

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

Excise Appeal No.41806 of 2013

(Arising out of Order-in-Original No. 4/2013 dated 16.5.2013 passed by the Commissioner of Central Excise, Chennai – IV)

M/s. WIPRO Ltd.

No. C-1, SIPCOT Industrial Park
Irungattukottai – 602 117
Sriperumbudur Taluk.

Appellant

Vs.

Commissioner of GST & Central Excise

Chennai Outer Commissionerate
Newry Towers, II Avenue, Anna Nagar
Chennai – 600 040.

Respondent

APPEARANCE:

Shri S. Muthuvenkataraman, Advocate for the Appellant
Smt. K. Komathi, ADC (AR) for the Respondent

CORAM

Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)
Hon'ble Shri M. Ajit Kumar, Member (Technical)

Final Order No.40401/2023

Date of Hearing: 01.06.2023
Date of Decision: 05.06.2023

Per Ms. Sulekha Beevi C.S.

Brief facts of the case are that the appellant is engaged in the manufacture of hydraulic cylinders and pars. They are availing CENVAT credit on inputs, capital goods and input services. M/s. WIPRO Infrastructure Engineering Ltd. which was having central excise registration had an EOU unit which was also engaged in manufacture of hydraulic cylinders. They later got converted into DTA Unit. In the same premises, their Plant – II which is a DTA unit was engaged in the manufacture of hydraulic cylinders and registered with the Central Excise Department. The appellant requested the Deputy

Commissioner, Poonamallee Division after exit as EOU unit, for the merger of these two units which was accepted by the department. Subsequently, merger took place with effect from 27.3.2008. The appellant had transferred the CENVAT credit which was lying in Plant – I, which was earlier an EOU unit to their merged DTA unit. The department was of the view that as per sub-rule (3) of Rule 10 of CENVAT Credit Rules, 2004, only if the ownership of capital goods / inputs are transferred to the other unit, the assessee would be eligible to have the credit transferred. The credit so transferred to the appellant-unit appeared to be not legal and proper. Show Cause Notice was issued proposing to recover the transferred credit along with interest and for imposing penalties. After due process of law, the original authority confirmed the demand along with interest and imposed penalty. Aggrieved by such order, the appellant is now before the Tribunal.

2. The learned counsel Shri S. Muthuvenkataraman appeared and argued on behalf of the appellant. It is submitted that the appellant had two units adjacent to each other. One of the units was clearing goods into DTA and the other unit was earlier functioning as an 100% EOU. Both the units were having CENVAT credit in their accounts separately. In 2007, the two units underwent a merger in accordance with the prescribed rules and procedures effectively consolidating into a single unit operating in the DTA. As part of this merger, CENVAT credit which was previously held by the EOU was transferred to the books of accounts of the merged DTA unit. The department alleges that such transfer of credit is impermissible as per provisions of sub-rule (3) of Rule 10 of CENVAT Credit Rules, 2004. The learned counsel

submitted that the capital goods and inputs lying in the stock have been transferred / merged with the appellant-unit and therefore the credit which was lying in the earlier EOU also is eligible to be transferred to the appellant unit.

3. The decision of the Tribunal in the case of Sun Pharmaceuticals Industries Ltd. Vs. CCE reported in 2010 (251) ELT 312 (Tri. Chennai) was relied by the learned counsel to submit that the very same issue was considered by the Tribunal and held that the credit so transferred is not against the provisions of law. The said decision was rendered by the Tribunal following the Larger Bench decision of the Tribunal in the case of CCE, Rajkot Vs. Ashok Iron and Steel Fabricators reported in 2002 (140) ELT 277 (Tri. LB) wherein it was held that the statute provides for reversal of CENVAT credit only in the case where the credit has been illegally or irregularly taken'. In the present case, department does not dispute that the credit availed by the EOU is not admissible. The transfer of the credit to the DTA unit after merger being eligible credit has to be allowed.

4. The appellant submitted that the issue as to whether the accumulated credit of the debonding unit can be carried forward to the DTA unit was considered by the Tribunal in the case of Technocraft Industries (India) Ltd. Vs. CCE, Thane reported in 2019 (369) ELT 1144 (Tri. Mum.) which has addressed the situation. The decision in the case of Jubilant Life Sciences Ltd. Vs. CCE, Thane reported in 2019 (10) TMI 580 was also relied.

