IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.

Date of Hearing/Order: 1.11.2017

Appeal No. E/1887/2011-SM

(Arising out of Order-in-Appeal No. 104/BPL/2011 dated 26.4.2011 passed by the Commissioner, Central Excise, Bhopal)

CCE, Bhopal Appellant

Vs.

Raymond Ltd. Respondent

Appearance

Shri U. Sengraj, D.R. - for the appellant

Shri Prakash Shah, Advocate - for the respondent

CORAM: **Hon'ble Mr. M.V. Ravindran, Member (Judicial)**

Final Order No. 57558/2017

Per M.V. Ravindran :

This appeal is filed by Revenue against the Order-in-Appeal No. 104/2011 dated 26.4.2011.

2 Heard both sides and perused the record.

3. Heard in detail the submissions of DR and ld. Counsel for the respondent, he files a short submission which is taken on record.

4. After hearing both the sides and on perusal of records, it transpires that the issue is regarding the refund of the amount lying unutilized in the Cenvat credit account of the respondent. It is the claim of the respondent in the refund claim filed that the preventive officers during the visit of the factory had restricted them from using the Cenvat credit available for the clearances of tops. It is also the submission that they had been directed to pay entire duty liability on the tops through PLA. Subsequently, they wrote a letter dated 24th June, 2008 to the jurisdictional Central Excise Commissionerate informing the details. It is also submitted that when they preferred the refund claim, clearly mentioned the reason for filing the refund claim is due to the unutilized Cenvat credit lying in balance which has arisen because of restriction by the preventive team to use the same for discharge the duty liability.

5. Such the said refund claim was sought to be rejected by issuance of the show cause notice dated 14.6.2010, wherein the only reason put forth by the authorities is that they are not covered the provisions of Rule 5 of Cenvat Credit Rules, 2004 to claim the refund. The adjudicating authority rejected the refund claim. On appeal, the first appellate authority has set aside the impugned order before him and allowed the refund claims to the respondent.

6. Revenue's case in the grounds of appeal and as argued by the ld. DR is summarized as under:

(i) Commissioner (Appeals) has erred in concluding that the respondent is entitled for refund of unutilized Cenvat credit as the appellant should not have availed Cenvat credit on the tops controls as they availed the benefit of exemption Notification No. 30/2004;

(ii) That nothing has been brought on record that the appellant was prevented from taking utilizing Cenvat credit lying in their account and

(iii) Commissioner (Appeals) has relied upon the decision of ***Gauri Plasticulture (P) Ltd.*** – 2006 (202) ELT 19 (Tri.-LB) which is incorrect.

7. The ld. Counsel submits that the first appellate authority was correct in coming to the conclusion. His submissions are that they had filed a letter on 24th June 2008 which is not disputed which clearly indicated that they had been forced to pay the duty through PLA or in cash; that the top which was procured on payment of duty was used for manufacturing of tops which was dutiable and not covered under Notification No. 30/2004 till 7th July 2009 and the entire credit which has been sought as refund is for the period in question i.e. till 7th July 2009; the first appellate authority has correctly held that they are eligible for refund claim. It is his submission that the tops were fully exempted from the payment of

duty under Sr. No. 10 only if they are made out of fibres. He submits that similar issue has been decided by the Hon'ble High Court of Karnataka in the case of ***Union of India Vs. Slovak India Trading Co. Pvt. Ltd.*** – 2006 (201) ELT 559 (Kar.), wherein it was held that if the unit is closed and the Cenvat credit is lying in balance, the same should be refunded in cash and the same view was expressed by the Hon'ble High Court of Bombay in the case of ***CCE, Vs. Jain Vanguard Polybutlene Ltd.*** – 2010 (256) 523 (Bom.) and upheld by the Supreme Court as reported at 2015 (326) ELT A86 (SC).

