

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED: 05.6.2017
CORAM
THE HONOURABLE MR.JUSTICE RAJIV SHAKDHER
AND
THE HONOURABLE MR.JUSTICE R.SURESH KUMAR
C.M.A.Nos.2518 to 2520 of 2015 and
M.P.Nos. 2 & 2/2015

M/s.K.G.Denim Ltd.,
Jadayampalayam, Mettupalayam
Coimbatore 641 302.

..Appellant/Respondent
in all CMAs

vs

1. Custom, Excise & Service Tax Appellate Tribunal
Shastri Bhavan Annexe Building,
26, Haddows Road, Chennai 600 006.

2. Commissioner of Central Excise
Anai Road, Salem 636 001.

.. Respondents/Appellants
in all CMAs

PRAYER in C.M.A.Nos 2518 and 2520/2015.: Civil Miscellaneous Appeals filed under Section 35 G of the Central Excise Act, 1944 to set aside the final order Nos.40683 & 40685 of 2015 dated 26.6.2015 in Appeal E/498/2009, passed by the 1st respondent herein and allow the above appeal.

PRAYER in C.M.A.No. 2519/2015.: Civil Miscellaneous Appeals filed under Section 35 G of the Central Excise Act, 1944 to set aside the final order No.40684 of 2015 dated 26.6.2015 in Appeal E/601/2010, passed by the 1st respondent herein and allow the above appeal.

For Appellant : Mr.K.S.Venkatagiri
For Respondent : Mr.A.P.Srinivas
Standing Counsel

COMMON JUDGEMENT

(Order of the Court was delivered by RAJIV SHAKDHER ,J.)

1.These three appeals have been filed by the Assessee against the common order dated 26.6.2015, passed by the Customs Excise and Service Tax Appellate Tribunal (in short the Tribunal). The Tribunal in the operative part of its impugned Judgment and order has partly allowed the appeals of both the

Assessee and the Revenue and furthermore, directed that the refund of the sum of Rs.30,60,023/- should be allowed by re-crediting the said amount to the CENVAT Credit Account. In other words, the Assessee's stand that the said amount should be refunded in cash to it, has been declined. We may only note that during the pendency of the proceedings, out of the sum of Rs.30,60,023/-, the assessee has been given a refund of Rs.10,00,000/- which of course was challenged by the Revenue and it is in this context, based on the appeal of the Revenue, that the aforementioned operative directions came to be passed even vis-a-vis, the sum of Rs.10,00,000/-.

2. The captioned appeals were admitted on 05.11.2015, whereupon, and the following questions of law were framed for consideration:

"1) Whether the Hon'ble CESTAT is correct in directing the consequential refund under Section 11B of the amount paid by the appellant, to be credited to the CENVAT Credit account, in the absence of any provision in the said Section for such re-credit?

2) Whether the Tribunal was right in treating an application for refund of the credit of the duty already utilized to pay the demand issued under Section 11A, as if it is an unutilized credit."

3. Before we proceed further, it may be relevant to advert to the following facts which have led to the institution of the captioned appeals:

3.1. The Assessee is a manufacturer of cotton Indigo blue dyed denim fabrics. For this purpose, the Assessee used duty paid inputs such as yarn, dyes, chemicals etc.

3.2. It appears that during the relevant period, spanning between 01.07.2001 to 31.10.2001, the Denim Fabric manufactured by Assessee was subject to Basic Excise Duty (in short, "BED") and Additional Excise Duty in lieu of Sales Tax (in short, "AED, GSI"). Similarly, yarn, which was the main input that was used in the manufacture of fabrics was subject to BED and Additional Excise Duty (Textiles and Textile Articles), [in short AED (T & TA)]. Since, both the inputs used and final product were dutiable, the Assessee availed of the benefit of CENVAT credit qua duties paid on inputs i.e., yarn used in the manufacture of the final product. In other words, the Assessee utilized the credit of AED (T & TA) paid on yarn to pay BED and AED, GSI on fabric. This was evidently objected to by the Department and therefore, the Commissioner of Central Excise, Salem, issued a show cause notice dated 29.4.2003 to the assessee. By virtue of the said show cause notice, a demand in sum of Rs.36,46,072 was

raised on the Assessee and the credit of AED (T & TA) was utilized by the Assessee to pay BED/AED (GSI). The said demand was raised by the Revenue evidently under Rule 12 of CENVAT Credit Rules 2001 (in short, "2001 Rules") r/w the proviso to Section 11(A)(1) of Central Excise Act, 1944 (in short, "CE Act"). It was the Department's stand that the Assessee could not have utilized the duty credit available vis-a-vis inputs, that is, yarn against the duty payable on fabric in terms of the 2001 Rules.