5. The learned counsel argued that the 100% EOU unit having undergone the process of debonding stands in a comparable position to other similarly situated taxpayers. Therefore, the credit which has

been rightly availed has to be allowed to be transferred to the merged unit in all fairness and justice. He prayed that the appeal may be allowed.

6. The learned AR Ms. K. Komathi supported the findings in the impugned order.

7. Heard both sides.

8. For better appreciation, Rule 10 of CENVAT Credit Rules, 2004 is reproduced as under:-

RULE 10. Transfer of CENVAT credit. – (1) If a manufacturer of the final products shifts his factory to another site or the factory is transferred on account of change in ownership or on account of sale, merger, amalgamation, lease or transfer of the factory to a joint venture with the specific provision for transfer of liabilities of such factory, then, the manufacturer shall be allowed to transfer the CENVAT credit lying unutilized in his accounts to such transferred, sold, merged, leased or amalgamated factory.

(2) If a provider of output service shifts or transfers his business on account of change in ownership or on account of sale, merger, amalgamation, lease or transfer of the business to a joint venture with the specific provision for transfer of liabilities of such business, then, the provider of output service shall be allowed to transfer the CENVAT credit lying unutilized in his accounts to such transferred, sold, merged, leased or amalgamated business.

(3) The transfer of the CENVAT credit under sub-rules (1) and (2) shall be allowed only if the stock of inputs as such or in process, or the capital goods is also transferred along with the factory or business premises to the new site or ownership and the inputs, or capital goods, on which credit has been availed of are duly accounted for to the satisfaction of the Deputy Commissioner of Central Excise or, as the case may be, the Assistant Commissioner of Central Excise."

(Emphasis supplied)

9. After considering the submissions of both sides and on perusal of records, it is seen that the allegation of the department is, that only if there is a transfer of ownership on account of sale, merger, amalgamation and there is transfer of ownership of capital goods, inputs etc. as per sub-rule (3) of Rule 10 of CENVAT Credit Rules, 2004, the CENVAT credit can be transferred. It is thus alleged that as there is no transfer of capital goods / inputs as required under the sub-rule

(3) of Rule 10 and the CENVAT credit lying unutilized in the accounts of the earlier EOU cannot be transferred to the merged DTA Unit. We do not find anything in Rule 10 which disallows transfer of CENVAT credit in the manner alleged by department. So also there is no dispute that the credit availed by the EOU which has been transferred is ineligible. The very same issue was considered by the Tribunal in the case of Technocraft Industries (supra). The relevant portion of the order is as follows:-

1. M/s. Technocraft Industries (India) Ltd. operated two facilities under the '100% Export Oriented Unit' scheme in the Foreign Trade Policy notified by the Director General of Foreign Trade under the Foreign Trade (Development & Regulation) Act, 1992. Both units opted out of the scheme and, upon debonding on 29th September, 2008 and 29th January, 2009 respectively, had balances of Rs. 93,64,988 and Rs. 1,33,38,504 in their Cenvat credit account arising from inputs, capital goods and input services procured by them. Proceedings were initiated against them to deny them continuity of the credit and for recovery of Rs. 8,31,031 that was utilized, between 30th September, 2008 and 6th December, 2008, by Unit I for discharge of duty liability on clearance of 'cotton yam' valued at Rs. 2,01,70,715.

2. Aggrieved by the confirmation in Order-in-Original No. 16/BR-16/Th-I/2010, dated 10th March, 2010 of Commissioner of Central Excise, Thane-I of the denial of credit balance, recovery of duty, along with interest as applicable, and imposition of penalties, appellant seeks relief. The findings of the adjudicating authority are that, consequent upon debonding of the two erstwhile units under the scheme in the Foreign Trade Policy, the new units registered under Central Excise Act, 1944 would be deemed to have commenced existence afresh and, that sans entitlement to the transfer provisions, in Rule 10 of Cenvat Credit Rules, 2004, or transitional provisions, in Rule 11 of Cenvat Credit Rules, 2004, as well as lack of any specific provision for retention by such debonded units, the accumulated credit lapses on date of debonding. On scrutiny of the records, it appears that the capital goods, both indigenous and imported, as well as finished goods had been assessed to appropriate duties on debonding and it also appears that these duties had not been subsumed in the accumulated credit.

