

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST ZONAL BENCH : AHMEDABAD**

REGIONAL BENCH - COURT NO. 3

EXCISE Appeal No. 10345 of 2021-SM

[Arising out of Order-in-Original/Appeal No CCESA-SRT-APPEAL-PS-207-2020-21 dated 26.03.2021 passed by Commissioner of Central Excise, Customs and Service Tax-DAMAN]

USV Private Limited

Plot No H-16a 17 18 20 21 E-22 OI DC Mahatma
Gandhi Udyog Nagar Dabhel, Daman UT-396210

.... Appellant

VERSUS

Commissioner of Central Excise & ST, Daman

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

.... Respondent

APPEARANCE :

Shri H.D. Dave, Advocate for the Appellant
Shri Vijay G Iyengar, Assistant Commissioner (AR) for the Revenue.

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

DATE OF HEARING : 02.02.2023

DATE OF DECISION: 06.02.2023

FINAL ORDER NO. A/10198 / 2023

RAMESH NAIR :

The issue involved in the present case is whether the appellant is entitled for cash refund against the accumulated and unutilized Cenvat credit of Education Cess and Secondary and Higher Education Cess.

2. Shri H.D. Dave, learned Counsel appearing on behalf of the appellant submits that the Revenue has denied refund on two counts, first, the Cenvat credit of Education Cess and Secondary and Higher Education Cess is not admissible and second, the refund is time-barred. He submits that this issue is no longer res-integra as various high courts have decided the issue in favour of the assessee. He relied upon the following decisions:-

(a) Slovak India Trading Company Private Limited vs. CCE Bangalore - 2006 (205) ELT 956 (Tri.Bang). This decision of the Tribunal is confirmed by Hon'ble Karnataka High Court reported at - 2006(201) ELT 559 (KAR) and by Hon'ble Supreme Court reported as -2008 (223) ELT A170 (SC).

(b) Surekha Project vs. Union of India - 2019 (367) ELT 789 (Gau.)

(c) Shalu Synthetic Private Limited vs. CC & SD Vapi - 2017 (346) ELT 413 (Tri-Ahmd)

(d) CIRCOR Flow Technology India Private Limited vs. CC CGST & CE Coimbatore -2022 (59) GSTL 63 (Tri. Chennai)

(e) Luvkhush Textile vs. CCE, Jaipur - 2017 (353) ELT 417 (RAJ)

(f) Welcure Drugs & Pharmaceuticals limited vs. CCE Jaipur - 2018 (15) GSTL 257 (RAJ)

(g) Toshiba Machine Private Limited vs. CCT Chennai - 2019 (27) GSTL 216 (Tri. Chennai)

3. Shri Vijay G Iyengar, learned Assistant Commissioner (AR) appearing on behalf of the Revenue reiterates the findings of the impugned order.

4. I have carefully considered the submissions made by both the sides and perused the record. I find that the question to be decided is, first, whether the appellant is entitled for the refund of Cenvat credit of education cess and higher education cess and consequently entitled for cash refund in case if unable to utilize the said Cenvat credit under GST regime and second, whether the refund is time-barred. I find that the appellant have heavily relied upon various High Court decisions according to which refund was allowed considering Rule 5 of Cenvat Credit Rules, 2004. It is not disputed that the appellant are not in a position to utilize Cenvat credit of Education Cess and Secondary and Higher Education Cess due to introduction of GST with effect from 01.07.2017.

5. As regards the admissibility of Cenvat credit of Education Cess and Secondary and Higher Education Cess, Rule 3 clearly provides the Cenvat credit to be allowed in respect of Education Cess and Secondary and Higher Education Cess for ease of reference, Rule 3 of Cenvat Credit Rules is reproduced below:-

Rule 3. CENVAT credit. -

(1) A manufacturer or producer of final products or a provider of taxable service shall be allowed to take credit (hereinafter referred to as the CENVAT credit) of -

- (i) the duty of excise specified in the First Schedule to the Excise Tariff Act, leviable under the Excise Act;
- (ii) the duty of excise specified in the Second Schedule to the Excise Tariff Act, leviable under the Excise Act;
- (iii) the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Textile and Textile Articles) Act, 1978 (40 of 1978);
- (iv) the additional duty of excise leviable under section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957);
- (v) the National Calamity Contingent duty leviable under section 136 of the Finance Act, 2001 (14 of 2001);
- (vi) the Education Cess on excisable goods leviable under section 91 read with section 93 of the Finance (No.2) Act, 2004 (23 of 2004);
- (via) the Secondary and Higher Education Cess on excisable goods leviable under section 136 read with section 138 of the Finance Act, 2007 (22 of 2007);
- (vii) the additional duty leviable under section 3 of the Customs Tariff Act, equivalent to the duty of excise specified under clauses (i), (ii), (iii), (iv), (v) (vi) and (via);
- (viia) the additional duty leviable under sub-section (5) of section 3 of the Customs Tariff Act,

