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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
38,MG Marg Civil Lines,Old Red Building,Allahabad-211001
Regional Branch, Allahabad

Dated: 09/11/2017

To

Appellant as per address in table below
Respondent as per address in table below

Final Order No. A/71318/2017-EX[DB] dated 10/10/2017

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section 35-C(1) of the Central Excise and Salt Act, 1944.

Asstt. Registrar

	Application	Appeal	Name and Address of Appellant
1	E/CROSS/187/2007	E/2078/2007	C.C.E, KANPUR 117/7, Sarvodaya Nagar, Kanpur 208005.
			Name and Address of Respondent
2			L.M.L. LTD. C-10, Panki Indl. Area, Site-II, Kanpur,,

Copy To
3Advocate(s) / Consultant(s):

R. Santhanam
C-3/210,
JANAK PURI,
NEW DELHI,
DELHI
110058

4 Bar Association, CESTAT, Allahabad

5 Director Publications, Customs, Excise. I.P. Estate, Delhi

6 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, Opp ICICI Bank of Defence Colony New Delhi-3

7 Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17

8 Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005

9 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)

10 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070

11 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad – 38

12 The ICFAI society, 52, Nagarjuna Hill,Punjagutta Hyderabad.-500082

13 M/S Knowledge Processing Pvt. ltd.(taxmanagementindia.com),FF-19,1st Floor,Cross River Mall,CBD Ground,Near Karkardooma Court,Delhi-110032

14 C.D.R. 15 Office Copy 16 Second Folder Copy 17 Guard File

Asstt. Registrar

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH : ALLAHABAD
COURT No. I

CROSS Application No. E/CROSS/187/2007 in
APPEAL No. E/2078/2007-EX[DB]

(Arising out of Order-in-Appeal No. 210-CE/APPL/KNP/2007 dated 31/05/2007 passed by Commissioner of Central Excise & Customs (Appeals), Kanpur)

Commissioner, Customs & Central Excise, Kanpur **Appellant**

Vs.

M/s L.M.L. Ltd. **Respondent**

Appearance:

Shri Mohd Altaf (Asstt. Commr.) for Appellant
Shri R. Santhanam (Advocate) for Respondent

CORAM:

Hon'ble Mr. Anil Choudhary, Member (Judicial)
Hon'ble Mr. Anil G. Shakkarwar, Member (Technical)

Date of Hearing : 10/10/2017
Date of Decision : 10/10/2017

FINAL ORDER NO-71318/2017...........

Per: Anil G. Shakkarwar

The present appeal filed by Revenue is directed against Order-in-Appeal No. 210-CE/APPL/KNP/2007 dated 31.05.2007 passed by Commissioner (Appeals), Customs and Central Excise, Kanpur.

2. Brief facts of the case are that the respondents were manufacturers of two wheelers falling under Chapter 87 of Central Excise Tariff Act, 1985. They were availing facility of Cenvat Credit under Cenvat Credit Rules, 2004. They were clearing the goods in the domestic market as well as exporting

the goods manufactured by them. On 17.04.2006 respondents submitted application for refund of accumulated unutilized balance of Cenvat Credit of Rs. 3,09,38,664/- as on 31.03.2006 under Ruled 5 of Cenvat Credit Rules, 2004 in the proforma prescribed in the Form A under Notification No. 5/2006 issued under Rule 5 of Cenvat Credit Rules, 2004. The respondents were issued with a show cause notice dated 02.05.2006 stating that the respondent did not give the evidence that the amount of unutilized Cenvat Credit of Rs. 3,09,38,664/- relates to inputs used against the goods exported during the period from 01.04.2005 to 31.03.2006 and also that the photocopies of the documents such as ARE-1 and shipping bill did not have signature of Authorized Signatory. Further it was stated that the respondent had failed to submit the original documents/records along with the said application in the Form A. On contest issue was adjudicated through Order-in-Original dated 24.05.2006 wherein the Original Authority has rejected the said application for refunds on the grounds that proper and original documents were not submitted and by holding that the amount of credit accrued on inputs said to have been used in the manufacture of goods exported was calculated by the respondent and certified by the Chartered Accountant on Standard Calculation basis, but not on the actual basis and could not be quantified but varied in their different submissions and that the invoices number mentioned in the shipping bills were not different than the invoices number issued under Rule 11 of Central Excise Rules, 2002 and engine numbers and chasis numbers were mentioned on ARE-1 and refund application were not submitted periodically and holding that adjustment of such accumulated Cenvat Credit balance towards payment of duty Central Excise duty was possible because the factory had to resume back the activities after termination of lockout. The respondent preferred appeal before Commissioner (Appeals). Learned Commissioner (Appeals) has decided the said appeal through impugned Order-in-Appeal dated 31.05.2007. The findings by learned Commissioner (Appeals) are reproduced below :-

