IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CENTRAL EXCISE APPEAL NO.35 OF 2024

M/s. Visen Industries Limited
A company incorporated under
the provisions of the Companies
Act, 1956 having its registered
office at 501, Stanford, Plot No.554,
Junction of S. V. Road and Juhu Lane,
Andheri (W), Mumbai – 400 058
And
Plant at K-30, 31 & 32,
MIDC Industrial Area, Tarapur,
Boisar, Dist. Thane, (Now Palghar),
Boisar – 401 506 ...**Appellant**

Versus

1. **Commissioner of Central Excise,**
Thane – II
Having its office at 3rd Floor,
Navprabhat Chambers, Ranade
Road, Dadar (W), Mumbai – 400 028

2. **Office of the Superintendent of**
Central GST & Central Excise
having its address 1st Floor,
Sai Shopping Centre, Chitralaya,
Boisar (W), Dist. Palghar – 401 504 ...**Respondents**

Mr. Vikram Nankani, Senior Advocate a/w Mr. Pradeep Bakhru
& Mr. Omkar Chavan i/b. Wadia Ghandy & Co. for Appellant.
Mr. Ram Ochani a/w Ms. Niyati Mankad (through VC) &
Mr. Akash Singh for Respondent.

CORAM : M. S. Sonak &
Jitendra Jain, JJ.
RESERVED ON : 11 December 2024
PRONOUNCED ON : 14 December 2024

JUDGMENT (Per Jitendra Jain J)**:-**

1. Heard learned counsel for the parties.

2. This appeal is filed under Section 35G of the Central Excise Act, 1944 by the Appellant-Assessee proposing the following substantial questions of law arising out of the Tribunal's order dated 27 February 2024:-

QUESTIONS OF LAW

"(1) Whether the Tribunal erred in holding that there was no reversal of Cenvat Credit merely because the reversal was in the form of debit in the Cenvat register, at the time of issuing the sales invoice?

(2) Whether the Tribunal erred in equating the Cenvat Credit reversal with utilization in as much as utilization of Cenvat Credit is for payment of excise duty, whereas in the present case admittedly excise duty was paid on receipt from the buyer and not through Cenvat Credit?

(3) Whether, in the absence of prescribed method for reversal of Cenvat Credit, has the Tribunal erred in not accepting the method adopted by the Appellant.

(4) Whether the impugned order is sustainable in upholding the equal penalty by the non-speaking and without reasons order on the issue of extended period of limitation, and consequently, penalty?

(5) Whether a legitimate demand can be raised to recover the CENVAT Credit availed on inputs despite there being a reversal of the entire availed CENVAT Credit and no loss being suffered by the exchequer?

(6) Whether penalty can be imposed as a matter of course in a mechanical manner without given reasons for such imposition of penalty?

(7) Whether a patently and solely punitive action on part of the excise authorities in seeking to recover the CENVAT credit and imposing interest and penalty is justifiable and permissible despite a reversal of the entire amount of CENVAT Credit availed on inputs resulting in no loss being caused / suffered by the exchequer?

(8) Whether in the facts and circumstances of the case and in law, the demand of Rs.5,63,66,047/- raised by the Commissioner of Central Excise, Thane-II vide the Show Cause Notice dated 5th September 2014 for the period August 2009 to September 2012 is barred by limitation?

Brief facts :-

3. The Appellant is engaged in the manufacture of polymer emulsions, which are used in paint, textiles and adhesive industries. For the product's manufacture, the primary raw material, i.e., Vinyl Acetate Monomer, is imported by the Appellant and stored in Customs Bonded Warehouses. The Appellant cleared the said Vinyl Acetate Monomer to their customers directly from the said Custom Bonded Warehouse but maintained the records in such a manner that the said raw material was received in the factory and subsequently cleared from the factory without bringing the said goods into the factory. This was done to take Cenvat Credit of the admissible duties and issue a central excise invoice to clear the same to their customers by debiting the Cenvat Credit account and passing on the credit to their customers. This *modus operandi* was unearthed by the Respondent-Revenue. After a detailed investigation, a show cause notice dated 5 September 2014 was issued by invoking a larger period of limitation since, according to the Respondent-Revenue, there was suppression, fraud etc. on the part of the Appellant-Assessee in doing so. The show cause notice and the statement recorded of the Appellant's representative and its customers were also enclosed.

