

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
EASTERN ZONAL BENCH: KOLKATA**

REGIONAL BENCH – COURT NO. 1

Service Tax Appeal No. 75915 of 2022

(Arising out of Order-in-Appeal No. 185/ST/BBSR-GST/2022 dated 06.09.2022 passed by the Commissioner (Appeals) of C.R. Building Rajaswa Vihar, Bhubaneswar-7)

M/s. R. S. Developers & Associates

At Balisasan, PO-Bali,
Via- Athagarh, Cuttack-754295

: Appellant

VERSUS

**The Commissioner of GST, CX & Customs,
Bhubaneswar-I**

C.R. Building Rajaswa Vihar, Bhubaneswar-7)

: Respondent

APPEARANCE:

MS. Shreya Mundhra, Advocate for the Appellant
Shri P. Das, Authorized Representative for the Respondent

CORAM:

HON'BLE SHRI K. ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NO. 75852/ 2025

DATE OF HEARING: 02.04.2025

DATE OF PRONOUNCEMENT: 04.04.2025

ORDER: [PER SHRI K. ANPAZHAKAN]

M/s. RS Developers & Associates (herein after referred as the appellant) are engaged in the business of construction of residential buildings and was registered under the Service Tax category of "Construction of Residential Complex". The Appellant had appointed M/s. Mishra Creations Pvt. Ltd. as the contractor for construction of residential buildings for which the Appellant made payments to the contractor in advance on the basis of money receipts. The

Contractor did not charge service tax at the time of raising money receipts. However, at the time of handing over possession of the constructed property, the Contractor raised an invoice dated 26.02.2015, charging Service tax for the entire consideration received/receivable from the Appellant, amounting to Rs. 5,58,015/-.

1.1. The Appellant was eligible to avail CENVAT Credit of the Service tax amount paid to the sub-contractor for the construction of residential property on which Service tax was leviable under the Finance Act, 1994 w.e.f. 01.07.2010. As such, the Appellant availed the credit of the Service tax amount paid to the sub-contractor. However, the Appellant could not utilize the aforesaid CENVAT Credit as it did not render any service from FY 2015-16 onwards.

1.2. The Appellant vide letter dated 10.05.2016 intimated the department that it was no longer rendering "Construction of residential complex" service from the Financial Year ending March 2015 onwards and did not intend to render the same in future. Accordingly, the Appellant prayed for surrender of its Service tax registration.

1.3. The Appellant submitted the application for refund to the Assistant Commissioner, Dhenkanal Division on 04.01.2016, within one year from the date of payment of tax to the sub-contractor. However, a Show Cause Notice dated 01.04.2016 was issued to the Appellant proposing to reject the refund claimed on the allegation that there was no provision available

in the Central Excise Act, 1944 for granting refund of unutilized balance lying in CENVAT credit account consequent upon exit from providing the service.

1.4. The said SCN was adjudicated by the Adjudicating Authority passed the Order-in-Original dated July 18, 2019, rejecting the refund claim filed by the appellant on the ground that there was no provision under the Central Excise Act, 1944 to deal with refund of unutilized Cenvat credit.

1.5. On appeal, the Ld. Commissioner (Appeals) upheld the rejection of the refund claim. Aggrieved against the rejection of the refund claim, the appellant has filed this appeal.

2. The appellant submits that they have surrendered their service tax registration on 10.05.2016 as they were no longer rendering "Construction of residential complex" service from financial year 2015-16 and did not intend to render the same in future. Further, it is undisputed that the Appellant was eligible for the unutilised credit of the invoice raised by the contractor. It is a settled position in law that an assessee is eligible to claim refund of the unutilized CENVAT Credit lying in the CENVAT account at the time when the assessee opts to go out of the CENVAT scheme or when the factory is closed.

2.1. In this regard, the Appellant relied on the decision of the Hon'ble Karnatake High Court in the case of ***Union of India vs. Slovak India Trading Co Pvt. Ltd. 2008 (223) E.L.T. A170 (SC)*** which affirmed the

decision of Karnataka High Court as reported in 2006 (201) E.L.T. 559 (Kar.).

wherein on similar facts and circumstances, the Hon'ble High court has allowed the refund of unutilized Cenvat credit.

