IN THE HIGH COURT OF DELHI

WP(C) No. 6706/2016

GLOBAL CERAMICS PVT LTD

Vs

THE PR COMMISSIONER OF CENTRAL EXCISE, DELHI-1

WP(C) No. 9152/2016

THE PR COMMISSIONER OF CENTRAL EXCISE

Vs

M/s B R CERAMICS PVT LTD

S Muralidhar & I S Mehta, JJ

Dated: May 24, 2019

Appellant Rep by: Mr Krishan Kant, Adv., Mr Harpreet Singh, Sr. Standing Counsel with Ms Subani Mathur, Adv. Respondent Rep by: Mr Harpreet Singh, Sr. Standing Counsel with Ms Subani Mathur, Adv., Dr Seema Jain, Mr Ajay K Jain, Mr Dushyant K Mahant and Ms Shova Choudhary, Adv.

Cus - Grievance of the Petitioner GCPL is that the Customs & Central Excise Settlement Commission declined to permit adjustment of the duty already paid and Cenvat Credit which had been allowed by it in other similar cases including the decision of the CCESC dated 16th December, 2015 in the case of B.R. Ceramics (P) Ltd. ("BRCPL") - Facts are that GCPL imported ceramic tiles between June, 2010 and January, 2014 and paid Basic Customs duty, Countervailing duty and Education Cess - CVD was paid on the basis of the maximum retail price ("MRP") declared on the unit containers of ceramic tiles as notified under Section 4-A of the Central Excise Act, 1944 - It is pointed out that the imported tiles were sold to numerous dealers,

some of whom sold the tiles at a price higher than the MRP, thereby the provisions of Section 2 (f) (iii) of the CE Act stood attracted - This led to issuance of a SCN demanding duty of Rs.3,69,76,139.00 and proposing penalty to many of the dealers including GCPL - GCPL filed an application before the CCESC admitting duty liability of Rs.30,79,862/- in addition to Rs. 25,00,000/- deposited during investigation and interest liability of Rs.16,51,695.00 - GCPL also sought adjustment of CVD Rs. 2,80,42,411/-paid at the time of import and Cenvat credit of Rs.16,10,252.00 paid as Service Tax on input services - By the impugned order dated 23rd June 2016, the CCESC left the issue of claiming adjustment of duty and availability of Cenvat Credit already paid, to the jurisdictional Commissioner - CCESC also imposed penalties on the GCPL and its directors - Petitioner submits that the matter had to be entirely settled by the CCESC itself and the issue regarding the adjustment of the CVD and the service tax component ought not to have been remanded to the jurisdictional Commissioner; that the application of the GCPL was in fact heard by a three member Bench of the CCESC, whereas the impugned order was signed by only two of them - Department contended that under Rule 4 (1) of the Cenvat Credit Rules, 2004, a time limit of six months from the date of issuance of the copy of the documents specified in Rule 9 (1) was imposed for claiming the Cenvat Credit with effect from 1st September 2014

Held: In the present case, the credit accrued when CVD was paid on finished goods deemed to be cleared from home consumption when the dealers sold the goods at higher price by altering the MRP - The right to the Cenvat Credit accrued on the very day when the inputs were received - Court is satisfied that the Amendment to Rule 4 (1) of CCR prescribing a time limit for claiming Cenvat Credit will not apply to the consignments in the present

case where the import took place prior to the date of the amendment and the deemed manufacture took place when the MRP was altered, which also happened prior to the amendment - In other words, the CVD paid by the BRCPL will have to be permitted to be adjusted against the CE duty settled as will the service tax paid on the input services - Court sets aside the impugned order dated 23rd June, 2016 passed by the CCESC in the case of GCPL and permits the adjustment of the CVD in the sum of Rs.2,80,42,411.00 and service tax to the tune of Rs.16,51,695.00 against the admitted settled duty liability of Rs.3,69,76,139.00 - Further, the penalty amount of Rs.60 lacs is reduced to Rs. 1 lac, as in the case of BRCPL - W.P.(C) No.6706/2016 filed by GCPL is disposed of in the above terms - Petition by Department is, therefore, rejected: High Court [para 22, 24, 25]

Cus - It is indeed true that the CCESC which heard the settlement application of the GCPL comprised of three members, therefore, an order passed by just two of them, would obviously be unsustainable in law: High Court [para 23]

Assessee Petition disposed of/Revenue petition rejected

Case laws cited:

Osram Surya (P) Ltd. v Commissioner of Central Excise, Indore - 2002-TIOL-64-SC-CX... Para 8

Eicher Motors Ltd. v. Union of India - 2002-TIOL-149-SC-CX-LB... Para 8

CCE, Chennai-I v Amalgamation Valeo Clutch Pvt. Ltd. 2006) (206) ELT 91 (Mad.)... Para 10

Rathi Ispat Ltd. v CCE, Meerut 2010 (251) ELT 199 (All.)... Para 10

Jayam & Co. v Assistant Commissioner - 2016-TIOL-128-SC-VAT... Para 19

Likewise in Samtel India Ltd. v. CCE, Jaipur - 2003-TIOL-40-SC-CX... Para 20

Filco Trade Centre Pvt. Ltd. v. Union of India - 2018-TIOL-2861-HC-AHM-GST... Para 21

JUDGEMENT

Per: Dr S Muralidhar:

1. These are two writ petitions raising a common question of law and accordingly are being disposed of by this common judgment.

