IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA

EASTERN ZONAL BENCH: KOLKATA

Excise Stay No. : 75558/2016
AND
Excise Appeal No. 76351/2016

(Arising out of Order-in-Appeal No. 02/RAN/2016-17 dated- 05.05.2016 passed by the Commissioner of Central Excise & Service Tax, Ranchi)

Commr. of Central Excise & Service Tax, Ranchi — **Applicant (s)/Appellant (s)**

vs.

M/s. Jindal Steel & Power Ltd. — **Respondent (s)**

Appearance:

Shri D. Haldar, A.C. (A.R.)
for the Appellant (s)

Sri Ravi Raghavan, Advocate &
Sri H. Shukla, C.A.
for the Respondent (s)

CORAM:

Hon'ble Shri P.K.Choudhary, Member (Judicial)
Hon'ble Shri Bijay Kumar, Member (Technical)

Date of Hearing & Decision: 07/06/2018

ORDER NO.FO/76544/2018

Per Shri Bijay Kumar

Revenue has filed the present appeal against the impugned Order-in-Appeal No. 02/RAN/2016-17 dated- 05.05.2016 passed by the

Commissioner of Central Excise & Service Tax, Ranchi wherein he has set aside the order passed by the lower Adjudicating Authority with consequential relief.

2. The issue involved in the present appeal is regarding the refund application filed by the appellant in terms of Section 11B of Central Excise Act, read with Rule 5 of the CENVAT Credit Rules, 2004. In this case the respondent has filed the refund application on line on 25/04/2015 and submitted the hard copy of the same alongwith relevant documents in the Divisional office on 30.06.2015 for refund of CENVAT credit amounting to Rs.4,22,51,651/-, accumulated due to clearance for final products, under LUT, for export without payment of duty. Accordingly, as per department limitation date of filing appeal shall to be 30/06/2015, which is the date on which all the documents the applicant had submitted to the Department.

3. It was alleged in the SCN that as per Section 11B of the Central Excise Act, 1944, the relevant date is the date on which such goods passed border and the date of ship leaving India. On perusal of the shipping bills, it is found that the relevant date is beyond one year of the date of filing refund application and the same is hit by limitation. The show cause notice further alleged that the refund application is for the second quarter of 2014, that is upto September, 2014. In some of the cases, shipping bill the date of export is beyond the time limit for which refund claim has been filed in quarter July, 2014 to September, 2014. The export was not for second quarter of July, 2014 to Sept. 2014 and all these cases appeared to be not available for consideration for refund as per the provisions of Section 11B of the Central Excise Act, 1944 and read with the Notification No.27/2012-CE (NT) dated-18.06.2012. The show cause

notice also alleged that the quantification of CENVAT Credit during the quarter ending Sept., 2014 included the CENVAT Credit on import of services and availed during the quarter ending July, 2014 to September, 2014 which was disputed through show cause notice dated 24.07.2015 and such disputed CENVAT credit cannot be part of the refund and therefore should have been excluded from the quantification. After following the due process of law the said refund claim was rejected by the Assistant Commissioner of Central Excise. The Commissioner (Appeal) vide the impugned order set aside the Order-in-Original and allowed the refund to the appellant. It is against the order of Commissioner (Appeals) Revenue is aggrieved and hence the present appeal.

4. The Ld. Advocate on behalf of the respondent submitted that time limit prescribed under Section 11B of the Central Excise Act is not applicable for refund under Rule 5 of the Cenvat Credit Rule.

4.1 The Department has contended that the refund application against ARE 1 Nos.145/2014 dated-29/09/2014 and 150/2014 dated 30/09/2014 are time barred under Section 11B of the Act as the said goods have been exported in the month of October,2014 which did not pertain to second quarter of 2014 for which refund claim has been filed by the Respondent.

4.2 It was further submitted that Rule 5 of the CENVAT Credit Rules does not prescribe the particular time limit for refund of tax paid on the input services which are exported under LUT. It was further submitted the time period under Section 11B of the Act is not applicable for the cases under the CENVAT Credit Rules. In support of the aforesaid submission, the Ld. Advocate relied upon the decision of Deepak Spinner Ltd. Vs. CCE, 2014 (302) ELT 132 (Tri.-Del)wherein it was held that time limit to claim refund as prescribed under 11B is not applicable for the refund claim under Rule 5 of the CENVAT Credit Rules. The same view was reiterated in the case of STI India Vs. CCE [2009 (236) ELT 248 (M.P.) and in the case of Global Food Industries Vs. CCE [2010 (262) ELT 627 (Tri-Ahmd.)].

4.3 It was also contended by the Ld. Advocate that the refund under Rule 5 is controlled by the time when goods are cleared for export and not from the physical export of the goods; that in the present case the goods have been cleared for export under LUT in terms of Notification No. 42/2001-CE (NT) dated-26.06.2001. As per the condition prescribed in the notification, the exporter is required to file the claim within the six months from the date on which the goods has been cleared from the factory/warehouse; that in the present case the refund claim against ARE-I No. 150/2014 dated-30.09.2014, are not time barred under Section 11B of the Excise Act as is evident from ARE and that the goods were have been cleared in the 2nd quarter of 2014 to September, 2014 and this contention of the Revenue is without any merit.

