CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL CHENNAI

REGIONAL BENCH – COURT NO. III

Excise Appeal No.421 of 2006
(Arising out of Order-in-Original No.4/2006 dated 28.02.2006 passed by Commissioner of Central Excise, Pondicherry]

M/s.IBM India Private Ltd. **Appellant**
Third Floor, Subramanya Arcade,
No.12, Bannerghatta Main Road,
Bangalore 560 029.

VERSUS

Commissioner of Central Excise,
Goubert Avenue,
Beach Road,
Pondicherry 605 001. **Respondent**

<u>APPEARANCE</u> :

Shri J. Shankar Raman, Advocate
Shri Sankareswaran, Advocate
For the Appellant

Shri B.Balamurugan, AC (AR)
For the Respondent

CORAM :

HON'BLE MS. SULEKHA BEEVI. C.S., MEMBER (JUDICIAL)
HON'BLE MR. P. VENKATA SUBBA RAO,MEMBER (TECHNICAL)

DATE OF HEARING : 28.10.2019
DATE OF DECISION : 30.10.2019

<u>FINAL ORDER No. 41199 / 2019</u>

PER P. VENKATA SUBBA RAO

In the first round of litigation, this appeal was decided exparte by Final Order No.40073/2016 dt. 20.01.2006. Both Revenue and the assessee appealed before the Hon'ble High Court of Madras who by their order dt.08.10.2018 allowed the appeals and left the substantial questions of law open for consideration. This appeal has been restored by the Hon'ble High Court to the file of the Tribunal to be heard and decided on merits, giving liberty to the assessee and to the Revenue to canvas all points. Hence this appeal has been listed today.

2. Head both sides and perused the records.

3. The facts of the case after filtering out unnecessary details are that the appellant assessee M/s.IBM India Pvt.Ltd (IBMI) were manufacturing computers in their factory at Pondicherry. They availed cenvat credit of duty paid on inputs meant for use in the manufacture of these computers. IBMI was amalgamated with IBM Global Service India Pvt. Ltd. (IGSI) as per the scheme of amalgamation approved by order dt. 25.09.2004 of the Hon'ble Karnataka High Court with effective date of 05.01.2005 and transfer date of 01.04.2002. As per the scheme, all liabilities, debts, obligations and duties of IBMI stood transferred to IGSI with effective from the transfer date. Subsequently, IGSI have assigned, transferred, conveyed and sold certain assets to M/s.Lenovo (India) Pvt. Ltd. including manufacturing operations carried out from the said factory.

4. The Central Government issued an unconditional exemption notification No.23/2004-CE (as amended) exempting the computers manufactured by the appellant from payment of excise duty, w.e.f. 01.09.2004. On this date, the appellant had credit balance in their cenvat account. The SCN No.9/2005 dt. 04.07.2005 was issued to the

appellant alleging that the availment of credit attributable to the inputs lying in stock as such or contained in the finished goods / semi-finished goods when the computers became exempt w.e.f. 09.07.2004 is irregular.

5. The notice also noted that IGSI have applied for transfer of the balance in the PLA and cenvat credit account and the factory to their name after amalgamation and have taken credit in the cenvat credit. The notice alleged that as the credit attributable to the inputs lying in stock on the effective date of amalgamation was only Rs.4,60,83,405/-, the balance amount of Rs.2,35,26,999/- is to be disallowed / recovered in terms of Rule 10 (3) of CCR 2004.

6. Thus the Show Cause Notice called upon the appellants to explain as to (i) cenvat credit amounting to Rs.4,60,83,405/- should not be recovered from them under Rule 12/ Rule 14 of CCR 2004 read with Section 11A of Central Excise Act, 1944 along with interest (ii) credit of Rs.2,35,26,999/- that was taken in account of IBM Global should not be disallowed under Rule 10 (3) of CCR 2004 and recovered under Rule 14 of CCR 2004 read with Section 11A. After following due process of law, Ld. Commissioner ordered as follows :

> "I. I hold that CENVAT credit amounting to Rs.4,60,83,405/- relatable to the inputs lying in stock, as such and contained in finished goods / work-in-progress, as on 9.7.2004 is liable to be recovered from IGSI under Rule 12 of the CENVAT Credit Rules, 2002 read with Sec.11A (1) of the Central Excise Act, 1944.
> II. I disallow the credit of Rs.2,35,26,999/- that was taken in the accounts of IGSI under Rule 10 (3) of the Cenvat Credit Rules, 2004 in terms of Rule 14 ibid read with Sec. 11A (1) of Central Excise Act, 1944.
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> III. I adjust the amount of credits reversed by IGSI on 11.4.2005 and on 30.09.2005 towards the above demand.
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> IV. IGSI are liable to pay interest under Sec.11AB of the Central Excise Act, 1944 for the amount of Rs.4,60,83,405/- from 09.07.2004 and on