Provided that a provider of taxable service shall not be eligible to take credit of such additional duty;

- (viii) the additional duty of excise leviable under section 157 of the Finance Act, 2003 (32 of 2003);
- (ix) the service tax leviable under section 66 of the Finance Act;
- (x) the Education Cess on taxable services leviable under section 91 read with section 95 of the Finance (No.2) Act, 2004 (23 of 2004); and
- (xa) the Secondary and Higher Education Cess on taxable services leviable under section 136 read with section 140 of the Finance Act, 2007 (22 of 2007); and
- (xi) the additional duty of excise leviable under section 85 of Finance Act, 2005 (18 of 2005)

From the above Rule, under clause (vi) and (via), the credit of Education Cess and Secondary and Higher Education Cess is clearly allowed. Therefore, the appellant is legally entitled for Cenvat of Education Cess and

Secondary and Higher Education Cess. Hence, on this count refund cannot be denied.

6. As regards limitation, in the judgments cited by the learned Counsel, the Hon'ble High Court also considered limitation and held that in case of refund of accumulated unutilized credit, limitation shall not apply. Relevant judgments are reproduced below:-

(a) Slovak India Trading Company Pvt. Limited (Karnataka High Court)(supra):

"4. Admitted facts would reveal of a claim of cash refund and admitted facts would reveal of rejection at the hands of the Assistant Commissioner and also the appellate authority. The Tribunal has chosen to allow the claim application on the ground that refund cannot be rejected when the assessee goes out of Modvat scheme or when the Company is closed. The argument is that there is no provision for refund in terms of Rule 5 of Cenvat Credit Rules, 2002. Rule 5 reads as under:

"Rule 5. Refund of CENVAT Credit: When any inputs are used in the final products which are cleared for export under bond or letter of undertaking, as the case may be, or used in the intermediate products cleared for export, the CENVAT credit in respect of the inputs so used shall be allowed to be utilized by the manufacturer towards payment of duty of excise on any final products cleared for home consumption or for export on payment of duty and where for any reason such adjustment is not possible, the manufacturer 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 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."

5. There is no express prohibition in terms of Rule 5. Even otherwise, it refers to a manufacturer as we see from Rule 5 itself. Admittedly, in the case on hand, there is no manufacture in the light of closure of the Company. Therefore, Rule 5 is not available for the purpose of rejection as rightly ruled by the Tribunal. The Tribunal has noticed that various case laws in which similar claims were allowed. The Tribunal, in our view, is fully justified in ordering refund particularly in the light of the closure of the factory and in the light of the assessee coming out of the Modvat Scheme. In these circumstances, we answer all the three questions as framed in para 17 against the Revenue and in favour of the assessee.

6. Ordered accordingly. No costs."

The above decision of Hon'ble Karnataka High Court has been upheld by the Hon'ble Supreme Court reported at 2008 (223) ELT A170 (SC).

(b) In the case of Shalu Synthetics Private Limited (supra) this Tribunal relying upon the above cited judgment of Hon'ble Karnataka High Court in the case of Slovak India Trading Company Pvt. Limited passed the following decision :

"10. The above said two judgments of the Hon'ble High Courts squarely cover the issue in favour of the appellant. It is to be noted that as against the above-said judgments of the Hon'ble High Courts, the Id. Departmental Representative seeks to rely upon the decision of this Bench in the case of *M/s. Jai Elastics Pvt. Ltd.* (supra). I have perused the said order produced by the Id. Departmental Representative and note that the said order of the Tribunal relies on the decision of the Larger Bench of the Tribunal in the case of *Steel Strips v. CCE, Ludhiana* (supra). With utmost respect to the Bench, I find that the judgment of the Hon'ble High Court of Karnataka in the case of *Union of India v. Slovak India Trading Co. Pvt. Ltd.* (supra) was cited before the Larger Bench and it was taken note of, but no reasonings have been recorded as to why the said judgment of the Hon'ble High Court of Karnataka was not applicable in the similar/identical situations. In my view, the judgments of the Hon'ble High Court of Bombay and Karnataka will have to be followed by the Tribunal in an identical/similar situation. In the case in hand, I find that the issue involved is identical to the issue which was before the Hon'ble High Court of Bombay and Karnataka.

