

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21.02.2020

CORAM

THE HON'BLE DR.JUSTICE VINEET KOTHARI
AND

THE HON'BLE MR.JUSTICE R.SURESH KUMAR

C.M.A.No.1907 of 2018

M/s.Hwashin Automotive India Pvt. Ltd.,
Plot No.F-65A, SIPCOT Industrial Estate,
Irungattukottai, Sriperumbudur,
Kancheepuram - 602 105.

... Appellant/
Appellant

Vs.

The Deputy Commissioner of Central Excise,
Poonamallee Division,
(Now known as the Assistant Commissioner of GST
& Central Excise, Irungattukottai Division),
Chennai Outer Commissionerate,
C-48, TNHB Building,
II Avenue, Anna Nagar,
Chennai - 600 040.

... Respondent/
Respondent

Appeal filed under Section 35G of the Central Excise Act,
1944 against Final Order No.40414/2018 dated 12.02.2018 on the
file of the Customs, Excise and Service Tax Appellate
Tribunal, South Zonal Bench, Chennai.

For Appellant : Mr.S.Murugappan

For Respondent : Mrs.Abarna Nandakumar
Senior Standing Counsel

JUDGMENT

(Judgment of the Court was delivered by DR.VINEET KOTHARI,J.)

The Assessee - M/s.Hwashin Automotive India Private
Limited has filed the present appeal under Section 35G of the
Central Excise Act, 1944, raising the substantial questions of
law were arising from the order of the learned Customs, Excise
& Service Tax Appellate Tribunal (in short 'CESTAT') dated
12.02.2018 whereby the CESTAT upheld the denial of refund on

the ground of limitation under Section 11B of the Central Excise Act, 1944 to the Assessee.

2.The appeal was admitted on the following substantial questions of law by a Coordinate Bench of this Court on 27.08.2018.

(i) Is the Customs, Excise and Service Tax Appellate Tribunal, Chennai correct in holding that no provision to seek restoration of CENVAT Credit under the CESTAT Rules?

(ii) Is the Customs, Excise and Service Tax Appellate Tribunal, Chennai correct in holding that the appellant is barred from seeking restoration of CENVAT Credit though their application was for refund of duty paid by reversal of credit?

(iii) Is the Customs, Excise and Service Tax Appellate Tribunal, Chennai correct in holding that "contention of the appellant that the sale has not taken place does not find favour with them", when the rectified invoices were rejected by the job workers?"

3.The case of the Assessee is that the Assessee had sent the materials in question to the Job workers M/s.Tenhnical Stampings Automative Limited and M/s.Neel Industries Limited on Delivery Challan under Notification No.214/86. With the introduction of Tamil Nadu Value Added Tax with effect from 01.01.2007, the Assessee changed the materials procurement policy from 'Job Work' to 'Outright Sale/Purchase' with their Vendors. When the Sale Invoices were issued for the materials removed as such on Job Work basis by reversing the Cenvat Credit availed. In other words, by debiting the Cenvat account instead of actual payment on such removal of goods. However, the Vendors M/s.Technical Stampings Automative Limited and M/s.Neel Industries Limited did not accept such Cenvat Invoices issued for the materials removed and did not avail any Cenvat credit in their books of such invoices and therefore the Assessee claimed the refund of such amount by way of restoration of Cenvat credit by filing the prescribed application in Form No.R. The said refund application was rejected by the adjudicating authority and that order was upheld by the learned Tribunal on the ground of limitation of six months under Section 11B of the Act.

4.The learned counsel for the Appellant/Assessee has submitted that the limitation prescribed under Section 11B of the Act does not apply when instead of claiming the refund in

cash, the Assessee merely claims the restoration of the Cenvat credit. Since the Assessee paid the excise duty in question at the time of removal of the goods only by debiting the Cenvat credit account and not in actual cash payment, he did not claim any cash refund, but only claimed the restoration of the Cenvat credit vide letters dated 11 September 2008 and 06 October 2008, in response to the Show Cause Notice issued by the adjudicating authority.

5.He relied upon the following the three judgments of the High Courts, including one rendered by the Coordinate Bench of this Court, which have upheld a similar contention on behalf of the Assessee.

6.On the other hand, the learned counsel for the Revenue submitted that since the refund application was made in the prescribed Form - R under Rule 173 of Central Excise Rules, 1944, therefore, the limitation under Section 11B of the Act would apply and such a refund could not be allowed to the Assessee and therefore, the authorities below was justified in rejecting the same.

7.We have heard the learned counsel for the parties and perused the Judgments cited at the Bar.

8.Section 11B of the Act to its relevant extent is quoted below for ready reference.

