IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
EAST REGIONAL BENCH : KOLKATA

Excise Appeal No.76785 of 2017

(Arising out of Order-in-Appeal No.38/HAL/2017 dated 16.06.2017 passed by Commr. (Appeals) of Central Excise, Kolkata)

CCEx. & S.Tax, Haldia
15/1 Strand Road,
Kolkata-700001

Applicant

VERSUS

M/s Associated Pigments Ltd.
Panskura, Mouja-Kanakpur, P.O. Naranda (Panskura)
Dist.-Purba Medinipur, W.B.-721139.

Respondent

Appearance:

Shri S.Mukhopadhyay, A.R. for the Appellant
Shri A.Sen & Shri S.Mondal, both Advocates for the Respondent

WITH

Excise Appeal No.76928 of 2017 &
Cross Objection No.75012 of 2018

(Arising out of Order-in-Appeal No.38/HAL/2017 dated 16.06.2017 passed by Commr. (Appeals) of Central Excise, Kolkata)

M/s APL Metals Ltd.
1st Floor, 18/1A, Hindusthan Road,
Sarat Bose Road, Kolkata-700029.

Applicant

VERSUS

CCEx. & S.Tax, Haldia
15/1 Strand Road,
Kolkata-700001

Respondent

Appearance:

Shri A.Sen & Shri S.Mondal, both Advocates for the Appellant
Shri S.Mukhopadhyay, A.R. for the Respondent

Excise Appeal Nos.76785,76928 & 76708/17

AND

Excise Appeal No.76708 of 2017

(Arising out of Order-in-Appeal No.38/HAL/2017 dated 16.06.2017 passed by Commr. (Appeals) of Central Excise, Kolkata)

M/s APL Metals Ltd.
1st Floor, 18/1A, Hindusthan Road,
Sarat Bose Road, Kolkata-700029.

Applicant

VERSUS

CCEx. & S.Tax, Haldia
15/1 Strand Road,
Kolkata-700001

Respondent

Appearance:

Shri A.Sen & Shri S.Mondal, both Advocates for the Appellant
Shri S.Mukhopadhyay, A.R. for the Respondent

CORAM:

HON'BLE SHRI P. K. CHOUDHARY, JUDICIAL MEMBER
HON'BLE SHRI BIJAY KUMAR, TECHNICAL MEMBER

FINAL ORDER NO.76470-76472/2019

DATE OF HEARING : 09.08.2019
DATE OF PRONOUNCEMENT : 25.10.2019

PER P.K.CHOUDHARY :

Common issue involved in these appeals, and therefore all are taken up together for disposal.

2. The relevant facts of the case, in brief, are that the assessee was engaged in the manufacture of Lead products classifiable under Chapter 78 of the Central Excise Tariff Act, 1985, which was cleared in the domestic market as well as exported the goods. They were availing Cenvat credit benefits on inputs, capital goods and input service under the provisions of Cenvat Credit Rules, 2004. In the instant case, the assessee submitted quarterly four separate claims of refund of unutilized CENVAT Credit on input or input service used in the

manufacture of final product, which were cleared for export under bond or Letter of Undertakings during the period for four quarters from October 2010 to September 2011 before the Assistant Commissioner of Central Excise, Haldia –II Division under Rule 5 of Cenvat Credit Rule 2004 read with Notification No. 5/2006-CE(NT) dated 14.03.2006 as amended.

2.1 The Assistant Commissioner of Central Excise by Order No. R-19/R-VI/Refund/APL/HAL-II/TECH/11 dated 23.11.2011 had sanctioned four Refund claims and paid amounting to Rs. 5,84,71,364.00 under Section 11B of the Central Excise Act, 1944. The department filed an appeal before the Commissioner (Appeals) for setting aside the Refund Order dated 23.11.2011 passed by the Assistant Commissioner of Central Excise.

2.2 By Order in Appeal No. 38/HAL/2017 dated 16.06.2017 the Commissioner (Appeals) allowed the departmental appeal and set aside the Order in Original dated 23.11.2011 passed by the Assistant Commissioner of Central Excise. It was ordered for recovery of erroneous sanctioned refund of the said amount of Rs. 5,84,71,364.00 alongwith appropriate interest as mentioned in the said Order and also allowed to the assessee to avail Cenvat Credit from the date of reversal. The assessee was allowed to pay the said amount in installments at the earliest.

2.3 The assessee filed Appeal No. E/76708/2017 before the Tribunal against Order in Appeal dated 16.06.2017 to the extent of demand of interest.