2.2. The appellant submits that the same view has been taken by the tribunals in the following cases:

(i) **M/S. International Engineering Agencies V. Commissioner 2019 (2) TMI 685 – CESTAT Chennai**

(ii) **Lalit Kumar Arya v. Commissioner 2023 (5) TMI 892 - CESTAT KOLKATA**

2.3. Thus, by relying on the decisions cited above, the appellant prayed for allowing the refund of unutilized Cenvat credit claimed by them.

3. The Appellant also claimed that they are entitled to interest on the refund amount at the rate of 12% per annum under Section 11BB of the Central Excise Act, 1944, which is made applicable to Service Tax through Section 83 of the Finance Act, 1994. Section 11BB mandates payment of interest if any duty ordered to be refunded is not refunded within three months from the date of receipt of application. The Appellant had filed the refund application within the stipulated time and has been wrongfully denied the refund. Therefore, the Appellant is entitled to interest at 12% per annum from the date of expiry of three months from the date of the refund application until the date of actual refund. Reliance in this regard is placed on the ruling in the case of:

- ***Z Konark v. Commissioner 2025 (1) TMI 479 – CESTAT Kolkata.***
- ***Parle Agro Pvt. Ltd. v. Commissioner 2021 (5) TMI 870 - CESTAT ALLAHABAD***

3.1. This position is further supported by the decision in the case of ***Shri Hari Gobind Steel Industries v. Commissioner 2020 (12) TMI 753 - CESTAT CHANDIGARH***, where it was held that the appellant is entitled to interest, as per Section 11BB of Central Excise Act from three months after the date of application till the date of grant of refund.

4. The Ld. A.R submits that there is no provision available in the CENVAT Credit rules to refund the unutilized CENVAT Credit. Accordingly, he supported the impugned order rejecting the refund claim. The Ld. A.R further submits that there is no provision in the Central excise act to grant interest on such refunds. Accordingly, he prayed for rejecting the claim of interest by the appellant.

5. Heard both sides and perused the appeal documents.

6. I observe that the issue involved in the present appeal is whether an assessee is entitled to claim refund of unutilized CENVAT credit lying in the CENVAT account at the time of surrender of service tax registration following closure of business or not. I observe that the issue is settled by the decision of the Hon'ble Apex Court in the case of ***Union of India vs. Slovak India Trading Co Pvt. Ltd. 2008 (223) E.L.T. A170 (SC) which affirmed the decision of Karnataka High Court as reported in***

2006 (201) E.L.T. 559 (Kar.). In this decision, the Hon'ble Karnataka HC has held as under:

4. Admitted facts would reveal of a claim of cash refund and admitted facts would reveal of rejection at the hands of the Assistant Commissioner and also the appellate authority. **The Tribunal has chosen to allow the claim application on the ground that refund cannot be rejected when the assessee goes out of Modvat scheme or when the Company is closed. The argument is that there is no provision for refund in terms of Rule 5 of Cenvat Credit Rules, 2002. Rule 5 reads as under:**

"Rule 5. Refund of CENVAT Credit: When any inputs are used in the final products which are cleared for export under bond or letter of undertaking, as the case may be, or used in the intermediate products cleared for export, the CENVAT credit in respect of the inputs so used shall be allowed to be utilized by the manufacturer towards payment of duty of excise on any final products cleared for home consumption or for export on payment of duty and where for any reason such adjustment is not possible, the manufacturer shall be allowed refund of such amount subject to such safe guards, 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 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."

5. 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 the Company. Therefore, Rule 5 is not available for the purpose of rejection as rightly ruled 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."

6.1. In the case of M/S. International Engineering Agencies V. Commissioner 2019 (2) TMI 685 – CESTAT Chennai, it has been held as under:

"Rule 5 of Cenvat Credit Rules, 2004 facilitates refund of credit, to be worked out in the manner provided in the formula prescribed, under sub-rule (1). The formula reads as under:

...

