

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 19.09 .2017

CORAM

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

C.M.A.No.492 of 2017

Commissioner of Central Excise
Salem. ... Appellant/Respondent

Versus

M/s.Pallava Textiles Ltd.,
Mangarangampalayam
Veerachipalayam Post
Sankari West
Salem - 637 303. ... Respondent/Appellant

(Second Respondent is deleted as per
the order of this Court dated
03.03.2017)

This Civil Miscellaneous Appeal is filed under Section 35-G
of Central Excise Act, 1944 praying to set aside the final order
No.40291 of 2016 dated 15.02.2016 passed in Appeal No.E/148/2009
on the file of the Customs, Excise and Service Tax Appellate
Tribunal, South Zonal Bench at Chennai.

For Appellant : Mr.S.Rajasekar
For Respondent-1 : No appearance

ORDER

(Order of the Court was delivered by V.BHAVANI SUBBAROYAN,J.)

This Civil Miscellaneous Appeal has been filed under Section
35G of the Central Excise Act, 1944 against the order dated
15.12.2016 passed by the CESTAT, South Zonal Bench at Chennai in
final Order No.40291/ 2016 in Appeal No.E/148/2009.

2. The brief facts of the case are as follows:-

M/s.Pallava Textiles Ltd., Salem, respondent herein, is the
Limited Company and manufactures of Viscose Yarn, Acrylic Yarn
and Blended Yarn and clear the same for home consumption as well
as export. Since they were not in a position to utilize the

CENVAT Credit of AED (T & TA) paid on input, which was allowed under Rule 5 of the CENVAT Credit Rules, 2002, in respect of their final products for exports as well as for indigenous clearance due to withdrawal of the duty by Notification No.31/2004 CE dated 09.07.2004, they filed refund claim for Rs.10,47,446/- towards unutilized credit of Additional Excise Duty (T & TA) lying in balance as on 31.03.2008 and carried forward till 31.03.2007. The Office of the Assistant Commissioner of Central Excise/ Adjudicating Authority herein by its Order-in-Original dated 21.01.2008 rejected the refund claim made by the respondent. Aggrieved by the same, the respondent herein filed an Appeal before the Commissioner of Central Excise (Appeals), Salem. The Commissioner also rejected the Appeal vide order dated 04.12.2008, against which, the respondent filed an appeal before the Customs, Excise and Service Tax Appellate Tribunal (CESTAT), South Zonal Bench, Chennai. However, CESTAT passed final order dated 15.02.2016, thereby setting aside the orders of the lower authorities and allowed the Appeal. Aggrieved over the same, the present Appeal is filed by the Department.

3. Despite notice being ordered and served and proof also filed for the respondent, none appeared on behalf of the respondent.

4. Heard the learned counsel for the appellant and perused the materials available on record.

5. Learned counsel for the appellant Department would submit that when the appellant failed to carryout any export, refund under Rule 5 of CENVAT Credit Rules, 2004, is not possible to be granted on the plea of unutilised credit remained. As the levy of AED (T& TA) was abolished w.e.f. 09.07.2004, the unutilised balance credit stands lapsed on that day itself. As per Section 11(B) of Central Excise Act, 1944, refund claim should be made within a period of one year, but in this case, refund claim has been made after a period of nearly three years from the date of abolition of AED (T& TA) and therefore, the same is time-barred one. But the learned Customs, Excise and Service Tax Appellate Authority, without assigning any reason, reversed the orders of the authorities below. Therefore, the learned counsel would pray to set aside the order impugned.

6. Before the authorities below, the respondent submitted that the unutilised credit on account of Additional Duty of Excise lying in the records of the appellant has not become possible to be utilised in view of no levy of such duty on textile goods. There is no notification issued by the Government to deprive the appellant from the credit by any means. Therefore, to avail the credit, the appellant has made

refund claim under Rule 5 of CENVAT Credit Rules, 2004. The one year time limit under Section 11(B) of Central Excise Act, 1944 is not applicable for claiming of refund of Cenvat Credit amount lying in Cenvat Credit Account.