6. Whether holding the title to those privileges or not, all manufacturers, other than those operating outside the 'customs territory', are registered under the Central Excise Act, 1944 and subject to the same excisability under Central Excise Act, 1944. The administration of the registration system does not, and cannot, create a separate class of coverage under the Central Excise Act, 1944 other than as envisaged in that statute. The sole difference, therefore, lies in duty structure that is applicable to them. Duty liability on domestic clearances confers on both the access to Cenvat credit scheme. That is not disputed by Revenue. There any dispute on the factum of exports effected by the appellant from the two facilities operated

as '100% export oriented units' with resultant inevitable accumulation of credit.

7. The scheme of indirect taxation requires that the tax burden is borne by the ultimate consumer, i.e. non-assessee, and all assessees in the production chain merely collect the duty for remitting to the government. At the same time, excise duties are limited to the contribution made to the manufacture of any goods; this requires that, for the proper administration thereof, each stage in the manufacturing process should be entitled to disassociate itself from the duties discharged upto the immediately preceding for computation of excise liability. Thus the full burden of duty should, without the privilege of passing on, be borne by the first non-assessee in the chain of transactions. The input credit scheme is devised towards that end and embodied as the Cenvat Credit Rules, 2004. Denial of Cenvat credit accumulated from duties discharged on procurements employed in exported goods would, therefore, load the burden on the exporter which defeats the very premise that is contained in the Cenvat Credit Rules, 2004.

8. As pointed out in the impugned order, the provisions of Rule 10 or Rule 11 will not apply to debonding units. It is also patently clear that a similar provision has not been explicitly incorporated in the Cenvat Credit Rules, 2004 for such debonding units. At the same time, Rule 5 of Cenvat Credit Rules, 2004 entitle exporting units, including '100% export oriented units', to claim refund of such accumulated credit at periodic intervals. Non-recourse to this privilege does not exclude them from entitlement to such. It may also be worth noting that the eligibility for refund is contingent only upon inability to utilize the accumulated credit for discharge of duty liability on clearance of goods domestically. Unlike the limitation of periodic eligibility for recourse to the refund route, utilization is open-ended. This provision obviates the need for explicit provision that the adjudicating authority seeks.

9. The existence of the appellant as an assessee has not been erased, substituted or subsumed at any point in time. The continued existence of the manufacturing facility is not compromised by a hiccup that is rooted in administrative orderliness. The provenance of the accumulated credit is not questioned. The statutory entitlement to regular monetization of the accumulated credit cannot be alienated; the alternative of utilization is not restricted by any condition. Denial of such utilization would have the impact of taxing the exporter as ultimate consumer and burdening the appellant with an implied duty on exports that is not authorized by law. To do so is an act illegality. Accordingly, we hold that denial of carry forward of accumulated Cenvat credit to assessees debonding from the '100% Exported Oriented Unit' scheme to continue operations without the privileges is not correct in law and is set aside. Appeals are allowed."

10. So also in the case of Sun Pharmaceuticals (supra), the Tribunal

held as under:-

"8. We find that at the material time the CER or CCR did not contain any provision barring the 100% EOUs from availing cenvat credit or utilizing the same for payment of duty on excisable goods removed to the DTA or for payment of duty on goods exported under claim for rebate. Also there exists no bar for a DTA unit carrying over inputs and the cenvat credit balance in its accounts when it got converted into an EOU. We also observe that this Tribunal in *Waterbase Ltd. v. CCE, Guntur* reported in 2005 (187) E.L.T. 346 (Tri. - Bang.) had made the following observations.

