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

Excise Appeal No. 990 of 2011

(Arising out of Order-in-Original No. 40/MP/Ayukta/2011 dated 26.08.2011 passed by Commissioner of Central Excise, Patna.)

M/s Graphite India Limited,
Village- Phulwaria, P.O.- Barauni-851112, Dist.-Begusarai, (Bihar)

...Appellant (s)

VERSUS

Commissioner of Central Excise, Patna,
C. R. Revenue, Building (Annexe), Birchand Patel Path, Patna,

. ..**Respondent(s)**

APPERANCE :
Shri Rahul Dhanuka, Advocate for the Appellant
Shri P. K. Ghosh, Authorized Representative for the Respondent

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

FINAL ORDER No...76370/2023

DATE OF HEARING : 10.08.2023

DATE OF DECISION : 10.08.2023

PER K. Anpazhakan :

M/s Graphite India Ltd.(The Appellant) is engaged in the manufacture of dutiable final products, comprising Calcined Petroleum Coke (CPC) and Carbon Paste . Raw Petroleum Coke (RPC) is their principal input.

2. During the period March 2005 to August 2005, RPC was procured from M/s IOC Barauni against central excise invoice. The same was cleared on payment of duty to M/s Universal Hydrocarbon Company Limited (UHCL) for manufacture of CPC. UHCL availed the Cenvat credit equivalent to the amount of Central Excise duty paid on the quantity of RPC so sent by the appellant. After processing, UHCL cleared the CPC to

the Appellant on payment of duty, under the cover of excise invoices and the Appellant availed the Cenvat credit on the same. Thereafter, the Appellant further undertook processing of mixing of different qualities of their manufactured CPC, sizing, quality check and packaging and cleared the same, on payment of duty, to customers

2.1 Further during the relevant period (i.e. 2004-05 and 2005-06), the final products were cleared by the Appellant both on FOR as well as on ex-factory basis. In respect of FOR Sales, the transportation charges were forming a part of the sale price of the goods and the Appellant was discharging excise on such sales price. In respect of ex-factory sales, the Appellant arranged transportation on behest of the customers and the same was separately collected from the customers. In such cases, excise duty was being paid on the transaction value excluding the freight component.

3. The audit of the records maintained by the Appellant was conducted by the Audit team of Central Excise Commissionerate Patna and Audit Report alleged that transportation charges amounting to Rs. 93,27,049/- was collected by them towards delivery of goods to different customers attract central excise duty @ 16%, amounting to Rs. 15,22,175/. It was also alleged by the Audit that CPC received by the Appellant from UHCL has been entered by the Appellant as a final product in RG-1 register and therefore, CENVAT credit of Rs. 56,84,435/- taken by them on the CPC received from UHCL is not admissible as the same is not input.

4. On the basis of the said Audit Report, a Show Cause Notice dated 30.06.2009 was issued to them central excise duty of Rs.15,22,175/- on the alleged ground of non-inclusion of transportation charges in the value of final products . It was also proposed to deny the cenvat credit of Rs.56,84,435/- taken by them on the CPC received from UHCL, as it was not an input. The Notice also proposed to levy interest and impose penalty. The Notice was adjudicated by the Adjudicating Authority vide Order-in-Original dated 26.08.2011 wherein the demands made in the Notice were confirmed along with interest and penalty. Aggrieved against the impugned order, the Appellant has filed the present appeal.

5. Regarding the allegation of wrong availment of Cenvat Credit amounting to Rs. 56,84,436/-, the Appellant stated that once the duty has been paid by the assessee and the materials were received into the factory, Cenvat credit cannot be denied. In this regard, they referred the following judgments in support of their contention:

- Commissioner of Central Ex. & Cus. Vs Creative Enterprises [2009 (235) E.L.T. 785 (Guj.)]
- Uttam Galva Steels Ltd. Vs Commissioner of Central Excise2016 (336) E.L.T. 81 (Tri. - Mumbai)]
- 5.1 The Appellant contended that even if the activities carried out by them do not constitute as manufacture, credit shall be allowed in terms of Rule 16 of the Central Excise Rules, 2002. Rule 16(2)of the Central Excise Rules, 2002clearly provides that in circumstances where the process does not amount to manufacture, the manufacturer shall pay an amount equal to the CENVAT credit taken at the time of receipt of the goods. In the present case, they have paid much more central excise duty than the CENVAT Credit availed by them on the CPC received from UHCL. Therefore, CENVAT credit cannot be again demanded from the Appellant. In this regard, they referred the following judgements in support of their contention:
- Bunty Foods (India) Pvt. Ltd. Vs Commr. of C. Ex. [2018 (359) E.L.T. 267 (Tri.-Mumbai)]
- Deepak Extrusion (P) Ltd. Vs Commr. of C. Ex.[2017 (347) E.L.T. 97 (Tri.-Bang.)]

