CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD
Division Bench - Court No. – I

Excise Appeal No. 877of 2011
(Arising out of **Order-in-Appeal** No.02/2011(T) CE, dated 31.01.2011 passed by Commissioner of Central excise & Customs, Guntur)

Commissioner of Central Excise, Customs & Service Tax Tirupati .. **APPELLANT**
No. 9/86-A, West Church Complex,
Amaravathi Nagar, MR Palli Road,
Thirupathi, Chittor,
Andhra Pradesh – 517 502.

VERSUS

Rani Plastic Pipe Industries .. **RESPONDENT**
B-15, Industrial Estate, Nandyal,
Kurnool Division,
Andhra Pradesh – 518 501.

Appearance
Shri C. Mallikarjun Reddy, Superintendent for the Appellant.
Shri P. Rosi Reddy, Advocate for the Respondent.

Coram: **Hon'ble Mr. ANIL CHOUDARY, MEMBER (JUDICIAL)**
Hon'ble Mr. P.V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER No. A/30886/2020

Date of Hearing:03.03.2020
Date of Decision:12.06.2020

[ORDER PER: P.V. SUBBA RAO]

1. This appeal is filed by the Revenue against Order-in-Appeal No. 02/2011(T) CE, dated 31.01.2011.

2. The respondent is a manufacturer of PVC Pipes and PVC Compound and was availing the benefit of MODVAT credit under Rule 57 of the erstwhile Central Excise Rules 1944. They filed a refund claim for Rs. 1,81,23,725/- on 24.05.2010 with the Joint Commissioner pursuant to order no. 1/2010-CEx dated 08.04.2010 issued by the Hon'ble Settlement Commissioner.

3. The background of the case is that originally a show cause notice dated 21.03.2010 was issued to the appellant demanding an amount of Rs. 3,14,53,090/- on account of alleged unaccounted manufacture and clearance of goods without payment of excise duty. The respondent approached the Hon'ble Settlement Commission in January who, after following due process, issued its final order dated 08.04.2010 determining the duty liability at Rs. 2,36,75,539/- along with simple interest at a rate of 5% and imposed some

penalties. The Settlement Commission while passing this order has also allowed the assessee to take credit of Rs. 1,81,23,725/- in their MODVAT account being the duty involved on the unaccounted duty paid raw materials. The appellant paid the dues as per the order issued by the Hon'ble Settlement Commission. However, their unit was closed by this time. They, therefore, filed a refund claim for Rs. 1,81,23,725/- in cash on the ground that their unit was closed and they were not able to utilise the MODVAT credit which they were entitled to take. The original authority examined the application and found that the Hon'ble Settlement Commission has only ordered MODVAT credit to be given and not cash refund. Further, in terms of the Rule 5 of Cenvat Credit Rules, 2004 (which were in vogue at the time this decision was taken), refund of credit can only be allowed in case input or input services is used in export of goods or services and for any reason, such credit cannot be used towards domestic clearance of goods. Therefore, the adjudicating authority rejected the refund claim filed by the appellant.

4. Aggrieved, the appellant appealed to the First Appellate Authority who, by the impugned order, reversed the order of the lower authority and held that the appellant is entitled to refund of the MODVAT/CENVAT in cash. Aggrieved, Revenue filed this appeal.

5. Learned Counsel for the respondent relies on the judgment of the Hon'ble High Court of Karnataka in the case of Slovak India Trading Company Pvt Ltd., [2006 (201) ELT 559, (Kar)] in which the Hon'ble High Court expressed the view that Rule 5 of Cenvat Credit Rules, 2004 does not specifically prohibit refund of cenvat credit if the factory is closed and has allowed refund in that case. He further submits that this judgment of the Hon'ble High Court of Karnataka was upheld by Hon'ble Supreme Court in the case Union of India Vs Slovak India Trading Co. Pvt Ltd., [2008 (223) ELT A170 (SC)]. He would further submit that the issue is well settled and the matter has been decided by the Commissioner (Appeals) in the impugned order as per the settled legal position.

6. Per contra, Learned DR asserts that a bare perusal of the order of the Hon'ble Supreme Court shows that the SLP in that case has been dismissed with the following words:

"Learned ASG appearing for the Union of India fairly concedes that those judgments of the High Court which were relied upon by the Tribunal have not been appealed against. In view of the concessions made by the Learned ASG, this Special Leave Petition is dismissed".

Learned DR would submit that prima facie, it appears that the Hon'ble Apex Court has not laid down the law as far as the judgment of the Hon'ble High Court of Karnataka in the case of Slovak India is concerned but the case was dismissed in view of the concession made by the Learned ASG.

