CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Zonal Bench At Ahmedabad

REGIONAL BENCH- COURT NO.3

EXCISE CROSS APPEAL NO. 10601 OF 2019
in
EXCISE APPEAL NO. 11492 OF 2019

(Arising out of OIO-SUR-EXCUS-000-COM-043-18-19 dated 23.06.2019 passed by Commissioner of Central Excise, Customs and Service Tax-SURAT-I)

C.C.E. & S.T. SURAT-I **.....Appellant**
NEW BUILDING...OPP. GANDHI BAUG,
CHOWK BAZAR,
SURAT, GUJARAT-395001

VERSUS

OIL AND NATURAL GAS CORPORATION LIMITED ....Respondent
Hazira Plant, Surat
SURAT-GUJARAT

APPEARANCE:
Shri. Prabhat K Rameshwaram, Additional Commissioner for the Appellant
Shri. S. Suryanarayanan, Advocate for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. RAJU

Final Order No. A/ 11120 /2022

DATE OF HEARING: 08.07.2022
DATE OF DECISION:09.09.2022

RAJU

This appeal has been filed by Revenue against order of Commissioner setting aside the Show Cause Notice issued for demand of cenvat credit and interest. Cross objection has also been filed by M/s ONGC.

2. Learned Authorized Representative pointed out that the show cause notice was issued to the respondent demanding reversal of cenvat credit. The respondent are engaged in manufacture of different petroleum products. After implementation of GST, w.e.f. 01.07.2017, most of the products of assessee are covered under GST Act except for HSD and ATF which continue to be covered under Central Excise Act. The appellant continued to file ER-1 returns in respect of such goods. In the ER-1 returns for the month of June-2017, it was observed that there was a

closing balance of cenvat credit of excise duty and service tax amounting to Rs.9,20,90,073/- and Rs.1,60,14,32,745/- respectively. The respondent carried forwarded the closing balance of all central excise duty of Rs.9,20,90,073/- in the cenvat credit register maintained for central excise and showed it in the return filed for the month of July 2017. As far as service tax credit was concerned, the appellant distributed the closing balance of service tax credit into GST and non-GST product proportionate to their turn over in the first quarter of 2017-2018. The respondent claimed an amount of Rs. 1,57,32,37,759/- as ITC under TRAN-1 filed under GST out of the total service tax credit amounting to Rs.1,60,14,32,745/-. The balance amount of service tax credit amounting to Rs.2,81,94,986/- was transferred as cenvat credit in their Central Excise return. The show cause notice alleged that in terms of Rule 15 of Cenvat Credit Rules, 2017, the respondent should have transferred the entire balance of cenvat credit available on 13.06.2017 in TRAN-1 filed under GST regime and should not have carried forward any amount into cenvat credit register maintained for central Excise purpose. The notice sought to deny the total cenvat credit of Rs. 12,02,85,059/- (Service Tax of Rs.2,81,94,986 and Central Excise duty of Rs. 9,20,90,073/-) into cenvat credit account maintained for the purpose of central excise duty on or after 01.07.2017.

3. Learned Authorized representative pointed out that Rule 15 of the Cenvat Credit Rules, 2017 is very unambiguous and mandates that the assessee shall transfer the entire cenvat credit available under Cenvat Credit Rules 2004 relating to the period ending with the day immediately preceding first day of July 2017 into his electronic credit ledger as per Chapter XX of Central Goods and Service Tax Act, 2017 and the Rules made thereunder. He pointed out that the said rule mandates that only cenvat credit which is not eligible for such transfer shall not be retained as cenvat credit except when they are eligible under these Rules. Learned

Authorized Representative pointed out that the Rule 15 of Cenvat Credit Rules, 2017 uses a word 'shall'. He relied on the decision of Hon'ble Bombay High Court in the case of Malaysian Airlines vs UOI 2010 (262) ELT 192 BOM for wich following has been observed in para 52:

> "Para 52....The use of the word "Skall" in the statute, ordinarily speaking, means the statutory provision is mandatory. It is construed as such, unless there is something in the context in which the word is used, which would justify departure from that meaning..."

4. Learned counsel appearing for the respondent pointed out that this is a revenue neutral situation. The appellant could have availed the credit as ITC under GST regime. In either circumstance the appellant would have got set off on the said amount from the duties and taxes leviable (GST or Central Excise duty) and only balance would have been paid in cash.

