Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad

REGIONAL BENCH- COURT NO.3

Excise Appeal No.1435 of 2011-DB

(Arising out of OIO-05-DEM-DAMAN-2011 dated 29/08/2011 passed Commissioner of Central Excise, Customs and Service Tax-DAMAN)

Hubergroup India Pvt Ltd ......**Appellant**

Plot No. 808e, 305/6&7 And Survey No. 80,81,84-89,
91,96-99, Gidc,
VAPI, GUJARAT

VERSUS

C.C.E. & S.T.-Daman ....**Respondent**

3rd Floor...Adarsh Dham Building, Vapi-Daman Road, Vapi
Opp.Vapi Town Police Station,
Vapi, Gujarat-396191

APPEARANCE:

Shri. S. Suriyanarayan, Advocate for the Appellant
Shri. Dharmendra Kanjani, Superintendent (AR) for the Respondent

CORAM: **HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR**
HON'BLE MEMBER (TECHNICAL), MR. RAJU

Final Order No. A/ 12548 /2021

DATE OF HEARING: 02.09.2021
DATE OF DECISION:26.11.2021

RAJU

This appeal has been filed by the M/s. MICRO INKS LTD, a 100% EOU, against denial of Cenvat Credit, demand of interest and imposition of penalty.

2. Learned counsel for the appellant pointed out that they are a public limited company involved in manufacture of colors and all type of printing inks, flushes, varnishes & resins. The appellant had a DTA unit known as Unit-II located close to the 100% EOU. The said DTA unit was registered under Central Excise. An application was made to the Development Commissioner for conversion of the said DTA unit into a 100% EOU & the same was allowed. Thereafter, the appellant requested to Development Commissioner, Kandla for permission to merge the two EOUs in terms of para 6.34 (10) of Foreign Trade Policy 2004-2009. Accordingly, they were granted permission for merger of new EOU with the existing EOU. The EOUs license was granted by the Assistant Commissioner, Central Excise, DIV-I Vapi to carry out the manufacturing activities in respect of colors, pigments,

flushes, inks, resins, varnishes, etc. Thereafter, a show cause notice was issued to the appellant alleging that during the process of conversion of DTA unit into EOU unit and merger of the same into the existing EOU unit all inputs lying on the date of merger in the new EOU unit (earlier DTA Unit) were transferred to the EOU Unit and Cenvat Credit was availed by EOU Unit. Moreover, the appellant had imported certain duty free inputs in the erstwhile DTA unit in respect of which they said DTA unit could not fulfill the export obligation as per undertaking given to DGFT. In respect of these inputs the appellant paid Customs Duty and interest and closed the advance licensees. The appellant thereafter, took credit of CVD amounting to Rs.1,33,45,230/- paid on such duty free inputs imported under advance license scheme, but on which duty was paid at the time of conversion from DTA to EOU Unit. The credit was taken in the RG 23A-part-II dated 30.11.2009. The show cause notice alleged that the said duty was paid due to closer of such advance licenses in which the appellant had failed the fulfilled the export obligation as per undertaking given by them. The said liability was discharged at the time of conversion of the DTA Unit. Consequently, it was alleged that the appellants are not entitle to said credit. It was also alleged that by failing to fulfill the export obligation, the appellant had violated the condition of this notification. It was also alleged that the appellant paid import duty through challan on unutilized materials left from the lot imported duty free an advance licenses, due to non fulfillment of export obligation after 4 to 5 years. It was alleged that the said duty payment was recovery of the Customs Authorities and the credit was taken on the strength of challan which are not specified document under Sub-Rule (1) rule 9 of Cenvat credit Rules, 2004. It was alleged that there is no authority to take credit on challan. It was further alleged that Rule 10(3) of the Cenvat Credit Rules, 2004 mandates that the transfer of Cenvat Credit shall be allowed only if stock of inputs as such or in process or the capital goods is also transferred along with the factory or business premises to a new site or ownership and the inputs or capital goods, on which credit has been availed of are duly accounted for to the satisfaction of Deputy Commissioner of Central Excise or as a case may the Assistance Commissioner of Central Excise. It was alleged that the appellant has not taken permission of jurisdictional Assistant/Deputy Commissioner prior to availment of Cenvat Credit, therefore, Cenvat Credit is not permissible. It was further alleged that the CBEC, GOI New Delhi Circular No. 54/2004-Customs dated 04.04.2004 and dated 13.10.2004 does not provide for such transitional facility to 100% unit converted from a DTA unit. It was alleged that since there is no transitional provision the credit could not have been transferred. The Learned Counsel pointed out that the inputs receipt on conversion of DTA to EOU unit were used as inputs and therefore all duties paid on such inputs are eligible as Cenvat Credit. He pointed out that it has not been in dispute that the said inputs received or laying in the DTA unit converted into EOU unit were not used for manufacture of finished goods. Learned Counsel relied on the decision of tribunal in the case of GTN and Exports Limited-2009 (240) ELT 53 (Tri.-Chennai), to assert that the OIO could go beyond the charges made in the SCN. The Learned Counsel relied on the decision of Tribunal in the case of Suryavanshi Spinning Mills Ltd-2004 (169) ELT 81 (Tri.-Bang.) To assert that the EOUs are entitled to take balance of credit relating to inputs/capital goods laying in the Cenvat account of the DTA on the date of conversion to EOU. It was also asserted that the said decision holds that Rule 10 of the Cenvat credit Rules, 2004 did not prohibit availing balance credit by EOU at the time of conversion.

