

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD**

Single Member Bench

Court – I

Excise Appeal No. 30068 of 2019

(Arising out of Order-in-Appeal No.HYD-EXCUS-RRC-APP-027-18-19 (APP-I) dt.22.11.2018
passed by CC & CT (Appeals-I), Hyderabad)

Lata Hydrocarbon Resources Pvt Ltd

Door No. 340/9, Gandipet Road, Narsinghee
Village, Rajendranagar Town, Rangareddy,
Telangana – 500 030

.....Appellant*VERSUS***Commissioner of Central Tax,
Rangareddy - GST**

Posnett Bhavan, Ramkoti, Hyderabad,
Telangana – 500 001

.....Respondent**Appearance**

Shri P. Ramakrishna, Advocate for the Appellant.

Shri C. Mallikarjun Reddy, Authorized Representative for the Respondent.

Coram:**HON'BLE MR. P. VENKATA SUBBA RAO, MEMBER (TECHNICAL)****FINAL ORDER No. A/31151/2019****Date of Hearing: 14.11.2019****Date of Decision: 23.12.2019****[Order per: P.V. SUBBA RAO.]**

1. This appeal is filed against Order-in-Appeal No.HYD-EXCUS-RRC-APP-027-18-19 (APP-I) dt.22.11.2018.

2. The facts of the case in brief are that the appellant filed refund applications for refund of Cenvat credit in respect of the goods which they cleared to the SEZ units without payment of duty. These applications were rejected by the adjudicating authority on two grounds: (a) the SEZ supplies were not to be treated as export of goods and (b) refund applications were

not filed within the time limit. The appellant appealed to the first appellate authority who held that the SEZ supplies must be treated as export of goods but the applications were hit by limitation. Aggrieved, the appellant appealed to this bench who, by Final Order No. A/30912-30913/2016 remanded the matter to the original authority. Paragraphs 9-14 of this order are reproduced as below:

"9. I have heard both sides. The counsel for appellant relies upon the decision laid by Hon'ble High Court of Madhya Pradesh in STI India Ltd. The said decision was referred by the Hon'ble High Court of Madras in the case of CUE Vs Celebrity Designs India (P) Ltd. The decision of the Hon'ble High Court of Madras being more recent and having considered the judgment laid in STI India Ltd case, I humbly follow the decision laid by the Hon'ble Madras High Court in the case of Celebrity Designs India Pvt Ltd., case and hold that the refund claim filed beyond the period of one year from the relevant date is time barred.

10. The question then arises what is the relevant date. The appellant submits that refund in respect of few of the exports is within time if calculated on the basis of the finding in the impugned order regarding the issue of relevant date. In the impugned order, the first appellate authority has observed that the date on which the goods enter the SEZ should be taken as relevant date for the purposes computing the limitation. The appellant has put forward in table II (shown above) that refund claim with regard to few of the exports would be within time if the period of limitation is computed taking the relevant date as the date on which goods entered SEZ. In view of the judgment laid in the case of Celebrity Designs India Pvt Ltd, there is no doubt that the refund claim if filed within one year from the relevant date when the goods are cleared for export, would not be barred by limitation. The appellants have cleared/exported the goods to SEZ. Sub Clause (ii) of Section 11B(B)(a) states that if the goods are exported by land, the date on which such goods pass the frontier would be the relevant date. Therefore the date on which the goods entered the SEZ can be taken into consideration for ascertaining the relevant date. The appellant appears to have accordingly computed the period of limitation and contends that some amount would fall within time. The dates of the goods crossing the frontier/ entering the SEZ as shown in the table, requires verification. Therefore, I am of the view that the matter can be remanded to the original authority to verify whether claim with regard to any export would fall within the period of limitation, if the relevant date is reckoned as the date when the goods entered the SEZ.

11. At the time of hearing the Ld. Counsel for appellant put forward a new submission, that the unit is now closed down for the past five years and that therefore the entire unutilized credit (Rs.28,07,191/- and Rs.15,04,515/-) has to be refunded to the appellant. He drew support from the decision of the Hon'ble Apex Court in the case of UOI Vs Slovak India Trading Co. (P) Ltd., [2008 (223) ELT A170 (SC)]. I am afraid that the said decision will not assist the appellant, the facts being different. In the said case the claim was made on account of closure of unit. Whereas, in the present case it is not. Even in the Show Cause Notice or in reply such allegation/contention was not raised. During the hearing of the appeal, the appellant cannot put forward an entire new contention to claim the refund.