> Rs.2,35,26,999/- from the date on which the credit was taken by IGSI, till the date of actual reversals (11.4.2005 and 30.9.2005)
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> V. Inasmuch as the entire credit amounting to Rs.6,96,10,404/- is irregular, the reversals made by IGSI is proper and hence their protest for reversing such amounts is hereby vacated."

7. Ld. counsel for the appellant would submit that two issues are to be decided in this case. The first question is whether the transitional provision under Rule 11 (3) of CCR 2004 inserted by Notification No.10/2007-CE (NT) dt.1.3.2007 (which mandates that if the final product of assessee become exempt absolutely, the manufacturer or producer shall be required to pay an amount equivalent to cenvat credit, if any, taken by him in respect of the inputs received for use in the manufacture of final products and is lying in stock or in process or is contained in the final product lying in stock) will be applicable to the period prior to date of this notification (1.3.2007).

8. The second question is whether they are entitled to cenvat credit taken by the predecessor unit under Rule 10 CCR 2004 or such transfer is invalid in view of Rule 10 (3) of CCR 2004.

9. Elaborating first issue, Ld. counsel would submit that assessee is entitled to take cenvat credit if the final product is dutiable and not otherwise. Consequently, if the product becomes exempted unconditionally from duty assessee will not be entitled to take credit from that date. As far as credit that has already been taken, which is attributable to the inputs lying in stock or work in progress or the final products lying in stock (in respect of which, evidently no duty will be paid because of the exemption) is

concerned, whether the assessee can continue to enjoy cenvat credit already taken or the same needs to be reversed is the question. He would submit that the relevant legal provision is Rule 11 of Cenvat Credit Rules,2004 which reads as follows :

"11. Transitional provision

(1) Any amount of credit earned by a manufacturer under the CENVAT Credit Rules, 2002,as they existed prior to the 10th day of September, 2004 or by a provider of output service under the Service Tax Credit Rules, 2002, as they existed prior to the 10th day of September, 2004, and remaining unutilized on that day shall be allowed as CENVAT credit to such manufacturer or provider of output service under these rules, and be allowed to be utilized in accordance with these rules.

(2) A manufacturer who opts for exemption from the whole of the duty of excise leviable on goods manufactured by him under a notification based on the value or quantity of clearances in a financial year, and who has been taking CENVAT credit on inputs or input services before such option is exercised, shall be required to pay an amount equivalent to the CENVAT credit, if any, allowed to him in respect of inputs lying in stock or in process or contained in final products lying in stock on the date when such option is exercised and after deducting the said amount from the balance, if any, lying in his credit, the balance, if any, still remaining shall lapse and shall not be allowed to be utilized for payment of duty on any excisable goods, whether cleared for home consumption or for export.

(3) A manufacturer or producer of a final product shall be required to pay an amount equivalent to the CENVAT credit, if any, taken by him in respect of inputs received for use in the manufacture of the said final product and is lying in stock or in process or is contained in the final product lying in stock, if, —

(i) he opts for exemption from whole of the duty of excise leviable on the said final product manufactured or produced by him under a notification issued under section 5A of the Act; or

(ii) the said final product has been exempted absolutely under section 5A of the Act, and after deducting the said amount from the balance of CENVAT credit, if any, lying in his credit, the balance, if any, still remaining shall lapse and shall not be allowed to be utilized for payment of duty on any other final product whether cleared for home consumption or for export, or for payment of service tax on any output service, whether provided in India or exported.

(4) A provider of output service shall be required to pay an amount equivalent to the CENVAT credit, if any, taken by him in respect of inputs received for providing the said service and is lying in stock or is contained in the taxable service pending to be provided, when he opts for exemption from payment of whole of the service tax leviable on such taxable service under a notification issued under section 93 of the Finance Act, 1994 (32 of 1994) and after deducting the said amount from the balance of CENVAT credit, if any, lying in his credit, the balance, if any, still remaining shall lapse and shall not be allowed to be utilized for payment of duty on any excisable goods, whether cleared for home consumption or for export or for payment of service tax on any other output service, whether provided in India or exported."

