IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI

REGIONAL BENCH – COURT No. I

Excise Appeal No. 40064 of 2023

(Arising out of Order-in-Appeal No. 55/2022 (CTA-I) dated 25.11.2022 passed by Commissioner of GST and Central Excise (Appeals-I), 26/1, Mahatma Gandhi Road, Nungambakkam, Chennai – 600 034)

M/s. MRF Limited **...Appellant**
No. 114,
Greams Road,
Chennai – 600 006.

Versus

Commissioner of GST and Central Excise **...Respondent**
Chennai North Commissionerate,
26/1, Mahatma Gandhi Road,
Nungambakkam,
Chennai – 600 034.

APPEARANCE:

For the Appellant : Ms. Preeti Mohan, Advocate
For the Respondent : Mr. Harendra Singh Pal, Assistant Commissioner / A.R.

CORAM:

HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)

DATE OF HEARING : 07.09.2023
DATE OF DECISION : 23.11.2023

FINAL ORDER No. 41056 / 2023

Order:-

Excise Appeal No. E/40064/2023 has been filed by M/s. MRF Ltd., aggrieved by the Order-in-Appeal No. 55/2022-ST dated 25.11.2022 passed by the Commissioner of GST & Central Excise (Appeals-I), Chennai - 600034 who upheld impugned Order-in-Original No. 11/2020-21 dated 31.03.2021 passed by the Assistant

Commissioner of GST & Central Excise, Chennai North Commissionerate, confirming demand of ineligible credit of Rs.34,84,905 /-Under Rule 14 of CENVAT Credit Rules,2004 read with Section 11A(4) of Central Excise Act, 1944 and also confirming the equal penalty imposed under Section11 AC and interest levied in the impugned Order-in-Original.

2.1 The brief facts of the case are that the Appellants engaged in manufacture of Tyres for Motor Vehicles, Tyre Flaps and Compounded Rubber are holders of Central Excise registration AAACM4154GXM007. During the course of Audit, it was observed that the Appellant had availed CENVAT credit of Rs.34,84,905/- on input/capital goods that were earlier written off or where provisions were made for write-off in the books of accounts. It appeared to the department that the CENVAT credit on Obsolescent material which was earlier debited, was taken back on 30.06.2017, without utilising the same in the manufacture of final products , was ineligible in terms of proviso to Rule 3(5B) of CENVAT Credit Rules, 2004 which reads as follows:

> *"If the value of any,*
> *i. input, or*
> *ii. capital goods before being put to use,*
>
> *on which CENVAT Credit has been taken is written off fully or partially or where any provision to write off fully or partially has been made in the books of account, then the manufacturer* ***or service provider*** *shall pay an amount equivalent to the CENVAT credit taken in respect of the said input or capital goods:*
>
> *Provided, if the said input or capital goods is subsequently used in the manufacture of final products* ***or provision of taxable services****, the manufacturer* ***or output service provider*** *shall be entitled to take the credit of the amount equivalent to the CENVAT Credit paid earlier subject to the other provisions of these rules."*

2.2 The department was of the view that the Appellant by availing CENVAT credit on Obsolescent material which was earlier debited, had contravened the provisions of Rule 3(5B) *ibid* and therefore the ineligible credit was liable for

reversal. As the Appellant failed to reverse the ineligible CENVAT credit, a Show Cause Notice dated 27.06.2019 was issued to the Appellant seeking to recover the ineligible CENVAT credit in terms of rule 14(1)(ii) of CENVAT Credit Rules, 2004 read with Section 11A(4) of Central Excise Act, 1944 and to levy interest under Section11AA and to impose penalty under Rule 15(2) of CENVAT Credit Rules, 2004 read with Section11 AC of Central Excise Act, 1944.

2.3 The Adjudicating Authority *vide* the Order-in-Original confirmed the demand of ineligible credit of Rs.34,84,905/- with levy of appropriate interest and imposed equal penalty of Rs.34,84,905/- on the appellant. Aggrieved, the Appellant filed an appeal before the Commissioner (Appeals-I), Chennai who *vide* Order-in-Appeal No.55/2022 dated 26.09.2022 upheld the impugned Order-in-Original.

