

**CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
BANGALORE.**

REGIONAL BENCH.

EXCISE APPEAL NO. 37 OF 2010

[Arising out of the Order-in-Original No. 02/2009 dated 26/05/2009 passed by The Commissioner of Central Excise & Customs, Cochin.]

M/s Traco Cable Company Ltd.

Irumpanam,
Ernakulam – 682 309.

Appellant

VERSUS

**The Commissioner of
Central Excise & Customs,**

C.R. Building, IS Press Road,
Cochin – 682 018.

Respondent

APPEARANCE

Shri Raghvendra, Advocate – for the appellant.

Ms. C.V. Savitha, Superintendent for the Department.

**CORAM : HON'BLE SHRI JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE SHRI P.V. SUBBA RAO, MEMBER (TECHNICAL)**

FINAL ORDER NO. 20823/2021

DATE OF HEARING : 28.07.2021.
DATE OF DECISION : 01.11.2021.

P.V. SUBBA RAO

This appeal is filed by the appellant assailing order-in-original dated 26.05.2009 passed by the Commissioner of Central Excise, Customs & Service Tax, Cochin¹.

2. The appellant manufacturers electric cables/ACSR conductors and supplies to M/s Kerala State Electricity Board (KSEB) as per the contract which includes a price variation clause. The appellant paid duties at the time of removal of the

¹ impugned order

goods. Subsequently, prices were enhanced retrospectively in view of the increased in the cost of raw material. The differential duty in respect of such goods which were already cleared was paid by issuing supplementary invoices using Cenvat credit.

3. A show cause notice dated 18.01.2008 was issued to the appellant alleging that the supplementary invoices were raised and, therefore, they are relatable to the clearances already made during the previous months. As per the proviso to Rule 3 (4) of Cenvat Credit Rules, 2004 and proviso to Rule 3 (3) of Cenvat Credit Rules, 2002, the appellant could not have used Cenvat credit, which was taken after the last day of month for payment of duty relating to that month. Therefore, the assessee/ appellant was called upon to pay the differential central excise duty on the supplementary invoices in cash and not using Cenvat credit. It was also proposed to demand, interest at the appropriate rate under Section 11AB of the Central Excise Act, 1944 for late payment of excise duty. It was also proposed to impose a penalty upon the appellant under Rule 15 of Cenvat Credit Rules, 2004/Rule 25 of Central Excise Rules, 2002 and Section 11AC of the Central Excise Act, 1944.

4. Adjudicating the above show cause notice, the Commissioner passed the order as follows :-

"(i) I confirm the demand of Rs. 89,95,674/- (Rupees Eighty Nine Lakhs Ninety Five Thousand Six Hundred and Seventy Four only) being the Cenvat credit wrongly utilized by M/s Traco Cable Co. Ltd., Irumpalam, Ernakulam for payment of differential duty during the period January, 2007 to March, 2007 as per details in the Annexure under Section 11A (2) of

the Central Excise Act, 1944 readwith Rule 14 of Cenvat Credit Rules, 2004

- (ii) I order that M/s Traco Cable Co. Ltd., Irumpuram, Ernakulam shall pay interest on the amount confirmed at the appropriate rate under Section 11AB of Central Excise, Act, 1944
- (iii) I impose a penalty of Rs. 1,00,000/- (Rupees One Lakh Only) on M/s Traco Cable Co. Ltd., Irumpuram, Ernakulam under Rule 25 of Central Excise Rules, 2002".

5. Hence this appeal.

6. The first contention of the appellant is that the supplementary invoices were relatable to the month in which the supplementary invoices were raised and not relatable to the month in which the goods were originally cleared because the duty became payable only when the price was enhanced and not before. The appellant relies on the order of the Tribunal in **Essar Steel Ltd. versus Commissioner of Central Excise, Customs & Service Tax, Visakhapatnam – I²** in which it was held:-

"5.4 From the mere reading of the above said provisions as regards supplementary invoices, we find that the supplementary invoice is raised by the manufacturer or importer in case of liability of additional amount of excise duty. **That would mean that the duty liability has arisen in this case in the month of November, 2006, that is to say on the date the supplementary invoices were issued.** If that be so, any duty liability to be discharged by the appellant would be considered as duty to the Revenue only in the month of November, 2006. It is undisputed in this case that in the month of November, 2006, the appellant had enough credit in RG 23A Part-II and RG 23C Part-II to discharge the said duty liability. We find that our views are fortified by the Hon'ble High Court of Gujarat in the case of *Chloritech Industries* (supra). Paras 4 and 5 of their Lordships judgment are reproduced below :-

"4. On a plain reading of the definition of the term 'transaction value' it becomes clear that the same means the price actually paid or payable for the goods, when sold; thereafter, the definition includes, in addition to the amount charged a price, any amount that the buyer is liable to pay to the assessee, whether payable at the time of sale or at any other time, by reason of sale, or in connection with sale.

² 2010 (251) E.L.T. 255 (Tri. – Bang.)