12. Further, the issue whether the factory is closed down, the reasons for closing down, the dues and liabilities if any etc., has to be verified by the department when the assessee/appellant puts forward a refund claim for the reason of closure of unit. At the fag end of the case, the appellant cannot contend that the unit is closed down and that therefore entire amount has to be refunded overlooking the period of limitation. Therefore this prayer of the appellant that refund is to be granted as the unit is unoperational/closed down is not acceptable, and hence disallowed.

13. *From the fore going discussions, the matter is remanded to the adjudicating authority to verify whether claim in respect of any export would be within the period of limitation, taking the relevant date being the date when the goods entered the SEZ. The impugned order is set aside and remanded to the original authority with the above observations.*

14. *In the result, the appeal is allowed by way of remand."*

3. In pursuance of this final order, the original authority in the denovo proceedings by OIO No.188/REF/2016-17 dt.28.04.2017 allowed the refund claims to the extent they were not time barred. Therefore, the issue has reached finality to this extent.

4. The present round of litigation is with respect to a new refund claim under Rule 5 of CCR, 2004 filed by the appellant on 11.05.2017 for an amount of Rs.32,24,145/- on the ground that their factory was closed and therefore, they were not able to use the Cenvat credit. A show cause notice dt.28.08.2017 was issued to the appellant proposing to reject the refund claim on two grounds: (a) there is no provision to refund unutilized Cenvat credit on account of closure of factory and (b) the refund application is barred by limitation as the same is filed nearly six years from the date of closure of factory. The appellant contested both these grounds. After considering their reply, the original authority sanctioned the refund by OIO dt.17.04.2018. Revenue filed an appeal against this order and the first appellate authority allowed the departmental appeal clearly bringing out the provisions in Rule 5 of Cenvat Credit Rules (CCR), 2004 prior to 01.04.2012 and after 01.04.2012. These are as follows:

"Period prior to 01.04.2012:

5. *Refund of CENVAT credit. – Where any input or input service is used in the manufacture of final product which is cleared for export under bond or letter of undertaking, as the case may be, or used in the intermediate product cleared for export, or used in providing output service which is exported, the CENVAT credit in respect of the input or input service so used shall be allowed to be utilized by the manufacturer or provider of output service towards payment of,*

(i) *duty of excise on any final product cleared for home consumption or for export on payment of duty; or*

(ii) *service tax on output service,*

and where for any reason such adjustment is not possible, the manufacturer or the provider of output service shall be allowed refund of such amount subject to such safeguards, conditions and limitations, as may be specified, by the Central Government, by notification;

.....

Period after 01.04.2012:

5. Refund of CENVAT Credit. – (1) A manufacturer who clears a final product or an intermediate product for export without payment of duty under bond or letter of undertaking, or a service provider who provides an output service which is exported without payment of service tax, shall be allowed refund of CENVAT Credit as determined by the following formula subject to procedure, safeguards, conditions and limitations, as may be specified by the Board by notification in the Official Gazette.....”

5. He, therefore, observed that prior to 01.04.2012 under Rule 5 of CCR, 2004 refund could be claimed if the Cenvat credit could not be used for any reason. In that context, the Hon'ble High Court of Karnataka had, in the case of Slovak India Trading Company Pvt Ltd [2006 (201) ELT 559 (Kar)] as well as Hon'ble High Court of Rajasthan in the case of Lav Kush Textiles [2017 (353) ELT 417 (Raj)] and Welcur Drugs and Pharmaceuticals Ltd [2018 (15) GSTL 257 (Raj)] held that refund should be available even if the appellant is not able to use Cenvat credit on account of closure of factory. After 01.04.2012, however, the clause 'where for any reason such adjustment has not been possible' has been deleted. Therefore, the appellant was not entitled to refund of Cenvat credit on this ground. The refund application in this case was filed on 11.05.2017 by which time the amended provisions were in vogue. Thus holding, the learned first appellate authority allowed the department's appeal and rejected the appellant's claim of refund.

6. The present appeal is filed by the appellant on the following grounds:
- a. The learned Commissioner (Appeals-I) erred in passing the impugned order without considering the cross objections filed by the Appellant. Thereby, the authority violated the principles of natural justice. It is not in dispute that the Appellant's factory was closed during the period April 2011 and the refund applications were filed during the period 2009-2010, exports were made during the period January, 2009 – June, 2009. It is also not in dispute that from the date of filing the refund application, this Appellant was put to judicial battle till it settled by the decision of Hon'ble Tribunal in 2016. The learned Commissioner (Appeals-I) failed to consider these facts while allowing the appeal of the Department. Hence, the order-in-appeal is liable to be quashed as it was passed without appreciating the facts of the case.