2. *W.P. (C) No.6706/2016 is by Global Ceramics Pvt. Ltd.* ("GCPL") challenging an order dated 23rd June, 2016 passed by the Customs and Central Excise Settlement Commission ("CCESC"). The grievance of the Petitioner GCPL is that the CCESC declined to permit adjustment of the duty already paid and Cenvat Credit which had been allowed by it in other similar cases including the decision of the CCESC dated 16th December, 2015 in the case of B.R. Ceramics (P) Ltd. ("BRCPL").

3. The companion petition is by the Principal Commissioner of Central Excise, Delhi-1 (hereafter, "the Department") questioning the aforementioned decision of the CCESC in the case of BRCPL contending that the Cenvat Credit as claimed and allowed to BRCPL by the CCESC, was not permissible.

4. The background facts in W.P. (C) 6706 of 2016 are that GCPL imported ceramic tiles between June, 2010 and January, 2014 and paid:

(i) Basic customs duty;

(ii) Additional Duty of Customs equal to the excise duty commonly known as countervailing duty ("CVD"); and

(iii) Education Cess.

5. It is stated that CVD was paid on the basis of the maximum retail price ("MRP") declared on the unit containers of ceramic tiles as notified under Section 4-A of the Central Excise Act, 1944 ("CE Act"). It is pointed out that the ceramic tiles are included in the Third Schedule to the CE Act whereby any process such as packing, re-packing or altering the MRP is deemed to be "manufacture" under Section 2 (f) (iii) of the CE Act. It is pointed out that the imported tiles were sold to numerous dealers, some of whom sold the tiles at a price higher than the MRP. Thereby the provisions of Section 2 (f) (iii) of the CE Act stood attracted. This led to issuance of a show cause notice ("SCN") demanding duty of Rs.3,69, 76,139.00 and proposing penalty to many of the dealers including GCPL.

6. GCPL filed an application before the CCESC admitting duty liability of Rs.30,79,862/- in addition to Rs. 25,00,000.00 deposited during investigation and interest liability of Rs. 16,51,695.00. GCPL also sought adjustment of CVD Rs. 2,80,42,411/-paid at the time of import and Cenvat credit of Rs.16,10,252.00 paid as Service Tax on input services.

7. By the impugned order dated 23rd June 2016, the CCESC left the issue of claiming adjustment of duty and availability of Cenvat Credit already paid to the jurisdictional Commissioner. Also, the CCESC imposed penalties on the GCPL and its directors.

8. It is submitted on behalf of GCPL that the matter had to be entirely settled by the CCESC itself and the issue regarding the adjustment of the CVD and the service tax component ought not to have been remanded to the

jurisdictional Commissioner. It is contended that the CCESC wrongly applied the decision of the Supreme Court in *Osram Surya (P) Ltd. v Commissioner of Central Excise, Indore 2002 (142) ELT (SC)* = *2002-TIOL-64-SC-CX*. According to GCPL, its case is covered by the decision in *Eicher Motors Ltd. v. Union of India 1999 (106) ELT 3 (SC)* = *2002-TIOL-149-SC-CX-LB*. It is further pointed out that the application of the GCPL was in fact heard by a three member Bench of the CCESC, whereas the impugned order was signed by only two of them.

9. On the other hand, it is contended on behalf of the Department that the decision of the CCESC in BRCPL"s case was erroneous. It is pointed out that BRCPL declared the wrong MRP at the time of import and therefore was deemed to be a manufacturer at the time of import. Consequently, an SCN had to be issued for the differential duty i.e. CVD. In such a case, the question of allowing Cenvat Credit did not arise. It is further pointed out by the Department that Notification No. 21/2014-CE(NT)dated 11th July, 2014, prescribed an upper time limit of six months/ one year for taking Cenvat Credit.

10. Mr Harpreet Singh, learned Senior Standing Counsel appearing for the Department has also placed reliance on the decisions in *CCE, Chennai-I v Amalgamation Valeo Clutch Pvt. Ltd. 2006) (206) ELT 91 (Mad.)* and *Rathi Ispat Ltd. v CCE, Meerut 2010 (251) ELT 199 (All.)*.

