CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL CHENNAI

REGIONAL BENCH – COURT NO. III

EXCISE APPEAL No.40303 of 2021

(Arising out of Order-in-Appeal No.04/2021-CE dt. 25.01.2021 passed by the Commissioner of GST & Central Excise (Appeals), Coimbatore, Circuit Office @ Salem Commissionerate)

M/s. ITCO Industries Ltd. **Appellant**
Plot No.66-C, SIPCOT,
Phase-I,
Hosur 635 126.

VERSUS

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

EXCISE APPEAL No.40304 of 2021

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The Commissioner of GST & Central Excise **Respondent**
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No.1, Foulkes Compound, Anai Road,
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APPEARANCE :

Shri Akbar Basha, Consultant
For the Appellant

Shri Arul C. Durairaj, Superintendent (AR)
For the Respondent

CORAM : HON'BLE MS. SULEKHA BEEVI, MEMBER (JUDICIAL)

DATE OF HEARING : 21.06.2022
DATE OF PRONOUNCEMENT : 23.06.2022

FINAL ORDER No. 40259-40260 / 2022

Brief facts of the case are that the appellants obtained two advance authorizations dated 29.06.2016 & 05.01.2017 issued by the Additional Directorate General of Foreign Trade, Bengaluru. Against such advance authorizations, the appellant imported raw materials without payment of duty. The appellants did not meet the export obligation and consequently a deficiency letter dated 15.03.2019 was issued to them directing them to regularize excess import of inputs made by them. Thereafter, a demand notice was issued by the office of the Commissioner of Customs, Chennai-IV for non-fulfilment of export obligation under the advance authorizations issued to them. The appellant then paid Customs duties along with CVD and Special Additional Duty (SAD) with applicable interest vide T.R. Challan dated 04.04.2019.

2. Meanwhile, G.S.T was introduced with effect from 01.07.2017 and the appellants were unable to avail input credit of CVD and SAD paid by them. They were also not able to transfer such credit to GST regime to TRAN 1 credit as the date of filing TRAN 1 procedure had expired on

27.12.2017. They therefore filed refund claim of Rs.9,76,684/- and Rs.3,07,305/- in regard to above appeals.

3. The original authority rejected the refund claims holding that the appellant is not eligible for CVD and SAD paid by them. They filed appeals against such orders before Commissioner (Appeals) who upheld the same. Hence these appeals.

4. On behalf of the appellant, Ld. Consultant Shri Akbar Basha appeared and argued the matter. He submitted that due to unexpected circumstances, the appellant could not meet the export obligation and resultantly, there were excess imports of inputs. To regularize the situation of excess import, the appellant deposited the Basic Customs Duty, CVD and SAD with applicable interest on 04.04.2019. Rule 3 of Cenvat Credit Rules, 2004 allows a manufacturer to avail credit of the Additional Duties of CVD and SAD paid under Section 3 of Customs Tariff Act, 1975. Therefore, credit of such CVD and SAD is eligible to the appellant. However, due to introduction of the new GST law, the appellant could neither avail credit in cenvat account nor transfer the credit by way of TRAN-1 as TRAN-1 proceedings had lapsed on 27.12.2017. Accordingly, they filed refund claims under Section 11B on 23.03.2020 which is well within one year from the date of payment of duties.

5. The Department rejected the refund claim applying Rule 9 (1) (b) of Cenvat Credit Rules, 2004. The said provision reads as under :

"RULE 9. Documents and accounts. __ (1) The CENVAT credit shall be taken by the manufacturer or the provider of output service or input service distributor, as the case may be, on the basis of any of the following documents, namely :-

(a) an invoice issued by –

(i) [a manufacturer or a service provider for clearance of-]
(I) inputs or capital goods from his factory or depot or from the premises of the consignment agent of the said manufacturer or from any other premises from where the goods are sold by or on behalf of the said manufacturer;

(II) inputs or capital goods as such;

(ii) an importer;

(iii) an importer from his depot or from the premises of the consignment agent of the said importer if the said depot or the premises, as the case may be, is registered in terms of the provisions of Central Excise Rules, 2002.

(iv) a first stage dealer or a second stage dealer, as the case may be, in terms of the provisions of Central Excise Rules, 2002; or

(b) a supplementary invoice, issued by a manufacturer or importer of inputs or capital goods in terms of the provisions of Central Excise Rules, 2002 from his factory or depot or from the premises of the consignment agent of the said manufacturer or importer or from any other premises from where the goods are sold by, or on behalf of, the said manufacturer or importer, in case additional amount of excise duties or additional duty leviable under section 3 of the Customs Tariff Act, has been paid, except where the additional amount of duty became recoverable from the manufacturer or importer of inputs or capital goods on account of any non-levy or short-levy ***by reason of fraud, collusion or any wilful mis-statement or suppression of facts or contravention of any provisions of the Excise Act, or of the Customs***

Act, 1962 (52 of 1962) or the rules made thereunder with intent to evade payment of duty.

Explanation. - *For removal of doubts, it is clarified that supplementary invoice shall also include challan or any other similar document evidencing payment of additional amount of additional duty leviable under section 3 of the Customs Tariff Act; or"*

6. Ld. Consultant argued that credit can be denied only if there is a finding that the same has been availed by reason of fraud, collusion, any wilful misstatement or suppression of facts with intent to evade payment of duty. In the present case, there is no such finding rendered against the appellant. The department has proceeded to deny refund only on the ground that a demand notice has been issued to the appellant. He adverted to page 140 of the Appeal No.40304/ 2021 to argue that notice issued to appellant on 29.06.2016 is merely an intimation letter to pay the duty and is not a demand or recovery notice issued under Section 142 of the Customs Act, 1962. Further, in such notice, there is no allegation of any fraud or wilful misstatement. He submitted that credit can be denied only if there is a finding of fraud, collusion or wilful misstatement or suppression of facts with intent to evade payment of duty and cannot be denied merely because an intimation is given by the department to pay the duty.