5.2 The Appellant also stated that CENVAT Credit can be utilized for payment of inputs removed as such in terms of Rule 3(5) of CENVAT Credit Rules, 2004 and therefore, no reversal of CENVAT credit can be sought once duty has been paid on final products. Rule 3(5) of CENVAT Credit Rules, 2004 provides that when inputs on which CENVAT credit has been taken, are removed as such from the factory, the manufacturer of the final products or provider of output service, as the case may be, shall pay an amount equal to the credit availed in respect of such inputs. In the present case, the Appellant has paid much more central excise duty than the CENVAT Credit availed by them on CPC received from UHCL which would be clear from the statement annexed to the compilation. In that event, the Appellant cannot be asked to reverse the CENVAT Credit once again. In this regard, they referred to the judgments of the Hon'ble Punjab and Haryana High Court in the case of Commr. of C. Ex. Vs M/s Hansa Tube Pvt. Ltd. [2023 (2) TMI 549 – P&H]

6. The Appellant contended that extended period of limitation cannot be invoked when there is no suppression of facts on their part. Accordingly, they prayed for setting aside the demands confirmed in the impugned order.

7. The Ld. A.R. reiterated the findings in the impugned order.

8. Heard both sides and perused the appeal records.

9. We observe that there are two issues in the present appeal. The first issue is non-inclusion of transportation charges in the assessable value amounting to Rs.15,22,175/- confirmed in the impugned order along with interest and penalty equal to amount of duty. We find that the issue is no longer res integra inasmuch as the same stands settled in favour of the Appellant by this Tribunal in the case of **Aditya Birla Chemicals (India) Ltd. Vs Commissioner of Central Excise reported in 2021 (376) E.L.T. 390 (Tri. - Kolkata)].** The relevant Paras of the said decision is reproduced below:

"7. The issue before us is whether the appellant can claim exclusion of the freight amount from arriving at the assessable value for the purpose of payment of central excise duty.

We have perused the decisions rendered by the Apex Court in the cases of *Escorts JCB, Roofit Industries* as well as *Ispat Industries* (Supra). The Hon'ble Supreme Court in *Ispat Industries* case after taking note of its earlier decisions in *Roofit Industries* as well as *Escots JCB,* and the various amendments introduced in Section 4 of the Act from time to time, has categorically observed that the buyer's premises can never be the "place of removal" as has been defined in Section 4 of the Act. The Hon'ble Court also made a very important observation that the words used in Section "place or premises from excisable goods are to be sold" can only be the manufacturer's premise and if the contention of the Revenue is accepted, the said words will have to be substituted by the words "have been sold" which would only then have possibly have reference to the buyer's premises. The Court also gave a specific finding in para 32 with regard to the decision in *Roofit Industries* case, wherein it observed that the attention of the Court was not drawn to Section 4 as originally enacted and as amended to demonstrate that the buyer's premises cannot, in law, be the place of removal under the said provisions. Relevant paragraphs of the judgment are reproduced below:-

> *"16. It will thus be seen that where the price at which goods are ordinarily sold by the assessee is different for different places of removal, then each such price shall be deemed to be the normal value thereof. Sub-clause (b)(iii) is very important and makes it clear that a depot, the premises of a consignment agent, or any other place or premises from where the excisable goods are to be sold after their clearance from the factory are all places of removal. What is important to note is that each of these premises is referable only to the manufacturer and not to the buyer of excisable goods. The depot, or the premises of a consignment agent of the manufacturer are obviously places which are referable only to the manufacturer. Even the expression "any other place or premises" refers only to a manufacturer's place or premises because such place or premises is stated to be where excisable goods "are to be sold". These are the key words of the sub-section. The*