7. From the records perused, it is seen that the respondent herein viz., Pallava Textiles Ltd., Salem, is the Limited Company and manufactures of Viscose Yarn, Acrylic Yarn and Blended Yarn and clear the same for home consumption as well as export and filed refund claim for Rs.10,47,446/- towards unutilized credit of Additional Excise Duty (T & TA) lying in balance as on 31.03.2005 and carried forward till 31.03.2007, since they were not in a position to utilize the CENVAT Credit of AED (T & TA) paid on input, which was allowed under Rule 5 of the CENVAT Credit Rules, 2002, in respect of their final products for exports as well as for indigenous clearance due to withdrawal of the duty by Notification No.31/2004 CE dated 09.07.2004. The Office of the Assistant Commissioner of Central Excise / Adjudicating Authority herein by Order-in-Original dated 21.01.2008 rejected the refund claim and held not admissible under Section 11(B) of the Central Excise and Sales Tax Act, 1944. Aggrieved by the same, the respondent filed an Appeal before the Commissioner of Central Excise (Appeals), Salem. The Commissioner by order dated 04.12.2008 concurred with the findings of the Assistant Commissioner of Central Excise/ Adjudicating Authority, dismissed the Appeal. Aggrieved over the same, the respondent filed Appeal before the CESTAT and the Customs, Excise and Service Tax Appellate Authority has allowed the Appeal and reversed the findings of the Assistant Commissioner of Central Excise and the findings of the Commissioner of Central Excise (Appeals), vide order dated 15.02.2016, which is impugned herein. Against which, the present Appeal is filed by the Department.

8. The undisputed factual possession being that the respondent Textiles were availing CENVAT Credit facility in respect of input duty and were having the balance of Rs.10,47,446/- as on 31.03.2005 lying unutilized in the head of Account AED (T & TA). What is important is that the levy of Additional Excise Duty was abolished vide Notification No.31/2004 -CE dated 09.07.2004. However, the balance credit has been carried forward and shown as balance even as on 31.03.2006 and 31.03.2007 respectively. Therefore, the respondent has filed the refund claim.

9. Section 11B of the Central Excise Act, 1944 deals with claim for refund of duty, which is extracted hereunder:-

"11B. CLAIM FOR REFUND OF DUTY.

(1) Any person claiming refund of any duty of excise may make an application for refund of

such duty to the [Assistant 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 12A) as the applicant may furnish to establish that the amount of duty of excise in relation to which such refund is claimed was collected from, or paid by, him and the incidence of 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 sub-section as amended by the said Act and the same shall be dealt with in accordance with the provisions of sub-section (2) substituted by that Act]

[Provided further that the limitation of one year shall not apply where any duty has been paid under protest.

[(2) If, on receipt of any such application, the [Assistant Commissioner of Central Excise] is satisfied that the whole or any part of the duty of excise 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 as determined by the [Assistant 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) 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) unspent advance deposits lying in balance in the applicant's account current maintained with the [Commissioner of Central Excise];

(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) duty of excise paid by the manufacturer, if he had not passed on the incidence of such duty to any other person;

(e) the duty of excise borne by the buyer, if he had not passed on the incidence of such duty to any other person;

(f) the duty of excise borne by any other such class of applicants as the Central Government may, by notification in the Official Gazette, specify :

Provided further that no notification under clause (f) of the first proviso shall be issued unless in the opinion of the Central Government the incidence of duty has not been passed on by the persons concerned to any other person.

(3) Notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal or any Court or in any other provision of this Act or the rules made thereunder or any other law for the time being in force, no refund shall be made except as provided in sub-section (2).

(4) Every notification under clause (f) of the first proviso to sub-section (2) shall be laid before each House of Parliament, if it is sitting, as soon as may be after the issue of the notification, and, if it is not sitting, within seven days of its re-assembly, and the Central Government shall seek the approval of Parliament to the notification by a resolution moved within a period of fifteen days beginning with the day on which the notification is so laid before the House of the People and if Parliament makes any modification in the notification or directs that the notification should cease to have effect, the notification shall thereafter have effect only in such modified form or be of no effect, as the case may be, but without prejudice to the validity of anything previously done thereunder.

(5) For the removal of doubts, it is hereby declared that any notification issued under clause (f) of the first proviso to sub-section (2), including any such notification approved or modified under sub-section (4), may be rescinded

by the Central Government at any time by notification in the Official Gazette.]