2.4 Department also filed Appeal No.E/ 76785/2017 before the Tribunal for setting aside the Order-in-Appeal dated 16.06.2017.

2.5 The assessee requested the Commissioner to allow to pay the said amount in installments in respect of Order-in-appeal dated 16.6.17. By communication dated 06.11.2017 the Commissioner rejected the request of the assessee to pay the said amount in installments. Hence, the assessee filed Appeal No. E/76928/2017 before the Tribunal against the communication dated 06.11.2017.

3. The Learned Counsel for the assessee argued the matter at length. It is submitted that the assessee filed a compilation with list of dates, which contained copy of all the appeals and application for easy reference to the Bench. The Learned Counsel submitted that they have already paid the refund amount and interest as per Order-in-Appeal passed by the Commissioner (Appeals). So, the Appeal No. E/76928/2017 filed by the assessee, would not be pressed. Regarding the appeal filed by the Revenue, it is submitted that in the instant case refund was granted under Rule 5 of the Cenvat Credit Rules. There is no dispute that the assessee had availed valid Cenvat Credit and entitled to utilize towards payment of Central Excise duty on clearance of the final product for home consumption. By erroneous refund of the said amount as observed by the Commissioner (Appeals), the assessee was deprived of use and enjoyment of the said amount and therefore the Commissioner (Appeals) rightly restored the CENVAT credit from the date of reversal. Hence, the department appeal should be dismissed. It is submitted that after receipt the refund amount, they reversed the entire amount of valid credit in the month of December 2011. Then, the assessee cleared the goods on payment of duty by cash as revealed from their letter dated 22.06.2017. Thus, it is a case of revenue neutral and no interest should be demanded and the appeal of the assessee be allowed. At the best, the demand of interest would be Rs. 74,43,971.00 for the period from 02.02.2012 to 29.01.2013 during which the assessee deposited the said amount of Rs. 5,84,71,364.00 by cash for clearance of goods as revealed from letter dated 22.06.2017. The Learned Counsel also cited the Case Laws and submitted Written Submission during the course of hearing.

4. The Learned authorized representative on behalf of the Revenue reiterates the Grounds of Appeal. It is submitted that the Order of the Commissioner (Appeals) for availment of credit from the date of reversal would keep ineligible financial accommodation to the assessee. It is also submitted that the assessee had utilized Cenvat credit from the date of reversal to avoid payment of interest and

penalty under Rule 8(3A) of the Central Excise Rules, 2002 for subsequent clearance of goods. It is submitted that the Order passed by the Commissioner (Appeals) is liable to be set aside.

5. Heard both the sides and perused the records.

6. We find that the assessee had cleared their final products i.e. Lead products for export under Bond and LUT. They have submitted four separate refund claims of unutilized Cenvat Credit on input or input service used in the manufacture of final product, which was cleared for export, during the period October 2010 to September 2011, under Rule 5 of Cenvat Credit Rules read with Notification No. 5/2006-CE(NT) dated 14.03.2006 as amended. It is seen from the Refund Order dated 23.11.2011 of the Assistant Commissioner of Central Excise that the concerned Range Superintendent had submitted proper Verification Report regarding the exportation and genuineness of the relevant documents and sanctioned and paid the amount of Rs.5,84,71,764.00. There is no dispute that the Assessee is entitled to avail and utilize the said amount of Cenvat Credit under the provisions of Cenvat Credit Rules, 2004. The department in their appeal before the Commissioner (Appeals) stated that a conjunctive reading of Rule 5 of the CENVAT Credit Rules, 2004 and Para 2 of the appendix of the Notification No. 5/2006-CE (N.T) dated 14.03.06 unambiguously conveys that refund of the accumulated credit is available only, where no adjustment of the accumulated credit against duty payable for home consumption is possible. The Assistant Commissioner of Central Excise, Haldia –II Division, Haldia Comm'te while sanctioning the refund has wrongly found that "the assessee has least opportunity to utilize the credit" whereas the actual percent of export clearance in comparison to total clearances are only 20.43%, 7.07% 13.76% and 18.93% in each quarter respectively. Thus, the amount of Rs.5,84,71,764.00 was paid to the assessee erroneously and it would be refunded by the assessee with interest for violation of condition of Notification No. 5/2006-CE (NT)

7. For the purpose of proper appreciation of the case, Rule 5 of the Cenvat Credit Rules is reproduced below :-

Refund of CENVAT credit

"5. 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:

***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 rebate of duty under the Central Excise Rules, 2002, in respect of such duty; or claims rebate of service tax under the Export of Services Rules, 2005 in respect of such tax :*

***Provided further** that no credit of the additional duty leviable under sub-section (5) of Section 3 of the Customs Tariff Act shall be utilized for payment of service tax on any output service.*

Explanation – For the purposes of this rule, the words 'output service which is exported' means the output service exported in accordance with the Export of Services Rules, 2005"

8. The relevant portion of the Appendix to Notification No. 5/2006-CE (NT) dated 14.3.2006 issued under Rule 5 of the CENVAT Credit Rules, 2004 laying down the procedure for claiming refund, is as under ;-

> *"2 – The claims for such refund are submitted not more than once for any quarter in a calendar year:-*
>
> *Provided that where –*
>
> *(a) the average export clearances of final products or the output services in value terms is 50% or more of the total clearances of final products or output services, as the case may be, in the preceding quarter, or*
>
> *(b) The claim is filed by Export Oriented Unit, the claim for such refund may be submitted for each calendar month"*
>
> *3.* ***** ***** ***** ***** *****
>
> *4. The refund is allowed only in those circumstances where a manufacturer or provider of output service is not in a position to utilize the input credit or input service credit allowed under Rule 3 of the said rules against goods and taxable services exported during the quarter or month to which the claim relates (hereinafter referred to as 'the given period'.*

9. It is clear from the above provisions that to get refund of unutilized accumulated Cenvat Credit in terms of Notification No. 5/2006-CE (NT) dated 14.03.2006, the assessee is required to show that the average export clearances of final products or the output services in value terms is fifty percent or more of the total clearances of final products. That means percentage of export clearance in a financial year should be more than home clearance for which refund can be allowed. In the present case, the export clearance is 20.43%, 7.07% 18.76% and 18.93% of the total clearance, in each quarter respectively for the four quarter of the financial year. The percentage of export clearance out of total clearance for the relevant financial

years is always about less than 20% of the total clearance. It is observed by the Commissioner (Appeals) that such contention of the revenue has not been contested by the assessee which establishes that they have accepted such observation of the department that their Export clearance was well below 50% of the total clearance for the material period of refund claim. Therefore, there is no chance of accumulation of any substantial amount of Cenvat Credit which could have been utilized in home consumption. We find that the Ld. Advocate for the assessee had not disputed such findings. Accordingly, the Commissioner (Appeals) had rightly directed for recovery of erroneous sanctioned refund of the said amount of Rs. 5,84,71,364.00 from the assessee. But, in the present appeal, the Department is aggrieved with the other reliefs extended to the assessee in so far as the availment of cenvat credit from the date of reversal, recovery of interest etc. as mentioned in the grounds of appeal of the Department.

10. For the purpose of proper appreciation of the case, the relevant portions of the findings of the Commissioner (Appeals) are reproduced below :

> *“ Therefore, I find that respondent party has claimed refund under wrong provision but they have not gained anything by getting the refund as per their submission and after coming to know that they have paid duty of Rs 8,94,14,922/- through e-payment Challan as mentioned in table –I below :*

Table - I

Sl. No	E-receipt Challan No. & Date	Amount of duty paid in Rs.
1	00966 dt 02.02.2012	10,000/-
2.	00922 dt 02.03.2012	1,78,000/-
3	02481dt. 30.03.2012	2,49,000/-
4	00535dt. 03.05.2012	40,500/-
5	04207dt. 05.06.2012	1,94,000/-

6	03478dt. 05.07. 2012	2,31,000/-
7.	02987dt. 04.08.2012	2,29,000/-
8.	001188dt.28.09.2012	86,93,536/-
9.	00071 dt.20.10.2012	5000000/-
10.	00325 dt.30.10.2012	18,38,972/-
11.	00108 dt.24.11.2012	90,01,741/-
12.	00185 dt.29.12.2012	31,03,123/-
13.	00544 dt.31.12.2012	1,21,84,674/-
14.	00384 dt.29.01.2013	1,20,85,442/-
15.	00344 dt.29.01.2013	1,20,85,445/-
16.	00307 dt.26.02.2013	1,19,34,449/-
17.	00344 dt.29.01.2013	1,19,34,449/-
	Total payment within 14 months of receipt of refund claim	Rs. 8,94,14,922/-

In the financial year 2012-13 just after getting the refunded amount of Rs 5,84,71,364.00 within 13(thirteen) months after the due date of getting the refund. If they would have not applied for the refund they could have paid duty from the said Cenvat Credit balance of Rs.5,84,71,364/- They admitted that their interest liability for 13 months within which they have covered repayment of Rs. 5,84,71,364/- is Rs. 74,43,971/- calculation of which may be verified at the Range level. Rather I am of the considered view that appellant has filed refund application unnecessarily without having any material benefit or having gained otherwise in getting the refund claim and the adjudicating authority has also passed the same violating the provision of Notification No. 5/2006-CE (NT) dated 14.03.2006 and which claim is not maintainable as per law.

