

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL  
MUMBAI**

**Excise Appeal No. 86105 of 2019**

(Arising out of Order-in-Appeal No. PVNS/363/APPEALS THANE/BW/2018-19/5863 dated 12.12.2018 passed by the Commissioner of (Appeals Thane), GST & Central Excise, Mumbai.)

**M/s. MIRC Electronics Ltd.**

Bhiwandi-Wada Road, Kudus Village,  
Wada Dist-Palghar- 421312.

.....Appellant

*VERSUS*

**Commissioner of GST & Central Excise, Mumbai.** .....Respondent

12<sup>th</sup> Floor, Lotus Infocentre,  
Near Parel Station, Narmawala Estate,  
Parel (East), Mumbai- 12.

**APPEARANCE:**

Shri Bibek Halwai, Chartered Accountant for the Appellant  
Shri Sanjay Hasija, Authorised Representative for the Respondent

CORAM:

**HON'BLE MR. AJAY SHARMA, MEMBER (JUDICIAL)**

**FINAL ORDER NO. A/85543 / 2022**

Date of Hearing: 14.03.2022

Date of Decision: 09.06.2022

**PER: AJAY SHARMA**

This appeal has been filed assailing the order dated 12.12.2018 passed by Commissioner (Appeals Thane), GST & Central Excise, Mumbai by which learned Commissioner (Appeals) upheld the adjudicating order and dismissed the appeal filed by the appellant.

2. The issue involved in this appeal is whether the appellant is justified in availing suo moto credit of excess duty paid in previous month on account of clearance of input effected under Rule 3(5) of Cenvat Credit Rules, 2004?

3. The appellant herein are engaged in manufacture of Colour T.V., LCD, LED, Washing Machines, Split Air Conditioners and its spare parts and are availing Cenvat Credit as per Rule 3 of Cenvat Credit Rules, 2004. They are providing after sale service to their customers and clearing spares and components for the said service. Free services were provided for in-warranty period, whereas for out-warranty period the services were provided on chargeable basis. For both the services they had outsourced the same to M/s. Adonis Electronics Pvt. Ltd., who were providing the service to the appellant's customers. The appellants were getting the report by 5<sup>th</sup> of next month, of raw materials consumed for in-warranty products and accordingly excess Excise duty paid on account of clearance of in-warranty spares in the previous month was adjusted against the duty payments for the next month. Same way the excess duty paid in the month of March was adjusted against the duty payments for the next month i.e. April and such adjustments were made in April 2013, April 2014, April 2015 and April, 2016 respectfully. The appellant was asked by the department to furnish the details of such adjustments of duty payments on the spares and components consumed for providing free warranty services during the period August, 2011 to February, 2012 and financial year ending in March, 2013 to March, 2016 against the duty payments on the spares used for the repairs of their out warranty products. The appellant provided the details. Thereafter a show cause-cum-demand notice dated 19.06.2017 was issued to them demanding Central Excise duty of Rs. 30,84,669/- short paid in the months of April 2013, April 2014, April 2015 and April, 2016 respectively on the clearance of excisable goods in the said months alongwith interest and penalty and also for confiscation of the goods cleared without payment of Central Excise duty during said months. The Adjudicating Authority vide Order-in-Original dated 19.12.2017 confirmed the demand of Central Excise duty alongwith interest and equal penalty and a fine of Rs. 5 Lakhs was also imposed in lieu of confiscation. The appeal filed by the appellant before the Commissioner (Appeals) was rejected.

4. The Learned Chartered Accountant explained the procedure adopted by the appellant which is in issue. According to him while supplying the raw material as required by their service agent M/s. Adonis Electronics Pvt. Ltd. for giving after sales service to appellant's customers, 'nil rate of duty' is shown in invoice of stock transfer as no duty is payable on clearance of in-warranty spares, but the spares cleared for in-warranty are also utilized by their service agent for out-warranty service and the monthly report is sent by their service agent regarding the total quantity of spares (raw material) consumed under the category of in-warranty and out-warranty service by 5<sup>th</sup> day of the next month. Based on the report, the appellant calculated the central excise duty payable by them on raw material consumed for out-warranty service and also on the closing stock remained un-utilized at the premise of their service agent and the same is debited in the Cenvat register by 5<sup>th</sup> of the following month. Learned Chartered Accountant further submits that in the month of March all central excise duty is required to be debited by 31<sup>st</sup> March and since on 31<sup>st</sup> March they do not have the figures for debit of central excise duty for the month of March in respect of out-warranty spares/raw material therefore, as a precautionary measure in the month of March they paid duty on total raw material cleared during that month and as by 5<sup>th</sup> of April they get the report of raw material consumed for in-warranty spares from their service agent, accordingly the excess central excise duty paid on account of clearance of in-warranty spares in the month of March is adjusted against the duty payments for the next month i.e. April. He further submits that they have discontinued the said practice with effect from May, 2016. Learned Chartered Accountant further submits that it is settled principle that excess payment made upon one clearance can be subsequently adjusted against another clearance and in support of the said submission learned Chartered Accountant relied upon the decision of the Tribunal in the matters of (i) *Vinir Engineering Pvt. Ltd. v/s CCE, Bangalore; 2004 (168) ELT 34 (Tri-Bang)* ; (ii) *South Asian Petrochem Ltd. v/s CC, Kolkata; 2007*