The term "Total turnover" used in the above formula includes the sum total value of all excisable goods cleared during the relevant

period. It doesn't restrict the inclusion of value of the excisable goods exported, per se. Sub-rule (2) deals with a situation where duty drawback is allowed and further lays down that in such a situation, credit could not be refunded. Therefore, it is clear from the above that Rule 5 facilitates the refund of Cenvat credit not merely of the excisable goods exported and therefore to say that Rule 5 provides for refund of un-utilized Cenvat only in the cases of export of service is incorrect. Thus, I am of the view that accepting this interpretation of the Commissioner (Appeals) would lead to serious anomaly, which cannot be the intention of the legislation. Admittedly, the appellant has a huge credit which is now lying with the Revenue; the appellant has surrendered its Service Tax Registration and they have also paid the service tax liability as on the last date of their business. The law cannot, therefore, lead to a situation where a bonafide tax payer's amount could be denied and withheld, for no fault of his. Further, in such a situation a bonafide assessee cannot be left remediless with his/its money in the form of credit struck with the Government. My view as above is also supported by the decision of the Hon'ble High Court of Karnataka in the case of Slovak India Trading Co. Pvt. Ltd. (supra), which decision has been followed by various judicial fora across the nation.

5. Further, when Article 265 of our Constitution mandates that no tax

be impaled/ collected without the authority of law, it is incumbent upon the Revenue to justify even retention, when there is bonafide payment/credit. In this case, there is no allegation or not even a whisper about unjust enrichment: after rejecting appellant's refund claim, apparently the same is retained without ordering deposit into Consumer Welfare Fund. It is clear that therefore both rejection and retention become contrary to the provisions of the statute. For the above reasons, I am of the considered view that the appellant's claim for refund is in order for which reason, I set aside the impugned order. Appeal is therefore allowed with consequential benefits, if any, as per law."

6.2. I observe that when Rule 5 of CENVAT Credit Rules, 2004 is read in conjunction with Section 11B, it provides a comprehensive framework for refund of CENVAT credit in cases of closure of business. Rule 5 specifically deals with refund of CENVAT credit, and while it primarily addresses export scenarios, it does not expressly prohibit refund in other circumstances. The adaptable provisions of the Act through Section 83 of the Finance Act enable refund to be routed through Section 11B of the Central Excise Act read with Rule 5 of CENVAT Credit Rules. This interpretation is consistent with the principle that the CENVAT credit is a vested right of the assessee which cannot be extinguished merely because the business has closed down.

6.3. Thus, by relying on the decisions cited supra, I hold that the appellant is eligible for the refund of

unutilized Cenvat credit. Accordingly, I hold that the impugned order rejecting the refund of unutilized Cenvat credit is liable to be set aside.

7. Regarding the claim of interest, I find that the Appellant had filed the refund application within the stipulated time and has been wrongfully denied the refund. Therefore, the Appellant is entitled to interest from the date of expiry of three months from the date of the refund application until the date of actual refund. I find that this view has been held in the following decisions:

- ***Z Konark v. Commissioner 2025 (1) TMI 479 – CESTAT Kolkata.***
- ***Parle Agro Pvt. Ltd. v. Commissioner 2021 (5) TMI 870 - CESTAT ALLAHABAD***

7.1. This position is further supported by the decision in the case of ***Shri Hari Gobind Steel Industries v. Commissioner 2020 (12) TMI 753 - CESTAT CHANDIGARH***, where it has been held that the appellant is entitled to interest as per Rules, as per Section 11BB of Central Excise Act from three months after the date of application till the date of grant of refund.

7.2. By relying on the decisions cited supra, I hold that the appellant is eligible for interest as per Section 11BB of Central Excise Act from three months after the date of application till the date of grant of refund.

8. In view of the above discussions, I pass the following order:

(i) The appellant is eligible for the refund of unutilized Cenvat credit of Rs. 5,58,015/-.

(ii) The appellant is eligible for interest as per Section 11BB of Central Excise Act from three months after the date of application till the date of grant of refund.

9. The appeal filed by the appellant is disposed on the above lines.

(Order Pronounced in Open court on 04.04.2025)

(K. ANPAZHAKAN)
MEMBER (TECHNICAL)

RKP