7. He would submit that the question which arises in such a case is whether the judgment of the Hon'ble Apex Court in the aforesaid SLP will be a declaration of law under article 141 of the Constitution of India which binds all the courts in the country or otherwise. This issue was examined at length by the Larger Bench of Hon'ble High Court of Bombay in the case of Gauri PlastiCulture P Ltd., and others [2019 (6) TMI 820 Bombay]. Hon'ble High Court framed the following questions:

> "(a) Whether cash refund is permissible in terms of clause (c) to the proviso to section 11B(2) of the Central Excise Act, 1944 where an assessee is unable to utilize credit on inputs?
>
> (b) Whether by exercising power under Section 11B of the said Act of 1944, a refund of un-utilised amount of Cenvat Credit on account of the closure of manufacturing activities can be granted?
>
> (c) Whether what is observed in the order dated 25th January 2007 passed by the Apex Court in Petition for Special Leave to Appeal (Civil) No. CC 467 of 2007 (Union of India Vs Slovak India Trading Company Pvt Ltd.) can be read as a declaration of law under Article 141 of the Constitution of India?"

These questions were answered by the Hon'ble Larger Bench of Bombay High Court in para 40 as follows:

> 40. As a result of the above discussion, we answer the questions of law framed above as (a) and (b) in the negative. They have to be answered against the assessee and in favour of the Revenue. Questions (a) and (b) having been answered accordingly, needless to state that the order of the Hon'ble Supreme Court in the case of Slovak India (supra) cannot be read as a declaration of law under Article 141 of the Constitution of India.

8. He would further rely on the order of the Tribunal in the case of Phoenix Industries Pvt Ltd., [2015 (330) ELT 303 Tri-Mum] in which it has been held that refund under Rule 5 of Cenvat Credit Rules, 2004 is subject to conditions laid down in Notification No. 5/2006-CE(NT) and no refund can be sanctioned beyond this.

9. We have considered the arguments on both sides and perused the records. Rule 5 of Cenvat Credit Rules, 2004 reads as follows:

> "RULE 5. Refund of CENVAT Credit.- Where any input or input service is used in the final products which is cleared for export under bond or letter of undertaking,

> as the case may be, or used in the intermediate products 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 products 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 shall be allowed refund of such amount subject to such safeguards, conditions and limitations, as may be specified, by the Central Government, by notification:
>
> Provided that no refund of credit shall be allowed if the manufacturer or provider of output service 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.
>
> Provided further that no credit of the additional duty leviable under sub-section (5) of section 3 of the Customs Tariff Act, as amended by clause 72 of the Finance Bill, 2005, the clause which has, by virtue of the declaration made in the said Finance Bill, under the Provisional Collection of Taxes Act, 1931, the force of law, shall be utilised for payment of service tax on any output service.
>
> **Explanation:** For the purposes of this rule, the words 'output service which are exported' means any output service in respect of which payment is received in India in convertible foreign exchange and the same is not repatriated from, or sent outside, India.
>
> Provided that the CENVAT credit or inputs shall not be denied to job worker referred to in rule 12AA of the Central Excise Rules, 2002, on the ground that the said inputs are used in the manufacture of goods cleared without payment of duty under the provisions of that rule."

10. This is the only provision under which a refund of Cenvat credit can be allowed. Such refund is also subject to conditions notified by the Government. There is no provision in the Cenvat Credit Rules for refund of cenvat credit if the assessee is not able to utilise it for any other purpose, such as the factory being closed. The Hon'ble High Court of Karnataka in the case of Slovak India (supra), has however allowed such refund. The SLP filed by the Revenue against this judgment has been dismissed by the Hon'ble Apex Court in view of the concessions made by the ASG. The question which arises is in such a case the dismissal by the Hon'ble Supreme Court of the SLP should be treated as a law laid down under article 141 of the Constitution or otherwise. This issue was examined by the Larger Bench of the Hon'ble High Court of Bombay which also examined whether unutilised cenvat credit can be refunded on account of the closure of manufacture activities of the factory. The Hon'ble Larger Bench has found that the law has not been laid down by the Hon'ble Apex Court and the SLP was merely dismissed on account of the concession made by the ASG. Further, the Larger Bench of Hon'ble High Court of Bombay has held that no

refund can be sanctioned under Section 11B if the assessee is unable to utilise cenvat credit on account of closure of the manufacturing activities.

11. In view of the above, we find that the ratio of the judgment of the Larger Bench of the Hon'ble High Court of Bombay is binding and prevails and accordingly no refund of MODVAT/Cenvat credit can be sanctioned to the respondent. We also find that the law has now been laid down by the constitutional bench of the Hon'ble Supreme Court in the case of Dilip Kumar and Company & Other [2018 (361) ELT 577 (SC)] and it is held that the fiscal laws must be interpreted as they are, without any intendment, regardless of the consequences. As per the ratio of this judgment also we cannot sanction a refund against the explicit provisions. In view of the above, the appeal filed by the Revenue is allowed and the impugned order is set aside.

(Order pronounced on 12.06.2020 in open court)

(ANIL CHOUDARY)
MEMBER (JUDICIAL)

(P. VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

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