He would submit that prior to 1.3.2007, this rule had only sub rules (1) & (2) which provide for reversal of cenvat credit by any manufacturer who opts for exemption from whole of duty based on notification which allows such exemption based on the value or quantity of clearance during the financial year (Rule 11 (2) of CCR 2004). Subsequently, w.e.f. 1.3.2007, sub-rule (3) was inserted extending requirement of reversal of cenvat credit even in cases where an assessee has either opted for exemption notification or the assessee's final product became absolutely exempt. In the present case, it is undisputed that the entire credit in question was taken prior to 1.3.2007. The exemption was not based on the value of clearances or its quantity but is a general unconditional exemption notification for their final products. In terms of Rule 11(3) such cenvat credit needs to be reversed. However, in their case clearances were made prior to the date of introduction of sub-rule. There is nothing in the notification or the sub rule to suggest that this sub rule was inserted either by way of an Explanation or that it had retrospective application. In the absence of any explicit provision, this sub-rule [11 (3)] has only prospective application. Hence reversal of cenvat credit as demanded by Revenue on this count needs to be set aside.

10. With respect to the transfer of credit in the case of amalgamation, lease or transfer of a factory to a joint venture, he would submit that Rule 10 of CCR 2004 permitted such transfer. Rule 10 (1) provided for transfer of cenvat credit on account of sale, merger, amalgamation, lease or transfer of the factory while Rule 10 (2) provided for transfer of cenvat credit in case of transfer of business. Thus, both in the case of transfer of business and the case of transfer of factory, cenvat credit is transferable to the new entity. Rule 10 (3) of CCR 2004 further states that cenvat credit shall be transferred under sub rules (1) & (2) only if stock of inputs as such or in process or the capital goods are also transferred along with factory or business premises to the new site or ownership and such inputs or capital goods have been duly accounted for to the satisfaction of Deputy Commissioner of Central Excise or Assistant Commissioner of Central Excise.

11. He would submit that the case of the department is that they have not fulfilled the requirement under Rule 10 (3) of proving that the capital goods and inputs have been transferred to the new entity. He would argue that this is very unusual allegation. In their case, they have not transferred part of the factory or business but the entire business and they operate from the same premises. It is not in dispute that all assets and liabilities have been transferred to the new entity. There is nothing on record to show that some of the inputs or capital goods have been diverted or sold outside. In fact, there is no such allegation at all. Under these circumstances, he would urge that they are squarely covered by provisions of Rule 10 (2) of CCR 2004 and are not covered by mischief of Rule 10 (3) of CCR 2004.

12. On the first question of reversal of CENVAT credit under Rule 11 (3), he relies on the case law of TAFE Ltd. Vs CCE Madurai-II - 2015 (320) ELT 357 (Mad.) affirmed by the Hon'ble Supreme Court reported in 2015 (324) ELT A86 (SC). The relevant portion of the judgment of the Hon'ble High Court of Madras in this case is contained in paras 17 & 18 which are reproduced below :

> "**17.** The introduction of Rule 11(3) of the Cenvat Credit Rules, 2004, by Notification No. 10/2007-C.E. (N.T.), dated 1-3-2007 and the Tax Research Unit Circular in D.O.F. No. 334/1/2007-TRU, dated 28-2-2007 clarifying that it will come into effect immediately, makes it clear that the position of law as it stood decided in the assessee's own case by the Karnakata High Court, the appeal against which was dismissed by the Supreme Court, is the correct position. The Tribunal in this case erred in distinguishing the decision of the Bangalore Bench Tribunal placing reliance on *Albert David Ltd.* case, referred

> supra. In any event, *Ashok Iron and Steel Fabricators* case, referred supra, is a Larger Bench decision and the same has been upheld by the Supreme Court and that would be binding on the Tribunal, rather than the Two-Member Bench decision in *Albert David Ltd.* case, referred supra.
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> **18.** For the foregoing reasons, we allow the appeal answering the substantial questions of law (1) to (4) in favour of the appellant and against the department. In such view of the matter, we do not propose to answer the substantial question of law (5) as the same is purely academic. No costs."

13. On the question of denial of cenvat credit to the new entity on the ground that there was no evidence of transfer of raw material, he would rely on the order of the Tribunal Ahmedabad in the case of *Tera Cables India Pvt. Ltd. Vs CCE Ahmedabad* - 2010 (258) ELT 111 (Tri.-Ahmd.). This order was upheld by the Hon'ble High Court of Gujarat [2014 (299) ELT A61 (Guj.)]

