

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

REGIONAL BENCH – COURT NO.2

Service Tax Appeal No. 76320 of 2018

(Arising out of Order-in-Appeal No.156/Pat/S.Tax/Appeal/2017-18 dated 29.01.2018 passed by the Commissioner (Appeals), CGST & CX, Patna).

Lalit Kumar Arya

(C/o Prabhat Zarda Factory (India) Pvt. Ltd.
New Area, Sikandarpur, Muzaffarpur-842001)

Appellant (s)

VERSUS

Commr. of Central Excise & Service Tax, Patna

(Central Revenue Building (Annexe), 2nd Floor
Bir Chand Patel Path, Patna-800001)

Respondent (s)

APPEARANCE :

None for the Appellant

Mr. A. Roy, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. RAJEEV TANDON, MEMBER (TECHNICAL)

FINAL ORDER NO...75379/2023

Date of Hearing : 21st April 2023

Date of Decision : 12.05.2023

PER RAJEEV TANDON

The present appeal has been filed against the Order-in-Appeal passed by the Ld. Commissioner (Appeals) on 29th January 2018. The impugned appeal has been filed by Smt Rukmini Devi, nominee and wife of Late Lalit Kumar Arya.

2. The facts of the case are that M/s. Lalit Kumar Arya was providing taxable service (Intellectual Property Rights Service). The appellants assessee has filed a refund claim for Rs.1,49,412/- on account of excess deposit of Service Tax on account of unutilized Cenvat Credit as per last return for the period October 2015 to March 2016. It is stated in the Order-in-Original that the assessee is engaged in providing taxable service under the category of "Intellectual Property Rights Service"

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other than Copyright (Section (65)(55a) of the Finance Act, 1994). The amount of Rs.1,49,412/- was deposited on 05/5/2015 through e-payment Challan No. 0005347-05052015-500965 as excess deposit of Service Tax and refund claimed on the ground of unutilized Cenvat Credit. The Assistant Commissioner of Central Excise rejected the refund claim filed on the plea that of the ST-3 Return for the period October 2015 to March 2016, in column 13.1/13.1.4, no opening and closing balance of Cenvat Credit was available with the assessee, as was sought to be claimed by way of refund.

2.1 In appeal against impugned order of the Adjudicating Authority filed by the appellants, the Commissioner (Appeals) however, dismissed the said plea of non-reporting of the aforesaid amount as found to be not correct. He observed that the ST-3 Return (October 2015 to March 2016) clearly showed the opening and closing balance of Cenvat Credit. However, the Learned Commissioner (Appeals) rejected the said refund claim on the ground that the appellants were not eligible for refund under Rule 5B read with Notification 12/2014 – dated 3rd March, 2014 of the cenvat credit Rules, 2004, the Learned Commissioner (Appeals) held the view that the said refund can only be claimed in respect of Cenvat Credit taken on input and input services during the half year for which the refund is claimed for providing output services in respect of

- (i) renting of a motor vehicle designed to carry passenger on non abated value, to any person who is not engaged in a similar business.

- (ii) supply of manpower for any purpose or security services.

- (iii) services portion in the execution of a work contracts. The Learned Commissioner (Appeals) further held that as output service of the

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appellant company have not been, any of the aforesaid three stated, therefore the refund claim did not qualify for its eligibility under Rule 5B *ibid*.

2.2 He, *interalia*, further held that there are other conditions also as stipulated in the said notification viz., the amount claimed as refund shall be debited by the claimant from his CENVAT credit account at the time of making the claim and that the claim is required to be filed in a prescribed format in which the required entries need to be filled in. It was his view that particulars of entries required to be filled in while furnishing any claim of refund under Rule 5B of the Cenvat Credit Rules would necessarily have convinced the appellant that the credit balance lying unutilized in their case is not eligible for refund under the said Rule.

3. Thus while holding that the unutilized credit balance for which refund claim had been filed was reflected in the revised ST-3 Return, however, as the appellant did not qualify for the refund, therefore the refund claim of the appellant does not merit the required sanction. He thus rejected the appeal filed by the appellant.

4. It is observed that the impugned appeal has been filed before this Tribunal by Smt. Rukmini Devi, enclosing therewith a copy of the Death Certificate of Shri Lalit Kumar Arya (deceased on 3rd February 2016), during the course of pendency of Appeal. As evident from a letter dated 17th May 2022, seeking adjournment of the hearing, it is noticed that Smt. Rukmini Devi also expired on 13/08/2021. Subsequently, vide letter dated 17/12/2022, written on the letter pad of the appellant, a

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signed communication as [“for” illegible (Rukmini Devi)] was received.

It has intimated as under:

“We do not wish to appear either in person or through an authorized representative for personal hearing of the Appeal, the matter may kindly be decided on merits as per Appeal Petition filed.”

4.1 The matter was listed for hearing on 21st April 2023. I therefore, proceed to decide the appeal based on facts available on record.

