CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

CENTRAL EXCISE APPEAL NO: 1352 of 2011

[Arising out of Order-in-Appeal No. Th-I/RKS/01/2011 dated 08/06/2011 passed by the Commissioner of Central Excise (Appeals), Mumbai – I.]

Deenox Poly-Yarn Pvt Ltd … ***Appellant***
H.No. 713, Survey No. 10, Village Katal,
Bhiwandi, Dist: Thane

versus

Commissioner of Central Excise, Thane – I …***Respondent***
Navprabhat Chambers, Ranade Road,
Dadar West, Mumbai – 400 028

APPEARANCE:

Shri Prasad Paranjape, Advocate for the appellant

Shri A S Parab, Assistant Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE DR SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

FINAL ORDER NO: ___ A/86225 / 2019

DATE OF HEARING: 03/05/2019
DATE OF DECISION: 11/07/2019

PER: C J MATHEW

Appellant herein, M/s Deenox Poly-Yarn Pvt Ltd is a manufacturer of 'polyester and polyester viscose yarn' and the dispute pertains to the exercise of option, under notification no. 30/2004-CE dated 9th July 2004, by then, in terms of the scheme of subjecting the manufactured product, which otherwise was outside the net of duties of central excise, to a specified rate to enable availment of CENVAT credit. Normally there is no option to be burdened with duty on exempted goods. The appellant had accumulated CENVAT credit till 31st March 2006 before reverting to full exemption as provided for in notification no. 30/2004-CE dated 9th July 2004. Appellant sought refund of accumulated, and unused, credit of ₹ 1,28,04,392/- under rule 5 of CENVAT Credit Rules, 2004 which was rejected by the original authority and the rejection was upheld in order-in-appeal no. Th-I/RKS/01/2011 dated 8th June 2011 of Commissioner of Central Excise (Appeals), Mumbai – I leading to the present proceedings.

2. The claim was rejected by the original authority for having been filed beyond the period of limitation of one year prescribed in section 11B of Central Excise Act, 1944 by determination of the date of opting for the exemption scheme, embodied in notification no. 30/2004-CE dated 9th July, 2004, as the relevant date. The impugned order has, besides, placed reliance on the decision of the Larger Bench of the Tribunal in *Steel Strips v. Commissioner of Central Excise, Ludhiana [2011 (269) ELT 257 (Tri.-LB)]*.

3. We find from the records that this matter was deferred by the

Tribunal, in its order dated 10th April 2014, to await the decision of the Hon’ble High Court of Bombay which was seized of the controversy in appeal of Revenue against order of the Tribunal in *Raymond Ltd v. Commissioner of Central Excise, Mumbai – III [2011 (273) ELT 582 (Tri.-Mumbai)]*.

4. Learned Counsel for the appellant informs that the appeal has since been dismissed as withdrawn in consequence of the threshold prescribed for continuation of litigation by Government of India. He also submits that the decision of the Tribunal in *Jain Vanguard Polybutylene Ltd v. Commissioner of Central Excise, Nashik [2009 (247) ELT 658 (Tri.Mumbai)]* stood affirmed by the Hon’ble High Court of Bombay in *Commissioner of Central Excise, Nasik v. Jain Vanguard Polybutylene Ltd [2010 (256) ELT 523 (Bom.)]* and further affirmed by the Hon’ble Supreme Court owing to dismissal of the ‘special leave petition’ filed by the Government of India.

5. It is seen that, in *re Jain Vanguard Polybutylene Ltd*, the Hon’ble High Court of Bombay was persuaded that judicial discipline stood in the way of taking inconsistent stand on identical questions. In the order of the Tribunal that was appealed against therein, reliance has been placed on the decision of the Hon’ble High Court of Karnataka in *Union of India v. Slovak India Trading Co Pvt Ltd [2006 (201) ELT 559 (Kar.)]*.