Claim for refund of [duty and interest, if any, paid on such duty]

SECTION [11B. - (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 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 :"

9.The Coordinate Bench of Madras High Court in the case of ICMC Corporation Ltd. Vs. CESTAT, Chennai [2014 (302)

E.L.T. 45 (Mad.) held as under:

"13. We do not subscribe to the view expressed by the Revenue. Admittedly, the assessee originally availed the Cenvat Credit on service tax for discharging its liability. However, for sound reasons, it reversed the credit. Strictly speaking, in this process, there is only an account entry reversal and factually there is no outflow of funds from the assessee to result in filing application under Section 11B of the Central Excise Act, 1944 claiming refund of duty. The contention of the Revenue that even in reversal of the entry there is bound to be an unjust enrichment has no substance or based on any legal principle, since, what is availed off by the assessee is only a credit on the duty paid on the services rendered. Further, the assessee is entitled to take note of as per Rule 6 (5) of the Cenvat Credit Rules, 2004, as there is no dispute of the fact that a sum of Rs.3,21,308/- available as Cenvat Credit was in respect of input services, which are given under Rule 6(5) of the Cenvat Credit Rules, 2004. When that being the case, in respect of those services specifically mentioned under Rule 6(5) of the Cenvat Credit Rules, 2004 as it existed during the relevant period viz., 2004-2006 getting the reversal of the entry is in tune with its stand taken, which was accepted by the Tribunal in the earlier round of litigation.

14. We do not find any good ground to hold that it was a case of refund of duty falling under Section 11B of the Central Excise Act, 1944 and that the assessee was to comply with the provisions of Section 11B of the Act. The view of the Tribunal that the assessee should seek reversal in the appropriate judicial forum, if the assessee was aggrieved by the earlier order herein does not arise at all."

10. The Division Bench of Allahabad High Court in Krishnav Engineering Ltd. V. CESTAT, [2016 (331) E.L.T. 391 (All.)] also similarly held in para 7 that where it is not a case of refund of duty but a case of reversal of an entry in the books relating to Cenvat credit, the limitation under Section 11B of the Act will not apply. Paras 5 to 7 of the said Judgment are also quoted below for ready reference.

"5. Having heard the learned counsel for the parties, we find that the department has proceeded on the ground that the appellant had taken the Cenvat credit without any refund order or without

permission from the proper authority and without filing proper documents under Rule 9 of the Rules of 2004. Rule 9 of the Rules of 2004 prescribes that Cenvat credit could be taken by the manufacturer on the basis of certain documents to be filed, namely, an invoice issued by the manufacturer for clearance of inputs or capital goods, etc. Admittedly, we find that the appellant had claimed Cenvat credit and had filed the proper invoice bills. The authority was satisfied and credit was allowed for which there is no dispute. However, for whatever reasons, the appellant reversed these Cenvat credit entries and debited the said amount in its books but subsequently, realised that they were eligible for Cenvat credit, inasmuch as furnace oil was an input as defined under the Rules, based on which, the assessee issued a letter dated 25th April, 2005 indicating its intention to again make the reversal of its Cenvat credit entries and also enclosing the original invoice bills.

6. In this view of the fact, we find that the show cause notice was wrongly issued on a wrong premise that no permission was taken or that original documents were not filed. In fact, we find that the appellant had not only intimated the department about its intention but also had filed the necessary documents. The letter indicated the details of the description of the goods, the invoice bills and the credit to be taken. This was in consonance with the provisions of Rule 9. If the authority had any objection they should have immediately asked the appellant for further clarifications, which in the instant case was not done.

7. The contention of the respondent that an application for refund of duty was required to be made under Section 11B of the Act does not hold water. It is not a case of refund of duty but a case of reversal of an entry in the books relating to Cenvat credit. We find support on this aspect of a judgment of the Madras High Court in ICMC Corporation Ltd. Vs. CESTAT, Chennai, 2014 (302) ELT 45, where in similar circumstances the High Court held that the provisions of Section 11B of the Act was not applicable. We find that the appellant originally availed the Cenvat credit, which was allowed but for various reasons it reversed the credit. In our view, it is only an account entry reversal and there is no out flow of funds from the

side of the appellant which may result in filing an application under Section 11B of the Act for claiming refund of duty. Consequently, in our opinion, the provision of Section 11B of the Act is not applicable."

11. By yet another decision, a Division Bench of the Calcutta High Court in Commissioner of Customs Excise, Kolkata-II V. Rahee Industries Limited [2011 (263) E.L.T. 225 (Cal.)] also reiterated the same position in the following words.

