credit.

[16] On a plain reading of the impugned order of the Tribunal, it is apparent that the conclusion arrived at by the Tribunal are based upon findings of fact recorded by it upon appreciation of the evidence on record. The Tribunal has, as a matter of fact, recorded that the denial of credit on the part of the appellants is not substantiated by any evidence on record. The learned counsel for the appellant revenue is not in a position to point out any evidence to the contrary, nor is he in a position to dislodge the findings of fact recorded by the Tribunal. In absence of any perversity being pointed out in the findings of fact recorded by the Tribunal, it cannot be stated that the Tribunal has committed any error so as to warrant interference. The Tribunal has given clear, cogent and convincing reasons in support of its conclusions. In the circumstances, it cannot be stated that the impugned order of the Tribunal suffers from any legal infirmity so as to warrant interference.

[17] No question of law as proposed or otherwise, much less any substantial question of law can be stated to arise out of the impugned order of the Tribunal.

[18] The appeals are, accordingly, dismissed, with no orders as to costs.