“6. We have gone through the rival contentions. The appellants have informed their intention of taking Cenvat credit. The Department acknowledged the intimation sent by the appellants. In these circumstances, the appellants started taking credit. Therefore, there is no contumacious conduct on the part of the appellants warranting imposition of any penalty. Therefore the penalties imposed on the appellants and on Shri P. Ravi, General Manager are set aside. As regards the merits of the case, we find that there is no rule corresponding to the erstwhile Rule 100H of the Central Excise Rules, 1944. The interpretation that there is no prohibition for 100% E.O.U. to take Cenvat credit appears to be correct. However, in view of Rule 17 of the Central Excise Rules, the duty should be paid by a 100% E.O.U. only through account current. Account current refers to PLA. In view of this position, the appellant cannot pay duty through Cenvat credit. In that case, the appellant will not be in a position to utilize the Cenvat credit at all and it does not make any sense to allow him to take credit. The inconsistency between Cenvat Rules and Central Excise Rules can be removed only by the legislature. As such in view of the Rule 17 of the Central Excise Rules, the appellant cannot avail the credit taken by him for payment of duty in respect of clearance to DTA. Therefore, the demand of duty only is confirmed. As already stated, the penalties are set aside. However the demand of interest under Section 11AB is upheld.”

The CBEC has since made good the deficiency in the rules noted by the Tribunal by providing for the EOUs to utilize the cenvat credit. In CCE, Rajkot v. Ashok Iron and Steel Fabricators reported in 2002 (140) E.L.T. 277 (Tri. - L.B.) cited by the Ld. Counsel for the appellants, this Tribunal held as follows :-

“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 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. Here, the credit 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.

9. In the absence of provisions requiring the DTA unit to reverse the credit balance at the time of its conversion into an EOU, the above observations of the Tribunal apply. Therefore, the impugned demand and penalties are not sustainable. In the result, the impugned order is set aside and this appeal allowed.”

11. In the case of Jubilant Life Sciences Ltd. (supra), it is held as under:-

“3. At the outset, the learned Advocate for the Appellant has submitted that the Appellant, after conversion of their 100% EOU to DTA unit, continued to retain the same Central Excise registration, hence the credit lying in balance as on the date of de-bonding ought to be admissible and has been rightly transferred to the DTA unit. It is his contention that the issue of admissibility of CENVAT Credit lying in balance in the accounts of 100% EOU, on the date of its conversion to DTA unit, is no more res integra and covered by the following judgment of the Tribunal.

i) Technocraft Industries (India) Ltd Vs CCE 2018 (12) TMI 8 - CESTAT, Mumbai

ii) Tecumseh Products India P.Ltd Vs CC,CE&ST, Hyderabad-IV 2016 (336) ELT 685 (Tri-Bang.)

iii) John Deere India Pvt. Ltd Vs CCE, Pune-III 2015 (326) ELT 205 (Tri-Mumbai)

iv) CCE, Thane-I Vs Sequent Scientific Ltd 2018 (4) TMI 590 - CESTAT Mumbai

4. The learned A.R. for the Revenue reiterates the findings of the learned Commissioner (Appeals).

5. We have carefully considered the submissions advanced by both sides and perused the records. The short point involved in the present appeal for consideration is whether CENVAT Credit lying in balance in the books of account of 100% EOU as on the date of de- bonding, could be transferred to the DTA unit. We find that the issue has been considered by this Tribunal in series of judgments viz. Technocraft Industries (India) Ltd Vs CCE (supra), Tecumseh Products India P.Ltd Vs CC,CE&ST (supra), Hyderabad-IV, John Deere India Pvt. Ltd Vs CCE(supra), Pune-III and CCE, Thane-I Vs Sequent Scientific Ltd(supra). It has been consistently held by the Tribunal in all these cases that the CENVAT Credit lying in balance as on the date of de-bonding of 100% EOU and conversion to DTA unit, could be transferred to the DTA unit and be utilised by the said unit. Following the principle consistently laid down by the Tribunal in aforesaid cases, we do not find merit in the impugned order, which is contrary to the said precedents.

6. Consequently, the same is set aside and the appeal is allowed with consequential relief, if any, as per law."

12. By judicial discipline, following the ratio laid down by the judgments above, which is squarely applicable to the facts of the case, we hold that the demand cannot sustain. The impugned order is set aside. The appeal is allowed with consequential relief, if any, as per law.

(Pronounced in open court on 5.6.2023)

(M. AJIT KUMAR)
Member (Technical)

(SULEKHA BEEVI C.S.)
Member (Judicial)