3.3. The matter went to adjudication and by virtue of an order-in-original dated 8.1.2004, duty to the extent of Rs.32,40,810/- was confirmed. The Assessee was given credit to the extent of Rs.3,65,652/- as that was the amount which had already been paid by it.

3.4. The assessee being aggrieved, preferred an appeal to the Commissioner of Central Excise Appeals [in short, "Commissioner (Appeals)"], Salem. The appeal however, was dismissed on 15.09.2004, resultantly, the demand to the extent of Rs.32,40,810/- was confirmed. The said order of the Commissioner (Appeals), was assailed by the Assessee before the Tribunal. The Tribunal vide order dated 11.3.2005 granted an interim stay on condition of pre-deposit of a sum of Rs.10,00,000/- towards the demand.

3.5. The Assessee, admittedly, complied with the interim order of the Tribunal by debiting the CENVAT account. This debit was carried out by the Assessee on 15.3.2005. There is nothing in the record to show that the aforementioned methodology followed by the Assessee for complying with the conditions of the order of stay dated 11.3.2005 were objected to by the Revenue.

3.6. Be that as it may, the Assessee, suo motu made a further payment of a sum of Rs.20,60,023/- by debiting its CENVAT credit account on 15.3.2007. This was done by the Assessee while the appeal was still pending adjudication before the Tribunal.

3.7. Thus, in effect, the Assessee by applying the methodology of debiting the CENVAT account credited in favour of the Revenue, the total sum of Rs.30,60,023/-.

3.8. Fortuitously, for the Assessee the Tribunal vide its Judgment and Order dated 08.10.2007 set aside the demand raised by the Revenue on the ground that it was barred by limitation. In sum, this appeal of the Assessee was allowed by the Tribunal via, the aforementioned Judgment and Order.

3.9. As a result of the aforesaid development, the Assessee filed a claim for refund before the Deputy Commissioner of Central Excise, Coonoor Division. The amount claimed was Rs.30,60,023/-.

4. The Deputy Commissioner however, issued a show cause notice dated 28.3.2008 and, via this notice the assessee was called upon to show cause as to why the refund claimed vis-a-vis, the sum of Rs.20,60,023/- should not be rejected. The notice was suggestive of the fact that the refund claimed vis-a-vis, the said sum which was credited to the Revenue's account, as indicated above on 15.3.2007, by debiting the CENVAT credit account, was not tenable in view of the provisions of Rule 11 sub rule 3(i) and (ii) of CENVAT Credit Rules, 2004 (in short 2004 Rules), as amended by Notification No.10/2007-CE(NT) dated 1.3.2007.

4.1. The record shows that the Deputy Commissioner by order dated 21.11.2008 sanctioned the refund in cash to the extent of Rs.10,00,000/-. However, by the very same order the assessee's claim for refund of the balance amount i.e., 20,60,023/- was rejected.

4.2. The Assessee being aggrieved by part rejection of its refund claim preferred an appeal against the order dated 21.11.2008, passed by the Deputy Commissioner. Similarly, the Revenue also preferred an appeal against the sanction of refund of Rs.10,00,000/- in cash in favour of the Assessee. It appears that while the appeal of the Revenue was pending, the show cause notice dated 23.6.2009 was issued by the Additional Commissioner of Central Excise, Salem for recovery of the sum of Rs.10,00,000/- by which refund had been ordered in favour of the Assessee. The main plank on which the said show cause notice was issued was that the refund in cash could be ordered only where the final product or intermediate goods are exported. In other words, the recourse was sought to be taken to Rule 5 of the 2004 Rules.

4.3. As luck would have it, the Commissioner (Appeals) upheld the Deputy Commissioner's order sanctioning the refund of Rs.10,00,000/- in cash in favour of the Assessee vide order dated 29.7.2009. However, the Assessee's appeal against the rejection of the claim of the refund of Rs.20,60,023/- was dismissed via, separate orders of even date, i.e., 29.7.2009.

4.4. To be noted, this order was passed in the Assessee's Appeal No.104/2009, while as indicated above, an order of even date dated 29.7.2009 was passed in the Revenue's appeal being No.101/2009. Since, both parties are aggrieved, they approached the Tribunal against the two separate orders dated 29.7.2009 passed by the Commissioner (Appeals) in their respective appeals

preferred before him.

4.5. It is not in dispute that despite the fact that the Commissioner (Appeals) had rejected the Revenue's appeal bearing No.101/2009 vide order dated 29.7.2009, the adjudication of the show cause notice dated 23.6.2009 was continued, which resulted in confirmation of demand raised qua the sum of Rs.10,00,000/-. The order in this effect was passed on 30.09.2009 by the Additional Commissioner of Central Excise, Salem.

