IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH: KOLKATA

Excise Appeal No. 75532 of 2015

(Arising out of Order-in-Original No. 13/Commr/Bol/2015 dated 02.03.2015 passed by Commissioner of Central Excise, Bolpur.)

M/s Sarva Mangalam Gajanan Steel Pvt. Ltd.,
DVC More, Feeder Road, P.O.- Kalipahari. Asansol,
Dist.-Burdwan, West Bengal.

...Appellant (s)

VERSUS

Commissioner of CGST & Central Excise, Bolpur.
Nanoor Chandidas Road, Sian, Bolpur, West Bengal.

. ..**Respondent(s)**

With

Excise Appeal No. 75898 of 2017

(Arising out of Order-in-Original No. 21/Commr/Bol/2017 dated 13.02.2017 passed by Commissioner of Central Excise & Service Tax, Bolpur.

M/s Sarva Mangalam Gajanan Steel Pvt. Ltd.,
DVC More, Feeder Road, P.O.- Kalipahari. Asansol,
Dist.-Burdwan, West Bengal.

...Appellant (s)

VERSUS

Commissioner of CGST & Central Excise, Bolpur.
Nanoor Chandidas Road, Sian, Bolpur, West Bengal. .

. ..**Respondent (s)**

APPERANCE :
Shri A. Roy, Authorized Representative for the Appellant/Revenue
Shri Avishek Ballodia, Chartered Accountant for the Respondent/Assessee

CORAM:
HON'BLE MR. P. K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. K. ANPAZHAKAN MEMBER (TECHNICAL)

FINAL ORDER No.....75527-75528/2023

DATE OF HEARING : 28.03.2023

DATE OF PRONOUNCEMENT: 05th June, 2023

PER K. ANPAZHAKAN :

Excise Appeal No. 75532 of 2015 was disposed of by the Tribunal vide Final Order No. 75683/2018 dated 22.03.2018. Against this order

the Department filed Appeal before the Hon'ble High Court at Calcutta vide CEXA/58/2019.

2. Excise Appeal No. 75898 of 2017 was disposed by the Tribunal vide Final Order No.FO/72447/2019 dated 27.03.2019. Against this order the Department has filed an Appeal under Section 35G of the Central Excise Act, 1944 before the Hon'ble High Court at Calcutta being CEXA No. 27/2021. The Hon'ble High Court has disposed both these Appeals vide Order dated 08.08.2022 and remanded the matter to the Tribunal to consider the cases afresh.

3. While deciding the Department Appeals, the Hon'ble High Court has taken up the following substantial questions of law for consideration

(i) Whether the Learned Tribunal without going into the merits of the case and without even seeing the documents was right in simply passing the order on the basis of the ratio laid down in the decision of the Tribunal in Jai Raj Ispat Limited Vs. Commissioner of Central Excise, Hyderabad-IV?

(ii) Whether the Learned Tribunal failed to appreciate that the judgment relied upon while passing the said order is on the classification of 'Mis-rolls' which is not identical in the respondent case?"

(iii) Why credit of CENVAT duty amounting to Rs. 90,05,802/- only Education Cess Amount to Rs.1,79,937/- only and Secondary & Higher Secondary Cess amounting to Rs.90,128/- only should not be disallowed and recovered from then under Rule 14 of the CENVAT Credit Rules 2004 read with erstwhile proviso to Section 11A and/or present Section 11A(5) of the Central Excise Act, 1944 ?

(iv) Why interest at the appropriate rate should not be charged and paid by them under Rule 14 of the CENVAT Credit Rules, 2004 read with erstwhile Section 11AB and/or present section 11AA of the Central Excise Act, 1944 ?

(v) Why a penalty should not be imposed upon them under Rule 15(2) of the CENVAT Credit Rules, 2004 read with Section 11AC of the Central Excise Act, 1944 ?

(vi) Whether the Learned Tribunal is justified in heavily relying upon the decisions being F.O. No. 75683/2018 dated 22.03.2018 passed in the case of M/s Sarva Mangalam Gajanan Steel Pvt. Ltd., Vs. Commissioner of Central Excise, Bolpur while coming to its conclusion without any independent reasons and without appreciating that in the facts and circumstances of the instant case, the aforesaid decision is not applicable?

4. While disposing the said Appeals, the Hon'ble High court has made the following observations:

"On reading of the impugned order we find there is no such factual finding recorded by the learned Tribunal, which is the last fact finding authority in the hierarchy of authorities. Further, the Tribunal has not gone into the classification issue which appears to be the sole issue arising in the facts of Jai Raj Ispat Ltd.,

In so far as the order impugned in CEXA 27 of 2021, the Tribunal has merely followed the other order and therefore, whatever reasons we have given above will equally apply to the said appeal.