11.1 The Court would first like to discuss the decision of the CCESC in the case of BRCPL which has been assailed by the Department in W.P.(C) No.9152/2016. There BRCPL had imported ceramic tiles falling under the Third Schedule to the CE Act and had alleged to have altered the MRP by reaffixing stickers, and this was deemed to be manufactured. This led to the issuance of SCN not only to BRCPL but certain other entities as well. BRCPL

voluntarily deposited Rs.13 lacs as Central Excise Duty during the course of investigation.

11.2 A SCN came to be issued proposing a demand of CE duty totalling Rs.3,04,73,655/-. BRCPL and the other entities applied to the CCESC for settlement, accepting the duty liability of Rs.67,38,815/- and interest liability of Rs.30,48,639/- accepting that the change in MRP should be deemed to be manufactured. BRCPL claimed that it had already deposited CED of Rs.67,40,000/- along with interest of Rs.30,50,000/-. It accordingly requested for waiver of penalty and prosecution and allowing deduction of Cenvat Credit of CVD and settlement of demand on the differential duty.

11.3 Before the CCESC, the Department contended that under Rule 4 (1) of the Cenvat Credit Rules, 2004 ("CCRs"), a time limit of six months from the date of issuance of the copy of the documents specified in Rule 9 (1) was imposed for claiming the Cenvat Credit with effect from 1st September 2014. It was also contended that the applicant had withheld from the Central Excise Authority, information that it had changed the MRP and cleared the final goods with an intention of evading payment of CE duty. It had not followed the proper procedure nor maintained the daily stock account and as such was not eligible to avail the credit of CVD.

11.4 The CCESC took the view that it was a well settled principle that a substantive right cannot be denied because of procedural irregularities. The fact that CVD had been paid at the time of the import, had not been denied by the Department. The law permitted the use of Cenvat Credit availed on the CVD paid at the time of import in discharging CE duty liability. Since the change in the CCRs did not have retrospective effect, the availment of Cenvat Credit as far as BRCPL is concerned, was not restricted to six months. Relying on the decision in the

Osram Surya (P) Ltd. v. Commissioner of Central Excise (supra), the CCESC held that the Cenvat Credit could not be denied to BRCPL.

11.5 Consequently, in the final order dated 16th December, 2015, the CCESC settled the differential duty and permitted Cenvat Credit adjustment of the CVD amount paid. Likewise, the interest amount deposited by BRCPL was also allowed to be adjusted. A fine of Rs. 1 lac in lieu of redemption of the goods was imposed for the goods seized from the applicant and a further penalty of Rs.1 lac was invoked as a condition for grant of immunity from penalty in excess of the said amount.

12. When it came to GCPL, even though, the CCESC followed certain other decisions and declined to concur with the view taken by the CCESC in BRCPL, although it noted that "In the instant case also the conditions are exactly the same as in the case of B.R. Ceramics". It was observed that in view of the decision of the Supreme Court in Osram Surya (P) Ltd. v. Commissioner of Central Excise (supra), GCPL was not entitled to take the Cenvat Credit and therefore it was left to the jurisdictional Commissioner to examine the claim for taking the Cenvat Credit. Unlike in the case of BRCPL, a penalty of Rs.60 lacs was imposed and the CE duty was settled without giving credit of the CVD and interest payment.

13. In CCE, Chennai-I v. Amalgamation Valeo Clutch Pvt. Ltd. (supra), the Madras High Court followed Osram Surya (P) Ltd. v. Commissioner of Central Excise, Indore (supra) to deny Cenvat Credit. A perusal of the said judgment shows that in paragraph 4, it was conceded by the counsel for the Assessee that "the manufacturer cannot take the Modvat Credit after six months from the date of documents specified in First Proviso to Rule 57-G of the CE Rules". Therefore, the decision proceeded on a concession.

14. As far as the decision in Rathi Ispat Ltd. v CCE, Meerut (supra) is concerned, here the reliance is essentially placed on the decision in Osram Surya (P) Ltd. v Commissioner of Central Excise, Indore (supra). None of these decisions are of help as far as the Department is concerned.

15. In the present case, we are concerned with the amendment to the Rule 4 of the CCRs with effect from 11th July, 2014, which reads thus:

"Provided also that the manufacturer or the provider of output services shall not take Cenvat credit after 6 months of the date of issue of any of the documents in sub rule (1) of rule 9."

16. It is in terms of this amendment that it was provided that the Cenvat Credit must be taken within one year of the issue of invoice for input goods or input services.

