**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL**
**SOUTH ZONAL BENCH, CHENNAI**

**Appeal No. E/42618/2017**

(Arising out of Order-in-Appeal No.92/2017 (CTA-II) dated 31.7.2017 passed by the Commissioner of CGST & Central Excise (Appeals – II), Chennai)

M/s. Nissan Motor India P. Ltd. Appellant

Vs.

CCE, Chennai – IV Respondent

Appearance

Shri R. Rajaram, Consultant for the Appellant
Shri K.P. Muralidharan, AC (AR) for the Respondent

**CORAM**

**Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)**

Date of Hearing / Decision: **04.06.2018**

Final Order No. **41715 / 2018**

Brief facts are that the appellants are engaged in manufacturing motor cars and their parts and are availing the facility of CENVAT credit of duty paid on inputs, capital goods and service tax paid on input services. The appellant informed the department that to facilitate the process of simplifying the manufacturing activities in India, they decided to sell all the machinery and inventory owned by them to M/s. Renault Nissan Automotive India Pvt. Ltd. (herein after referred to as M/s.RNAIPL). The business change scheme accorded only to transfer of assets to M/s. RNAIPL and the liabilities would rest with the appellant. Thereafter, the appellant surrendered their registration certificate on 10.4.2012 and became non-functional. They then filed a refund claim on 28.1.2013 for Rs.3,62,58,851/- for the CENVAT credit balance and since they had utilized the balance on various occasions to the tune of Rs.3,37,40,140/-, under intimation to the department filed revised refund claim to the tune of Rs.25,18,712/- only. Show cause notice dated 15.9.2015 was issued as to why the refund claim should not be denied. After due process of law, the original authority rejected the claim of Rs.25,18,712/-. In appeal, Commissioner (Appeals) upheld the rejection. Hence this appeal.

2. On behalf of the appellant, ld. consultant Shri R.Rajaram submitted that the appellant has surrendered the registration certificate and has become totally non-functional. The whole of the assets were transferred to M/s. RNAIPL and the appellant has retained only the liabilities. In para 11 of the adjudication order, the adjudicating authority has noted that the appellant has removed all the assets / capital goods, duty paid inputs, semi-finished goods, finished products after payment of duty to M/s. RNAIPL, as per the business change agreement. The department vide letter dated 30.5.2016 had called for a list of assets as per the agreement which was later furnished by the appellant. The refund claim has been rejected by the authorities

below observing that the appellant ought to have chosen to transfer the CENVAT credit also under Rule 10 of CENVAT Credit Rules, 2004. As per the terms and conditions of the business change scheme agreement, the parties had agreed to transfer only the assets and the CENVAT credit was not included in the list of assets. Thus, CENVAT credit has not been transferred to M/s. RNAIPL and therefore the authorities below ought to have refunded the unutilized balance CENVAT credit for the reason of closure of factory / cancellation of registration. It is also submitted by him that there was an issue with regard to refund of amount in PLA amount which was sanctioned by the original authority. To support that the CENVAT credit which is lying in balance in the account due to closure of factory, has to be refunded to the assessee, the ld. consultant relied upon the decision in the case of Union of India Vs. Slovak India Trading Co. Pvt. Ltd. – 2007 (1) TMI 556 – SC. That the Hon'ble High Courts in the following cases have taken a similar view:-

(a) M/s. Lav Kush Textiles Vs. Commissioner of Central Excise – 2017 (5) TMI 1021 – Rajasthan High Court

(b) Commissioner of Central Excise Vs. Apex Drugs and Intermediaries Ltd. – 2011 (9) TMI 964 – AP High Court

(c) Rama Industries Ltd. Vs. Commissioner of Central Excise, Chandigarh – 2009 (2) TMI 136 P&H

3. The Tribunal in the following cases has ordered for refund of the balance CENVAT credit in the situation where the

assessee could not use the CENVAT credit due to closure of factory is as follows:-

(a) Computer Graphics Ltd. Vs. Commissioner of Central Excise – 2016 (8) TMI 1100

(b) M/s. Srinivasa Hair Industries Vs. Commissioner of Central Excise, Chennai – 2016 (6) TMI 673

(c) Delta Power Solution India Pvt. Ltd. Vs. Commissioner of Central Excise, Puducherry – 2017 (3) TMI 849

4. The ld. AR Shri K.P. Muralidharan supported the findings in the impugned order. He adverted to Rule 10 of CCR, 2004 and submitted that the appellant ought to have transferred the balance CENVAT credit to M/s. RNAIPL who has purchased the machinery and inventory from them. The said unit would thus be able to utilize the CENVAT credit. There is no provision in the law to refund the CENVAT credit in cases of closure of factory. Therefore, the authorities below have rightly rejected the claim.