Thus, for the above reasons, we are of the view that the substantial questions of law does arise for consideration in these

appeals, more particularly, the question whether the Tribunal without going into the merits of the case and without noting the documents was right in simply passing the order on the basis of the decision in the case of Jai Raj Ispat Ltd., and whether the learned Tribunal failed to note that the judgment in the case of Jai Raj Ispat Ltd., was pertaining to a classification issue.

With regard to the other substantial question of law, we have to necessarily leave it open because we are inclined to remand the matter to the Tribunal for fresh adjudication.

In the result, the appeals are allowed and the substantial questions of law nos. I and 2 are answered in favour of the revenue and other question nos. 3 to 6 are left open.

The matters are remanded to the Tribunal to consider the cases afresh and after taking note of the factual position, as well as the legal and various decisions that may be relied upon. The learned Tribunal shall pass a speaking order on merits and in accordance with law."

5. As directed by the Hon'ble High Court, before going into the merits of the case, the correct classification of the inputs purchased by the Appellant is to be determined. It is observed that the Appellants have purchased TMT Cuttings (more than one meter), MRM Roll Spoils, Cobble Cuttings, finished TMT Bar Rolls Spoils etc from M/s SAIL, IISCO, Burnpur and some other manufacturers on payment of Central Excise duty. The said manufacturers classified the above goods under tariff item No. 72044100 of the Central Excise Tariff Act. We observe that the classification of the goods done by the supplier's end cannot be changed by the receiver. In the case of Jai Raj Ispat Vs Commissioner

of Central Excise, Hyderabad IV, the issue is related to classification of misrolls which are directly used by small re-rolling mills. The said 'mis-rolls' have been classified under the sub heading 7207.90 of CETA. We observe that the goods received by the Appellants does not have the description 'mis-rolls' in the invoices. Hence, the goods received are correctly classifiable under the sub heading 72044100, as classified by the suppliers. However, we observe that for the purpose of eligibility of CENVAT Credit, the classification of the input is irrelevant. The duty paid nature of the inputs and the receipt and utilization of the inputs in the manufacture of the final products are the relevant criteria required for allowing the credit. Having discussed the classification of the inputs received, as directed by the Hon'ble High Court, we now proceed to decide the merits of the appeals filed by the Appellant, as directed by the Hon'ble High Court.

6. Briefly stated facts of the case are that M/s Sarva Mangalam Gajanan Steel Pvt. Ltd., holder of Central Excise Registration No. AAICS5924JXM001 (hereinafter referred to as 'the Appellant') are engaged in manufacture of M/s Flat Bar, MS Channel, MS Round, Angle, MS Ribbed Bar & Melting Scraps falling under TSH No. 72149190, 72165000,72142090 & 72044100 of the First Schedule to the Central Excise Tariff. A Show Cause Notice dated 23/04/2015 was issued to the Appellant alleging that they have contravened the provisions of Rule 3 read with Rule 9 of the CENVAT Credit Rules, 2004, inasmuch as they have wrongly availed CENVAT credit on Scrap (Misrolls & End Cuttings), MS Scraps. TMT Cuttings, MRM Rolls Spoil amounting to Rs.1,32,05,296/-, Education Cess amounting to Rs.2,64,769/- & SHE

Cess amounting to Rs.1,31,914/-, totaling to Rs.1,36,01,979/- (Rupees One Crore Thirty Six Lakh One Thousand Nine Hundred and Seventy Nine only) during the period from April, 2010 to February, 2015, by wrongly treating the same as 'inputs'. The allegation in the Notice is that it is practically impossible for the Appellant to manufacture MS Flat, Bar, MS Angle, MS Channel, MS Round from the said scraps mainly falling under TSH No. 72044100, since the said Appellant is only a Rolling Mill and does not have furnace for melting of such waste and scrap. The Notice proposed to disallow the irregular credit under Rule 14 of the Cenvat Credit Rules, 2004, read with proviso to erstwhile Section 11A (present Section 11A (4)) of the Central Excise Act, 1944 along with appropriate interest under Rule 14 of CENVAT Credit Rules, 2004 read with proviso to erstwhile section 11AB (present Section 11AA) of the said Act. The Notice also proposed penal action under Rule 15(2) of the Cenvat Credit Rules, 2004 read with Section 11AC of the Central Excise Act 1944. Another Notice was issued earlier on 28.02.2013 covering the period 21.06.2008 to 23.03.2010, proposing disallowance of CENVAT credit amounting to Rs 92.75.862