17. There is substance in the contention of the learned counsel for the Assesses in both the cases that the above amended provision cannot be given retrospective effect. As explained in Eicher Motors Ltd. v. Union of India (supra) the rule of lapse of credit lying with it unutilized on the date of amendment, cannot be applied to the goods manufactured prior to the date of the amendment. This is based on the principle that the right to adjustment of tax on final products accrues to an Assessee on the date when they paid the tax on the raw materials and that right would continue until the facility available thereto gets worked out. In fact, the judgment in Osram Surya (P) Ltd. v. Commissioner of Central Excise, Indore (supra) approvingly refers to the judgment in Eicher Motors Ltd. v. Union of India (supra).

18. In the present case, the credit accrued when CVD was paid on finished goods deemed to be cleared from home consumption when the dealers sold the goods at higher

price by altering the MRP. The right to the Cenvat Credit accrued on the very day when the inputs were received.

19. In *Jayam & Co. v Assistant Commissioner (2016) 96 VST 1 (SC)* = *2016-TIOL-128-SC-VAT*, it was held that a provision introduced for the first time cannot be given retrospective effect. It is further held as under:

"11. Now it is a well-settled rule of interpretation hallowed by time and sanctified by judicial decisions that, unless the terms of a statute expressly so provide or necessarily require it, retrospective operation should not be given to a statute so as to take away or impair an existing right or create a new obligation or impose a new liability otherwise than as regards matters of procedure. The general rule as stated by Halsbury in Volume 36 of the Laws of England (Third Edition) and reiterated in several decisions of this court as well as English Courts is that-

"all statutes other than those which are merely declaratory or which relate only to matters of procedure or of evidence are prima facie prospective" and retrospective operation should not be given to a statute so as to affect, alter or destroy an existing right or create a new liability or obligation unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only'."

20. *Likewise in Samtel India Ltd. v. CCE, Jaipur 2003 155 ELT 14 (SC)* = *2003-TIOL-40-SC-CX*, it was held that the right to credit accrued to an Assessee on the date the tax on inputs was paid. Once the inputs were used, the Rule imposing a period of limitation, could not be given retrospective effect.

21. The Gujarat High Court in *Filco Trade Centre Pvt. Ltd. v. Union of India (decision dated 5th September, 2018 in SCA No.18433/2017)* = *2018-TIOL-2861-HC-AHM-GST* followed the dictum of the Supreme Court in Jayam & Co. v. Assistant Commissioner (supra) and reiterated that the input tax credit could not be denied on the basis of an amendment, which is prospective. The question dealt with by the High Court was whether Section 140-A (3) (iv) of the CGST Act, which declined the Cenvat Credit in relation to goods purchased prior to one year from the appointed date, could be given retrospective effect. In answering the question in the negative, the Gujarat High Court held as under:

"30. To sum up we are of the opinion that the benefit of credit of eligible duties on the purchases made by the first stage dealer as per the then existing CENVAT credit rules was a vested right. By virtue of clause (iv) of sub-section (3) of section 140A such right has been taken away with retrospective effect in relation to goods which were purchased prior to one year from the appointed day. This retrospectivity given to the provision has no rational or reasonable basis for imposition of the condition. The reasons cited in limiting the exercise of rights have no co-relation with the advent of GST regime. Same factors, parameters and considerations of "in order to co-relate the goods or administrative convenience" prevailed even under the Central Excise Act and the CENVAT Credit Rules when no such restriction was imposed on enjoyment of CENVAT credit in relation to goods purchased prior to one year.

22. Consequently, in the present case, the Court is satisfied that the Amendment to Rule 4 (1) CCRs prescribing a time limit for claiming Cenvat Credit will not apply to the consignments in the present case where the import took place prior to the date of the amendment and the deemed manufacture took place when the MRP was altered, which

also happened prior to the amendment. In other words, the CVD paid by the BRCPL will have to be permitted to be adjusted against the CE duty settled as will the service tax paid on the input services.

23. That apart, it is indeed true that the CCESC which heard the settlement application of the GCPL comprised of three members. Therefore, an order passed by just two of them, would obviously be unsustainable in law.

24. For all of the aforementioned reasons, this Court sets aside the impugned order dated 23rd June, 2016 passed by the CCESC in the case of GCPL and permits the adjustment of the CVD in the sum of Rs.2,80,42,411.00 and service tax to the tune of Rs. 16,51,695.00 against the admitted settled duty liability of Rs.3,69, 76,139.00. Further, the penalty amount of Rs.60 lacs is reduced to Rs. 1 lac, as in the case of BRCPL. W.P.(C) No.6706/2016 is disposed of in the above terms.

25. As far as the Department"s challenge to the decision of the CCESC in the case of the BRCPL is concerned, it is hereby rejected and the W.P.(C) No.9152/2016 is dismissed. No costs.