7.3 . In view of my above observation and findings I am of the considered view that Cenvat Credit is required to be restored on the date of reversal after which they become liable to deposit the refunded amount immediately along with appropriate interest at an earliest date. As the appellant has prayed to give him minimum time of 30 days for payment. I think when the amount involved is more than Rs. 5 Crore it would be fair enough to allow reasonable time for payment in instalments as the party has prayed for the same due to insufficient fund on their end. Therefore, considering the difficulties faced and wrong sanction of refund on the part of the department, they may be allowed to deposit in installments at an earliest. On payment of duty and interest I find that the situation becomes revenue neutral in effect. Therefore I pass the following order-

ORDER

I allow departmental appeal and hereby set aside the OIO No. R-19/R-VI/Refund/APL/HAL-II/Tech/11 dated 23.11.2011 passed by Assistant Commissioner,Central Excise, Haldia-II Division, Haldia Commissionerate. I order for recovery of erroneous sanctioned refund amount of Rs. 5,84,71,364/- along with appropriate interest in above terms. I also allow availment of credit from the date of reversal".

11. We have already observed that the Commissioner (Appeals) rightly directed to recover the amount erroneously refunded. The Ld. Advocate submitted that interest should not be demanded. Section 11A of the Central Excise Act, 1944 deals with recovery of duties not levied or not paid or short levied or short paid or erroneously refunded. Sub Section (14) of Section 11A of the Act, 1944 provides that where an order determining the duty of excise is passed by the Central Excise Officer under this Section, the person is liable to pay the duty of excise, shall pay the amount so determined along with the interest due on such amount whether or not the amount of interest is

specified separately. The present case before us is related to the demand of amount erroneously refunded. So, we are unable to agree with the Ld. Advocate of the assessee. The Hon'ble Supreme Court in the case of Steel Authority of India Ltd Vs. Commissioner of C.Ex. Raipur, 2019 (366) ELT 769(S.C) while dealing with demand of interest on price variation upward with retrospective effect observed as under -

> *" 47. Coming to Section 11AB, it came to be inserted by Act 33 of 1996. Thereafter, it was amended by Act 10 of 2000,Act 14 of 2001, Act 20 of 2002 and Act 49 of 2005.We have already extracted the relevant provisions of the said section. Section 11A must necessarily be read with Section 11B. This is for the reason that interest under Section 11AB is premised upon the duty of excise not being levied or paid or short levied, short paid or erroneously refunded. Such duty is either determined under sub-section (2) of Section 11A or without such determination it being paid under Section 2B of section 11A. In any of the cercumstancs, namely, non – levy, non payment, short-levy and short-paid, any duty has been determind or paid as has been provided under Section 11A,necessarily the assessee becomes liable to pay interest from the first date of the month succeeding the month in which duty ought to have been paid."*

12. The Ld. Advocate for the assesee stated that the assessee filed refund claim of unutilised credit on inputs used in the manufacture of export goods. According to the Revenue, the credit could be utilised for home consumption. The Ld. Advocate submitted that there is no dispute that the assessee taken the credit validly and lawfully. Hence, the credit is indefeasible, as held by the Hon'ble Supreme Court in the case of Dai Ichi Karkaria 1999 (112) ELT 353 (SC), If so, in the month of November 2011, the Assistant Commissioner paid the said amount as refund of unutilized Cenvat Credit. Simultaneously, the assessee reversed /debited the said amount of valid credit from their CENVAT

Account R.G. 23A, Part-II in December 2011which they could have lawfully use for clearance of the finished products for home consumption at that time. It is a case of vice versa/revenue neutrality.

