CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL BANGALORE

REGIONAL BENCH, COURT NO. 2

Central Excise Appeal No. 27004 of 2013

(Arising out of Order-in-Original No. 1/CCE/MY-COMMR/2013 dated 25.02.2013 passed by the Commissioner of Central Excise, Customs & Service Tax, Mysore.)

Commissioner of Central Excise,
Central Excise, Customs and Service Tax
Commissionerate,
S1-S2, Vinaya Marga,
Siddhartha Nagar,
Mysore – 570 011. ……….**Appellant**

Versus

M/s. Kirloskar Electric Co. Ltd.
Transformer Division,
Belavadi Industrial Area,
Mysore – 571 186. ………..**Respondent**

Appearance:
Mr. Maneesh Akhoury, Asst. Commissioner (AR) for the Appellant.
Ms. Yovini Rajesh C Kumar, Advocate for the Respondent.
Coram:

Hon'ble Mr. P.A. Augustian, Member (Judicial)
Hon'ble Mr. Pullela Nageswara Rao, Member (Technical)

Final Order No. 20019 /2025

Date of Hearing: 10.07.2024

Date of Decision: 09.01.2025

Per : P.A. Augustian

The issue in the present appeal is whether the Appellant can recover the sanctioned refund amount of Rs. 88,37,167/-.

2. The brief facts are the Respondent herein was manufacturing transformers and during the period from April to June, 2008, they have utilized CENVAT credit amounting to Rs. 4,02,70,471/- towards clearance of finished goods for home consumption and as per the

refund claim of cenvat credit on account of export during the said period it was only Rs. 1,23,04,383/- and they have made a claim for refund of entire Rs. 1,23,04,383/-. However, the Appellant vide Order-in-Original No. 18(R) 2009 dated 16.06.2009 partially sanctioned an amount of Rs. 88,37,167/- in cash and in appeal, it was confirmed vide Order-in-Appeal No. 133/2010/2010 dated 10.03.2010. Thus the issue has attained finality. However, in the meantime, a protective show cause notice was issued for recovery of the sanctioned amount and the Adjudication authority dropped the demand against the said show cause notice. Aggrieved by said order, present appeal is filed by the Revenue.

3. When the appeal came up for hearing, Ld AR reiterated the finding in the impugned order and draws our attention to the grounds of appeal. The Ld. AR further submits that the Respondent had utilized CENVAT credit amounting to Rs. 4,02,70,471/- towards clearance of finished goods for home consumption during the period from April to June, 2008, While the amount of refund claim of the credit on account of export during the said period was only Rs.1,23,04,383/- which proves the fact that the Respondent has not satisfied the conditions spelt out in clause No. 1 & 2 of the Notification No.5/2006 CE (NT) dated 14.03.2006. Thus the impugned order dated 25.02.2013 issued by the Commissioner is not legal and proper.

4. The Ld. Counsel for the Respondent submits that the appeal itself is untenable and liable to be dismissed as infructuous. The Revenue's appeal on merit on the same ground have already been, not only dismissed by the Commissioner (Appeals) on merit but the order of Commissioner (Appeals) also stands accepted in Review by the Committee of Commissioners on 28.05.2012. However, suppressing the

above facts, present appeal is filed. The Ld. Counsel further submits that once the Revenue have failed in appeal against the sanction of the refund on merit and the said order of the Commissioner (Appeals) have been accepted in Review, the Revenue cannot pursue the dropping by initiating further proceedings by way of protective show cause notice and the only remedy is to challenge such order before the Tribunal. The Ld. Counsel further submits that the proceedings initiated under the present appeal are also unsustainable, since no notice to show cause under Section 11A can be sustained against the orders passed by the Appellate Authority. Even otherwise if the Appellant's order is accepted, then there cannot be a case of erroneous refund for the purpose of invoking provisions of Section 11A. The Ld. Counsel relied on the decision of the Tribunal in the matter of **M/s. Tri Dos Laboratories Ltd Vs. CCE (2019 (370) E.L.T 485).** The Ld. Counsel also draws our attention to the decision of the Hon’ble High Court of Karnataka in the matter of **M/s.Dynamic Technologies Ltd Vs. Union of India (2005 (186) E.L.T 277 (Kar.**) wherein it is held that recovery of any refund can be made only upon modification of the Order-in-Appeal and not other ways. Similarly, the Hon’ble High Court of Allahabad in the matter of **M/s Honda SIEL Power Products Vs. Union of India (2020 (372) E.L.T 30 (Allahabad**) held that once the adjudication has taken place under Section 11B of the Central Excise Act, 1944. Department cannot proceed to recover on the basis of 'erroneous refund' under Section 11A so as to enable the refund order to be revoked, as the remedy lied under Section 35E, ibid for applying to the Appellate Tribunal for determination and not invoking Section 11A of Central

Excise Act, 1944. The Ld. Counsel also relied on large number of decisions in support of their contentions.

5. Heard both sides and perused the records.

6. We find that it is an admitted fact that the Respondent was holding CENVAT credit in their account at the relevant time and as per Section 5 of the CENVAT Credit Rules, if any input is used in manufacture of final product, which is cleared for export under Bond or letter of undertaking, the CENVAT Credit in respect of such input shall be allowed to be utilized by the manufacturer towards payment of duty of excise on any final product cleared for home consumption and where for any reason such adjustment is not possible, the manufacturer shall be allowed refund of such amount subject to such safe guards, conditions and limitations as prescribed in the relevant notification. The Respondent had applied for refund of unutilized CENVAT credit amounting to Rs.1,23,04,382/- and Adjudication authority as per the order dated 16.06.2009 sanctioned only Rs. 88,37,166/- though the Appellant admits that the CENVAT credit available against the goods exported during the same period was Rs. 1,23,04,383/-. Fact being so, and in view of the above discussion we find that the entire proceedings initiated against the Respondent are unsustainable.

7. Hence the appeal filed by the Revenue is dismissed.

(Order pronounced in Open Court on 09.01.2025)

(P.A.Augustian)
Member (Judicial)

(Pullela Nageswara Rao)
Member (Technical)