"6. In the context of the aforesaid submissions we now have carefully read the findings of the learned Tribunal. It appears to us that the learned Tribunal has found on fact that there is no dispute about cancellation of the advance licence and there was no requirement on the part of the respondent to reverse the credit and as such already reversed credit was liable to be credited back to them. The learned Tribunal has taken note of the provisions of Rule 57G requiring the assessee to take credit within a period of six months from the date of issuance of the invoice. The learned Tribunal on fact found that the appellant had already availed of the credit within the said period. Once this course of action is taken, consequence of law will automatically follow. The learned Tribunal factually recorded that said credit so earned by the appellant in accordance with law was utilised by them by reversing the same at the first instance when exports were made under the said Scheme. As has been correctly observed that however on cancellation of advance licence the assessee again became entitled to put back the credit. The said credit was recredited in their accounts making reverse entry earlier made by them. Therefore, the learned Tribunal held on fact that it cannot be said at all that the reverse entry was made good. The credit so taken was on the basis of the invoices which were already more than six months old. On factual score the learned Tribunal held that availing of the credit on the basis of the invoices when for the first time the credit entries were made in the RG-23A Part 2 record in accordance with law. The Tribunal further held that having earned that credit it was only utilisation which was to be survived when the appellant made credit entry in their records second time, they were only reversing the debit entry of the credit already earned by them.

7. On the fact finding by the learned Tribunal we hold that the learned Tribunal has correctly held that provisions of Rule 57G (2) do not have any role to play in these circumstances and their contravention cannot be alleged against the appellant. In view of the factual finding and further appropriate application of law we do not think fit that judgment of the learned Tribunal should not be interfered with. Moreover, we have examined the provisions of Section 57G which is the basic provision for allowing credit and when the Tribunal on fact found this the other portion of the law has got no determinative value in this matter."

12. There is no contrary opinion from any other High Court on the aforesaid issue.

13. Therefore, respectfully agreeing with the views expressed by three different Division Bench of High Courts including one from Madras High Courts itself, we are of the view that the learned Tribunal has erred in applying the limitation of the Section 11B of the Act in the present case, where the refund of duty was not claimed in cash as such, but only by the restoration of Cenvat credit by the Assessee. When a debit to the Cenvat credit account could be treated as a mode of payment of duty at the time of removal of goods, we fail to understand how the limitation under Section 11B of the Act could be denied when only restoration of such claim is only by way of reversal of that debit entry only upon the returning such CENVAT Invoices and the vendors not having availed any Cenvat credit, being the undisputed facts. The learned Revenue authorities could not deny the adjustment entry of restoration of Cenvat credit in the present case irrespective of limitation. Merely because the Assessee laid its claim of refund by his moving an application in prescribed Form No.R under Rule 127, being a procedural requirement of the law, the substantive right of Assessee cannot be defeated by the Revenue authorities except at the peril of violating Article 265 of the Constitution of India.

14. There is considerable force in the contention raised by the learned counsel for the Appellant/Assessee that Rule 4 (5) (a) (iii) of the Cenvat Credit Rules, 2004, the Assessee could itself credit the Cenvat account, if the goods were received back within the time frame of 180 days under the said Rule, but merely because he filed the refund application under prescribed Form R under Rule 127 his claim was refused. The aforesaid Rule 4(5) (a) (iii) is quoted below for ready

reference.

"if the inputs or capital goods, as the case may be, are not received back within the time specified under sub-clause(i) or (ii), as the case may be, by the manufacturer or the provider of output service, the manufacturer or the provider of output service shall pay an amount equivalent to the CENVAT credit attributable to the inputs or capital goods, as the case may be, by debiting the CENVAT credit or otherwise, but the manufacturer or the provider of output service may take the CENVAT credit again when the inputs or capital goods, as the case may be, are received back in the factory or in the premises of the provider of outputs service."

15. In our opinion, the said Rule is clear and it permits the Assessee to credit the CENVAT account book, if the goods are received back after 180 days. Therefore, in the face of a clear Rule permitting the said adjustment entry, merely because the Assessee made a claim in prescribed Form R under Rule 127, his claim of adjustment entry could not be refused by the authorities below.

16. Therefore, in view of the aforesaid Judgments and the position of law, we cannot sustain the order passed by the learned Tribunal and the appeal filed by the Assessee deserves to be allowed and the same is accordingly allowed and the questions of law are answered in favour of the Assessee and against the Revenue. The Assessee is permitted to have the consequential relief. No costs.

Sd/-

Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

Sgl

To

The Customs, Excise and Service
Tax Appellate Tribunal,
South Zonal Bench,
Chennai.

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2.The Deputy Commissioner of Central Excise,
Poonamallee Division,
(Now known as the Assistant Commissioner of GST
& Central Excise, Irungattukottai Division),
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+lcc to Mr.S.Murugappan , Advocate SR.No. 15037

C.M.A.No.1907 of 2018

A.SK(16/03/2020)



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