Thus, it becomes apparent that the value, on which duty is chargeable, has to be the price actually paid or payable for the goods. Even the inclusive definition requires that the additional amount which the buyer is liable to pay to the assessee is by reason of or in connection with the sale whether payable at the time of sale or at any other time. The emphasis is on the factum of the buyer being liable to make the payment. This becomes clear when one reads the word 'payable' and the latter part of the provision which talks of buyer being liable to pay. In other words, at the point of time when the transaction was entered into the buyer must be aware that a particular price is payable *qua* the transaction in question, or that he is liable to pay at a future point of time but that liability must have arisen at the point of time of the transaction. This is more than abundantly clear because Section 4(1) of the Act fastens charge on transaction value, i.e. value placed on the goods at the time of transaction.

5. If at the given point of time when the transaction took place the additional price was not fixed, the liability of the buyer to pay the additional amount was not known to the buyer, mere existence of an escalation clause in the contract between the parties cannot bring the subsequent escalation within the meaning of the definition for the purposes of levying interest. Duty of excise would become payable even subsequently in point of time and that is the admitted position between the parties, the respondent-assessee having already discharged that liability."

5.5 We find that the issue in hand is squarely settled by the ratio as laid down by the Hon'ble High Court.

6. Accordingly, for the foregoing reasons, we are of the view that the impugned order is not sustainable and is liable to be set aside and we do so. The impugned order is set aside and the appeal is allowed with consequential relief, if any".

7. The appeal filed by the Revenue against this order was dismissed by the High Court of Andhra Pradesh³.

8. The contention of the appellant is that it had correctly availed and utilized Cenvat credit available at the time of raising supplementary invoices in its account. The second contention of the appellant is that the proviso to Rule 3 (4) of Cenvat Credit Rules, 2004 was held to be *ultra vires* by the High Court of Gujarat in **Advance Surfactants India Ltd. versus Union of**

³ 2015 (317) E.L.T. A210 (A.P.)

India⁴. Thus, even for this reason, it has been contended that there is nothing wrong in utilizing the Cenvat credit of payment of duty against the supplementary invoices. The relevant paragraph of the decision in **Advance Surfactants India Ltd.** reads as follows:-

"7. In view of the above and for the reasons stated hereinabove, proviso to sub-rule (4) of Rule 3 of Cenvat Credit Rules is held to be *ultra vires* and unconstitutional to the Scheme of Cenvat Credit. Now the appropriate authority to adjudicate the show cause notice accordingly and consider and/or treat the proviso to sub-rule (4) of Rule 3 of Cenvat credit Rules as unconstitutional, in accordance with law and on its own merits. Rule is made absolute to the aforesaid extent. No order as to costs".

9. The third argument of the appellant is regarding the interest under Section 11AB. It is the assertion that since the duty is relatable to the date of supplementary invoices, no interest is payable.

10. The last submission of the appellant is that no penalty is imposable under Rule 25 of Central Excise Rules, 2002 and Rule 15 of Cenvat Credit Rules, 2004 as there was no violation of any Act or Rules and they had paid the duty on such supplementary invoices when they raised.

11. Learned Departmental Representative supports the impugned order. With respect to the first question of relatability of the supplementary invoices to the clearances, learned Departmental Representative submits that there were conflicting views on the subject and the matter has been settled by Constitution Bench of Supreme Court in **Steel Authority of**

⁴ 2017 (358) E.L.T. 53 (Guj.)

India Ltd. versus Commissioner of Central Excise, Raipur⁵

in which it has been held that the enhancement of the value will date back to the original date of removal due to retrospective escalation of price though it was received later and consequential differential duty has to be paid under Section 11A readwith interest Section 11AB. Therefore, it is now a settled position that if prices are enhanced retrospectively, the supplementary invoices for the differential prices date back to the original date of clearances and interest on the differential duty needs to be paid.

12. We have considered the arguments advanced by the parties and have perused the records.

13. The first question as to whether the supplementary invoices relate to the date of original clearance or the date on which the supplementary invoice was raised has been decided by the Supreme Court in **Steel Authority of India**. Accordingly, interest under Section 11AB needs to be paid by the appellant on the differential amount of duty.

14. On the second question of whether Cenvat credit can be utilized for payment of duty in view of the proviso to Rule 3 (4) of the Cenvat Credit Rules, 2004, we find that the High Court of Gujarat in **Advance Surfactants India Ltd.** has held that this proviso is ultravires. No judgment of any other High Court or Supreme Court has been produced before us to show that a

⁵ 2019 (366) E.L.T. 769 (S.C.)

contrary view has been taken in respect of this proviso. Therefore, we find that the appellant was correct in utilizing the Cenvat credit for payment of the excise duty.

15. On the third question of imposition of penalty, we find from the facts of the case that the assessee has not violated any provision of the Act or the Rules to attract penalty under Rule 25 of the Central Excise Rules, 2002. The appellant on its own had paid the differential duty on the supplementary invoices which were raised.

16. In view of the above, the impugned order is modified, as follows :

- (a) the demand of duty in cash denying the use of Cenvat credit for payment of duty of supplementary invoices is set aside ;
- (b) interest, if any, is payable under Section 11AB the same needs to be paid for the period from the date of clearance upto the date of payment of the differential duty.
- (c) the penalty imposed under Rule 25 of the Central Excise Rules, 2002 is set aside.

17. The appeal is partly allowed by modifying the impugned order to the extent indicated above.

(Order pronounced in open court on 01/11/2021.)

**(JUSTICE DILIP GUPTA)
PRESIDENT**

**(P.V. SUBBA RAO)
MEMBER (TECHNICAL)**