3. Aggrieved, the present appeal has been filed before this forum by the Appellant.

4.1 Ld. Advocate Ms. Preeti Mohan, appeared for the Appellant and submitted that the impugned order failed to address the primary issue as to whether retaking CENVAT credit by the appellant is permissible under the applicable law. It was pointed out that the impugned order failed to address the issue as to whether all the goods available at the factory of the appellant were obsolete or not and was misguided in confirming the impugned Order-in-Original without deliberating on this aspect.

4.2 It was contended that the impugned order had miserably digressed on unconnected issues which never

formed part of the Show Cause Notice and Order-in-Original and implanted a new ground which never existed at the time of issuance of audit Memo and Show Cause Notice.

4.3 It was submitted that the impugned order failed to discuss the submissions made by the Appellant for re-taking the CENVAT credit on 30.06.2017 and seeking to transition the said credit in terms of the provisions of the CGST Act. It was mentioned that the impugned order failed to appreciate the fact that, had the Appellant not retaken credit on the goods provisionally written off for accounting purpose, it might have permanently lost its legal right to claim credit on the goods which were still being used for manufacturing. The Appellant had taken re-credit in accordance with the provisions of law and on advent of the new GST regime w.e.f 01.07.2017. The appellant submitted that in the GST regime, only for the goods which are finally written off, the registered person has to reverse the credit and therefore if the credit was not taken back, when the same goods were subject to final write off, another reversal would have called for resulting in double reversal. The Appellant pointed out that the impugned Order-in-Original, without appreciating the fact that the credit was taken under CENVAT Credit Rules, 2004, proceeded to hold that Section 17(5)(h) of the CGST Act, 2017 does not enable taking back of credit and accordingly held that under the GST regime, no provision has been made for reversal of credit, on a provisional write off. The very basis of such finding was flawed as the appellant did not retake credit under CGST Act, but under the CENVAT Credit Rules, 2004 prior to GST regime.

4.4 It was contended that the impugned order had gone beyond the scope of appeal in adjudicating factual issues and holding that the appellant failed to provide the claim through documentary evidence when no such issue

was under consideration. The impugned order failed to appreciate that Rule 3(5B) of CENVAT Credit Rules, 2004, was in fact applicable to the Appellant and specifically permits the appellant to take benefit of the same including utilisation of said goods in future. The Appellant submitted that in so far as proof of usage is concerned, they have made a submission before the first appellate authority that what was provided to the Adjudicating Authority was a list of all items with usage upto 28.02.2021 (634 out of 1513) and that as on date more inputs were used for which a fresh list was provided upto 30.06.2022 (1134 out of 1513) and a further list up to date can also be provided.

4.5 It was further contended that the impugned order failed to consider the fact that the goods on which provision to write off was made, is only in pursuance of certain accounting standards and practices and that said goods were continuously used in the course of business. The impugned order errs in discounting the statement filed by the Appellant showing that the goods were available in stock which would itself establish that the goods were not written off. The impugned order erred when in fact what was provided was an extract of balance sheet and accounts, finalised as envisaged under the Companies Act, 2013 and in fact publicly disclosed under the SEBI guidelines. The appellant during the course of proceedings was called upon to produce any documentary evidence for use of the materials for which credit was taken. It was submitted that the provision made in the books of accounts was due to provisional write off of goods in stock on account of identifying non-movable/ old stock and it was not the case of declaring the goods as finally written off due to obsolescence/ permanent loss, etc. That the impugned order failed to consider that re-taking of credit was intimated in the ER-1 filed on 8th June 2017, which reflected the closing balance of credit transitioned in terms of Section 140 of GST Act, which is in accordance with

the provisions of law and there is no further burden on the appellant to intimate the department. The impugned order had wrongly held that the availment of re-credit came to light during the audit of accounts of appellant in September 2018 which is contrary to facts as ER1 was already filed by the Appellant. It was pointed out that the relevant period under consideration was 2014-2017, but the department sought to invoke the extended period under Section 11A(4) of the Central Excise Act, 1944 to issue the Show Cause Notice, on the ground that the Appellant had mis-stated and suppressed facts, with an intention to evade payment of duty. The impugned order failed to appreciate that CCR 2004 was repealed by CENVAT Credit Rules, 2017 and since there is no savings clause provided for in CENVAT Credit Rules, 2017, no demand can be made from the Appellant.

