CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI

REGIONAL BENCH - COURT NO. I

Excise Appeal No. 429 of 2011

(Arising out of Order-in-Appeal No. PKS/441-442/BEL/2010 dated 25.11.2010 passed by the Commissioner of Central Excise (Appeals), Mumbai-II)

M/s VVF Ltd. .... Appellant
Plot No. V-14. MIDC, Taloja,
Raigad, Maharashtra - 410208

Versus

Commissioner of Central Excise, Belapur .... Respondent
5th Floor, CGO Complex, CBD Belapur,
Navi Mumbai – 400614

WITH

Excise Appeal No. 1824 of 2011

(Arising out of Order-in-Appeal No. PKS/441-442/BEL/2010 dated 25.11.2010 passed by the Commissioner of Central Excise (Appeals), Mumbai-II)

M/s VVF Ltd. .... Appellant
Plot No. V-14. MIDC, Taloja,
Raigad, Maharashtra - 410208

Versus

Commissioner of Central Excise, Belapur .... Respondent
5th Floor, CGO Complex, CBD Belapur,
Navi Mumbai – 400614

AND

Excise Appeal No. 837 of 2012

(Arising out of Order-in-Original No. Belapur/73/Taloja/R-VI/SLM/ Commr/2011-12 dated 29.02.2012 passed by the Commissioner of Central Excise, Belapur)

M/s VVF Ltd. .... Appellant
Plot No. V-14. MIDC, Taloja,
Raigad, Maharashtra - 410208

Versus

Commissioner of Central Excise, Belapur .... Respondent
5th Floor, CGO Complex, CBD Belapur,
Navi Mumbai – 400614

Appearance:

Shri V.K. Jain, Advocate with Shri Ramnath Prabhu, Advocate for the Appellants

Shri R.K. Dwivedi, ADC, Authorized Representative for the Respondent

CORAM:

HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO. A/87442-87444/2019

Date of Hearing: 05.12.2019
Date of Decision: 05.12.2019

Per: Dr. D.M. Misra

These three appeals are filed against respective Orders-in-Appeal and Order-in-Original, since involve common issue, are taken up together for hearing and disposal.

2. Briefly stated the facts of the case are that the appellants are engaged in the manufacture and marketing of Olia chemicals and personal care products for domestic and international market at their Taloja unit, which is a 100% EOU. The appellants manufacture distilled Fatty Acid, Fatty Alcohol, Soap Noodles etc. and these finished goods are mostly exported. The appellants received duty paid inputs (distilled fatty acid) from its another unit at SION and used the same in the manufacture of finished products. Since the finished products are mostly exported, the CENVAT Credit availed on inputs got accumulated and they filed cash refund claims of the accumulated credit under Rule 5 of the CENVAT Credit Rules, 2004. The appellant during the period November, 2008 and December, 2008 was sanctioned with a total cash refund claim of accumulated credit of Rs.10,16,26,652/-. Initially the Assistant Commissioner on 12.8.2009 granted provisional refund claim of Rs.5,27,87,071/-

on the basis of verification carried out by the Range Superintendent. Subsequently, the refund claim was finally sanctioned on 10.11.2009. The Department filed an appeal before the learned Commissioner (Appeals) against the said order of the adjudicating authority and the learned Commissioner (Appeals) vide order dated 15.12.2010 allowed the Revenue's appeal. Aggrieved by Commissioner's (Appeals) order, the appellant filed two appeals before this Tribunal bearing Appeal No. E/429/2011 and E/1824/2011. The appellants were also issued a protective demand notice on 25.03.2010 by the Department for recovery of the amount of refund allowed to the appellant. On adjudication, the demand was confirmed by the learned Commissioner by order dated 29.02.2013. The appellant had also filed an appeal against the said order bearing Appeal No. E/837/2012.

3. The learned Advocate Shri Vipn K. Jain for the appellants has submitted that while disposing the appeals, the learned Commissioner (Appeals) framed two issues i.e. whether process of distillation of fatty acid carried out by the appellant amounts to manufacture, and whether the appellants are eligible to cash refund of accumulated CENVAT Credit when the manufacturing process is not a batch process but a continuous one and consequently there is no possibility of a one to one correlation between the finished products manufactured and exported for the month for which the refund filed.

