CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL CHENNAI

REGIONAL BENCH – COURT NO. III

EXCISE APPEAL No.42306 of 2013

[Arising out of Order-in-Appeal No.62/2013-CE dated 30.08.2013 passed by the Commissioner of Central Excise (Appeals), Salem]

M/s.Sakthi Sugars Ltd. **Appellant**
Sakthi Nagar,
Bhavani Taluk – 638 315
Erode District

Vs

The Commissioner of GST & Central Excise **Respondent**
Salem Commissionerate,
No.1, Foulks Compound, Anai Road,
Salem 636 001.

APPEARANCE:

Shri M.N. Bharathi, Advocate
For the Appellant

Shri S. Balakumar, Assistant Commissioner (AR)
For the Respondent

CORAM:

Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)

Date of Hearing : 19.10.2022
Date of Decision: 19.10.2022

FINAL ORDER No. 40346 / 2022

Brief facts of the case are that appellant who is engaged in manufacture of Sugar, Molasses and Industrial Alcohol is registered with the Department for manufacture of the final products. They were availing the facility of cenvat credit of service tax paid on various

inputs services. During the conduct of audit in August 2008, it was noticed that appellant has availed wrong credit on input services used in the Co-generation plant for generation of electricity which was being wheeled out to T.N.E.B. They also availed credit on input services used for manufacture of Ethyl Alcohol. On being pointed by audit officers, the appellant paid the amount by reversing the credit on 16.08.2008. Thereafter, show cause notice dated 17.07.2012 was issued proposing to recover the wrongly availed cenvat credit along with interest and also for imposing penalty under Section 11AC of the Central Excise Act, 1944. After due process of law, the original authority confirmed the demand along with interest and appropriated the amount that has already been paid by the appellant. Equal penalty under Section 11AC of the Central Excise Act, 1944 was imposed. Aggrieved by the penalty imposed, the appellant filed appeal before the Commissioner (Appels) who upheld the same. Hence this appeal.

2.1 On behalf of the appellant, the Ld. Counsel Shri M.N. Bharathi appeared and argued the mater. He submitted that the appellant is contesting only the penalty imposed; that they paid up the entire duty amount in order to buy peace with the department and to avoid unnecessary litigation. He submitted that duty was immediately paid on being pointed out by the department in 2008 itself and the interest was paid after receiving the show cause notice. However, the show cause notice has been issued invoking the extended period after a period of 4 years of the audit conducted by the Department. There is

much delay in issuing the SCN and there are no grounds for invoking the extended period. The period is from July 2007 to July 2008. During the relevant period, there was much confusion as to whether input service tax credit can be availed on electricity which is used in the co-generation plant and thereafter wheeled out to T.N.E.B. The confusion was as to whether electricity was an excisable or non-excisable product. The appellant had availed the service tax credit credit on the bonafide belief that they are eligible to avail credit. The issue travelled upto the Apex Court and later in the case *of Maruti Suzuki Ltd. Vs CCE Delhi* reported in 2009 (240) ELT 641 (S.C) the issue was settled that when electricity generated by co-generation plant is sold outside, the credit is not eligible. Ld. Counsel argued that as the issue was interpretational in nature and also because the appellant had availed credit on the *bonafide* belief that it was eligible during the relevant period, the allegation that appellant suppressed the facts with intention to evade payment of duty is without any basis.

2.2 Ld. Counsel submitted that the department has collected details with regard to the wrongly availed credit from the E.R1 returns filed by the appellants. In the returns, the appellant had correctly reflected the credit taken on input services. The show cause notice is thereafter issued after much delay of 4 years invoking unsustainable grounds alleging that appellant has suppressed facts with intention to evade payment of duty. The major part of the credit so alleged to be wrongly availed pertains to the credit availed in regard to input services used

in the co-generation plant for generation of electricity which has been wheeled out to T.N.E.B.