5. The refund claim is filed by the Appellant for unutilized Cenvat Credit. It is observed that it has been rejected by both the lower Authorities on different grounds. The copy of the Show Cause Notice if any is not available on records neither does it appear to have been so issued, as appears from the case records. The benefit of representation in person for the Appellant is also not available to this Court. The question in the matter remains, is the assessee entitled for the impugned refund of Rs.1,49,412/- rejected by the lower authority and said to be excess deposit of Service Tax, due to non-utilization of Cenvat Credit as per the Return for the period October 2015 to March 2016. It is the case of the appellants that in view of the extraordinary circumstances where the Appellant, providing said services in his individual capacity, expired on 03/02/2016, i.e. prior to submission of the Half Yearly ST-3 Return wherein un-utilized Cenvat Credit of Rs.1,49,412/- was duly reflected. That upon the death of Shri Lalit Kumar Arya, the business and alongwith the provisioning of the service by the Appellant also closed down forthwith. Service Tax registration has also been surrendered for cancellation to the jurisdictional office

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and therefore, the refund claim of the appellant ought to be decided as an exceptional case and not in the context of the basic rules and general principles. In support of their content they relied on the following judgments, in support.

- (i) Shalu Synthetics (P) Ltd. Vs. CCE-2014 (6) TMI 34 (Tri.- Ahmd.)
- (ii) Berger Paints India Ltd. Vs. CCE-2004 (165) E.L.T. 488 (SC)
- (iii) UOI Vs. Slovak India Trading Co.-2006 (205) E. L. T. 559 (Kar.)

6. They submitted that it has now been settled by the order of the Commissioner (Appeals), that there is no dispute of the balance Cenvat Credit lying un-utilized, there is no bar to give cash refund thereof when an assessee ceased to exist and activities have come to end due to the death of the service provider working in his individual capacity. They also submitted that due to availability of un-utilized Cenvat Credit balance the assessee was not required to pay tax to the extent of available Credit and still if the said tax is received by Revenue, it cannot be retained on any ground and must be refunded.

7. In view of the extraordinary circumstances of the appellant, the assessee being now deceased, bringing to closure of the business activities of providing of the services by the appellant and ultimately resulting in surrender of the registration, it is therefore certainly a case for consideration of the plea of the appellants. The appellant placed reliance on the decision of the Hon'ble Karnatka High Court in the case of **Union of India Vs. Solvak India Trading Co. Pvt. Ltd.-2006 (201) E. L. T. 559 (Kar.)**. The Tribunal in the said case had observed that the assessee is eligible for refund claim when the assessee opts out, of the Modvat Scheme or when the Company is closed. The

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Tribunal in the said matter had followed a plethora of its earlier decisions viz.

- i. Commissioner v. Arcoy Industries-2004(170) E.L.T.507 T.
- ii. Commissioner v. Babu Textiles Industries 2003(158) E.L.T.215 T.
- iii. Eicher Tractor v. Commissioner 2002(147) E.L.T.457 T.
- iv. Shree Prakash Textiles (Guj)Ltd v. Commissioner 2004(164) E.L.T.162T

8. In appeal against the said order filed by the Department before the Hon'ble Karnatka High Court, the High Court had held as under:

" There is no express prohibition in terms of Rule 5. Even otherwise it refers to a manufacturer as we see from Rule 5 itself. Admittedly in the case on hand, there is no manufacture in the light of closure of company. Therefore Rule 5 is not available for purpose of rejection as rightly held by the Tribunal. The Tribunal has noticed that various case laws in which similar claims were allowed. The Tribunal, in our view, is fully justified in ordering refund particularly in the light of the closure of the factory and in the light of the assessee coming out of the Modvat Scheme. In these circumstances, we answer all the three questions as framed in para 17 against the Revenue and in favour of the assessee."

8.1 The three questions framed were:

- a) Whether under the facts and circumstances of the case Tribunal is right in ordering for refund even if there is no*

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provision in Rule 5 of Cenvat Credit Rules 2002, to refund the unutilized credit.

- b) Whether under the facts and circumstances of the case the Tribunal is right in ordering for refund even if there is no production and there is no clearance of finished goods?*
- c) Whether under the facts and circumstances of the case the Tribunal is right in holding that the respondent is entitled for refund even if it goes out of Movat Scheme or the Company is closed.*

9. The Supreme Court also dismissed the appeal filed by the Department assailing the aforesaid order of the Karnataka High Court. The order of the Hon'ble Apex Court is reproduced below :

"Delay condoned.