4.4 It was further stated by the Ld. Advocate that availment of drawback pertaining to Customs duty will not be a bar under Rule 5 of the CENVAT Credit Rules to the extent that Rule 5 of the Cenvat credit Rule which aimed at only to prevent the assessee to take double benefit in respect of the duty paid on the input or input services which are used for the manufacture of export goods. Notification No. 98/2013-CUS (NT) dated-14.09.2013 provides all industry rate of duty draw back, and the heading has two AIRs (1) for CENVAT Credit. One where the assessee has not availed credit on duty paid on input or input services and second, CENVAT AIR which is applicable in case the assessee who has availed credit of duties paid on inputs/input services. In the present case, the prescribed rate is the same for both Non-Cenvat AIR and Cenvat AIR. Condition No. 6 of the notification states that in case both the AIR-rates are same, it shall mean that those pertained to the customs duty component and is available irrespective of the Cenvat Credit availed or not. Therefore, the said draw back only pertains to the Customs duty component. Therefore, it was submitted that the bar as per Rule 5 of the Credit Rules, is not applicable in the present case as the respondent has availed drawback of customs duty only and not of the excise duty under draw back rules. In this regard the reliance was placed on the following decisions : (i) ***CCE Vs. Sabharwals Medicals Pvt. Ltd.*** *[2017 (357) ELT 1171 (Tri.-All)* wherein it is held that refund under Rule 5 of the Credit Rules cannot be denied in case the exporter has claimed drawback of the customs duty component under the Drawback Rules. Similar view was taken in the case of (ii) ***Meghdoot Pistons Pvt. Ltd. Vs. CCE****[2011 (263) ELT 610 (Tri.-Del) and* (iii) ***CCE Vs. Meghdoot Pistons Pvt. Ltd.*** [2006 (201) ELT 398 (Tri-Del.).

4.5 Further, there is no shipment as contended by the Department in respect of ARE-1 No. 132 and 133 and their corresponding shipping bill reveals that the final product has been short shipped in comparison to the goods dispatched and as a result the short shipping quantity cannot be considered for the quantification of the refund claim. Not only that the corresponding BRCs has also been submitted to the Department.

4.6 The Ld. Advocate also contested that during the relevant quarter an amount of Rs.94,54,063/- towards credit of input services is covered by show cause notice No. V (72)26/Jindalsteel/Adj./Ran-I/2015/5556 dated-24/07/2015 and hence disputed amount cannot be part of the present refund claim. It was further submitted that Principal Commr. vide Order-in-Original No. No.54-59/Central Excise/Pr. Commr./2018 dated-22.03.2018 has confirmed the amount disputed vide the SCN dated-24.07.2015. However, the appeal against the same is pending and therefore the aforesaid demand cannot be adjusted against the claim of the appellant in the present case.

5. Ld. D.R. has reiterated the grounds contained in the appeal memorandum and reiterated the grounds of appeal.

6. We find that Commr. (Appeal) has decided the issue on the basis of ratio laid down in the case of ***Deepak Spinner Ltd. Vs. CCE*** (supra), which relied upon the following the ratio of Hon'ble High Court of M.P. in the case of ***STI India Vs. CCE*** (supra). Also the Hon'ble CESTAT has held that similar view was held in the case ***of Global Food Industries Vs. CCE*** (supra). It is held in these judgments that the time limit as prescribed under Section 11 B is not applicable in the case of refund of unutilised Cenvat credit under Rule 5 of the Cenvat Credit Rules,2004. Thus the time limit as prescribed in section 11B of Central Excise Act shall not be applicable in the case at hand, we are in agreement with the Commr. Appeal on the finding regarding non adjustment of the duty demand, which have not attained finality against the order of the refund as held in the case of :

(i*) Commr. of Central Excise , Bangalore-III Vs. Steela Rubber Works (Unit-III)[2012 (275) ELT 404 (Kar.)***

ii) KEC International Ltd. Vs. Commr. of Central Excise and Service Taxm Bhopal[2014 (310) ELT 615 (Tri-Del.)

iii) BSNL Vs. CCE [2014 (36) (STR-Delhi)

7. As far as availing of Draw Back by the appellant is concerned, there is no bar in availing the drawback pertaining to the portion of the of Customs or Excise duty, on which the said facility has not been availed. The Rule 5 of the CENVAT Credit Rules, wherein it is stated that no refund shall be available if the benefit under Customs and Central Excise duties and Service Tax Draw Back Rules, 1995 is availed. It is only to prevent claimant to avail double benefit in respect of the duties on input and input services which are used in the manufacture of export goods. The said Rule does not debar an assessee to claim drawback of Customs duty as per Drawback Rule even if the benefit of Cenvat Credit is availed or vice versa. If the rate indicated is the same, for AIR with Cenvat facility and without Cenvat facility, it shall mean the rate in AIR pertains to Customs portion only. In such a situation, the question of taking double benefit does not arise. In this regard the CBEC Circular No. 83/2000/CUS dated 16/10/2000 is referred to which supports the above view that there is no double benefit available to the manufacturer where only Customs portion of industry rate of Drawback is claimed by allowing the benefit of Cenvat Credit refund. It is apparent from the record that there was a hug accumulation of Cenvat Credit at the time of filing of refund under Rule 5 of the Cenvat Credit Rule even after adjustment. Other minor issues regarding valuation of Weigh and Calculation of Cenvat Credit for refund has duly been rectified subject to appropriate verification and subsequent adjustment by the Adjudicating Authority.

8. After going through the case records, we find that the Commissioner (Appeals) has decided the issue relying on the decision in case of ***Deepak Spiner Ltd Vs. CCE***,(supra) which is again based on the hon'ble High court of MPs order in case of ***STI India Vs CCE*** referred above.

9. Accordingly, the Revenue appeal is dismissed holding the impugned order correct and legal. Stay Petition rejected.

(Oprative part of the order already *Pronounced in the Court*)

Sd/	***Sd/***
(P.K.Choudhary)	**(Bijay Kumar)**
MEMBER(JUDICIAL)	**MEMBER(TECHNICAL)**

k.b/-