3. The second part of the allegation is that credit has been wrongly availed in respect of input services used for manufacture of Ethyl Alcohol which is an exempted product. The appellant was not actually availing the credit. A small amount was availed by mistake. Ld. Counsel adverted to annexure to the show cause notice in page 70 of the paper book and submitted that only an amount of Rs.393/- and Rs.13,364/- have been shown in the said chart as credit availed in regard to manufacture of Ethyl Alcohol. The total amount of credit availed on input services including cess in regard to manufacture of Ethyl Alcohol would be below Rs.15,000/-. The said credit was availed only by inadvertent mistake and there was no intention to evade payment of duty.

4. Ld. Counsel relied upon the Tribunal decisions in the case of *Covalent Laboratories Pvt. Ltd. Vs CCE Hyderabad-I* - 2016 (344) ELT 641 (Tri.-Hyd.) and *Jai Balaji Industries Ltd. Vs CCE & ST Durgapur* – 2021 (378) ELT 674 (Tri.-Kolkata) to argue that when the issue is interpretational and also where there is no evidence for positive act of suppression, the extended period cannot be invoked. He prayed that appeal may be allowed by setting aside the penalty.

5. Ld. A.R Shri S. Balakumar appeared and argued for the Department. He supported the findings in the impugned order. Ld. A.R stressed that appellant has accepted the liability and paid up the

amount as demanded in the show cause notice. The contest in the present appeal is only with regard to penalty and as they have already paid up the liability, the grounds for setting aside the penalty cannot be entertained.

6. Ld. A.R pointed out the discussions made by Commissioner (Appeals) in page-5 of the impugned order to argue that by merely stating the input credit was disclosed in the E.R1 returns it cannot be said that there is no suppression of facts. In the returns, the appellant has not stated the credit availed in respect of Ethyl Alcohol and Electricity separately. Further, the self-assessment has to be considered as full and correct disclosure of the credit availed by them. The wrongly availed credit would not have come to light but for the audit conducted by the Department. He argued that penalty imposed is legal and proper.

7. Heard both sides.

8. The challenge in the present appeal is only with regard to equal penalty imposed under Section 11AC of the Central Excise Act, 1944. On perusal of records, it is seen that though audit was conducted in the year August 2008 the show cause notice has been issued much later after a delay of 4 years on 17.07.2012. It is seen that the appellant has paid up the duty immediately when the audit had pointed out the defect of availing wrong credit. Even then, the department has taken a period of 4 long years to issue the show cause notice. It is stated in the show cause notice that appellant has suppressed facts

with intention to evade payment of duty. Apart from this allegation there is no positive act of suppression brought out by the Department. Ld. Counsel has argued that the issue whether credit can be availed of service tax paid on inputs services used in regard to generation of electricity wheeled out to T.N.E.B was under litigation before various forums. The Hon'ble Apex Court in the case of *Maruti Suzuki Ltd. Vs CCE Delhi-III* (supra) settled the issue by saying that credit is eligible only when electricity is used for manufacture of final products. Taking note of this aspect into consideration that there were conflicting views as to whether credit is eligible on input services used for generation of electricity that is sold outside, I am of the view, the appellant cannot be burdened with the guilt of suppression of facts with intent to evade payment of duty. The issue being interpretational in nature and as the department had collected all the details of availment of credit from the accounts maintained by the appellant, the penalty imposed in this regard is unwarranted. I hold that penalty imposed with regard to duty liability of the input tax credit availed in respect of electricity (Co-generation plant) requires to be set aside which I hereby do so.

9. However, with regard to cenvat credit of input service availed for manufacture of exempted goods, namely, Ethyl Alcohol, the only argument put forward by the Ld. Counsel for appellant is that they had availed credit by inadvertent mistake. The said mistake would not have come to light but for the audit conducted by the Department.

I do not find sufficient grounds for setting aside penalty on input service tax credit in respect of Ethyl Alcohol. I uphold the same.

10. From the foregoing the impugned order is modified to the extent of setting aside the penalty imposed in regard to credit availed in respect of input services used in the co-generation plant for generation of Electricity sold outside. Penalty imposed in regard to input service tax credit on the services used in manufacture of Ethyl Alcohol is upheld.

11. The appeal is partly allowed in above terms with consequential relief, if any.

(Dictated and pronounced in court)

(**SULEKHA BEEVI C.S.**)
MEMBER (JUDICIAL)

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