14. Per contra, Ld. D.R supports the impugned orders. He agrees that the facts of the case and dispute have been correctly laid out by the Ld. Counsel for the appellant. With respect to the availment of cenvat credit lying unutilized when the final products were exempted, he would submit that scheme of cenvat credit is very clear that if the final products are not dutiable, no cenvat credit is admissible in terms of rule 6 of CCR 2004. It does not matter when the exemption notification has come into force. In the assessee's case computers became fully exempt w.e.f. 09.07.2004. Therefore, the inputs which have gone into the manufacture of computers which were lying in stock on that date, and the credit taken on this account and lying in balance on that day needs to be reversed.

15. He relies on the case law of *Albert David Ltd.* - 2003 (151) ELT 443 (Tri.-Del.) in which it was held that once the final product becomes exempt the assessee cannot utilize unutilized cenvat credit availed on this account. This order of the Tribunal was upheld by the Hon'ble Supreme Court [2003 (157) ELT A81 (SC)]. Therefore, the appellant is not entitled to disputed cenvat credit.

16. Countering this argument Ld. Counsel for the appellant submits that the case of *Albert David* (supra) has been reckoned by the Hon'ble High Court of Madras in the case of *TAFE Ltd.* (supra) while ruling that no cenvat credit under Rule 11 (3) needs to be reversed. This decision of the Hon'ble High Court of Madras has also been upheld by the Hon'ble Apex Court.

17. On the question of transfer of credit to the new entity Ld. D.R submits that sub-Rule (3) of Rule 10 is very categorical that the transfer of credit to the new entity is allowed only if the inputs as such or in process or the capital goods are also transferred along with factory or business and accounted for to the satisfaction of the Dy. Commissioner or Asst. Commissioner of Central Excise and the appellant has failed to show such transfer Therefore, appellant is not entitled to the cenvat credit of the disputed amounts.

18. We have considered the arguments on both sides and perused the records.

19. As far as the first question of reversal of cenvat credit availed on inputs lying unutilized in the cenvat credit account or contained in the inputs lying in stock or final products lying in stock on the day when the

final products becomes fully exempt is concerned, we find that Rule 11 (3) of CCR 2004 specifically provides for such a reversal. This sub rule was inserted from 1.3.2007. There is nothing on record for us to believe that this sub rule had retrospective application. In the absence of any specific provision, fiscal statutes are only presumed to have prospective application. We also find that in respect of exemptions based on the value or quantity of clearances in a financial year sub rule (2) of Rule 11 had always provided for such reversal. The present case does not pertain to exemption based on value of clearances. Therefore, we find that the demand for reversal of the cenvat credit is without any authority of law applicable during the relevant period. We have considered the order of the Tribunal Delhi in the case of *Albert David* (supra) upheld by the Supreme Court, which was issued in the context of erstwhile Modvat Credit Rules. We also note that the jurisdictional High Court of Madras in the case of *TAFE (India)* (supra), has considered the case law of *Albert David* also in the context of the introduction of Rule 11 (3) of CCR 2004 and held that this sub-rule had only prospective application and not retrospective application.

20. We also find that after the introduction of Rule 11 (3) by Notification No.10/2007 dt 1.3.2007 the Tax Research Unit of CBEC has issued Circular No.334/1/2007-TRU dt. 28.2.2007 clarifying that it will come into effect immediately. The letter does not suggest that Rule 11 (3) was supposed to have retrospective effect. Therefore, we find that it has never been the intention to give retrospective application to Rule 11 (3). In consequence, demand on this count along with

interest and penalties on this account needs to be set aside and we do so.

21. As far as the demand on account of transfer of cenvat credit is concerned, it is clear from the details narrated in the SCN and the impugned order that all assets and liabilities of the previous entity have been passed on to the successor entity. Under these circumstances, the allegation that there is no evidence to satisfy the Asst. Commissioner or Deputy Commissioner of Central Excise that stock of inputs as such or in process or the capital goods have also been transferred to the successor entity is, at best, far fetched. The satisfaction of AC or DC or otherwise should also be based on same cogent reasons. We find no reasons or evidence because of which the Asst. Commissioner or Deputy Commissioner has come to the conclusion that the inputs or capital gods have not been transferred to the successor unit when the entire business itself has been transferred at the very same premises to the successor entity. In view of the above, we find that demand on this account also must fail.

22. In view of the above, appeal is allowed and the impugned order is set aside with consequential benefits, if any.

(Order pronounced in court on 30.10.2019)

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

(P. Venkata Subba Rao)
Member (Technical)

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