7. After the introduction of GST, the appellant could not avail cenvat credit of the duties paid by them which, otherwise, they would have been eligible. The appellant has filed refund claim of the eligible credit of the CVD and SAS paid by them. Section 142 (3) of G.S.T Act, 2017 provides

that every refund claim has to be processed under the existing law and has to be allowed in cash. The provision reads as under :

> **"Extract of section 142 of CGST Act, 2017 (Miscellaneous Transitional provisions)**
>
> **Section 142 of CGST Act 2017: Miscellaneous Transitional Provisions (CHAPTER XX – TRANSITIONAL PROVISIONS)**
>
> (1) … … ….
>
> (2) … … ….
>
> (3) Every claim for refund filed by any person before, on or after the appointed day, for refund of any amount of CENVAT credit, duty, tax, interest, or any other amount paid under the existing law, shall be disposed of in accordance with the provisions of existing law and any amount eventually accruing to him shall be paid in cash, notwithstanding anything to the contrary contained under the provisions of existing law other than the provisions of sub-section (2) of section 11B of the Central Excise Act, 1944:
>
> Provided that where any claim for refund of CENVAT credit is fully or partially rejected, the amount so rejected shall lapse:
>
> Provided further that no refund shall be allowed of any amount of CENVAT credit where the balance of the said amount as on the appointed day has been carried forward under this Act."

8. To support his argument, Ld. Consultant relied upon the following decisions and prayed that the appeal may be allowed :

1. *Ganges International Pvt. Ltd. Asst Comm. of GST and CE, Puducherry 2022-TIOL-325-HC-MAD-GST*
2. *CESTAT Final Order No.42467/2021 dated 16.12.2021 in the case of M/s.Circor Flow Technologies India Private Ltd.*
3. *CESTAT Final Order No.42366/2021 dated 11.10.2021 in the case of M/s.Terex India Ltd.*

4. CESTAT Final Order No.50157-50159/2022 dated 03.02.2022 in the case of M/s.Mithila Drugs Pvt. Ltd.

9. Ld. A.R Shri Arul C. Durairaj appeared for the Department and supported the findings in the impugned order.

10. Heard both sides.

11. From the narration of facts, it can be seen that Department has rejected the claims invoking Rule 9 (1) (b) of Cenvat Credit Rules, 2004. The said provision has already been reproduced above. The Department is of the view that credit is not eligible as appellant has paid the duties only after issuing a demand notice. On perusal of the alleged demand notice, it is merely in the nature of an intimation letter and has not been issued invoking any provisions of Customs law or Excise law. Further, in such intimation also, there is no allegation of any fraud, collusion or suppression of facts with intent to evade payment of duty. There is no evidence placed before me to establish that the duties were paid after adjudication and rendering a finding of fraud, collusion or suppression of fact with intent to evade payment of duty. In such circumstances, the credit cannot be denied. I hold that the appellant is eligible for credit of CVD and SAD paid by them. The Tribunal in the case of *Circor Flow Technologies* (supra) and *Mithila Drugs Pvt. Ltd.* (supra) had analysed a similar issue. In *M/s.Mithila Drugs Pvt. Ltd.*, the facts are identical to that of the instant case. The relevant paragraphs read as under :

"5.1 Learned Counsel further relies on the precedent ruling of this Tribunal in **Flexi Caps and Polymers Pvt. Ltd., vs. Commissioner, CGST & Central Excise, Indore -2021 (9) TMI 917-CESTAT, New Delhi,** wherein also pursuant to demand of service tax under reverse charge mechanism after 30.06.2017, for transaction related prior to the said date (01.07.17), this Tribunal held that as the appellant was entitled to cenvat credit under Cenvat Credit Rules, which is not now available due to GST regime, is entitled to refund under Section 142 read with Rule 146 of the CGST Act.

6. Learned Authorised Representative Sh. Mahesh Bhardwaj appearing for the Revenue relies on the impugned order.

7. Having considered the rival contentions, I find that the payment of CVD and SAD subsequently during GST regime, for the imports made prior to 30.06.2017 is not disputed under the advance authorisation scheme. It is also not disputed that the appellant have paid the CVD and SAD in August, 2018 by way of regularisation on being so pointed out by the Revenue Authority. Further, I find that the Court below have erred in observing in the impugned order, that without producing proper records of duty paid invoices etc. in manufacture of dutiable final product, refund cannot be given. I further find that refund of CVD and SAD in question is allowable, as credit is no longer available under the GST regime, which was however available under the erstwhile regime of Central Excise prior to 30.06.2017. Accordingly, I hold that the appellant is entitled to refund under the provisions of Section 142(3) and (6) of the CGST Act.

8. Accordingly, I direct the jurisdictional Assistant Commissioner to grant refunds to the appellant of the amount of SAD & CVD as reflected in the show causes notices and also in the orders-in-appeal. Such refund shall be granted within a period of 45 days from the date of receipt of order

along with interest under Section 11BB of the Central Excise Act. The impugned orders are set aside."

12. After appreciating the facts and evidence as well as applying the principles of law laid in the above decisions, I am of the view that the rejection of refund claims cannot be justified. The impugned orders are set aside. Appeals are allowed with consequential relief, if any, as per law.

(Pronounced in Court on 23.06.2022)

Sd/-
(SULEKHA BEEVI C.S.)
MEMBER (JUDICIAL)

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