11. In view of foregoing, judicial discipline requires that the Tribunal follows the decisions of the Hon'ble High Court in preference of the Larger Bench order; I set aside the impugned order and allow the appeal filed by the appellant with consequential relief."

(c) Considering the ratio of judgment by Hon'ble Karnataka High Court in the case of Slovak India Trading Company Pvt. Limited the Hon'ble Rajasthan High Court in the case of Luvkush Textiles passed the following decision :

"10. In view of the fact that after the cristilization of the claim on account of the Cenvet credit in favour of the assessee, assessee was entitled for the refund of Rs. 63,001/- from the Revenue which is not in dispute. It is also a fact that manufacturing unit of assessee had been closed and the concern of the assessee is not in production any more. Therefore, in view of Rule 5 which is reproduced as under :-

"Rule 5. Refund of CENVAT credit. - Where any inputs are used in the final products which are cleared for export under bond or letter of undertaking, as the case may be, or used in the intermediate products cleared for export, the Cenvat credit in respect of the inputs so used shall be allowed to be utilized by the manufacturer towards payment of duty of excise on any final products cleared for home consumption or for export on payment of duty and where for any reason such adjustment is not possible, the manufacturer 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 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."

11. As far as the provisions under Rule 5 is concerned the words used are that "manufacturer shall be allowed refund of such amount subject to such safeguards". The provision, therefore, only speaks about a refund of amount and, therefore, clearly does not prohibit for payment of a refund amount in any form including cash.

12. The assessee is entitled for refund amount which is due to him after the proper adjudication of its claim scheme and the only question which remains for consideration is that when the manufacturing unit of the assessee is closed, the benefit which is otherwise available to him is required to be paid and the Revenue cannot deny the benefit of the same.

13. In *Commissioner of Central Excise, Ranchi v. Ashok Arc*, the High Court of Jharkhand [2006 \(193\) E.L.T. 399](#) (Jhar.) = [2007 \(7\) S.T.R. 365](#) (Jhar.) has held as under :-

4. In this petition, the Revenue has raised the following question for reference :

"Whether the learned Tribunal has gravely erred in allowing the Appeal and directing the authority to refund the pre-deposit amount in cash when the same has been deposited through RG 23A Pt.-II i.e. MODVAT account and under the provisions of Central Excise Rules, 1944 no such refund in cash is permissible?"

5. On hearing the parties, we find that the aforesaid issue was raised by the Revenue before the CEGA Tribunal, which answered the same in favour of the respondent by the impugned order dated 30th April, 2002. The stand of the learned Counsel for the Revenue that the amount should have been adjusted in RG-23A Part-II account can not be accepted, there being no such RG-23 Part-II account available in respect of the finished goods. Similar issue was decided by Andhra Pradesh High Court in the case of Deccan Sales Corporation, as noticed by the CEGA Tribunal and, in fact, no credit account is being maintained by the respondent on account of raising of exemption limit. As the respondent will not be in a position to utilise the credit, the CEGA Tribunal has rightly held that the Revenue should refund the amount to the respondent in cash. There being no substantial question of law, raised for reference, we are not inclined to ask the Tribunal to refer any issue."

14. Similarly the Karnataka High Court in the case of *the Union of India (UOI) represented by the Commissioner of Central Excise v. Slovak India Trading Company Private Limited* has held as under :-

4. Admitted facts would reveal of a claim of cash refund and admitted facts would reveal of rejection at the hands of the Assistant Commissioner and also the appellate authority. The Tribunal has chosen to allow the claim application on the ground that refund cannot be rejected when the assessee goes out of Modvat scheme or when the Company is closed. The argument is that there is no provision for refund in terms of Rule 5 of Cenvat Credit Rules, 2002. Rule 5 reads as under?

Rule 5. Refund of CENVAT Credit. - When any inputs are used in the final products which are cleared for export under bond or letter of undertaking, as the case may be, or used in the intermediate products cleared for export, the CENVAT credit in respect of the inputs so used shall be allowed to be utilized by the manufacturer towards payment of duty of

excise on any final products cleared for home consumption or for export on payment of duty and where for any reason such adjustment is not possible, the manufacturer 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 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.