4. On 23 December 2014, the aforesaid show cause notice came to be adjudicated by the Commissioner of Central Excise, Thane, who

passed an order disallowing the Cenvat Credit of Rs.5,63,66,047/- wrongly availed and utilised by the Appellant during the period August 2009 to September 2012 and ordered the recovery of the said amount. By this order, a penalty of Rs.6,82,11,154/- was also imposed on the Appellant under Rule 15(2) of the Cenvat Credit Rules, 2004, read with Section 11AC of the Central Excise Act, 1944. The Commissioner also imposed a penalty on the Managing Director and ordered the reversal of other Cenvat Credit with which we are not concerned in the present appeal since the relief on the other issues has been granted by the Tribunal. Being aggrieved by the said Order-in-Original of the Commissioner, the Appellant appealed to the Tribunal, raising various grounds.

5. The Tribunal, vide its order dated 27 February 2024, confirmed that the Order-in-Original, whereby Cenvat Credit of Rs.5,63,66,047/- was disallowed and ordered to be recovered along with interest and penalty, was set aside. Insofar as other demands and penalties are concerned, the same were set aside.

6. Aggrieved by the aforesaid order of the Tribunal, the Appellant has preferred the present appeal on substantial questions of law referred to hereinabove. Question No.(1) to Question No.(7) deals with the confirmation by the Tribunal of the Order-in-Original dealing with Cenvat Credit of Rs.5,63,66,047/- along with interest and penalty.

Question No.(8) deals with the show cause notice dated 5 July 2014 being barred by limitation.

7. We have heard Mr. Vikram Nankani, learned Senior Advocate for the Appellant and Mr. Ram Ochani, learned counsel for the Respondent.

8. We first propose to decide Question No.(8) which deals with the show cause notice being barred by limitation. Section 35G(1) reads as under:-

> *35G Appeal to High Court*
> *(1) An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal on or after the 1st day of July, 2003 (not being an order relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment), if the High Court is satisfied that the case involves a substantial question of law.*

9. For the question to be raised in an appeal to the High Court under Section 35G, the same should arise out of the Tribunal's order against which an appeal is preferred to the High Court. Section 35G(1) provides that an appeal shall lie from every order passed in appeal by the Appellate Tribunal. Therefore, the issue raised in the Question No. (8) dealing with notice being barred by limitation should arise from the Tribunal's order. On a perusal of the Tribunal's order, the issue of notice being barred by limitation does not appear to have been raised by the Appellant since there is no such recording by the Tribunal in the order. This issue, in the facts of the case, is a mixed issue of fact and law. Since

the issue of a notice being barred by limitation has not been argued in the view of the absence of the same being recorded in the Tribunal's order, in our view, Question No.(8) would not arise from the Tribunal's order.

10. In-ground (h) of the appeal memo before this Court it is stated that ground relating to limitation was raised in the appeal before the Tribunal. However, the Tribunal has failed to consider the same and, therefore, the Tribunal's order suffers from infirmities. In our view, raising ground in the appeal and advancing arguments at the time of the hearing before the Tribunal are two different things. A ground may be raised in the appeal but may not have been argued before the Tribunal, in which case the Appellant cannot raise a grievance that the Tribunal has failed to give its finding on the said ground. If the ground was argued before the Tribunal and the same has not been considered by the Tribunal then the correct approach of the Appellant should have been to make an application for rectification of the order passed by a Tribunal by filing application for Rectification of Mistakes (ROM) before the Tribunal. In the instant case, we are informed that the Appellant has not filed any such application before the Tribunal. We cannot, in an appeal before us, entertain such a ground because we are not aware as to whether the ground of limitation was argued before the Tribunal or not. The Tribunal's record must be given credence. The appeal Court