4.1 Learned counsel further relied on the decision of Hon'ble High Court of Delhi in case of Mega Cabs Pvt. Ltd. 2016 (43) STR 67 to assert that after introduction of GST Regime the audit of respondent itself is ab initio illegal and therefore, the notice issued consequent to the audit needs to be quashed. He also relied on the decision of Hon'ble Gujarat High Court in case of Marwadi Shares and Finance Limited 2019 A TMI 1082 to assert that the audit was conducted without any powers.

4.2 Learned counsel further argued that phrase "any cenvat credit which is not eligible for such transfer shall not be retained as cenvat credit unless eligible under these rules" occurring in Rule 15(1) of Cenvat Credit Rules, 2017 clearly shows and means that only credit which are not eligible for transfer to GST regimes, cannot be retained under Cenvat Credit Rules, 2017. He pointed out that the interpretation of Revenue that the question of retention of cenvat credit arises only in such cases where cenvat credit is not eligible for transfer ITC is contrary to the plain reading of Rule 15(1) of Cenvat Credit Rules, 2017.

5. We have gone through rival submissions. We find that Rule 3 and Rule 15 of Cenvat Credit Rules, 2017 reads as follows:

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"Rule 3. CENVAT credit. -

(1) A manufacturer or producer of final products shall be allowed to take credit (hereinafter referred to as the CENVAT credit) of -

(a) the duty of excise specified in the Fourth Schedule to the Excise Act, as leviable under the said Act,

(b) the National Calamity Contingent duty leviable under section 136 of the Finance Act, 2001 (14 of 2001);

(c) the additional duty leviable under Section 3 of the Customs Tariff Act, equivalent to the duty of excise as specified under clauses (a) and (b);

(d) the additional duty leviable under sub-section (5) of section 3 of the Customs Tariff Act;

(e) the additional duty of excise leviable under Section 85 of Finance Act, 2005 (18 of 2005)

paid on -

any input received in the factory of manufacture of final product on or after the 1st day of July, 2017 including the said duties paid on any input used in the manufacture of intermediate products, by a job-worker availing the benefit of exemption specified in the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 214/86 Central Excise, dated the 25th March, 1986, published in the Gazette of India vide number G.S.R. 547 (E), dated the 25th March, 1986, and received by the manufacturer for use in, or in relation to, the manufacture of final product, on or after the 1st day of July, 2017."

"**Rule 15. Transitional Provisions**:

(1) A person registered under the Central Goods and Services Tax Act, 2017 (12 of 2017) **shall transfer the entire CENVAT credit available under the CENVAT Credit Rules, 2004** relating to the period ending with the day immediately preceding the 1st day of July, 2017 in his electronic credit ledger as per Chapter XX of the Central Goods and Services Tax Act, 2017 (12 of 2017) and the rules made there-under, and **any CENVAT credit which is not eligible for such transfer shall not be retained as CENVAT credit unless eligible under these rules**."

6. The Revenue is of the opinion that the assessee transitioning from central excise regime to GST regime, either partially or fully, is mandatorily required to transfer the entire cenvat credit available in the

Cenvat Credit Rules into electronic credit ledger as per Chapter XX of Central Goods and Service Tax Act, 2017 and the Rules made thereunder. The Revenue fails to notice that the Rule further states that any cenvat credit which is not eligible for such transfer would not be retained as cenvat credit unless eligible under these Rules, which means Cenvat Credit Rules, 2017. It is seen that the sole objection of Revenue is that the appellant should not have retained any part of the cenvat credit in their Central Excise records and should have transferred the entire balance into electronic credit ledger as per Chapter XX of Central Goods and Service Tax Act, 2017.

7. A perusal of Chapter XX of Central Goods and Service Tax Act, 2017 shows that section 140 deals with the transitional arrangement for input tax credit. The said rule reads as under:

> "**140. Transitional arrangements for input tax credit**.— (1) A registered person, other than a person opting to pay tax under section 10, shall be entitled to take, in his electronic credit ledger, the amount of CENVAT credit [of eligible duties]90 carried forward in the return relating to the period ending with the day immediately preceding the appointed day, furnished by him under the existing law [within such time and] 91in such manner as may be prescribed:
>
> Provided that the registered person shall not be allowed to take credit in the following circumstances, namely:—
>
> (i) where the said amount of credit is not admissible as input tax credit under this Act; or
> (ii) where he has not furnished all the returns required under the existing law for the period of six months immediately preceding the appointed date; or
> (iii) where the said amount of credit relates to goods manufactured and cleared under such exemption notifications as are notified by the Government.
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> (2) A registered person, other than a person opting to pay tax under section 10, shall be entitled to take, in his electronic credit ledger, credit of the unavailed CENVAT credit in respect of capital goods, not carried forward in a return, furnished under the existing law by him, for the period ending with the day immediately preceding the appointed day [within such time and] in such manner as may be prescribed:
>
> Provided that the registered person shall not be allowed to take credit unless the said credit was admissible as CENVAT credit under the existing law and is also admissible as input tax credit under this Act.