> *place or premises from where excisable goods are to be sold can only be the manufacturer's premises or premises referable to the manufacturer. If we are to accept the contention of the revenue, then these words will have to be substituted by the words "have been sold" which would then possibly have reference to the buyer's premises.*
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> *17. It is clear, therefore, that as a matter of 17. law with effect from the Amendment Act of 28-9-1996, the place of removal only has reference to places from which the manufacturer is to sell goods manufactured by him, and can, in no circumstances, have reference to the place of delivery which may, on facts, be the buyer's premises."*
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> 8. ……In the instant case before us, the issue whether or not place of removal can be manufacturer's premises or buyer's premises has since been settled by the Apex Court in *Ispat Industries* (Supra), which has to be respectfully followed for the purpose of assessment of duty as per law. [Emphasis Supplied]

10. Following the ratio of the decision cited above, we hold that the transportation charges are not includable in the assessable value. Accordingly, the demand of central excise duty of Rs.15,22,175/- confirmed in the impugned order on the ground of non-inclusion of transportation charges is not sustainable.

11. Regarding the second issue of denial of Cenvat credit of Rs.56,84,435/- taken by the Appellant on the CPC received from UHCL, on the ground that it was not an input, we observe that the department has not questioned the duty payment by UHCL on the CPC. There was also no dispute regarding the receipt of the duty paid inputs into the factory. Once the duty has been paid by the assessee and the materials were received into the factory, Cenvat credit cannot be denied. Further, even if the activities carried out by them do not amount to manufacture, Cenvat credit shall be allowed in terms of Rule 16 of the Central Excise Rules, 2002. Rule 16(2) of the Central Excise Rules, 2002 clearly provides that in circumstances where the process does not amount to manufacture, the manufacturer shall pay an amount equal to

the CENVAT credit taken at the time of receipt of the goods. In the present case, the Appellant has paid much more central excise duty than the CENVAT Credit availed by them on the CPC received from UHCL. Therefore, CENVAT credit availed cannot be denied on the ground that they were not inputs. Even if they were considered as 'inputs', Rule 3(5) of CENVAT Credit Rules, 2004 provides that when inputs on which CENVAT credit has been taken, are removed as such from the factory, the manufacturer of the final products or provider of output service, as the case may be, shall pay an amount equal to the credit availed in respect of such inputs. In the present case, the Appellant has paid much more central excise duty than the CENVAT Credit availed by them on CPC received from UHCL which would be clear from the statement annexed to the compilation. In that event, the Appellant cannot be asked to reverse the CENVAT Credit once again. This view has been taken by the Hon'ble Gujarat High Court in the case of **Commissioner of Central Excise Vs Delta Corporation, reported in 2013 (287) ELT 15 (Guj).** The relevant part of the decision is reproduced below:

> **6.** It is the case of the Revenue that in terms of such Rules since the respondent did not carry out any manufacturing activity on the PD Pumps purchased before clearance of home consumption, Modvat credit could not be availed.
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> **9.** It was in this context that the Tribunal in the impugned judgment referred to and relied upon the decision of the Tribunal in case of *Rico Auto Industries Ltd.* v. *CCE, New Delhi-III* reported in 2003 (57) RLT 271 = 2003 (157) E.L.T. 170 (Tribunal), in which it was held that when inputs are subjected to certain process and the processed inputs are cleared on payment of duty which was more than credit taken, Modvat credit cannot be denied on the ground that the processes undertaken by the assessee did not amount to manufacture.
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> **12.** The Tribunal in the impugned judgment has also recorded that it is admitted fact that the assessee paid duty when they cleared final output. Such duty was more than the credit taken.

> **13.** In view of above situation, we find no merits in the appeal. We therefore, answer the question in the affirmative i.e. against the Revenue and in favour of the assessee. [Emphasis Supplied]

12. Following the decision of the Hon'ble Gujarat 7High Court, we hold that the credit availed by the Appellant cannot be denied on the ground that it has been entered as finished goods in their RG-1 and hence it is not an input.

13. In view of the above discussion, the demands confirmed in the impugned order are liable to be set aside and accordingly we do so. Since the demand itself is not sustainable, the question of charging interest or imposing penalty does not arise.

14. In view of the above, discussion, we allow the appeal filed by the Appellant with consequential relief, if any as per law.

(Dictated and pronounced in the open court)

Sd/-

(R. Muralidhar)
Member (Judicial)

Sd/-

(K. Anpazhakan)
Member (Technical)

Tushar