13. The Hon'ble Supreme Court in the case of Collector of Central Excise, Pune & Others Vs .Dai ichi Karkaria Ltd and others 1999 (112) ELT 353 (SC) , held that Cenvat Credit validity taken is indefeasible. The relevant portion in the case of Dai Ichi Karkaria Ltd (supra) is reproduced below :

> *"18. It is clear from these rules, as we read them, that 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 the credit by the Excise Authorities except where it has been illegally or irregularly take, in which event it stands cancelled or, if utilized, has to be paid for. We are here really concerned with credit that 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 it excisable product. The credit is, therefore, indefeasible. It should also be noted that there is no correlation of the raw material and the final product, that is to say, it is not as if credit can be taken only on a final product that is manufactured out of the particular raw material to which the credit is related. The credit may be taken against the excise duty on a final product manufactured on the very day that it becomes available.*
>
> *19. It is, therefore, that in the case of Eicher Motors Ltd vs. Union of India this Court said that a credit under the MODVAT Scheme was "as good as tax paid".*

14. The Ld. Advocate submitted that after receipt of the said amount as refunded, the assessee deposited the said amount by cash in respect of clearance for final products during the period from 2.2.12 to 29.1.13 as mentioned in Table –I. It may be said that the refund amount received by the assessee in the month of November 2011, was used for clearance of the finished goods during the said period and therefore they have used and enjoyed the refund amount during the said period and they are liable to pay interest on that period only. Hence, the Assessee calculated interest of Rs. 74,43,971.00. On perusalof records, we find that the assessee cleared the goods for home consumption during the period 02.02.2012 to 26.02.2013 on payment of duty of Rs. 8,94,14,922.00 by cash, then, the refund of the amount of Rs. 5,84,71,364.00 in November 2011 have been used therein. It may be noted the present case is not covered by the expression of "any duty has not been levied or paid or has been short-levied or short paid" in Section 11A(1) of the Central Excise Act, 1944. It is covered by the words "where any duty of excise has …….. erroneously refunded" in Section 11A(1) of the Act, 1944. The refund in the present case is governed by Rule 5 of Rule 2004. which is a self contained provision as held by the Hon'ble Supreme Court in the case of Jayaswal Neco Ltd (2015 (372) ELT 587 (S.C)). Hence, while calculating the demand of interest , the facts and circumstances of the instant case is required to be examined

15. The Hon'ble Supreme Court in the case of Jayaswal Neco Ltd Vs. Commissioner of Central Excise, Raipur, (S.C.) observed as under

> *" 22. The Scheme is thus, a self contained one, dealing with its applicability, eligibility of credit of duty on certain inputs, adjustment to be made on the credit of inputs used in final products, manner of utilization of inputs, procedure to be followed by the manufacturer, procedure to be followed by the persons who have availed credit issued in invoice and finally*

provision for recovery of credits wrongly availed and a provision for imposing penalty for violation of the provisions and availing wrong credit. With the introduction of this new scheme, the assessee had the option to pay excise duty by availing credit of the duty paid on inputs provided he is a manufacturer of the finished products making use of such inputs."

16. On close reading of the aforesaid decisions of the Hon'ble Supreme Court and provision of law, it is clear that if the credit is taken validly and legally, its benefit is available to the manufacturer without any limitation. In the present case, there is no dispute that the said amount of credit of Rs. 5,84,71,364.00 availed by the assessee is legal and valid. The refund order dated 23.11.11 of the Assistant Commissioner would envisage the situation that the assessee was paid cash refund of the lawful credit. Further, the assessee reversed / debited the same amount from their CENVAT account, which they could have utilize for payment of duty of final product, as per Department's case. Furthermore, the assessee paid the said amount of Rs. 5,84,71,364.00 by cash for clearance of final product in 13 months. The consequence is that the amount of refund allowed to the assessee was deposited by the assessee by cash during the period from 02.02.2012 to 29.01.2013 and the delay of payment would be accrued the amount of interest of Rs. 74,43,971.00 as mentioned in the impugned order, and the Department has not refuted the calculation in their appeal. Hence, the demand of interest of Rs. 74,43,971.00 as mentioned in the impugned order, cannot be found faulted. We agree with the findings of the Commissioner (Appeals) that there is no gain on the part of the assessee and rightly calculated the amount of interest.

17. The department in the Grounds of Appeal stated that the Commissioner (Appeals) sanctioned the payment of refund amount in installments causing substantial losses of Government revenues. The assessee in their appeal against the rejection of payment of

installments had referred the Board Circular No. 996/3/2015-CX dated 28.02.2015 for recovery of arrears in installments. In the said Circular the Board allowed the recovery of arrears of taxes, interest and penalties in installments. Board has given the guidelines to allow the recovery of arrears in installments. The Commissioner may allow to pay arrears in installments upto maximum of 24 months installments. In the instant case, the assessee filed the statement of payment of Rs. 5,84,71,364.00 during the period from 05.07.2017 to 13.09.2018 (i.e. 15 months). Apparently, the direction of the Commissioner (Appeals) for payment of the tax arrears in installments is at per with the Board Circular and therefore there is no merit on such ground.