(219) *ELT 991 (Tri-Kolkata)* and (iii) *Gujarat NRE Coke Ltd v/s CCE, Rajkot; 2012 (27) STR 372 (Tri-Ahmd)*. He further submits that if suo moto availment of credit is allowed, suo moto adjustment of credit also cannot be disputed and in support of this submissions learned Chartered Accountant placed reliance on the decision of the Hon'ble Madras High Court in the matter of *ICMC Co-operation Ltd. v/s CESTAT, Chennai; 2017 (49) STR 490 (Mad.)* and also on the decision of Hon'ble Allahabad High Court in the matter of *Krishnav Engineering Ltd. v/s CESTAT; 2016 (331) ELT 391 (All.)*. It was also the contention that since entire proceeding is Revenue neutral, there is no loss to the Revenue and so the demand is not sustainable. According to learned Chartered Accountant the extended period is also not invocable as there is no suppression of the facts with intent to evade duty and the entire proceedings is barred by limitation since the show cause notice was issued after the expiry of more than one year from the relevant date i.e. the date of filing of Excise Returns. Per contra learned Authorised Representative appearing for the Revenue reiterated the findings recorded in the impugned order and submitted that the appellant have deviated from the laid down provisions and have instead opted to pay duty by suo motu adjusting such payments towards their future liabilities which is not permissible. He further submitted that there is no provision in the Central Excise Act or Rules to adjust the excise duty debited against the excess duty liability for the subsequent month. He also submits that the appellant has not disclosed the details of such adjustments of central excise duty in their statutory records viz. ER-1 Return, Cenvat register and the said short payment of Central Excise duty would have remained undetected, if efforts were not taken by the department and they have thus suppressed the facts from the department and therefore the extended period of limitation has rightly been invoked in the matter. Learned Authorised Representative, therefore prayed for dismissal of the appeal filed by the appellant.

5. I have heard learned Chartered Accountant appearing for the appellant and learned Authorised Representative for the Revenue and perused the case records including the written submissions and the case laws filed on behalf of the appellant.

6. The perusal of a case records shows for the identical issue, for the period August, 2011 to February, 2012 and April 2012 to July, 2017; August, 2012 to April, 2012, April 2013 to May, 2013 to June, 2014, three Show cause notices were issued to the appellants and those were adjudicated on 9<sup>th</sup> July, 2015 by a common adjudication order. Therefore, it is not correct to say that there is any suppression on the part of the appellant as the procedure adopted by the appellant was well within the knowledge of the Revenue way back since the year 2011 and accordingly extended period of limitation is not invocable on the facts of the present case. Otherwise also it is settled legal principle as laid down by the Hon'ble Supreme Court in catena of decisions that something positive other than mere inaction or failure on the part of the manufacturer or producer or conscious or deliberate withholding of information when the manufacturer knew otherwise, is required before the assessee is saddled with any duty liability. Therefore, mere short payment of duty by the appellant is not sufficient in order to invoke the extended period. Learned Chartered Accountant submits that the appellant was filing periodically ER-1 Returns, etc. therefore the said fact coupled with the fact that three show cause notices on identical issue have already been adjudicated in the year 2015, itself establishes that the procedure adopted by the appellant was within the knowledge of the Revenue. Therefore, no suppression can be attributed to the appellant. A Co-ordinate Bench of the Tribunal in the matter of *Sourav Ganguly v/s Union of India, 2016 (43) STR 482 (Cal.)* has held that there has to be positive, conscious and deliberated action on the part of the assessee intended to evade tax and a clear fraudulent motive or an element of mens rea on part of the assessee has to be established before the department can take recourse to the extended period of limitation. The facts of the case clearly

establish that there was no suppression on the part of the appellant and they have submitted all the documents/information as and when the same was asked by the department, starting from the year 2011 onwards. On merits also the issue is about the adjustment of excess duty paid in previous month with the duty liability of the subsequent month. The amount have been paid by the appellant in the month of March i.e. the ending of the financial year on the entire spare parts cleared to their service agent as abundant precaution. This excess payment have not been controverted anywhere. If this is the scenario and if the same has not been specifically prohibited by the statue, I find no reason why the duty cannot be adjusted for the subsequent month. In the matter of *South Indian Petrochem (supra)* as cited by learned Chartered Accountant, a Co-ordinate Bench of the Tribunal had even permitted the adjustment of excess payment towards education cess against the short payment of Central Excise duty. In the case laws cited by learned Chartered Accountant I found that repeatedly it has been held by Tribunal that excess payment of duty can be adjusted against tax liability. The procedure adopted by the appellant may not be proper but that itself cannot make it illegal per se. This procedure admittedly has been discontinued by the appellant w.e.f May, 2016.

7. During the course of argument learned Authorised Representative appearing on behalf of the Revenue raised a submission regarding *unjust enrichment*, but I am unable find the said objection or any finding on *unjust enrichment* from the orders of the authorities below or from the show cause notice. This was never the case of the department. There is no whisper anywhere that at any point of time the appellant had passed on the burden to the buyer.

8. In view of the discussions and findings recorded in the preceding paragraphs, I am of the considered view that on the ground of limitation as well as on merits the appeal filed by the

appellant deserves to be allowed and the same is accordingly allowed with consequential relief, if any.

(Pronounced in open Court on.....)

**(Ajay Sharma)**  
**Member (Judicial)**

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