"The Adjudicating Authority has rejected the refund claim on the following grounds:

(i). Proper and original documents relating to details of input used in the export goods, credit availed thereon, stock position of impugned inputs as on 31.03.2006 and Shipping Bills have not submitted by the appellant alongwith the claim in the absence of which claim could not be finalized;

(ii). Benefit of CBEC Circular No. 828/5/2006-CX dt. 20.04.2006 is not admissible to the appellants as the demands of short levy were pending recovery against the appellant;

(iii). The amount of credit accrued on inputs said to have been used in the manufacture of goods exported is calculated by the

party and certified by the Chartered Accountant on Standard Calculation basis, but not on the actual basis and could not be quantified but varies in their different submissions;

(iv). No documented correlation is made in respect of goods removed from the factory under invoices issued under Rule 1 of Central Excise Rules, 2002 and goods exported against the Shipping Bills because the invoices number mentioned on Shipping Bills are different. The engine numbers and chasis numbers are also not mentioned on ARE-1s or on Shipping bills for correlation;

(v). Refund claim have not been submitted periodically as prescribed in Notification No. 5/06-CE(NT) dt. 14.03.2006;

(vi). The adjustment of such accumulated Cenvat balance towards payment of duty/service tax is possible because the factory has to resume back the activities after termination of lockout.

As against this, the appellant has pleaded that the Bill of material containing inputs quantity, stock position as well as credit etc. have been submitted alongwith the refund claim on 31.03.2006 and again on 10.05.2006 alongwith the certificate of the Chartered Accountant; the concept of credit relating to inputs in stock, in pipeline and in finished goods has been imported by the adjudicating authority unnecessarily as the same is not required to be maintained under the provision and *no such condition has been imposed in the rule for claiming refund; shipping bills are not required to be filed alongwith the refund application; stock position of inputs as on 31.03.2006 and proof of actual use has been given vide their letter dt. 10.05.2006 & 11.05.2006 which were well supported by certificate from Chartered Accountant; that the alleged four cases are not the offence cases like evasion of duty or clandestine removal but the routine notice to deny the benefit of Cenvat credit on technical grounds. Further, it is pleaded that the demand vide Order-in-Original 40/JC/MP/01 dated 02.08.2001 has been appropriated; demand vide Order-in-Original No. 91/CDK-II/03 dated 18.11.2003 was set aside by the Commissioner (Appeals) vide Order-in-Appeal No. 374/CE/APPL/KNP/05 on 20.12.2005; demand vide Order-in-Original No. 4/Comm/MP/03 dated 19.05.2003 was not in existence at material time as the same was set aside vide Final Order No. 342/06-SM dated 22.02.2006 by way of remand by the CESTAT and demand vide Order-in-Appeal No. 289 to 292/CE/APPL/KNP/03 dated 25.05.2004 related to denial of credit on technical ground and has been set aside by CESTAT vide Final Order No. 1104-1107/06-SM dated 06.07.2006; that the calculation has been made by the Chartered Accountant after examining the records; the allegation of variation of credit is self-generated by adopting a common figures of Rs. 2254.50P as the figure of Cenvat credit for all type of scooter and motor cycle whereas a different figure of Rs. 3424/- in*

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respect of the motorcycle has been ignored to justify the pre-determined conclusion; the appellant has pleaded that the reason for such difference is due to the fact that commercial invoice number is mentioned in the shipping bill as per the annexed to ARE-1's; further that these allegations were not made in the Show Cause Notice and hence cannot be made ground of rejection; there is no provision in the notification which makes it mandatory to file refund claim on quarterly basis; since the factory remained closed, no domestic clearances are likely to take place in near future and the volume of export has to go up & up, the same cannot be utilized. Reliance on catena of judgments has been taken as mentioned in grounds of appeal and written submission; interest is payable on the refund amount for the period of delay in excess of three months as per the provisions contained in Section 11BB of Central Excise Act, 1944.