4.6 It was submitted that the impugned order wrongly confirmed the applicability of the extended time limit on erroneous basis and wrongly confirmed the interest even as re-credit taken by the appellant did not cause loss of revenue to the department and such interest could be demanded only up to 30.06.2017 on utilisation of credit for payment of central excise duty whereas utilisation of the same was for payment of GST. The impugned order failed to appreciate the fact that the entire dispute revolves in relation to the interpretation of law including the beneficiary transition provisions and the same cannot be a ground to hold that there has been a suppression of facts by the Appellant.

4.7 The Ld. Advocate filed the latest statement of goods/ materials as on 07.09.2023 on which CENVAT re-credit was availed, demonstrating the subsequent usage of goods in manufacture that were provisionally written off.

4.8 The Appellant had filed copies of various judgements relied in support of their case before the adjudicating and first appellate authority as mentioned below:

(i) Pratibha Processors Vs. Union of India [1996 (88) ELT 12 (SC)]

(ii) Eicher Motors Ltd. Vs. Union of India [1999](106) ELT 3 (SC)]

(iii) Shabnam Petrofils Pvt. Ltd. Vs. Union of India [2019 (29) GSTL 225 (Guj.)]

(iv) Sah Petroleums Ltd. Vs. Commr of Customs (Imports), JNCH, Nhavasheva [2017 (358) ELT 483 (Tri.-Mum.)]

(v) Principal Commissioner Vs. Gandhar Oil Refinery(I) Pvt. Ltd.[2018 (360) ELT A177 (SC)]

(vi) Reliance Life Insurance Company Ltd. Vs. Commissioner of Service Tax, Mumbai [2018 (363) ELT 1050 (Tri.-Mum.)]

(vii) Rajasthan Tourism development Corporation Ltd. Vs. CCE, Jaipur-I [2017 (5) GSTL 169 (Tri.-Del.)]

(Viii) Hira Cement Vs. Commissioner of Central Excise& St, Raipur [2017 (4) GSTL 75 (Tri.-Del.)]

(ix) Commissioner of C.Ex & ST, Ahmedabad Vs. Kartik Engineers Pvt. Ltd. [2014 (308) ELT 550 (Tri.-Ahmd.)]

(x) SDL Auto Pvt. Ltd. Vs. Commissioner of Central Excise, Delhi-IV [2013 (294) ELT 577 (Tri.-Del.)]

(xi) Kolhapur Cane Sugar Works Ltd. Vs. Union of India [2000 (119) ELT 257 (SC)]

5. The Ld. Authorised representative Shri Harendra Singh Pal representing the department reiterated the findings of the lower Adjudicating Authority.

6. Heard both sides and carefully considered the submissions and evidences on record.

7. The only issue that arises for decision in this appeal is :

- Whether the Appellant is eligible to avail CENVAT re-Credit on inputs, provisionally written off in the books of accounts, in terms of Rule 3(5B) of CENVAT Credit Rules, 2004 or not?