4.6. The assessee, therefore, was left with no other choice but to file an appeal with the Commissioner of Central Excise, Salem against the order dated 30.09.2009 as well. Consistent with its earlier position, Commissioner of Central Excise, Salem vide order dated 29.6.2010 passed in Appeal No.32/2010 (SLM), set aside the order dated 30.9.2009. This resulted in the Revenue, now filing an appeal to the Tribunal in respect of order dated 29.6.2010. It is in this context that the Tribunal was called upon to deal with two appeals preferred by the Revenue and one appeal preferred by the Assessee. As indicated above, at the very outset all three appeals have been disposed of by the Tribunal by a common order dated 26.6.2015.

4.7. It is in this background, the instant appeals have been preferred by the assessee, being aggrieved by the operative directions issued by the Tribunal to which we have made a reference above.

5. On behalf of the Assessee, argument have been advanced by the learned counsel Mr.Venkatagiri while on behalf of the Revenue, submissions have been made by the learned counsel Mr.A.P.Srinivas.

6. The learned counsel for the assessee, Mr. Venkatagiri has submitted that the provisions of Rule 5 of 2004 Rules would have no application as refund in cash can be ordered only where any input or input service is used in the manufacture of final product which is cleared for export under bond or letter of undertaking, as the case may be, or used in an intermediate product cleared for export. Furthermore, it is the learned counsel's submission that Rule 5 of 2004 Rules applies where there is unutilized credit available in the CENVAT Credit Account. It is the learned counsel's submission that in this case the amount credited in the assessee's CENVAT Credit Account stood utilized upon debit entries being passed on 15.3.2005 and 15.3.2007. According to the learned counsel, the authorities below misdirected themselves by concentrating upon Rule 5 of 2004 Rules.

7. It was therefore, the submission of Mr.Venkatagiri that refund in cash was payable to the Assessee and in that behalf the claim had to be processed under Section 11(B)(2)(c) of the CE Act, 1944. According to the learned counsel, the Assessee was entitled to refund of credit of duty paid by it on excisable goods used as inputs, in accordance with the rules or any notification issued under the CE Act.

8. The learned counsel also drew out attention to the fact that the provision while defining the relevant date for the purpose of limitation has taken into account the fact that duty may become refundable as a consequence of a Judgment, Decree, Order or Direction of the Appellate Authority, Appellate Tribunal or any Court. The learned counsel drew our attention to the 'Explanation B' pertaining to relevant date as adverted to in clause (ec).

9. In support of his submissions, the learned counsel relied upon the following Judgments:

- (i) COMMISSIONER OF CENTRAL EXCISE, RANCHI VS. ASHOK ARC [2006(193 E.L.T.399(Jhar.)]
- (ii) UNION OF INDIA VS. SLOVAK INDIA TRADING CO. PVT. LTD. [2006(201)E.L.T.559(Kar.)]
- (iii) RAYMOND LTD VS. COMMISSIONER OF CENTRAL EXCISE, MUMBAI-III [2011(274) E.L.T.513 (Tri.-MUMBAI)]

9.1. As against this, the learned counsel for the Revenue, Mr.Srinivas, submitted that since duty had been paid by the assessee by debiting the CENVAT credit account, refund of the same could be made only by re-crediting the account as was held by the Tribunal. In support of this submission, the learned counsel relied upon the Judgment of the Principal (larger) Bench of the Tribunal in the matter of : STEEL STRIPS VS. COMMISSIONER OF C.EX., LUDHIANA [2011(269) E.L.T. 257 (Tri.-LB)]. On a query being put to Mr.Srinivasan, he conceded that Rule 5 of the 2004 Rules would not be applicable in the instant case in view of the fact that the final product manufactured by the assessee was not being exported.

10. Before we proceed further, we may also note that with effect from 09.7.2004, the fabric manufactured by the appellant has been given exemption from excise duty and this fact is not disputed by Mr.Srinivas. However, what has emerged from the record which we have made a reference to hereinabove, is that, there is no unutilized balance left in the assessee's CENVAT credit account. Mr. Srinivas, fairly, did not dispute the fact that the assessee had squared off credits by making two debit entries; the first one on 15.3.2005 equivalent to a sum of Rs.10,00,000/- and, the second, on 15.3.2007 amounting to a sum of Rs,20,60,023/-. Mr.Srinivasan's only objection was (an

objection, which has been accepted by the Tribunal) to payment of the total amount i.e. 30,60,023/- in cash. Learned counsel submitted that the said amount could only be refunded to the Assessee by re-crediting the CENVAT credit account and by Assessee being paid in cash as is sought to be expounded by it in the captioned appeals.