After taking into consideration all the facts, following issues emerges for decision in the impugned appeal:

(i) Whether refund is sanctionable in case where proper and original document have not been submitted by the appellants at the time of filing but filed subsequently;

(ii) Whether benefits of CBEC Circular No. 828/5/2006-CX dt. 20.04.2006 are admissible to the appellant under the facts and circumstances of the case;

(iii) Whether the AR1's, Shipping Bills, invoices and other documents submitted with refund application are proper documents for sanctioning refund claim;

(iv) Whether the calculation of credit accrued on inputs claimed to be used in the manufacture of export goods supported by the certificate of Chartered Accountant is acceptable;

(v) Whether lack of correlation between invoice ARE-1's and non-mentioning of engine number and chasis number on the Shipping Bill are reasonable cause to reject the refund claim;

(vi) Whether it is mandatory on the part of the applicants to file the refund claim on quarterly basis;

(vii) Whether the view of the adjudicating authority that claim is not sanctionable on the grounds of possibilities of its utilization when the factory goes in the production and effects domestic clearance;

Now, I take up the point one by one.

It is observed that the issue raised above relates to the point whether inputs have been used in the manufacture of final product which are exported and procedural requirements as provided under Notification No. 5/2006-CE(NT) dated 14.03.06 have been fulfilled. As regards use of inputs in the manufacture of exported goods, the proof have been submitted by the appellant in the form of extracts of the record maintained which is well supported by the certificate of Chartered Accountant. Nothing material has been brought on *record by the adjudicating authority to prove that inputs procured has not been so used.*

Further, on the plea of the adjudicating authority that the appellant has failed to prove that credit lying in balance as on 31.03.06 relates to unutilised credit, it is observed that the amount for which the refund has been sought for is a residual balance and the law does not require one to one correlation which is explicit from the CESTAT order in the case of Mahindra & Mahindra Ltd. Vs CCE, Mumbai [2001(127) E.L.T. 247(Tri.-Mum)]. The appellant has given full details that credit of Rs.945/- lakhs has been taken in respect of those inputs which have been used in the manufacture of export goods and Rs.636/- lakhs have been utilized in paying duty on domestic clearances and remaining Rs.309 lakhs have been claimed as refund. The argument putforth by the appellant is very clear and leaves no doubt as to the fact that credit lying in balance relates to inputs used in the manufacture of export goods. It is a settled law that certificates issued by the qualified professionals like Chartered Accountant cannot be rejected unless proved wrong by definite evidence, while holding so reliance is placed on CESTAT order in the case of Toyota Kirloskar Motor Ltd. Vs CCE, Bhopal [2005(187) E.L.T. 52 (Tr.-Bang)].

On the issue i.e. whether benefits of CBEC Circular No. 828/5/2006-CX dated 20.04.06 is applicable or otherwise, it is observed that the benefit of giving 80% of the amount of *refund claimed within 15 days of filing the claim has been denied on the grounds that condition imposed in Para-4 of the Circular has not been fulfilled i.e. four demands were pending recovery against the appellant.*

Para-4 of the Circular provides that the 80% amount can be refunded within 15 days from the date of filing refund claim, if no demand of short levy is pending recovery. In this regard, since the refund was rejected by the adjudicating authority at the adjudication stage in view of pending demand, the issue whether CBEC Circular was applicable at that material time need not be taken up at this stage. The pendency of demand is an ongoing process which keeps changing from time to time. Hence benefit of circular can be given on merits at the material time only.