does not lightly entertain any attacks against the Court's record. The proper mode is approaching the same court within a reasonable period, if not at the earliest. Even ground (h) only speaks that same was raised in the appeal, but it does not say that it was argued before the Tribunal. Admittedly, there is no discussion on the ground of limitation in the Tribunal's order and, therefore, in our view, since the issue of limitation does not arise from the present Tribunal's order dated 27 February 2024, same is to be rejected.

11. The Co-ordinate Bench of this Court in ***Commissioner of Income Tax vs. Tata Chemicals Ltd.***[1] while dealing with Section 260A of the Income Tax Act on appeals to the High Court in paragraph 9 observed as under:-

> *"9. As far as question (a) is concerned, it is not in dispute that this question was not raised before the Tribunal. Mr. Desai submitted before us that under section 260-A(6)(a) it is permissible for the High Court to determine any issue which is not determined by the Appellate Tribunal. The careful reading of section will show that High Court can decide only that question which was raised but not determined by the Tribunal. Therefore it was necessary that the question sought to be raised ought to have been raised before the Tribunal and then if it had not determined it, one can say that it has not been determined by Tribunal and therefore the High Court should look into it. In the present case, we do not find that this issue had been raised before the Tribunal. It is also not the case of revenue that the issue or question was raised but not decided by the Tribunal. In the circumstances, we do not propose to dwell on this question".*

The above decision squarely supports the view we have taken on Question No.(8) above.

1 (2002) 256 ITR 395

12. Now, we propose to deal with Questions Nos.(1) to (7), which concerns a Cenvat Credit of Rs.5,63,66,047/- that was wrongly availed and ordered to be recovered by the Order-in-Original and confirmed by the Tribunal. In this connection, the findings of the two authorities, the Commissioner of Central Excise in his Order-in-Original and the Tribunal as the final fact-finding authority, are relevant.

13. The *modus operandi* concerning the issue above has been narrated in paragraph 3 of the present order, wherein we have observed that the Appellant used to clear the imported goods directly from the customs bonded warehouse and send them to its customers. Still, the records were maintained in such a manner that they reflect that the goods entered the Appellant's factory premises and left the factory premises for the customer's destination. Based on the excise invoices raised by the Appellant, the customers used to take Cenvat credit. There is no dispute that unless the goods enter the factory premises and leave the factory premises, Cenvat Credit cannot be taken.

14. In the show cause notice dated 5 September 2014, it is stated that the Appellant availed inadmissible Cenvat Credit and also wrongly passed the incidence of duty to various customers. The show cause notice records statements made by various customers of the Appellant in support of this *modus operandi*. The customers have stated that although the goods were received from customs bonded warehouse, the

documents received from the Appellant were shown as if the goods had been dispatched from the factory at Tarapur. On a specific question being asked to the customers as to how they had taken Cenvat Credit when the goods were not being transported from the factory premises, they have categorically stated that the Cenvat Credit was taken based on invoices issued by the Appellant. The Appellant has rebutted none of these statements of the customers. In the statements recorded of the representatives of the Appellant they have also admitted to the said *modus operandi* adopted by them which has not been rebutted.

15. In the Order-in-Original dated 23 December 2014, the Adjudicating Authority has recorded the admission of the Appellant of the *modus operandi* adopted by them of issuing documents as if the goods were received in the factory. In contrast, in effect the goods never reached the factory, but were transported directly from the customs bonded warehouse. The said authority has also recorded that the Appellant has reversed the credit, but despite the said reversal, they had passed this inadmissible credit to their customers, and the Appellant has not produced any record to show permission to store Cenvat goods outside factory premises for availing the Cenvat credit. These findings of facts have not been rebutted. The fact that Cenvat Credit is reversed is not disputed, but it also remains undisputed that the said Cenvat Credit was passed on to the customers, although the Appellant could not have

done the same. This too, has remained uncontroverted. Thus, crucial findings of fact that are well-supported by the record warrant no interference.