[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) in the case of goods exported out of India where a refund of excise duty paid is available in respect of the goods themselves or, as the case may be, the excisable materials used in the manufacture of such goods, -

(i) if the goods are exported by sea or air, the date on which the ship or the aircraft in which such goods are loaded, leaves India, or

(ii) if the goods are exported by land, the date on which such goods pass the frontier, or

(iii) if the goods are exported by post, the date of dispatch of goods by the Post Office concerned to a place outside India;

(b) in the case of goods returned for being remade, refined, reconditioned, or subjected to any other similar process, in any factory, the date of entry into the factory for the purposes aforesaid;

(c) in the case of goods to which banderols are required to be affixed if removed for home consumption but not so required when exported outside India, if returned to a factory after having been removed from such factory for export out of India, the date of entry into the factory;

(d) in a case where a manufacturer is required to pay a sum, for a certain period, on the basis of the rate fixed by the Central Government by notification in the Official Gazette in full discharge of his liability for the duty leviable on his production of certain goods, if after the manufacturer has made the payment on the basis of such rate for any period but before the expiry of that period such rate is reduced, the date of such reduction;

[(e) in the case of a person, other than the manufacturer, the date of purchase of the goods by such person;]

[(ea) in the case of goods which are exempt from payment of duty by a special order issued under sub-section (2) of section 5A, the date of issue of such order;]

[(eb) in case where duty of excise is paid provisionally under this Act or the rules made thereunder, the sub-section (2) of section 5A, the date of issue of such order;]

(f) in any other case, the date of payment of duty .”

10. It is clear from the above provision that any reason for matter of fact, the claim has to be made before the expiry of one year from the payment of duty. But, it could be seen from the claim of refund of duty filed by the respondent, the same was made only in the year 2008 ie., the respondent assessee made the claim after a period of three years from the date of abolition of AED (T & TA), which is a clear time barred claim after the expiry of time limit for refund. Since the levy of Additional Excise Duty (T & TA) was abolished with effect from 09.07.2004, the unutilised balance credit stands lapsed and the claim of refund cannot be entertained after a period of nearly three years from the date of abolition of Additional Excise Duty (T & TA).

11. It could be seen from the records available, the respondent Textiles had cleared the final product for export under a 'letter of undertaking' as well as 'on payment of duty' and claimed rebate of the same and the same was sanctioned and paid to them subsequently on 12.11.2007.

12. The respondent Textiles seems to have filed the refund claim under Rule 5 of CENVAT Credit Rules, 2004. Rule 5 of CENVAT Credit Rules, 2004 reads as under:-

“5. Refund of CENVAT credit.- where any input or input service is used in manufacture of final product, which is cleared for export under bond or letter of undertaking, as the case may be, or used in the intermediate product cleared for export, or used in providing output service so used shall be allowed to be utilised by the manufacturer or provider or output service towards payment of,

(i) duty of excise on any final product cleared for home consumption or for export on payment of duty; or

(ii) service tax on output service; and

where for any reason such adjustment is not possible, the manufacturer or the provider of output service shall be allowed refund of such amount subject to such safeguards, conditions and limitations, as may be specified, by the Central Government, by notification.

Provided that no refund of credit shall be allowed if the manufacturer or provider of output service avails of drawback allowed under the Customs and Central Excise Duties Drawback Rules, 1995, or claims a rebate of duty under the Central Excise Rules, 2002, in respect of such duty: Provided further that no credit of the additional duty leviable under sub-section (5) of section 3 of the Customs Tariff Act, as amended by clause 72 of the Finance Bill, 2005, the clause which has, by virtue of the declaration made in the said Finance Bill, under the Provisional Collection of Taxes Act, 1931, the force of law, shall be utilised for payment of service tax on any output service.

Explanation: For the purposes of this rule, the words 'output service which is exported' means the output taxable services exported in accordance with The Export of Service Rules, 2005.

13. The respondent had cleared their final product for export under 'letter of undertaking' as well as 'on payment of duty' and had claimed rebate and the same was sanctioned and paid to them subsequently. The export award admittedly made on payment. The object of CENVAT Credit Claim is to avoid the cascading effect of input duty on the cost of final products and therefore, once duty on the final product is fully exempted or abolished, the question of extending the benefit in the form of credit or payment of such credit in cash does not arise. It is well settled principle that what cannot be done directly should not be allowed to be done indirectly. Refund of such unutilised credit of duty, which has been abolished long back, in cash would make the assessee enrich himself and would defeat the very basic concept of CENVAT Credit Scheme. The above provision cannot be exercised seeking refund of unutilized balance credit. The above provision can be invoked except in the cases of export of goods, refund of credit in cash is not permissible. It is clear from the records that after the abolition of Additional Excise Duty (T & TA) with effect from 09.07.2004, the unutilised balance credit lapsed, which ought to have been