7. Both the Notices were adjudicated by Commissioner vide Orders-in-Original dated 02/03/2015 and 13/02/2017(impugned Orders), confirming the above said demands made in the said Notices along with interest and imposing penalty equal to the irregular credit availed under section 11 AC of the Central Excise Act, 1994. On appeal, Tribunal passed orders vide Final Order No. 75683/2018 dated 22.03.2018 and Final Order No.FO/72447/2019 dated 27.03.2019. Aggrieved against the above said Tribunal Orders, Department filed Appeals under Section

35G of the Central Excise Act, 1944 before the Hon'ble High Court at Calcutta . The Hon'ble High Court has disposed both these Appeals vide Order dated 08.08.2022 and remanded the matter to the Tribunal to consider the cases afresh. Accordingly, the Appellant is before us again for deciding the appeals afresh.

8. In their submissions the Appellant stated that,

(i) They have purchased TMT Cuttings (more than one meter), MRM Roll Spoils, Cobble Cuttings, finished TMT Bar Rolls Spoils etc from M/s SAIL, IISCO, Burnpur on payment of Central Excise duty and in few cases from other manufacturers. The above manufacturers classified the above goods under tariff item No. 72044100 of the Central Excise Tariff Act, but in actual those goods were re-rollable materials having length more than one meter. Those goods are mostly in the form of Misrolls and TMT Cuttings and generated in the course of rolling of the Billets in the Rod Mill section of M/s SAIl, IISCO, Bumpur and other manufacturers. They purchased the above goods to manufacture different hot rolled products.

(ii) The goods so purchased from SAIL and others have been subjected to heating, straightening to make suitable for rolling and sometimes cut to sizes and then rerolled to manufacture their final products. The rolling mill installed by them have the capacity to roll such items.

(iii) Rerolled products, MS Flat/Bar, MS Angle, MS Channel, MS Round etc, so manufactured by them have been cleared on payment of Central Excise duty.

(iv) The goods purchased from SAIL and other parties have been used in the manufacture of dutiable final products, hence the CENVAT credit cannot be denied;

(v) The demand notice was issued without any enquiry or investigation in the factory of the Appellant or from where they purchased the 'inputs'

(vi) When the department did not dispute payment of duty on the goods purchased from SAIL, and the payment of duty on the final products manufactured by them, there was no revenue loss of revenue to the exchequer. The Hon'ble Apex Court has held that no proceedings can be initiated in such cases

(vii) The disputed credit was taken from April, 2010 to February, 2015 and the demand notice was served on 01.05.2015 on the basis of allegation that they suppressed the fact with intent to evade payment of duty which is not a fact. They showed in their Cenvat Register in RG23A Part-I & Part-II, name and character of the goods so purchased from SAIL and others. The RG23A Part-I maintained by them contained, invoice number with date, name of the supplier, description of goods, quantity of goods received and use of such goods. Therefore, there was no suppression of any fact and hence the demand up to March, 2014 is barred by imitation.

9. The Appellant submitted on the similar issue, a show cause notice no. 15/Commr/Bol/13 dated 28.02.2013 was already issued to them asking as to why:-

(i) CENVAT Credit of Rs.92,75,862/- including cesses should not be disallowed and recovered from them under Rule 14 of the said Credit Rules read with erstwhile proviso to Section 11A (present Section

11A(5) of the said Act. Issuing another Notice on the basis of allegation of suppression of fact with intent to evade payment of duty, on the same issue is barred by limitation. In support of this argument they relied on the decision of the Hon'ble Apex Court in the case of Nizam Sugar Factory Vs. collector of Central Excise A.P. [2006 (197) ELT 465 (S.C.)] holding the following :-

Demand-Limitation Suppression of facts- All relevant facts in knowledge of authorities when first show cause notice issued While issuing second and third show cause notices, same similar facts could not be taken as suppression of facts on part of assessee as these facts already in knowledge of authorities- No suppression of facts on part of assessee appellant- Demands and penalty dropped Section 11A and 11AC of Central Excise Act, 1944:

10. They also relied on the decision of the Hon'ble High Court in the case of Gujarat Ambuja Exports Ltd., Vs. U.O.I. [2011(269) E.L.T. 159 (Guj.)] wherein it has been held that since all the facts were already known to the department at the time of earlier show cause notice and so extended period of limitation cannot be invoked and hence the second notice except for the normal period is not maintainable.

11. The Departmental Representative reiterated the findings of the adjudicating authority in the impugned order. He stated that the Appellant has no furnace to melt the waste and scrap and hence these rerolled final products could not have been manufactured in the Appellant's factory. As the waste and scrap were not used in the factory, they were not eligible for the CENVAT credit availed on the inputs namely waste and scrap.