18. The Department in their Grounds of Appeal further stated that the Commissioner (Appeals) has unnecessarily restored the credit on the date of reversal and given credence to the payment from such erroneous cash refund towards regular payment of Central Excise duty on clearance of their final products. It is further stated that default payment made by the assessee under Rule 8(3A) of the Central Excise Rule is completely different from return of erroneous cash refund which attract interest from the date of such erroneous refund when order to be refunded. It is also stated that interest is payable from the date of such refund as the assessee has utilized such money and saved interest and penalty under Rule 8(3A) of the Cenvat Credit Rules. The department in the Grounds of Appeal had contended that the interest be payable for utilization of money and saving interest and penalty under Rule 8(3A) of the Rules, 2002.

19. We find that the Commissioner (Appeals) had allowed the availment of Cenvat Credit from the date of reversal. The department in their appeal had raised that the availment of Cenvat Credit from the date of reversal would affect the consequence of demand and interest under Rule 8(3A) of the Central Excise Rules, 2002. It is pertinent to note that Rule 8 deals with “manner of payment” of duty. It is an independent provision laid down the procedure for payment of

duty. Rule 8(1) provides that the duty on the goods removed from the factory or the warehouse during a month shall be paid by the 6th day of the following month. Rule 8(3) says if the assessee fails to pay the amount of duty by the date, he shall be liable to pay the outstanding amount along with interest on the outstanding amount. Rule 8(3A) substituted by Notification No. 13/2006-CE(NT) dated 01.06.2006 provides that if the assessee defaults in payment of duty beyond thirty days from the due date, the assessee shall pay excise duty for each consignment at the time of removal without utilizing Cenvat Credit. Rule 8(4) provides mechanism of recovery of outstanding dues under Rule 8(1), as the provision of Section 11 of the Act shall be applicable. Section 11 of the Central Excise Act, 1944 deals with recovery of sums due to the Government.

20. On the other hand, Cenvat Credit 2004 provides for the credit of duty paid or deemed to have been paid on goods used in or in relation to manufacture of excisable goods. Rule 3(1) of the Cenvat Credit Rules, 2004 provides that a manufacturer shall be allowed to take credit of the duty of excise and other duty as mentioned therein paid on any input or capital goods received in the factory of manufacture of the final products. Sub Rule (4) of Rule 3 of Rules, 2004 provides that the Cenvat Credit may be utilized for payment of any duty of excise on any final product. In the present case, we are concerned with the availment and utilization of Cenvat Credit under the Rules, 2004, which has no relation to the manner of payment of duty under Rules 8 of Rules, 2002. So, we do not find any force in ground of appeal foiled by the Revenue.

21. Further the Department stated in Order in Review that supposedly, the assessee is allowed to avail credit of Rs. 5,84,71,364.00 on the date of reversal and the reversal of credit of equivalent amount from their credit account is correct, then, the assessee is liable to pay penalty and interest for the intentional defaulted amount which occurred at the end of such month under Rule 8(3A) Central Excise Rules, 2002, which is a substantial amount. We

have already observed that there is a distinction between the availment of Cenvat Credit under Cenvat Credit Rules, 2004 and manner of payment of duty under Rule 8 of the Central Excise Rules, 2002. In the present case, we are concerned with the availment of credit under the Cenvat Credit Rules. In our considered view, the defaulted payment of duty under Rule 8(3A) of the Rules, 2002 has no bearing in the impugned Order passed by the Commissioner (Appeals). Hence, we do not find any force in the submission of the Ld. Authorised Representative of the Department. The Hon'ble Supreme Court in the case of Commissioner of Customs, Mumbai Vs. Toyo Engineering India Limited 2006 (201 ELT (SC) held that new plea cannot be permitted in appellate stage.

22. In view of the above discussion, we agree with the findings of the Commissioner (Appeals). Accordingly, the order passed by the Commissioner (Appeals) is upheld. We dismiss both the Appeal No. E/76708/2017 filed by the assessee and the appeal no. E 76785/2017 filed by the Revenue. Appeal No. E/76928 of 2017 filed by the assessee is also dismissed as infractuous. Cross Objection is disposed off.

(Pronounced in the open court on 25.10.2019)

Sd/

(P. K. Choudhary)
Member (Judicial)

Sd/
(Bijay Kumar)
Member (Technical)

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