6. Learned Authorised Representative relies upon the decision of the Tribunal in *Commissioner of Central Excise, Mumbai v. Hindoostan Spinning and Weaving Mills Ltd [2016-TIOL-1589-CESTAT-MUM]* in which the dispute related to accumulated CENVAT credit being ineligible for refund under rule 5 of CENVAT Credit Rules, 2004 for non-compliance with procedure prescribed therein.

7. The various issues raised by Learned Counsel have been dealt with by the Tribunal in *Voltas Ltd v. Commissioner of Central Excise, Pune – IV [2018-TIOL-3092-CESTAT-MUM]* thus

> *'6. It would appear from these decisions that neither assures a precedent to be followed without examining the circumstances of eligibility. Indeed, the Hon'ble High Court of Karnataka did, in re Slovak India Trading Co Ltd, emphasise the importance of scrutinising the circumstances of each claim for refund and directed that a disposal solely on that one statutory exclusion would not suffice. Following that prescription, it is necessary to examine the circumstances in which this claim has been made. Before so doing, the CENVAT credit and the implication of allowing the claim preferred by the appellant must also be subject to examination.'*

to emphasise that the direction of the Hon'ble High Court of Karnataka had desired that the competent authorities should scrutinise the eligibility for claim of refund under any of the available provisions instead of peremptory dismissal for lack of coverage by rule 5 of CENVAT Credit Rules, 2004. The decision did not extend the coverage of CENVAT Credit Rules, 2004 to credit that was accumulated, and unused, on closure of the unit. After doing so, the Tribunal has gone on to posit that duties of central excise are leviable, under Central Excise Act, 1944, on the value added by the manufacturer which is made operational by adjustment of duty computed on total value with the duties discharged on the inputs, input services and capital goods used for such manufacture. It was squarely held that the cessation of operation by a manufacturer eliminates the burden of duty liability and, thereby, eliminates the statutory obligation to allow such adjustments. With closure of operation, continuing with the accumulated CENVAT credit becomes redundant. It was also held that pleas for refund assume that CENVAT Credit Rules, 2004 is an exemption scheme; if it were, the Rules would have been issued under the authority of section 5A of Central Excise Act, 1944 and section 93 of Finance Act, 1994 instead of general ‘rule making powers’ conferred by both these statutes. Furthermore, the Tribunal has held that the monetization of accumulated CENVAT credit would amount to refund of tax duly discharged on the raw materials, services and capital goods that were manufactured by another entity and procured by the appellant. Such refund is not envisaged under Central Excise Act, 1944 unless the duty itself was not exigible. As the circumstances in which the claim disputed in *re Slovak India Trading Co Pvt Ltd* denied by the lower authorities is not ascertainable from the records and unable to be tested for congruence with the present circumstances, compliance with the decision of the Hon'ble High Court of Karnataka, followed by Hon'ble High Court of Bombay in *re Jain Vanguard Polybutlene,* necessitates the ascertainment of entitlement to CENVAT credit after closure of operation.

8. It is seen from the records that the denial of claim for such entitlement to the mantle of CENVAT credit had not been preceded by any notice to the appellant herein of the various grounds on which it was proposed to be rejected. The original authority has exercised power of dismissal of the application at the threshold by taking recourse to the bar of limitation of time. The claim has been preferred under rule 5 of CENVAT Credit Rules, 2004. The said Rules govern disposition of credit equivalent to duty discharged on raw material, consumables, capital goods and input services procured for, and attributable to, goods that have been exported. That may, or may not, apply to the present dispute. The adjurement of the Hon'ble High Court of Karnataka, in *re Slovak India Trading Co Pvt Ltd,* requiring ascertainment of any other provision under which entitlement to refund may be allowed should also be coupled with it. It would,

therefore, be appropriate for us to set aside the impugned order for having to failed to comply with the principles of natural justice and remand the application for refund back to the original authority for necessary action thereon in accordance with the decisions cited and our findings *supra.*

9. Appeal is accordingly disposed off.

(Order pronounced in the open court on 11/07/2019)

(C J Mathew)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

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