Explanation.––For the purposes of this sub-section, the expression —unavailed CENVAT credit‖ means the amount that remains after subtracting the amount of CENVAT credit already availed in respect of capital goods by the taxable person under the existing law from the aggregate amount of CENVAT credit to which the said person was entitled in respect of the said capital goods under the existing law.

(3) A registered person, who was not liable to be registered under the existing law, or who was engaged in the manufacture of exempted goods or provision of exempted services, or who was providing works contract service and was availing of the benefit of notification No. 26/2012—Service Tax, dated the 20th June, 2012 or a first stage dealer or a second stage dealer or a registered importer or a depot of a manufacturer, shall be entitled to take, in his electronic credit ledger, credit of eligible duties in respect of inputs held in stock and inputs contained in semi-finished or finished [goods held in stock on the appointed day, within such time and in such manner as may be prescribed, subject to] the following conditions, namely:––

(i) such inputs or goods are used or intended to be used for making taxable supplies under this Act;

(ii) the said registered person is eligible for input tax credit on such inputs under this Act;

(iii) the said registered person is in possession of invoice or other prescribed documents evidencing payment of duty under the existing law in respect of such inputs;

(iv) such invoices or other prescribed documents were issued not earlier than twelve months immediately preceding the appointed day; and

(v) the supplier of services is not eligible for any abatement under this Act:

Provided that where a registered person, other than a manufacturer or a supplier of services, is not in possession of an invoice or any other documents evidencing payment of duty in respect of inputs, then, such registered person shall, subject to such conditions, limitations and safeguards as may be prescribed, including that the said taxable person shall pass on the benefit of such credit by way of reduced prices to the recipient, be allowed to take credit at such rate and in such manner as may be prescribed.

(4) A registered person, who was engaged in the manufacture of taxable as well as exempted goods under the Central Excise Act, 1944 or provision of taxable as well as exempted services under Chapter V of the Finance Act, 1994, but which are liable to tax under thisAct, shall be entitled to take, in his electronic credit ledger,—

(a) the amount of CENVAT credit carried forward in a return furnished under the existing law by him in accordance with the provisions of sub-section (1); and

(b) the amount of CENVAT credit of eligible duties in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day,

relating to such exempted goods or services, in accordance with the provisions of sub-section (3).

(5) A registered person shall be entitled to take, in his electronic credit ledger, credit of eligible duties and taxes in respect of inputs or input services received on or after the appointed day but the duty or tax in respect of which has been paid by the supplier under the [existing law, within such time and in such manner as may be prescribed,]

subject to the condition that the invoice or any other duty or tax paying document of the same was recorded in the books of account of such person within a period of thirty days from the appointed day:

Provided that the period of thirty days may, on sufficient cause being shown, be extended by the Commissioner for a further period not exceeding thirty days:

Provided further that said registered person shall furnish a statement, in such manner as may be prescribed, in respect of credit that has been taken under this subsection.

(6) A registered person, who was either paying tax at a fixed rate or paying a fixed amount in lieu of the tax payable under the existing law shall be entitled to take, in his electronic credit ledger, credit of eligible duties in respect of inputs held in stock and inputs contained in semi-finished or finished [goods held in stock on the appointed day, within such time and in such manner as may be prescribed, subject to]95 the following conditions, namely:–

(i) such inputs or goods are used or intended to be used for making taxable supplies under this Act;
(ii) the said registered person is not paying tax under section 10;
(iii) the said registered person is eligible for input tax credit on such inputs under this Act;
(iv) the said registered person is in possession of invoice or other prescribed documents evidencing payment of duty under the existing law in respect of inputs; and
(v) such invoices or other prescribed documents were issued not earlier than twelve months immediately preceding the appointed day.

(7) Notwithstanding anything to the contrary contained in this Act, the input tax credit on account of any servicesreceived prior to the appointed day by an Input Service Distributor shall be eligible for distribution as [credit under this Act, within such time and in such manner as may be prescribed, even if]96 the invoices relating to such services are received on or after the appointed day.