16. The Tribunal, being final fact-finding authority, has given a finding of fact that the Appellant has availed inadmissible Cenvat Credit although the goods did not enter the factory. It further records that the inadmissible Cenvat Credit was availed, utilised, and not reversed. It records that although inputs were not received in the factory, credit was availed and utilised for clearance of inputs. The contentions of the Appellant that they have reversed the Cenvat Credit have also been rejected by the Tribunal by observing that Cenvat Credit was utilised by adopting the *modus operandi* through the invoices issued by the Appellant for sale of inputs directly from the customs bonded warehouse. The Tribunal has observed that the customers to whom goods were sold have admitted that based on such documents prepared, they availed the Cenvat Credit, although the same could not have been availed.

17. In our view, two authorities have examined the facts and have given a finding of fact that the same Cenvat Credit was wrongly availed and passed on to the customer, and this has not been rebutted. In our view, these findings of facts and, more particularly, by the final fact-finding authority cannot be challenged by saying that there arises

substantial questions of law. The original authority and the Tribunal have recorded that the Appellant has admitted the *modus operandi* referred to hereinabove and the same is corroborated by the customers' statements also. In our new, such findings of facts would not raise any question of law much less substantial questions of law.

18. During the course of the hearing before us, the learned Senior Counsel for the Appellant stated that the Appellant had filed a detailed chart which is at pages 167 onwards, to show the date of reversal, and the Tribunal has failed to consider the same. In our view, if these charts were brought to the notice of the Tribunal and the Tribunal has not considered the same, the Appellant should have filed a rectification application to the Tribunal stating that these charts have not been referred in the Tribunal's order. However, the same was brought to the notice of the Tribunal. In the absence of any such thing, we cannot accept the statement made by the learned counsel for the Appellant. In any case, the issue doesn't stop by reversal, but it extends to the invoices prepared to show that the goods have entered the factory and sold from the factory to the customers and thereby, the customers availed the Cenvat Credit, which is the issue which was required to be addressed which has not been addressed. Since admittedly, the *modus operandi* was proved to avail wrongly the Cenvat Credit and passed on to the customers and further there is no denial that the customers have

availed the Cenvat Credit based on the documents prepared by the Appellant, which otherwise they have not been able to avail, these are questions of facts, and on such questions of facts, no substantial questions of law can be said to arise. Therefore, even after considering the chart, no interference with the factual findings is warranted.

19. The Tribunal in paragraphs 4 and 5 after giving its findings have concluded that the Cenvat Credit was intentionally wrongly availed and, therefore, they did not interfere with the Order-in-Original insofar as recovery of Rs.5,63,66,047/- and penalties is concerned. In our view, the basis of confirming the penalty is in paragraph 5 wherein the *modus operandi* of the Appellant for availing and passing on Cenvat Credit to its customers which was exposed by the investigation team and confirmed by the adjudicating officer also got reconfirmation by the Tribunal. The fact that invocation of larger period of limitation on account of suppression, fraud etc. has become final since said ground not having been argued as per the Tribunal's order which does not mention so, there does not seem to be any infirmity in Tribunal's order on confirming penalty. Therefore, in view of above, no substantial questions of law as raised in Question Nos.(1) to (7) arise from the Tribunal's order.

20. In view of the above, the appeal filed by the Appellant against the order of the Tribunal dated 27 February 2024 does not raise any

substantial questions of law, and, therefore, the appeal is dismissed with no order as to costs.

(Jitendra S. Jain, J.) (M. S. Sonak, J.)