11. We have considered the matter at great length. We are of the view that the provisions of Section 11 B(2)(c) of CE ACT 1944 would come to the aid of the Assessee. We may also note that there is no dispute that the refund claimed by the assessee is within the period of limitation as prescribed under sub section (1) of Section 11 B. In order to appreciate the point in issue, it may be relevant to extract the relevant provisions hereafter:

"11B. Claim for refund of duty

(1) Any person claiming refund of any duty of excise and interest, if any, paid on such duty may make an application for refund of such duty and interest, if any, paid on such duty to the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise before the expiry of one year from the relevant date in such form and manner as may be prescribed and the application shall be accompanied by such documentary or other evidence (including the documents referred to in section 12-A) as the applicant may furnish to establish that the amount of duty of excise and interest, if any, paid on such duty in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such duty and interest, if any, paid on such duty had not been passed on by him to any other person:

Provided that where an application for refund has been made before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991, such application shall be deemed to have been made under this subsection as amended by the Act and the same shall be dealt with in accordance with the provisions of subsection (2) as substituted by that Act:

Provided further that the limitation of one year shall not apply where any duty and interest, if any, paid on such duty has been paid under protest.

(2) If, on receipt of any such application, the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise is satisfied that the whole or

any part of the duty of excise and interest, if any, paid on such duty paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund:

Provided that the amount of duty of excise and interest, if any, paid on such duty as determined by the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise under the foregoing provisions of this sub-section shall, instead of being credited to the Fund, be paid to the applicant, if such amount is, relatable to--

- (a)
- (b)
- (c) refund of credit of duty paid on excisable goods used as inputs in accordance with the rules made, or any notification issued, under this Act;
- (d)
- (e)
- (f)
- (3)
- (4)
- (5)

" Explanation : For the purposes of this section, --

(A) "refund" includes rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;

(B) "relevant date" means, -

(a) सत्यमेव जयते

.....

(b)
(c)"

12. A perusal of the aforementioned Rules would show that if on receipt of any applications, the concerned officer, who is referred to in sub section (2) of Section 11 B is satisfied that the whole or part of any duty of excise and interest if any paid on such duty is refundable, he is required to make an order of refund and the amount so determined is to be credited to a Fund,

i.e., the Consumer Welfare Fund.

12.1 The proviso to sub section (2) of Section 11 B, on the other hand, empowers the concerned Officer to pay the amount of excise duty and interest, if any paid on such duty, as may be determined, to the applicant, in the circumstances contemplated under clause (a) to (f), instead of crediting the amount to the Fund.

12.2. The learned counsel for the Assessee has, correctly, argued that the Assessee would fall under clause (c) of Section 11 B of the CE Act. The said clause requires the concerned officer to refund credit of duty paid on excisable goods used as inputs in accordance with rules made or any notification issued under the CE Act. Clearly, once, determination has been made by the concerned officer with regard to what is provided in clause (c), the concerned Officer would be required to pay the amount to the applicant.

12.3. There is no dispute that excisable inputs such as yarn was used in the manufacture of the final product i.e., fabric. The amount paid as a condition of interim stay imposed by the Tribunal in the earlier round vide order dated 11.3.2005 was credited to the Revenue by debiting the CENVAT Credit Account. The sum credited at that stage was an amount equivalent to Rs.10,00,000/-. Similarly, on 15.3.2007, another sum of Rs, 20,60,023/- was credited in favour of the Revenue by debiting the CENVAT credit account.

13. Therefore, in our view, there is no impediment in the said amount being refunded to the Assessee by way of cash, contrary to what the Tribunal has indicated. This is the only viable and practical approach which can be adopted in the instant case as the Revenue does not dispute the fact that the final product manufactured by the assessee which is fabric, is no longer amenable to excise duty. In these circumstances, quite obviously, the re-credit of duty as ordered by the Tribunal via impugned Judgment or Order will not serve any purpose insofar as the Assessee is concerned.

14. Therefore, having regard to the aforesaid facts and circumstances, we agree with the submissions of the learned counsel for the Assessee, Mr.Venkatagiri, that the refund in cash ought to have been ordered by the Tribunal. The Jharkand High Court in the case of CCE Vs. ASHOK ARC has taken a similar view with regard to grant of refund.

15. Accordingly, these appeals are allowed. The impugned Judgment and Order of the Tribunal dated 26.6.2015, is set aside. The necessary consequences of this would be that both questions of law would have to be answered in favour of the

assessee and against the revenue. Consequently, pending applications are closed. No costs.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

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To

1. Custom, Excise & Service Tax Appellate Tribunal
Shastri Bhavan Annexe Building,
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2. Commissioner of Central Excise
Anai Road, Salem 636 001.

+1 cc to Mr.A.P.Srinivas senior standing counsel
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C.M.A.Nos.2518 to 2520 of 2015

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