The other issue relates to non-submission of some documents at the time of filing refund claim. It is observed that in case where details given by the appellant are not complete, the natural justice will be denied, if no opportunity is given to rectify the error. It is on record that all such details have been filed by the appellant subsequently. Bill of material alongwith Chartered Accountant's Certificate dated 09.05.06 has been filed vide letter dated 10.05.06; list of high value inputs alongwith Chartered Accountant's Certificate dated 09.05.06 has been filed on 11.05.06; original Shipping Bill and on board certificate have been filed vide letter dated 18.10.06 although submission of the same has been contested on the plea that *export certificate given by the Customs Department on the back of ARE-1's are sufficient to prove export and as vide the provision of Para-12.1 of Chapter 7 of CBEC Manual readwith Section 2(12) of Customs Act, 1962, ICD is a port of export; copies of Shipping Bill , Bill of Lading, commercial invoice, packing list, excise invoice; ARE-1's have been filed on 01.11.06. Since the documents filed vide letter dated 18.10.06 and 01.11.06 were filed after passing of impugned Order-in-Original, an enquiry was caused with the Assistant Commissioner, Central Excise Division-II, Kanpur, whether the documents are sufficient to prove export of goods. The Assistant Commissioner in his reply has submitted that the documents viz. self attested copies of Bill of Lading alongwith on Board certificate are sufficient to prove export of goods. As proof of export is established and procedural lapses have been rectified by the appellant as discussed above, it is observed that compliance of the requirements of Notification No. 5/2006-CE(NT) dated 14.03.06 has been done. Further, it has been held by CESTAT/ Apex Court in the case of Tisco [2003(156) E.L.T.-777(T)] and Formica India [1995(77) E.L.T. 511(SC)] that substantial benefit cannot be denied for procedural lapses. Accordingly, after taking cognizance of the cited CESTAT order, I hold that refund claim is not rejectable on these grounds.*

On the issue, the adjudicating authority has held that such calculation is not acceptable as it has been done on standard basis and not on actual basis and has varied in *different submission, I have perused the certificate dated 09.05.06 issued by Chartered Accountant. At the outset it has been mentioned that the certificate is being issued after examining excise records, export records and costing records which is sufficient to prove that calculation of Cenvat credit has been made on actual basis and not on standard basis. In Para-4 of the certificate, amount of total credit, credit relating to input used in export goods, credit used in discharging duty liability and the balance lying unutilized has been clearly given which leaves no scope of ambiguity. On the plea of difference in calculation, it is observed that while making the calculation the adjudicating authority has taken into consideration the certificate of Chartered Accountant dated 09.05.06 which is with reference to one model namely SPEEDY only. I have pursued the Bill of material submitted vide letter dated 10.05.06 alongwith Chartered Accountant Certificate dated 09.05.06 as well as grounds of appeal. It is observed that credit of Rs.2254.50/- per vehicle shown in Para-1 of Chartered Accountant Certificate dated 09.05.06 related to 'SPEEDY' model of Scooter only. Further the certificate reflect that 24607 Speedy model scooter and 9076 motor cycle totally 33683 vehicles have been exported. The adjudicating authority has calculated the figure of Rs.7,59,38,323/- by multiplying total vehicles by Rs.2254.50/- P which was not warranted in view of the details given in Para-4 of the certificate dated 09.05.06 which clearly indicates that credit of Rs.945/- lakhs* *is attributable to inputs used in export of 24607 scooters and 9076 motor cycles; the fact that credit per vehicle of scooter and motor cycle may not be the same; the fact that Rs.2254.50P. relates to speedy model of scooter only and has been accepted by the adjudicating authority as mentioned in para-2 of page 7 of the adjudication order. Under the circumstances, the plea of difference in calculation is not sustainable.*

On the issue of absence of documentary correlation between Central Excise invoice and shipping bill and non-mentioned of engine number and chasis number of ARE-1, It is observed that since the lapses are procedural in nature and the export of goods has been proved by the bill of lading as well as the certificate given by the Customs officer on the back of ARE-1's submitted by the appellant, the plea is not sustainable.

On the issue of not filing the refund claim on quarterly basis, I am of the opinion that there is no bar under the notification to the file the refund claim on annual basis which is evident from the provisions of para-2 of the notification wherein no such condition has been imposed. It provides that such refund cannot be submitted more than once in a quarter. Under the circumstances the plea is not sustainable and refund is not deniable on this ground.

