# IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
## WEST ZONAL BENCH AT MUMBAI
## COURT No. I

**APPEAL Nos. E/978/2009,1157/2010**

(Arising out of Orders-in-Appeal No. P-I/VSK/137/2009 dated 3.6.2009 and No. P-I/VSK/58/2010 dated 29.3.2010 passed by Commissioner of Central Excise & Customs (Appeals), Pune-I)

**Racold Thermo Ltd.** **Appellant**

Vs.

**Commissioner of Central Excise, Pune-I** **Respondent**

Appearance:

Shri Makarand Joshi, Advocate, for appellant
Shri D.S. Chavan, Superintendent (AR), for respondent

**CORAM:**

**Hon'ble Mr. Ramesh Nair, Member (Judicial)**
**Hon'ble Mr. Raju, Member (Technical)**

Date of Hearing: 22.3.2018
Date of Decision: 8.6.2018

ORDER No. **A/86746-86747/2018**

Per: Ramesh Nair

The brief facts of the case are that Appellant availed cenvat credit on invoices of Argon gas, Hydrogen gas and LAR facility. The Appellant got manufactured 'Argon Hydrogen Mix (AHN Gas) form M/s Prax Air (India) Pvt. Ltd who raised separate invoices for liquid Argon, Hydrogen and mixing facility provided by them and on which duty has been paid by

M/s Prax Air. The Appellant availed Cenvat Credit on invoices raised by M/s Prax Air India Pvt. Ltd. on the duty paid on inputs and the same was cleared for captive use and certain quantity of the said gas was sent to the adjacent their own 100% EOU Unit and group company under the cover of AR – 3 on the basis of CT-3 certificate claiming exemption under Notification No. 22/2003 dt. 31.03.2003. They were issued show cause notice contending that the mixing of gases by M/s Prax Air does not result into manufacturing of new product and hence the goods removed by the Appellants were as such. That in terms of Rule 3 (5) of the Cenvat Credit Rules, 2004 they were liable to reverse credit on inputs removed as such when cleared from the factory. According to Notification No. 22/2003 dt. 31.03.2003 the goods has to be brought directly from the factory from where they were cleared to the 100% EOU by claiming exemption. The inputs or capital goods cleared as such are not covered by the notification and the assessee has to reverse the cenvat credit availed. That the Appellants has contravened the provisions of Rule 3 (5) of CCR, 2004 and condition of Notification No. 22/2003 – dt. 31.03.2003. The show cause notice proposed recovery of Cenvat Credit along with interest and penalty. The demands were confirmed by the adjudicating authority. The Appellant filed appeal before Commissioner (Appeals) who upheld the same. Hence the present appeals.

2. Ld. Counsel Shri Makarand Joshi, appearing for the Appellant submits that even if the inputs are removed as such to 100% EOU then too no credit is required to be reversed as it is a deemed export. He relies upon the Karnataka High Court judgment in the case of CCE, Bangalore Vs Solectron Centum Electronics Ltd. (2014 (309) E.L.T. 479) (Kar.).

3. Shri D.S. Chavan, Ld. Superintendent (A.R.) appearing on behalf of the revenue reiterates the findings of the impugned order. He relies upon the judgments in case of Goyal Gases Pvt. Ltd. 2000 (115) ELT 467 (TRI), CCE Vs. Goyal Gases Pvt. Ltd. 2000 (119) ELT 5 (SC) and Vadilal Gases 2017 (346) ELT 161 (SC) that the mixing of gases does not amount to manufacture and hence the inputs were removed as such which requires reversal of credit in terms of Rule 3 (5) of CCR, 2004.