- b. The learned Commissioner (Appeals-I) erred in allowing the Department appeal without even noting the decision of Hon'ble Apex Court in the case of UOI Vs Slovak India Trading Co. Pvt Ltd., 2008 (223) ELT A 170 (SC). The said decision is squarely applicable to the present case.
 - c. The learned Commissioner (Appeals-I) erred in passing the impugned order without applying his mind on sub-rule 2 of the Rule 5 of Cenvat Credit Rules, 2004 (amended by Notification No. 18/2012-CE(NT) dt.17.3.2012 w.e.f. 1.4.2012. Wherein, the rule specifically excluded the provision for the exports made prior to 1st April 2012.
 - d. The learned Commissioner (Appeals-I) ought to have appreciated the fact that this Appellant filed the refund application within one year from the date of Hon'ble Tribunal's decision in the subject matter vide its Final Order No. A/30912-30913/2016 dt.29.09.2016 and the Hon'ble Tribunal's observation on closure of factory. It is a settled law, that when the Appellant prosecuting remedy before any forum under bona fide belief, then, the period spent is to be ignored for the purpose of proviso of sub-rule 2 of Rule 5 of Cenvat Credit Rules, 2004.
 - e. The learned Commissioner (Appeals-I) ought to have appreciated the facts of the case and ought to have given his findings on the Ground No. 6 of the Department's appeal. Wherein, it is contested by the Department that as per the amended provisions, refund is to be sanctioned in case of exports by following the formula prescribed under Rule 5 of Cenvat Credit Rules, 2004. In such circumstances, the impugned order-in-appeal is a non-speaking order and liable to be set aside.
 - f. The appellant craves leave to file further grounds which are in the nature of modified, altered or fresh grounds during the course of appeal proceedings."
7. I have considered the arguments on both sides and perused the records. The short point to be decided is whether the application for refund of Cenvat credit under Rule 5 of CCR, 2004 could be sanctioned after

01.04.2012 on the ground that the factory has been closed after a period of six years from the closure of such factory or otherwise. The appellant's case is only that they had accumulated Cenvat credit prior to the amendment and that the refund claim was filed much later and hence, they are entitled to the refund of Cenvat credit on the closure of the factory. On the question of limitation, it is the claim of the appellant that as another refund claim seeking refund of unutilized Cenvat credit for another part of the amount on another ground was already pending at various judicial fora, they could not file any second refund claim.

8. I find when the Rule 5 of CCR, 2004 was amended w.e.f. 01.04.2012 there is no saving clause indicating that with respect to credits which were accumulated prior to this date the new provisions do not apply. I have also considered the provisions in General Clauses Act, 1977. Section 6 of which reads as follows:

"6. Effect of repeal.— Where this Act, or any Act made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not—

(a) revive anything not in force or existing at the time at which the repeal takes effect ; or

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder ; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed ; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed ; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid ;

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act had not been passed."

9. The General Clauses Act allows continuation of any right, privilege, obligation or liability acquired or accrued under any Act or enactment so repealed and also affects the previous operation of any Act or enactment so repealed. In this case, refund claims were filed prior to 01.04.2012 and these claims did not include refund claim on the ground that factory has been closed. The issue was raised before this Tribunal in the first round of litigation which has been rejected by this Tribunal in Final Order

No.A/30912-30913/2016. The order of this Tribunal has not been set aside by any higher judicial forum. In pursuance of the remand by this final order, the original authority has sanctioned the refund claim. Therefore, all proceedings which had begun prior to 01.04.2012 have concluded unimpeded by the unamended Rule 5 of CCR, 2004 for a different amount on a different ground. A separate refund claim was filed after 01.04.2012 which is the issue in dispute. Therefore, the appellant was not entitled to refund as there was no saving clause when Rule 5 of CCR, 2004 was amended. Further, the period of limitation of one year for filing the refund claim has also been violated as refund claim was filed more than six years after alleged closure of the factory. In view of the above, I find no infirmity in the impugned order.

10. The impugned order is upheld and the appeal is rejected.

(Order pronounced in the open court on 23.12.2019)

(P.VENKATA SUBBA RAO)
MEMBER (TECHNICAL)