On the issue of possibilities of utilization of such credit on termination of lockout and domestic clearances, the appellants have pleaded that the factory of the appellant remained closed *and as a result, the credit lying in balance cannot be utilized as there were no domestic clearances. In this regard, the appellants have also placed reliance on the various pronouncements of CESTAT as well as of High Court in the matter, quoted supra. Though there are various judgments in their support, I reproduce the extract of recent judgment delivered in the year 2007 in the case of Bishen Dyeing Printing & Weaving Mills [2007 (210) E.L.T. 0582 (Tri.-Mumbai)], which itself is based on an earlier CESTAT judgment of the year 2006 in the case of Navbharat Industries [2006 (199) ELT 0148 (Tri.-Mum)], being relevant in the circumstances of the present case. The Tribunal in Navbharat Industries case, supra, has observed:-*

"We agree with the Learned Advocate appearing for the appellant that the provisions of Rule 5 relating to refund of Modvat credit accumulated in records on account of their non-utilization for the exported goods is a beneficiary piece of legislation, the refund arising on account of the same cannot be denied being a substantive right of the citizen. The wording of Rule 5 read with Rule 3 are very clear providing for refund of accumulated Modvat credit if the same cannot be adjusted for any reasons. As such the only condition in the said Rule is non-utilization of the credit and no jurisdiction vests in the Central Excise officer to find out the reason for such non-adjustment. The use of the expression that "where for any reason" such adjustment is not possible, the manufacturer shall be allowed

refund of such amount is an unlimited expression and cannot be narrowed or curtailed down by the departmental authorities."

Relying on this judgment, Hon'ble Tribunal finally concluded in the case of Bishen Dyeing Printing & Weaving Mills that "...the credit lying was on account of non-utilization in a particular month and the same cannot be kept pending for the future. As such, the refund is permissible under Rule 5 read with Rule 3 of the Cenvat Credit Rules, 2002.."

In view of the built in provisions of Rule 5 of Cenvat Credit Rules, 2004 as well as the judgments quoted supra, I am of the opinion that the balance of credit lying unutilized is refundable to the appellants.

Accordingly, Order-in-Original is set aside."

In above terms the learned Commissioner (Appeals) allowed the appeal. Aggrieved by the said order Revenue has preferred appeal before this Tribunal.

3. The main ground of the Revenue is that the entire credit involved on the inputs used in goods exported during the quarter ending March, 2006 was exhausted and there was nothing as unutilized credit in respect of inputs used in the goods exported. Further the grounds also included that the respondents did not submit the quantity of inputs lying as such, the quantity of inputs contained in the goods in process and quantity of inputs contained in finished goods as on

31.03.2006 which was essential to ascertain and arrived at the quantum of unutilized credit in respect of the goods exported.

4. Heard the learned AR who has taken order through impugned Order-in-Appeal and submitted that the main ground of Revenue is that there was no Cenvat Credit left unutilized therefore, the question of refund of the same does not arise.

5. Heard the learned counsel for the respondent who has submitted that they had submitted their cross objection and they have given the details of the Cenvat Credit how it was unutilized as on 31.03.2006 and also supported the finding of learned Commissioner (Appeals).

6. Having considered the rival contentions, we find that after submission of application for refund the Original Authority issued show cause notice dated 02.05.2006 wherein the Original Authority did not raise the issue that there was no Cenvat Credit at balance as on 31.03.2006 and further the Original Authority through Order-in-Original also has held that the accumulated Cenvat balance would have been used by the respondent for clearance of possible clearance of goods from the factory after the factory resumes back the activities after termination of lockout. Therefore, during the proceedings it was undisputed that the Cenvat

Credit of Rs. 3,09,38,664/- was left unutilized as on 31.03.2006 and, therefore, we do not find any merit in the grounds raised by Revenue. We, therefore, dismissed the appeal filed by the Revenue. The respondent shall be entitled for consequential relief as per law. Cross objection also stands dispose of.

(Dictated and pronounced in Court)

-Sd/-
(ANIL CHOUDHARY)
Member (JUDICIAL)

-Sd/-
(ANIL G. SHAKKARWAR)
Member (TECHNICAL)

Ankit

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