(8) Where a registered person having centralised registration under the existing law has obtained a registration under this Act, such person shall be allowed to take, in his electronic credit ledger, credit of the amount of CENVAT credit carried forward in a return, furnished under the existing law by

him, in respect of the period ending with the day immediately preceding the appointed day [within such time and in such manner]97 as may be prescribed:

Provided that if the registered person furnishes his return for the period ending with the day immediately preceding the appointed day within three months of the appointed day, such credit shall be allowed subject to the condition that the said return is either an original return or a revised return where the credit has been reduced from that claimed earlier:

Provided further that the registered person shall not be allowed to take credit unless the said amount is admissible as input tax credit under this Act:

Provided also that such credit may be transferred to any of the registered persons having the same Permanent Account Number for which the centralised registration was obtained under the existing law.

(9) Where any CENVAT credit availed for the input services provided under the existing law has been reversed due to non-payment of the consideration within a period of three months, such [credit can be reclaimed, within such time and in such manner as may be prescribed, subject to]98 the condition that the registered person has made the payment of the consideration for that supply of services within a period of three months from the appointed day.

(10) The amount of credit under sub-sections (3), (4) and (6) shall be calculated in such manner as may be prescribed.

Explanation 1.—For the purposes of sub-sections (3), (4) and (6), the expression —eligible duties‖ means––

(i) the additional duty of excise leviable undersection 3 of the Additional Duties of Excise (Goods of Special Importance)Act, 1957;
(ii) the additional duty leviable under sub-section (1) of section 3 of the Customs Tariff Act,1975;
(iii) the additional duty leviable under sub-section (5) of section 3 of the Customs Tariff Act,1975;
(iv) [*****];
(v) the duty of excise specified in the First Schedule to the Central Excise Tariff Act, 1985;
(vi) the duty of excise specified in the Second Schedule to the Central Excise Tariff Act, 1985; and
(vii) the National Calamity Contingent Duty leviable under section 136 of the Finance Act, 2001,

in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock on the appointed day.

Explanation 2.—For the purposes of sub-section (5), the expression —eligible duties and taxes‖ means––

(i) the additional duty of excise leviable undersection 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957;

(ii) the additional duty leviable under sub-section (1) of section 3 of the Customs Tariff Act,1975;

(iii) the additional duty leviable under sub-section (5) of section 3 of the Customs Tariff Act,1975;

(iv) [*****];

(v) the duty of excise specified in the First Schedule to the Central Excise Tariff Act, 1985;

(vi) the duty of excise specified in the Second Schedule to the Central Excise Tariff Act,1985;

(vii) the National Calamity Contingent Duty leviable under section 136 of the Finance Act, 2001; and

(viii) the service tax leviable under section 66B of the Finance Act, 1994, in respect of inputs and input services received on or after the appointed day.

[Explanation 3.—For removal of doubts, it is hereby clarified that the expression —eligible duties and taxes‖ excludes any cess which has not been specified in Explanation 1 or Explanation 2 and any cess which is collected as additional duty of customs under sub-section (1) of section 3 of the Customs TariffAct,1975.]"

As perusal of above section clearly indicates that there are numerous restrictions of transfer of credit from central excise cenvat credit to GST input tax credit. In these circumstances, it may not be possible in many circumstances to transfer the entire cenvat credit available in cenvat credit Rules, 2004 to the electronic credit register maintained under GST regime. The appellant has worked out a certain proportion and that has been examined by the Commissioner and found to be proper. The Revenue in its appeal has not pointed out as to why the said apportioning done by Commissioner is incorrect. The appeal simply says that the respondent should have transferred the entire cenvat credit available under Cenvat Credit Rules, 2004 to the electronic credit register maintained under Central Goods and Service Tax Act, 2017.

8. It is obvious that as per first proviso to Section 140(1), only the credit which is admissible as input tax credit under the CGST Act can be availed as input tax credit. Obviously, the quantum of credit which relates to the items which continued to be covered under the Central Excise Act would not be admissible as input tax credit under CGST Act and therefore,

the argument of the Revenue that the Respondent should have transferred the entire credit is incorrect. We find that some argument has been used by Commissioner to justify the quantification of cenvat credit under Cenvat Credit Rules, 2017 to the respondent, however the said arguments about quantification have not been challenged by Revenue before Tribunal.

9. In the aforesaid circumstances, we do not find any grounds to interfere with the order of Commissioner. The appeal of Revenue is consequently dismissed. Cross also stand disposed of.

(Pronounced in the open court on 09.09.2022)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Neha