

**IN THE HIGH COURT OF PUNJAB & HARYANA AT
CHANDIGARH.**

Date of Decision:-11.12.2019

CEA No.36 of 2019(O&M)

The Commissioner, Goods & Service Tax Commissionerate.

.....Appellant.

Versus

M/s Shree Krishna Paper Mills & Industries Ltd. & Ors.

.....Respondents.

**CORAM:- HON'BLE MR. JUSTICE JASWANT SINGH
HON'BLE MR. JUSTICE GIRISH AGNIHOTRI**

Present:- Mr. Sunish Bindlish, Advocate for the Appellant.

Mr. Jagmohan Bansal, Advocate for the Respondent.

JASWANT SINGH, J.

1. The Appellant-Principal Commissioner of Central Excise through instant Appeal under Section 35G of Central Excise Act, 1944 is seeking quashing of order dated 15.3.2018 (**Annexure A-3**) whereby Customs Excise and Service Tax Appellate Tribunal, Chandigarh (for short 'Tribunal') has allowed appeal of the Respondent-Assessee.

2. Conceded facts emerging from record are that the Respondent-Assessee with respect to unutilised Cenvat Credit, on 7.3.2016 filed refund claim which was subsequently amended. The refund claim was forwarded for pre-audit to competent authority, which returned the file with an observation that claim does not appear to be legal and fair. The Deputy

Commissioner, Central Excise, Bahadurgarh issued show cause notice dated

27.5.2016 proposing to reject refund claim, however finding merits in the contention of the Assessee, vide order dated 7.6.2016 sanctioned refund claim of Rs.16,78,26,562/-. The Revenue did not accept order of Deputy Commissioner and preferred an appeal before first Appellate Authority, which remanded the matter back to adjudicating authority. The Respondent-Assessee assailing order of first appellate authority preferred an appeal before Ld. Tribunal which vide order dated 15.3.2018 (**Annexure A-3**) set aside order passed by first appellate authority and restored order passed by adjudicating authority. Revenue is in appeal assailing said order dated 15.3.2018 of the Tribunal.

3. The Appellant-Revenue has raised following questions of law for the consideration of this court:

- i) Whether CESTAT's final order No. 61626/2018 dated 15.03.2018 is fair, legally correct and proper in the light of admission of Refund Claim of CENVAT Credit lying unutilized when Doctrine of unjust enrichment has not been fulfilled and there is no provision under section 11B of the Central Excise Act, 1944/ Rule 5 of the CENVAT Credit Rules, 2004 to sanction Refund in cash of the unutilized CENVAT Credit lying in CENVAT account on closure of the unit and therefore, is not, if needed to be set aside.
- ii) Whether the impugned order passed by the Ld. Tribunal is justified and in accordance with law?

4. Counsel for the Revenue contended that there is no provision of refund in cash of unutilised Cenvat Credit under Section 11B of the Central Excise Act, 1944. Barring refund under Rule 5 of Cenvat Credit Rules, 2004 there is no notification permitting refund of unutilised Cenvat Credit. Larger

and ors. Vs Commissioner of Central Excise, Indore and ors. MANU/MH/1362/2019 after noticing various judgments has held that cash refund of unutilised Cenvat Credit is not permissible. Larger Bench of Tribunal in the case of **Steel Strips Vs CCE, Ludhiana 2011 (269) ELT 257** and Division Bench of Tribunal in the case of **Phoenix Industries Pvt. Ltd. Vs CCE 2015 (201) ELT 303** on similar facts have rejected refund claim of unutilised Cenvat credit. He further contended that duty paid on inputs formed part of cost of output supplies thus test of unjust enrichment as mandated under Section 11B of the 1944 Act must be applied.