claimed within three years. The refund claim should have been filed within one year from the date of abolition, that too only when the respondent proves that the unutilised credit was on account of export. Hence, Rule 5 of CENVAT Credit Rules, 2004, is not applicable to the refund claim seeking refund in cash for the unutilised balance credit, that too after it was lapsed on 09.07.2004. The refund claim has to be filed within one year from the date of export as per Section 11 (B) of the Central Excise Act, 1944. Thus, it is evidently clear that the refund claim is not maintainable as time barred and hit by limitation. When the Central Excise Act, 1944 under Section 11(B), as amended, prescribes time limit for making any claim for refund of any duty of excise, the CESTAT ought to have concurred with the well considered view of the Adjudicating Authority. Moreover, CESTAT has not dealt with the aspect of limitation in the context of provisions under Section 11(B) of the Central Excise Act, 1944. Thus, the final order passed by the (CESTAT) that the unutilised credit of Additional Excise Duty is refundable merely on the basis that there is no provision in law to deny refund, deserves to be set aside.

14. In view of the foregoing discussions, the Civil Miscellaneous Appeal is allowed and the final order No.40291 of 2016 dated 15.02.2016 passed in Appeal No.E/148/2009 on the file of the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench at Chennai is set aside and the orders of the Assistant Commissioner of Central Excise, Erode and the Commissioner of Central Excise (Appeals), Salem, are confirmed. No costs.

Sd/-
Asst.Registrar (CCC)

/true copy/

Sub Asst. Registrar

mra

To

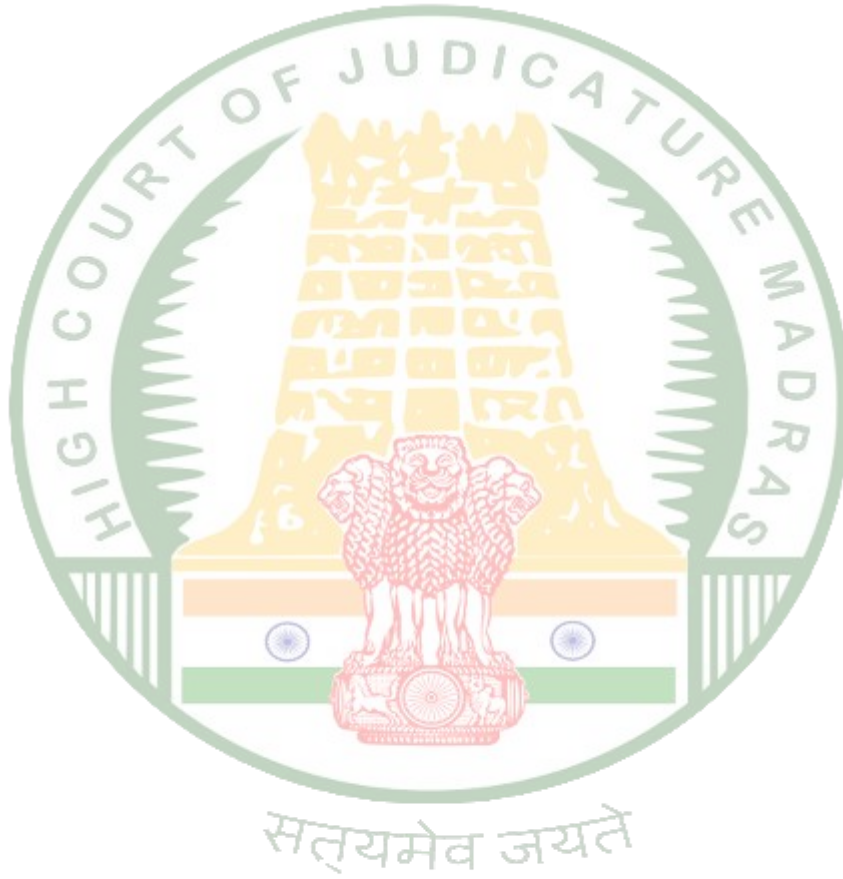
1. The Customs Excise and Service Tax Appellate Tribunal
South Zonal Bench, I Floor
Shastri Bhavan Annexe, Haddows Road
Chennai - 600 006.
2. The Commissioner of Central Excise (Appeals)
No.1, Foulks Compound,
Anai Medu, Salem.

3. The Assistant Commissioner of Central Excise
Erode - II Division
81, Bharathi Nagar, Veerappan Chatram (PO)
Erode.

+1cc to Mr.S.Rajasekar, Advocate in sr.no.68585

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PVS (CO)
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