12. Heard both sides and perused the appeal records.

13. We find that the allegation of the department is that the Appellant had availed Cenvat credit on TMT Cutting, Square Cobble, MRM Rolls Spoils, Misrolls & End cutting, Scrap & Melting Scrap considering them as 'inputs' used in the manufacture of their final products MS Flat/Bar, MS Channel, MS Round, MS Angle, MS Ribbed Bar etc. The Department's contention is that the Appellant is only a Rolling Mill and does not have furnace for melting of such waste and scrap and hence they could not have used these scrap as 'inputs' to manufacture their finished goods namely hot rolled products. The Appellant stated that they have purchased TMT Cuttings (more than one meter), MRM Roll Spoils, Cobble Cuttings, finished TMT Bar Rolls Spoils etc from M/s SAIL, IISCO, Burnpur on payment of Central Excise duty and in few cases from other manufacturers. These goods are mostly in the form of Misrolls and TMT Cuttings generated in the course of rolling of the Billets in the Rod Mill Section of M/s. SAIL, IISCO, Burnpur and other manufacturers. They purchased these goods on payment of central excise duty. The goods so purchased from SAIL and others have been subjected to heating, straightening to make suitable for rolling and sometimes cut to sizes and then rerolled to manufacture their final products. The rolling mill installed by them have the capacity to roll such items. The Rerolled products, MS Flat/Bar, MS Angle, MS Channel, MS Round etc, so manufactured by them have been cleared on payment of Central Excise duty. The Department has not brought any evidence on record to show that these inputs purchased by the Appellants have not been used in their factory for manufacture of final products.

14. As per Rule 3 of Cenvat Credit Rules 2004, any manufacturer can avail credit of duty paid on any goods (excepting light diesel oil, high speed diesel oil and motor spirit) treating the same as 'input' if those goods are used in or in relation to manufacture of their final products. Thus for the purpose of availment of credit on such items, it has to be established that the same were used in the manufacture of final products. Rule 3(1) of the Cenvat Credit Rules, 2004 clearly states that a manufacturer or producer of final products and a provider of output service shall be allowed to take credit of the duty paid on eligible inputs or services. It means that cenvat credit can be availed by manufacturer or producer of final products who uses the inputs in or in relation to manufacture of final products.

15. Rule 2(k)(i) of the Cenvat Credit Rules, 2004 which defines 'iputs' for manufacturer states that these should be 'used in the factory'. In the instant case, there is no evidence brought on record to show that the impugned goods purchased by the Appellant from IISCO and other manufacturers on payment of duty has not been used in the factory. Only an allegation has been made without any evidence that the scrap were not used in the factory as they were not capable to be used in the manufacture of Billets or Ingots. The Appellant stated that the goods so purchased from SAIL and others have been subjected to heating, straightening to make suitable for rolling and sometimes cut to sizes and then rerolled to manufacture their final products. The rolling mill installed by them have the capacity to roll such items. The Department has not adduced any evidence to counter this claim. Further, we find that the Rerolled products, MS Flat/Bar, MS Angle, MS Channel, MS

Round etc, manufactured by the Appellants have been cleared on payment of central excise duty. As the inputs on which credit has been availed, were used in the manufacture of dutiable final products, the CENVAT credit availed on these inputs cannot be denied. In view of the above, we hold that the Appellants are eligible for the CENVAT credit availed on the 'inputs' used in the manufacture of their final products namely, Rerolled products, MS Flat/Bar, MS Angle, MS Channel, MS Round etc and hence the demands made in the impugned order is not sustainable.

16. The Appellant submitted that on the similar issue, another show cause notice no. 15/Commr/Bol/13 dated 28.02.2013 was already issued to them and hence the present notice is barred by limitation. They relied on the decision of the Hon'ble Apex Court in the case of Nizam Sugar Factory Vs. collector of Central Excise A.P. [2006 (197) ELT 465 (S.C.)], and argued that the second notice on the same issue alleging suppression is not sustainable. We find merit in the argument of the Appellant. When a show cause notice was already issued and the facts are in the knowledge of the authorities, then another notice cannot be issued on the same facts alleging suppression of facts. Thus, we hold that the Notice dated 23/04/205 issued on the same ground and the impugned order confirming the demands made in the Notice are not sustainable on the ground of limitation also. Thus, we hold that the demands made in the impugned orders along with the demand of interest and penalties are not sustainable on merit as well as on the ground of limitation.

17. In view of the above discussion, we set aside the impugned orders and allow the appeals filed by the Appellant.

(Order pronounced in open Court on……05th June, 2023…..)

Sd/-

(P. K. Choudhary)
Member (Judicial)

Sd/-

(K. Anpazhakan)
Member (Technical)

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