8. On careful consideration and the submissions made, I find that the first appellate authority in the impugned order in para 5 has specifically recorded the reasoning for setting aside the impugned order which I find are correct and no interference is called for. The said findings are recorded are reproduced below:

> "From perusal of letter dated 24.6.2008 of the appellants addressed to the Additional Commissioner it revealed that during their visit to unit of Appellant by the officers of preventive wing had pointed out that since the Appellants are availing facility of Cenvat Credit of duty paid on input namely Polyester tow, they are not eligible for benefit of exemption provided under Notification 30/2004. The appellants were in agreement with this, however, in order to continue benefit of said notification, they have paid an amount of Rs.16,81,977/- to the extent of Cenvat credit utilised towards payment of duty on the polyester top manufactured and cleared by them, vide TR 6 challan No. CE/03/08-09 dated 23.6.2008 "Under Protest", with right to claim refund of the amount so paid. The Appellants have submitted that in the writ petition No. 2931/2008 filed by the

Appellants, the Hon'ble Bombay High Court, by its judgment dated 16.6.2009 was pleased to hold that the appellants are entitled to the benefit of exemption under S.No. 10 of Notification No. 30/2004 dated 9.7.2004 in respect of tops manufactured out of duty paid tow and accordingly allowed the said petition. In respect the said judgment, the only dispute raised by the department is no longer res-integra and the appellants become entitled to refund of the accumulated unutilised credit balance of Rs.31,78,019/- lying in their Cenvat Credit Account.

The Appellants have submitted since they were prevented to use Cenvat credit, they had to pay Rs. 40,87,218/- in cash. Now it is settled that they were eligible for utilisation of Cenvat credit. However, they are not in position to utilise accumulated credit of Rs.31,78,019/- as the goods are fully exempted, therefore, they are eligible for unutilised Cenvat credit. In this context, I find that Rule 5 of Cenvat Credit Rules, 2004 provides for refund of Cenvat Credit, Hon'ble Tribunal in the case of Gauri Plasticulture (P) Ltd. Vs. CCE Indore – 2006 (202) ELT 199 (T-LB) have held that if denial of credit has compelled on assessee to pay duty out of PLA, refund of the same would be admissible in cash to the extent of payment of duty in cash during that period. However, if no cash payment towards duty were made, through PLA and the credit would have remained, unutilised in account book, such credit cannot be allowed in cash. In the present case, the Appellant had availed credit on polyester tow and utilised the same for payment of duty on polyester top. However on being objected by the officers that Cenvat credit is not admissible amount utilised to the extent of Rs.16,81,977/- was paid by them cash and subsequent clearances were effect on payment of duty in cash only. Thus they were prevented from utilisation of from accumulated credit also. Since, the appellant were infact eligible for availment of Cenvat credit and utilisation of the same towards payment of duty on the final product i.e. polyester top, they were not required to pay duty in cash to the extent of credit admissible and which was lying unutilised. However, since the goods were subsequently exempted from payment of duty, the appellants are not in a position to utilise such accumulated credit. In the circumstance, in view of Tribunal's decision (supra), the appellants are eligible for refund of such unutilised accumulated credit in terms of provisions of Rule 5 of the Cenvat Credit Rules, 2004. Therefore, the order passed by the original authority rejecting the refund claim is not sustainable. Held accordingly."

9. As against such detailed findings and factual position, I find that grounds of appeal of Revenue does not bring on record anything contrary to such findings. In my view, reliance placed by the first appellate authority on the larger bench decision is correct. Further, I do find strong force in contentions raised by ld. Counsel for the respondent that the show cause notice only seeks to reject the refund claim on the ground that Rule 5 of the Cenvat Credit Rules does not attracted which has been settled by the Hon'ble High Court of Karnataka and Bombay.

10. In view of the foregoing, I find that the appeal is devoid of merits and appeal stands rejected.

(Dictated & pronounced in open Court)

(M.V. Ravindran)
Member (Judicial)

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