5. Counsel for the Respondent-Assessee contended that Tribunal has sanctioned refund relying upon pronouncement of law by various High Courts including this court in the case of **Rama Industries Ltd. Vs CCE, Chandigarh 2009-TIOL-100-HC-P&H-CX**, thus there is nothing wrong in the impugned order, warranting interference of this court. As per clause (c) to proviso of Section 11B (2) of the Central Excise Act, 1944 cash refund of unutilised Cenvat Credit is permissible. As per judicial discipline, Division Bench of this court is bound by decision of coordinate bench of this Court and not any contrary view of different high court irrespective of strength of bench. This court cannot ignore decision of this Court and follow opinion expressed by larger bench of Bombay High Court. Appellant is not disputing availment of Cenvat credit on inputs. Credit can be availed on compliance of various conditions mentioned in the Cenvat Credit Rules, 2004, thus it is undisputed that Respondent-Assessee took Cenvat credit as per Cenvat Credit Rules, 2004 hence there is no reason to deny refund of unutilised Cenvat credit as per Section 11B of the Central Excise Act, 1944.

Adjudicating authority on account of closure of factory

sanctioned refund of unutilised Cenvat credit, therefore, there is no question of unjust enrichment. The Assessee paid duty as leviable on finished goods and there is no question of passing of burden when credit is availed and not utilised.

6. Tribunal after considering various judgments has allowed appeal of the Respondent-Assessee. The findings of Tribunal as recorded in Paras 8, 9 & 10 are reproduced below:

“ 8. Heard the parties at length and perused the record. We find that the facts of the case are that appellant were manufacturing paper and paper products. They were availing Cenvat credit on inputs clearing the final products on payment of duty. Appellant also closed their factory and surrendered their Central Excise registration. As there was certain Cenvat Credit lying unutilized in their Cenvat account, they filed refund claim. The refund claim was sanctioned to the appellant on closure of the factory, relying the decision of Slavak India Trading Company Pvt. Limited (Supra). The dispute arose between the parties on the ground that the activity undertaken by the appellant does not amount to manufacture, therefore they are not entitled to avail Cenvat Credit. Consequently, they are not entitled to refund claim. We find that, at no stage, it has been questioned to the appellant that for denial of Cenvat credit which are not entitled to them. Moreover, the Revenue collected the duty from the appellant. Although the Revenue was of the view that activity undertaken by the appellant does not amount to manufacture. At the stage of filing of refund claim, Revenue cannot correct their wrong doings. Therefore, the issue of non-entitlement of Cenvat credit cannot be raised at the stage of entertaining refund claim without challenging the availment of Cenvat credit. In that circumstances, the decision in the case of Pitamber Coated Paper Limited (supra) is not applicable to the facts of this case, as in this

case, at any stage, nowhere the availment of Cenvat credit was questioned rather the Revenue collected duty from the appellant on their final products.

9. The Revenue is heavily relying on the decision of Steel Strips (supra) to say that it is the main ground in the show cause notice to deny the refund claim filed by the appellant. We find that the facts in the case of Steel Strips (supra) are altogether different from the facts of the case in hand. In the case of Steel Strips (supra), the assessee had not closed down their factory nor they surrendered their registration certificate, they were not able to utilize Cenvat credit and that is why they filed the refund claim which was held by the Larger Bench of this Tribunal that same cannot be refunded. Therefore, the facts of said case are not applicable to the facts of this case. Moreover, similar facts were there in the case of Purvi Fabrics & Texturise (P) Limited (supra) wherein the unit of the assessee was lying closed but assessee did not surrender their registration certificate nor closed their business. In that circumstance the facts of this case are not applicable to the facts of this case. The facts in the case of Slovak India Trading Company Pvt. Limited (supra) are identical to the facts of case hand. Moreover, the facts in the case of **CCE, Nasik Vs. Jain Vanguard Polybutlene Limited – 2010 (256) ELT 523 (Bom.)** are also similar to the facts of this case. Further, in the case of Welcure Drugs and Pharmaceuticals Limited (supra), the Hon'ble High Court of Rajasthan has examined the issue and considered the decision of Steel Strips (supra) and held that in such cases where closure of factory, surrender of registration certificate, assessee is entitled to claim refund of Cenvat credit lying unutilized in their Cenvat account. Therefore, on merits, we hold that appellant is entitled to claim refund which has already been granted to the appellant by adjudicating authority. We also take note of the fact that in the case of Rama Industries Limited (supra), the jurisdictional High Court has

entertained the issue on merits and hold that appellant is entitled to claim of refund of Cenvat credit lying unutilized in their Cenvat account on closure of factory and on surrender of registration.