4. We have carefully considered the submissions made by both the sides. We find that the main plank of the revenue is that the goods removed to EOU have been removed as such since the mixing of gases does not amount to manufacture and hence it requires reversal of credit. We find that the goods even if cleared as such to 100% EOU against CT – 3

certificate does not invite any reversal as removals are deemed export. Our view is also based upon the order of Hon'ble High Court of Karnataka in case of CCE, Bangalore – II Vs. Solectron Centum Electronics Ltd. 2014 (309) ELT 479 (Kar). Similar view has been taken by the Tribunal in various case. In case of CCE, CHENNAI Vs. M.R.F. LTD. 2016 (341) E.L.T. 472 (Tri. - Chennai) the Tribunal held as under :

> *5. After hearing both sides and on perusal of records, I find that there is no dispute on the packing material which is eligible for Cenvat credit. The only dispute is that respondent has cleared packing material under CT2 certificate to their own EPG for export purposes which is declared as Export Processing Godown having a Customs Bonded Warehouse and the packing material used in the finished goods which are ultimately exported from the bonded warehouse at EPG and also there is no dispute on the export of finished goods which contained packing material from the EPG and the appellant followed procedure under Central Excise Rules and duly followed CT-2 procedure as per Notification No. 43/2007, dated 26-6-2007. The respondents are eligible for Cenvat credit on the packing material. I find that as per sub-rule (5)(vi) of Rule 6 of CCR, the provisions of Rule 6 is not applicable as the goods were cleared for export under bond in terms of provisions of CER. Accordingly the respondents are not required to reverse the Cenvat credit while clearing under CT-2 certificate to their EPG unit and there is merit in the contention of respondent that LAA has relied his own OIA No. 20/2007 in the impugned order. I do not find any infirmity in the impugned order which is upheld. Accordingly, Revenue's appeal is rejected. The cross-objection filed by respondent gets disposed of.*

In case of BALA HANDLOOMS EXPORTS CO. LTD. Vs. CCE, CHENNAI 2009 (15) S.T.R. 483 (Tri. - Chennai), the Tribunal held as under :

> ***9.3*** *Appellants take credit of duty paid on yarn and fabrics. At the time of receipt of inputs ie, fabrics, the appellants are not in a position to identify the fabrics which would be sent for job work for embroidering and for ultimate export. All the fabrics received including those which are subjected only to the processes enumerated by the lower authorities in their orders are exported. I find that the appellants used to be allowed refund in the same circumstances till the subject claims were filed and that the lower authorities denied the refund on the ground that the fabrics involved had not undergone any process of manufacture as interpreted by the Apex Court in the case of CCE v. Maharashtra Fur Fabrics Ltd. (supra).*
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> ***9.4*** *As per the Explanation to erstwhile Central Excise Rules (CER) 12 and rule 13, 'manufacture' includes the process of blending of any goods or making alterations or any other operation thereon. Replacing of the CER '44 with CER '2001/02 did not curtail any benefits the trade had enjoyed in relation to export. Moreover if the manufacturer of the impugned goods or a merchant manufacturer were to export them, the exporter would have been granted the duty paid on the fabrics.*
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> ***9.5*** *I find that Rule 5 of the CENVAT Credit Rules reads as follows :-*
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> *"**Rule 5. - Refund of CENVAT Credit :***

> *Where 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 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 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". The rule provides for refund of CENVAT credit taken on inputs where for any reason the same could not be utilized for clearing final products for home consumption or export products on payment of duty. After considering the relevant facts I am convinced that the appellants are eligible for refund of accumulated CENVAT credit in terms of Rule 5 of the CCR. Considering the above legal position I find that the appellants are eligible for the refund of the CENVAT credit claimed. The appeal is allowed.*

The above order was affirmed by the Hon'ble Madras High Court in case of *Commissioner* v. *Bala Handlooms Exports Co. Ltd. - 2015 (320) E.L.T. A124 (Mad.)*

5. We thus find that the issue involved stand settled in favour of Appellant and they are not liable to reverse any credit in terms of Rule 3 (5) of CCR, 2004. We therefore set

aside the impugned orders and allow the Appeals with consequential relief, if any.

(Pronounced in court on 8.6.2018)

**(Raju)**
**Member (Technical)**

**(Ramesh Nair)**
**Member (Judicial)**

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