8. I find from the appeal records that the Appellant have availed CENVAT re-credit of Rs.34,84,905/- on 30.06.2017 on the inputs which were provisionally written off earlier and carried forward the same in ER 1 return filed prior to introduction of GST in terms of Section 140(1) of the Act as transitional credit. It is pertinent to note that the material on which CENVAT credit was availed was not fully written off. In this regard, for the sake of convenience, the provisions of Rule 3(5B) of erstwhile CENVAT Credit Rules, 2004 are reproduced below:

> *"If the value of any,*
> *i. input, or*
> *ii. capital goods before being put to use,*
>
> *on which CENVAT Credit has been taken is written off fully or partially or where any provision to write off fully or partially has been made in the books of account, then the manufacturer* ***or service provider*** *shall pay an amount equivalent to the CENVAT credit taken in respect of the said input or capital goods:*
>
> *Provided, if the said input or capital goods is subsequently used in the manufacture of final products* ***or provision of taxable services****, the manufacturer* ***or output service provider*** *shall be entitled to take the credit of the amount equivalent to the CENVAT Credit paid earlier subject to the other provisions of these rules."*

9. I find in terms of the said provision that any assessee is entitled to take re-credit if the said inputs/ capital goods are subsequently put to use in the manufacture of final products and which have not been fully written off. In the instant case, the Appellant has provided documents pertaining to the utilisation of inputs in the manufacture of final products. The Appellant had argued that in so far as proof of usage is concerned, they have made a

submission before the first appellate authority, a list of all items with usage upto 28.02.2021 (634 out of 1513 items) and later on produced relevant documentary evidence for usage of more inputs upto 30.06.2022 (1134 out of 1513 items). Further, during the course of their written submissions, the Appellant has provided documentary evidence for utilisation of 1156 input items up to 07.09.2023 certified by an independent Chartered Accountant, involving CENVAT credit of Rs.21,40,393/- out of the 1513 materials. As most of the input items which were earlier provisionally written off have been utilised by the Appellant in the manufacture and the remaining input materials are in the process of being used subsequently, I hold that the retaking of CENVAT Credit under the provisions of Rule 3(5B) of CENVAT Credit Rules, 2004 on 30.06.2017 is in order.

10. As the appellant had an intention which is obvious from the facts to utilise the inputs which were provisionally written off earlier due to stock valuation as per accounting standards, they are entitled to retake CENVAT Credit as on 30.06.2017 or otherwise the entire credit would have lapsed on introduction of GST. It has to be pointed out that inputs / raw-materials involving credit of Rs.21,40,393/- were already utilised in the manufacturing of their final products as per the submissions made by the appellant. The remaining inputs / raw-materials are required to be utilized and in case if they are written off fully in their books of accounts without utilising the same in their manufacture, the appellant is liable to reverse the appropriate CENVAT Credit amount availed in terms of provisions of Section 17(5)(h) of the CGST Act, 2017. Whether, the remaining inputs / raw-materials are used or not can be monitored by the Department during the subsequent audit of the records of the appellant. In view of the above, we have to hold that the appellant is eligible to retake the credit which was

initially provisionally written off. The provisions of Rule 3(5B) of erstwhile CENVAT Credit Rules, 2004 as mentioned above at paragraph 8 are very clear which states that when said inputs or capital goods are subsequently used in the manufacture of their products, the manufacturer is entitled to take the credit of the amount equivalent to the CENVAT Credit paid earlier.

11. In the instant case, the appellant has provided sufficient documentary evidence pertaining to the utilisation of inputs in the manufacture of their final products. As such, the demand of alleged ineligible CENVAT Credit cannot sustain. As the issue is of interpretational in nature, invocation of extended period is not justified as the ingredients required for extending the limitation are not satisfied in this case. In this regard, the appellant has relied upon many case laws in support of their contention that suppression cannot be invoked as pointed out at paragraph 4.8 above. As the demand cannot sustain, imposition of penalty and demand of interest also cannot survive. However, it is to be observed that the Departmental authorities are free to verify the utilisation of the impugned inputs whether used or not in the manufacture of their finished products by the appellant.

12. In view of the above, the impugned Order-in-Appeal No. 55/2022 (CTA-1) dated 25.11.2022 is set aside with consequential relief, if any, as per law.

(Order pronounced in open court on 23.11.2023)

Sd/-

(VASA SESHAGIRI RAO)

MEMBER (TECHNICAL)

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