10. We have examined the impugned order placed before us. The adjudicating authority, relying on the decision of Slovak India Trading Company Pvt. Limited (supra) has allowed the refund claim to the appellant. The said order was challenged by the Revenue before the Ld. Commissioner (Appeals) and wanted to place additional evidence which were never prevented by the adjudicating authority to be placed before adjudicating authority. In that circumstance, the appeal filed by the Revenue before the Ld. Commissioner (Appeals) was also baseless. We take note of the fact that Commissioner (Appeals) was not required to consider the appeal filed by the Revenue but chose to send the matter back to the adjudicating authority, which is not permissible in law. In that circumstances, we set-aside the impugned order, restore the order of the adjudicating authority for allowing the refund claim. ”

7. After having scrutinised record of the case and heard arguments of both counsel, we find that concededly the Respondent-Assessee availed Cenvat credit on inputs which accumulated on account of its non-utilisation and Deputy Commissioner-refund sanctioning authority on the closure of factory, sanctioned refund of unutilised Cenvat Credit. The Appellant is not disputing entitlement of Respondent *qua* Cenvat credit meaning thereby Respondent-Assessee had met with all the conditions which are necessary to avail Cenvat credit.

8. We further find that this court in **Rama Industries (Supra)** relying upon judgment of Karnataka High Court in the case of **Union of India Vs Slovak India Trading Co. Pvt. Ltd. 2006 (201) ELT 559 (Kar)**

has sanctioned refund of unutilised Cenvat Credit on the closure of factory.

Rajasthan High Court in the case of **Lav Kush Textiles Vs CCE, Jaipur 2017 (353) ELT 417 (Raj)**, **Welcure Drugs & Pharmaceuticals Ltd. Vs CCE 2018 (15) GSTL 257 (Raj)** has formed similar view. High Courts have held that judicial discipline is required to be maintained; Tribunal cannot distinguish High Court judgments and is bound by High Court judgments. However, larger bench of Bombay High Court in the case of **Gauri Plasticulture (Supra)** has formed a different opinion.

It is true that judgment cited by counsel for the Revenue has been delivered by a bench of three judges of Bombay High Court, nonetheless, as per judicial discipline we cannot ignore judgment of this Court and take contrary view. We do not find any fault in the judgment of this Court in the case of **Rama Industries** as well judgments delivered by Rajasthan and Karnataka High Court, thus we do not deem it fit to disagree with judgment of this court and refer the matter to larger bench. We deem it appropriate to subscribe to view of this court as well view of Rajasthan and Karnataka High Court. Our opinion is fortified by judgement of 5 judges bench of Gujarat High Court in the case of **State of Gujarat Vs Gordhandas Keshavji Gandhi and ors, AIR 1962 Gujarat 128** wherein court has discussed at length question of judicial precedent. Relevant Paragraph is extracted below:

“ 4. In India, some High Courts have both Original and Appellate jurisdiction and an appeal lies in certain matters from a decision of a single Judge of a High Court to a Division Bench of that Court. A decision of a High Court Judge of a State is regarded as binding on all the subordinate courts in that State. A decision of a Division Bench of a High Court is regarded as binding on Judges of the same High Court sitting singly in the High Court. A decision of a Full Bench, i, e., a

Bench of at least 3 Judges of a High Court is considered binding on all judges of the same High Court sitting singly and on all Division Benches of the same High Court. A decision of the Supreme Court is binding on all the High Courts. By Article 141 of the Constitution of India it is laid down that the law declared, by the Supreme Court shall be binding on all courts within the territory of India. **A decision of one High Court is not binding on another High Court. Even a decision of a Full Bench of one High Court is not binding on a Judge sitting singly in another High Court.** A decision of a High Court Judge sitting singly is not legally binding on another Judge of the same High Court sitting singly. So also a decision of a Division Bench of a High Court is not legally binding on another Division Bench of the same High Court. A decision of a Full Bench is not legally binding on another Full Bench of the same Court. One Judge of a High Court has, however, no right to overrule the decision of another Judge of the same High Court nor has one division Bench of a High Court the legal right to overrule another decision of a Division Bench of the same High Court. In connection with the question whether a larger Full Bench can overrule a decision of a Full Bench of lesser number of Judges, Sir John Beaumont in a decision reported in 43 Bom LR 864. : (AIR 1941 Bom 408) Emperor v. Ningappa Ramappa Kurbar, observes at P- 868 (of Bom LR) : (at p. 409 of AIR) as follows:

" There, seems to be very little authority on the powers and constitution of a Full Bench There can be no doubt that a Full Bench can overrule a Division Bench, and that a Full Bench must consist of three or more Judges; but it would seem anomalous to hold that a later Full Bench can overrule an earlier Full Bench, merely, because the later bench consists of more Judges than the earlier. If that were the rule, by a majority of four to three, could overrule a unanimous

decision of a bench of six Judges, though all the Judges were of co-ordinate jurisdiction. In Enatullah v. Kowsher Ali MANU/WB/0422/1926 Sanderson; C. J., stating the practice in Calcutta, seems to have been of opinion that a decision of a Full Bench could only be reversed by the Privy Council or by a bench specially constituted by, the Chief Justice."

The principles of judicial comity and legal propriety require, in order to avoid conflict of authority and to secure certainty, uniformity and continuity in the administration of justice, that one Judge of a High Court sitting singly should follow the decision of another Judge of the same High Court sitting singly, and that a Division Bench of a High Court should follow another Division Bench of the same High Court, that a decision of a Full Bench consisting of the same number of Judges should follow the decision of a Full Bench of equal number of Judges and that a decision of a larger Full Bench should be considered authoritative and binding on all other benches constituted of a lesser number of judges. ”

9. Though present appeal deserves to be dismissed in view of afore cited judicial pronouncement, alone nonetheless we deem it appropriate to look at Section 11B of the Central Excise Act, 1944 which governs refund. Section 11B of the Act is extracted below:

“ **Section 11B. Claim for refund of duty and interest, if any, paid on such duty.-** 1. Any person claiming refund of any duty of excise and interest, 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 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 12A 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 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 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) rebate of duty of excise on excisable goods exported out of India or an excisable materials used in the

manufacture of goods which are exported out of India;

(b) unspent advance deposits laying 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) the duty of excise and interest if any, paid on such duty paid by the manufacturer, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;

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

(f) the duty of excise and interest , if any paid on such duty 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 and interest, if any, paid on such duty has not been passed on by the person 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).

”

Emphasis Supplied

As per clause (c) to proviso of Section 11B (2) of the 1944 Act, refund of credit of duty paid on inputs is admissible and only condition is that inputs must be used in accordance with Rules and Notifications issued under the 1944 Act. As per scheme of the Act and Cenvat Credit Rules, 2004 credit of duty paid on inputs is permissible subject to various conditions like inputs must be used directly or indirectly in the manufacture of finished goods; finished goods should be dutiable; inputs must be accompanied with duty paying invoice etc. In the case in hand, the Appellant-Revenue is not disputing entitlement of credit of duty paid on inputs and dispute is confined to refund of credit already availed and unutilized, thus we are of the opinion that Respondent-Assessee is entitled to refund of unutilised credit of duty paid on inputs.

10. In view of consistent view of different High Courts including opinion of this court, we do not find any infirmity in the impugned order. Tribunal could not rely upon its contrary earlier decision including larger bench decision ignoring precedent of High Courts especially jurisdictional high court. Tribunal is bound by decision of jurisdictional High Court thus Tribunal has rightly allowed appeal of the Assessee.

11. The Assessee-Respondent has claimed refund of Cenvat Credit which could not be utilised. It is not case of refund of duty paid on finished goods; or duty paid on inputs which formed part of cost of purchase and party did not avail Cenvat Credit. Situation could be different, had it been a case where Assessee did not avail Credit and claimed refund on the ground that duty was paid by mistake. It is case where over the period Respondent

took credit of duty paid on inputs but could not use at the time of sale of finished goods.

12. In view of above findings, we find no fault in the impugned order dated 15.3.2018 (**Annexure A-3**) warranting interference of this Court, resultantly present appeal deserves to be dismissed and accordingly **dismissed**.

(JASWANT SINGH)
JUDGE

(GIRISH AGNIHOTRI)
JUDGE

December 11th, 2019
Vinay

Whether speaking/reasoned	Yes/No
Whether Reportable	Yes/No