3. Learned AR relies on the impugned order.

4. We have gone through the rival submission. We find that the impugned order the Commissioner holds that what was paid by the appellant due to failure to fulfill the export obligation in their erstwhile DTA unit were Customs recovery due to failure of assessee to comply with the conditions of the notification under advance licence scheme. We find that it may be true that the duties were paid due to failure of appellant to fulfill export obligation but that fact has no relevance. In the instance case the availability of Cenvat Credit only depends on the fact if the duties have been paid and if the inputs are Admissible inputs and the same were received by them in their limit. The fact that the duties were recovered due to failure of appellant to fulfill export obligation is irrelevant for this purpose.

4.1 It has been argued in impugned order that the erstwhile DTA unit which had imported this inputs duty free under the advance license scheme is a different legal entity then the unit in which the credit is sought to be taken. We find that this is a mistaken proposition. Both the units are part of the same legal entity and under one ownership. The fact that the merger of two units were allowed clearly shows that they were part of the same legal entity. The Cenvat credit Rules permit to transfer of credit from one unit to another in such circumstances. In view of the above, we find that no merit in this objection raised by the Learned Commissioner.

4.2 The impugned order holds that the Cenvat credit cannot be availed on the basis of supplementary invoices issued by a manufacturer or importer in case of additional amount of Excise duty or additional duties leviable under section 3 of the Customs Tariff Act paid become recoverable on the account of non levy or short levy by reason of fraud collusion or any willful mis-statement or suppression of fact etc. We find that there is no charge that in the show cause notice that there was any fraud collusion or any willful mis-statement or suppression of fact on the part of the appellant and therefore the observations made in the impugned order are irrelevant. In fact the impugned order does not even allege that the said duty was recovered on account of fraud collusion etc.

4.3 The next issue raised by the impugned order relates to the document on the strength of which credit has been taken. The impugned order takes note of Rule 9 of Cenvat Credit rules, to hold that challans are not specified documents except in the circumstances when they are supplementary to the original invoice. It takes note of Rule 9(1) (b) of Cenvat Credit Rule,2004 which reads as follows:-

> *"For removal of doubts, it is clarified that supplementary invoice shall also include challan or any other similar document evidencing payment of additional amount of additional duty leviable under section 3 of the Customs Tariff Act."*

It is notice that the said Rule permits taking of credit on challans, however, the impugned order holds that credit cannot be taken on the strength of all the challans. It holds that only when an additional amount on duty becomes payable that credit can be availed on the strength of the challans. We hold that in the instance case the original duty paying document is bill of entry and the challans are the documents on the strength of which additional duty has been paid. Thus, even going by the logic given by the Commissioner in the impugned order there is no bar on availing credit on the strength of challans. Thus, we find no merit in this argument of the Commissioner in the impugned order.

4.4 The next issue raised by the Commissioner relates to the delay in taking of credit. In the instances case the duties were paid in the year 2008 and 2009 and credit was taken on 30.11.2009. The Commissioner has relied on the decision of Tribunal in the case of Motch Technology Ltd-2008 (12) STR 532 (Tri.) wherein the term 'immediate' was interpreted. We do not find any merit in the argument of the Commissioner as in the instance case there is no significant delay in availment of credit. The duty was paid in the year 2008/2009 and credit was availed on 30.11.2009. At the material time there is no time limit specified for taking of credit. In the year 2014 when time limit for availment of credit was specified, a limit of 1 year was given. In these circumstances, we do not find any merit in this argument of Commissioner also.

4.5 The next issue raised by the Commissioner relates to Rule 10 of the Cenvat Credit Rules. Rule 10 of the Cenvat Credit Rule reads as under:-

> ***"RULE 10. Transfer of CENVAT credit***.- *(1) if a manufacturer of the final products shifts his factory to another site or the* <u>*factory is transferred on account of change in ownership or on account of sale, merger, amalgamation, lease or transfer of the factory to a joint venture with the specific provision for transfer of liabilities of such factory, then, the manufacturer shall be allowed to transfer the CENVAT credit lying unutilized in his accounts to such transferred, sold, merged leased or amalgamated factory.*</u>
>
> *(2) If a provider of output service shits or transfers his business on account of change in ownership or on account of sale, merger, amalgamation, lease or transfer of the business to a joint venture with the specific provision for transfer of liabilities of such business then, the provider of output service shall be allowed to transfer the CENVAT credit lying unutilized in his accounts to such transferred, sold, merged, leased or amalgamated business.*
>
> *(3) The transfer of the CENVAT credit under sub-rules (1) and (2) shall be allowed only if the stock of inputs as such or in process, or the capital goods is also transferred along with the factory or business premises to the new site or ownership and the inputs, or capital goods, on which credit has been availed of are duly accounted for to the satisfaction of the Deputy Commissioner of Central Excise or, as the case may be, the Assistant Commissioner of Central Excise."*

It is seen that the said rule clearly specified that in case of merger transfer of credit shall be allowed only if the stock of input as such or in process or the capital goods is also transferred along with the factory or business premises to the new site or ownership and the inputs or capital goods on which the credit has been availed are duly account for to the satisfaction of Deputy Commissioner of Central Excise as a case may be. In the instance case, it is notice that the permission for conversion of DTA unit to EOU unit was initially granted by the Development of Commissioner, KASEZ, thereafter, the Assistance Commissioner of Central Excise and Customs, Div-Vapi granted license on 15.01.2007. However, from the record it is not clear if the exercise of dealing the transfer of stock of inputs as such or in process all the capital goods transferred was done. However, in the instance case, it is seen that the issue is not covered by the mischief of Rule 10. It is seen that the appellant merged two units in the year 2007. This duty was paid subsequently by the merged unit in the year 2008/2009. Thus, it is not a case falling within the ambit of Rule 10 of the Cenvat Credit Rules and the same is therefore not applicable to the instance case.

5. Thus, we find no merit in the impugned order and it is set aside. The appeal is allowed.

(Pronounced in the open court on 26.11.2021)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

PRACHI