5. There is no express prohibition in terms of Rule 5. Even otherwise, it refers to a manufacturer as we see from Rule 5 itself. Admittedly, in the case on hand, there is no manufacture in the light of closure of the Company. Therefore, Rule 5 is not available for the purpose of rejection as rightly ruled by the Tribunal. The Tribunal has noticed various case laws in which similar claims were allowed. The Tribunal, in our view, is fully justified in ordering refund particularly in the light of the closure of the factory and in the light of the assessee coming out of the Modvat Scheme. In these circumstances, we answer all the three questions as framed in para 17 against the Revenue and in favour of the assessee.

15. The order of the Karnataka High Court has further been confirmed by the Hon'ble Supreme Court in the SLP mentioned in the above paragraph. Taking into consideration, the Rule 5 of the Cenvat Credit Rules, 2002, we are of the view that the Tribunal was not correct while relying upon the judgment of the Larger Bench in *Gauri Plasticulture (P) Ltd.* as Rule 5 in no way prohibits the payment of the refund amount in cash and more particularly when after a proper adjudication of matter an amount of Rs. 63,001/- is said to have been sanctioned in favour of assessee (appellant) and the factum of their manufacturing unit having been closed, we are of the considered opinion that the present appeal deserves acceptance, the same is, therefore, allowed. The refund amount due to the appellant is required to be paid in cash by the Revenue. The respondents are directed to pay the same within a period of two months from today.

16. Accordingly, the question is answered in favour of assessee and against the Revenue."

(d) The Rajasthan High Court considering the issue in the case of *Welcure Drugs & Pharmaceuticals Limited (supra)* passed the following judgment:-

"9. We have heard counsel for the parties.

10. Before proceeding with the matter, it will not be out of place to reproduce Rule 5 of the Central Excise Act which reads as under :

"Rule 5. Refund of CENVAT credit. - Where any inputs are used in the final products which are cleared for export under bond or letter of undertaking, as the case may be, or used in the intermediate products cleared for export, the CENVAT credit in respect of the inputs so used shall be allowed to be utilized by the manufacturer towards payment of duty of excise on any final products cleared for home consumption or for export on payment of duty and where for any reason such adjustment is not possible, the manufacturer 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 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.”

11. In our considered opinion, in view of the observations made by the Karnataka High Court in *Slovak India Trading Co.’s* case (supra) and also in *Collector of Central Excise, Pune’s* case (supra) by the Supreme Court, which reads as under :

17. It is clear from these Rules, as we read them, that a manufacturer obtains credit for the excise duty paid on raw material to be used by him in the production of an excisable product immediately it makes the requisite declaration and obtains an acknowledgement thereof. It is entitled to use the credit at any time thereafter when making payment of excise duty on the excisable product. There is no provision in the Rules which provides for a reversal of the credit by the excise authorities except where it has been illegally or irregularly taken, in which event it stands cancelled or, if utilised, has to be paid for. We are here really concerned with credit that has been validly taken, and its benefit is available to the manufacturer without any limitation in time or otherwise unless the manufacturer itself chooses not to use the raw material in its excisable product. The credit is, therefore, indefeasible. It should also be noted that there is no co-relation of the raw material and the final product; that is to say, it is not as if credit can be taken only on a final product that is manufactured out of the particular raw material to which the credit is related. The credit may be taken against the excise duty on a final product manufactured on the very day that it becomes available.

18. It is therefore, that in the case of *Eicher Motors Ltd. v. Union of India* - [[1999 \(106\) E.L.T. 3](#)] this Court said that a credit under the Modvat scheme was “as good as paid”.

12. Four different High Courts have also taken the view against which the SLP was preferred and earlier also the Tribunal granted refund against which the SLP was not preferred. In that view of the matter, the principle of estoppel applies as once the department has accepted the view taken by the Tribunal it will not be appropriate to challenge the same by choosing the present assessee.

13. In our considered opinion, the judicial discipline is required to be maintained. The Tribunal cannot distinguish the High Court judgments. They are bound by the High Court judgments even jurisdictional High Court and at the most they can refer it back prior to distinguish on facts but no authority has been made. Full Bench decision of the Tribunal has to be followed.

14. Hence, we answer the issue in favour of assessee against the department.

15. The appeal is allowed. The view of Karnataka High Court which has been confirmed by the Supreme Court is required to be approved and the same is approved.”

7. In view of the above judgments, it is observed that the issue is no longer res-integra. Accordingly the appellant is entitled for cash refund of

accumulated and unutilized Cenvat credit of Education Cess and Secondary and Higher Education Cess. The impugned order is set-aside and the appeal is allowed with consequential relief.

(Pronounced in the open court on 06.02.2023)

(Ramesh Nair)
Member (Judicial)

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