The Tribunal while allowing the appeal filed by the respondent assessee has relied upon the following decisions :

- (1) Eicher Tractors v. CCE, Hyderabad, 2002 (147) E.L.T. 457 (Tri. - Del.)*
- (2) Shree Prakash Textiles (Guj.) Ltd. v. CCE, Ahmedabad, 2004 (169) E.L.T. 162 (Tri. - Mumbai)*
- (3) CCE, Ahmedabad v. Babu Textile Industries, 2003 (158) E.L.T. 215 (Tri. - Mumbai); and*
- (4) CCE, Ahmedabad v. Arcoy Industries, 2004 (170) E.L.T. 507 (Tri. - Mumbai).*

of the Tribunal in which it has been held that the assessee is entitled to refund of the amount deposited if the assessee has gone out of the

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Modvat Scheme or their unit is closed. Aggrieved against the order of the Tribunal, Revenue filed C.E.A. No. 5/2006 in the High Court of Karnataka at Bangalore. The High Court by its impugned order has affirmed the order of the Tribunal and dismissed C.E.A. No. 5/2006 filed by the Revenue.

Learned ASG appearing for the Union of India fairly concedes that those decisions of the Tribunal, which were relied upon by the Tribunal, have not been appealed against.

In view of the concession made by the Learned ASG, this special leave petition is dismissed.”

10. Thus from the aforesaid, it is mandated that refund has to be granted when either there is a closure of the factory or the assessee goes out of the Modvat (Cenvat) Scheme. This decision of the Tribunal has been subsequently followed in several other similar cases rendered by co-ordinate Benches of this Tribunal. Similar provision of the law have been considered by the Tribunal and the decision rendered in favour of the Appellants/assesee in the case of **Kirloskar Toyota Textile Machinery Pvt. Ltd. Vs. Commssioner -2022 (379) E. L. T. 256.T**

11. The Learned AR however placed reliance on the law propounded by the Hon'ble Bombay High Court, in the case of **Gauri Plasticulture P. Ltd. V. Commissioner of Central Excise, Indore 2019 (30) G. S. T. L. 224 (Bom)** to submit that Cenvat Credit was not refundable even in relation to those inputs that remained unutilized and as such no refund was therefore payable. It is observed that the contextual situation in the said case before Bombay High Court was rather different

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as the credit pile up had happened because of change in legal position as the goods on which credit was availed got to be exempted from payment of additional duty of excise. However, that was not a case of closure of the operations on account of the demise of the Proprietor of the firm leading to unavailed and non-utilizable overflow of credit.

12. This Tribunal had an occasion to consider the two contrary viewpoints in the case of **CCE, Hyderabad Vs. Apex Drugs & Intermediates Ltd. 2014(314) E.L.T.729 T.**, after debating the same, it came to the conclusion that Rule 5 of the Cenvat Credit Rules did not prohibit the grant of such credit refund when for any reason accumulated credit was not utilizable. The assessee in the present case has ceased to be a manufacturer upon surrender of the licence and so the credit available remains unutilizable. Following the judgement of the Hon'ble Karnataka High Court in *Slovak India Trading Pvt. Ltd.*, the Tribunal had dismissed the appeal filed by the department and allowed the refund.

13. A similar situation of accumulation of credit, however was considered by this Tribunal in the case of **Nu Vista Ltd. V. Commissioner (Appeals), CGST, CEX. Raipur 2022(381) E.L.T.-681 T.** The credit remained unutilized as cesses viz. Education cess & Secondary Higher Education cess were phased out w.e.f. 01.03.2015. It was held therein that the appellants were clearly entitled to the refund of the balance amount of credit and any decision to the contrary was unsustainable. In arriving at the said ratio in law it followed the decisions of the Hon'ble Punjab and Haryana High Court in the case of *Commissioner Shree Krishna Paper Mills & Industries Ltd. – C.E.A.*

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No.36 of 2019 (OPM) decided on 11.12.2019 wherein refund of credit on account of closure of unit and surrender of licence was allowed to be paid in cash. Hon'ble Rajasthan High Court in the following cases also allowed refund of unutilized Cenvat Credit in cash

(i) Lav Kush Textiles V. CCE, Jaipur 2017(353) E.L.T. 417 (Raj)

(ii) Welcure Drugs and Pharma Ltd. V. CCE 2018(15) GSTL-257 (Raj).

14. To similar effect is the Tribunal's decision in the case of **Commr. of C.Ex. & Commr.(Appeals), Tirupati V. Kores (India) Ltd-2011(22) STR-361T**, allowing refund of Cenvat Credit lying with the assessee upon closure of the factory.

15. In view of the fact that right to availment of Cenvat Credit is a vested right **(Eicher Tractors V. UOI - 1999(106) E.L.T.-3SC, Samtel India Ltd. V. Commissioner - 2003(155) E.L.T.14SC)**, which accrues to a manufacturer, the fact of closure of business leading to non-utilization thereof, cannot deprive the deceased of their accrued interests in law and following judicial discipline and precedent decisions referred above, I allow the appeal with consequential relief, if any, to the appellant's legal heir as per law.

(Order pronounced in open court on.12.05.2023...)

Sd/-

(Rajeev Tandon)
Member (Technical)

Pinaki