5. Heard both sides.

6. It is correct that Rule 10 provides for transfer of CENVAT credit in case of transfer of ownership or shift of factory etc. In the present case, as per the business scheme change agreement entered into between the parties, there is no terms and conditions in respect of transfer of CENVAT credit to M/s. RNAIPL. The appellant has submitted that the liabilities are retained by the appellant. They have surrendered the registration and undisputedly they have become non-functional

with effect from 10.4.2012. Thus they have ceased to be manufacturer of cars with effect from 10.4.2012 due to closure of unit / surrender of Central Excise registration. A similar situation was analyzed by the Hon'ble High Court of Karnataka in the case of Union of India Vs. Slovak India Trading Co. Pvt. Ltd. – 2006 (7) TMI 9 - Karnataka High Court, wherein it was observed 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:*
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> *"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 :*
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> *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."*
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> *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."*

The said view was upheld by the Hon'ble Apex Court as reported in 2007 (1) TMI 556 – Supreme Court.

6.1 The Hon'ble High Court of Rajasthan in the case of M/s. Lav Kush Textiles (supra), following the decision in the case of Slovak India Trading Co. Pvt. Ltd. (supra) had held the issue in favour of the assessee.

6.2 In the case of Apex Drugs and Intermediates Ltd. (supra), the Hon'ble High Court of Andhra Pradesh observed as under:-

> *"On a true and fair construction of the provision as well the Rule entitles the manufacturer to refund of the cenvat credit 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. No notification of the Central Government setting out safeguards, conditions and limitations for the refund, in case of closure of the unit has been placed on record either before the Appellate Authority, the further Appellate Authority, the Tribunal or even before us.*
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> *In the aforesaid circumstances, no substantial question of law arises for consideration in this appeal and it is accordingly dismissed at the stage of admission. No costs."*

6.3 The Hon'ble High Court of Punjab & Haryana in the case of Rama Industries Ltd. (supra), observed as under:-

> *"We have heard learned counsel for the parties and have perused the paper book with their able assistance. The matter is covered against the revenue by the Division Bench judgment of Karnataka High Court in the case of Union of India v. Slovak India Trading Co. Pvt. Ltd., 2006 (2001) E.L.T. 559 (Kar.), wherei n it has been held that Rule 5 of Cenvat Credit Rules, 2002 (for brevity, 'the Rules') in terms does not prohibit refund in cash of Cenvat credit. On a further appeal against the aforesaid judgment*

> *of the Division Bench to the Supreme Court, Special Leave Petition has been dismissed by holding that the revenue did not file any appeal against many such orders passed by Tribunals at Delhi and Mumbai. The Tribunal at Delhi has passed one such order in the case of Eicher Tractors v. CCE, Hyderabad, 2002 (147) E.L.T. 457 (Tri.-Del.), whereas the Tribunal at Mumbai had passed three such orders, namely, Shree Prakash Textiles (Guj.) Ltd. v. CCE, Ahmedabad, 2004 (169) E.L.T. 162 (Tri.-Mumbai); CCE, Ahmedabad v. Babu Textile Industries, 2003 (158) E.L.T. 215 (Tri.-Mumbai); andCCE, Ahmedabad v. Arcoy Industries, 2004 (170) E.L.T. 507 (Tri.- Mumbai). The Tribunals in all the aforementioned cases have held that the assessee is entitled to refund in cash of the amount deposited if the assessee has gone out of the Modvat Scheme or his unit is closed. The Supreme Court has considered all the aforementioned decisions. Before the Supreme Court it was conceded by the revenue that no appeal had been filed against the orders of the Tribunal. Therefore, the order of the Division Bench of Karnataka High Court was upheld."*

7. Thus, the decisions cited by the ld. consultant in the above judgments as well as the decisions of the Tribunal have held that the appellant is eligible for refund of the balance CENVAT credit when the appellant ceases to be a manufacturer due to closure of factory. The circumstances being identical, following the ratio laid down in the above decisions, I am of the view that the rejection of refund claim is unjustified. The impugned order rejecting the refund claim is set aside and the appeal is allowed with consequential relief, if any.

(Operative portion of the order was
pronounced in open court)

(**Sulekha Beevi C.S.**)
Member (Judicial)

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