4. Assailing the finding of the learned Commissioner (Appeals) on the issue of marketability, wherein the learned

Commissioner (Appeals) observed that the appellant procures “fatty acid” and after carrying out the distillation of fatty acid clears “distilled fatty acid” for export under Bond; that this process has been undertaken to make the product more pure or to enhance its marketability which is already marketable. Consequently, the learned Commissioner (Appeals) held that the activity though renders the product “more marketable” but does not amount to ‘manufacture’ within the definition of Section 2(f) of the Central Excise Act, 1944 because the fatty acid in any case is earlier also marketable. In arriving at the said conclusion, the learned Commissioner (Appeals) adopted the principles laid down by the Tribunal in the case *of S.D. Fine Chem Pvt. Ltd. – 1997 (91) ELT 610 (Tri)*.

5. The learned Advocate has submitted that the process undertaken by the appellant is not merely plain distillation, but comprises of plain distillation, fractional distillation and blending. The learned Commissioner (Appeals) in the order accepted that the process carried out by the appellant make the resultant product “more marketable”. He has submitted that in view of Chapter Note 9 to Chapter 38 of Central Excise Tariff Act, 1985, adoption of any other treatment to render the product marketable to the consumer shall amount to manufacture. It is submitted that as long as the process adopted renders the product marketable including enhancement of its marketability to a particular set of customers, the process would amount to manufacture. He has laid emphasis on the expression “treatment” used in Note 9 to Chapter 38 in making the statement that the process undertaken by the appellant

enhances the marketability of the fatty acid received by them from their other unit. In support, they have referred to the judgment of the Hon'ble Supreme Court in the case of *CCE Vs. Air Liquide North India Pvt. Ltd. – 2011 (271) ELT 321 (SC)* and *Jindal Drugs Ltd. Vs. CCE – 2015-TIOL-857-CESTAT-MUM.*

Further, he has submitted that the distilled fatty acid exported by them after undertaking the distillation process, adds its value by approximately Rs.28,600/- PMT. Hence, there is also value addition to the input fatty acid after being subjected to the process of further distillation.

6. The learned Advocate on the issue of input output ratio submitted that there is no one to one correlation required of the inputs to the finished goods to consider cash refund of accumulated CENVAT Credit under rule 5 of the CENVAT Credit Rules, 2004 on account of export of goods. It is his contention that the manufacturing process undertaking by the appellant is a continuous process and physical one to one correlation of its inputs with the finished goods in a particular month cannot be established, though from the documents the correlation between the inputs and the finished goods can be established. This fact has been established before the Range Superintendent at the time of verification and accordingly, he has recommended for refund of the accumulated CENVAT Credit. Further, he has referred to the Circular No. 84/2001-Cus and 85/2001-Cus dated 21.12.2001, where the First-in-First-Out (FIFO) method has been adopted in such circumstances. It is his contention that the duty paid materials are procured by them from its DTA unit wherein duty was discharged in terms of Rule 8 of the Central

Excise Valuation Rules, 2000. Consequently, the assessable value of all the inputs received was uniform and therefore, applying the accounting principle, including the FIFO method, the refund amount would be the same. Further, he has submitted that there is no requirement of one to one correlation of the inputs with the finished products for claiming the cash refund of accumulated credit. In support, he has referred to the judgment of this Tribunal in the case of *CCE Vs. Motherson Sumi electric Wires – 2010 (252) ELT 543 (Tri)* affirmed by the Karnataka High Court in *2012 9278) ELT 177 (Kar); CCE Vs. Ambica International Pvt. Ltd. – 2011 (266) ELT 262, Philco Exports Vs. CCE – 2009 (234) ELT 568 (T), Capiq Engineering Pvt. Ltd. Vs. CCE – 2009 (245) ELT 186.*

7. The learned AR for the Revenue reiterating the findings of the learned Commissioner (Appeals) has submitted that the Chartered Accountant's certificate calculates the input-output ratio on average basis and not on actual basis, therefore, the same was discarded by the adjudicating authority. No other evidence has been placed by the appellant in support of their claim that the input-output ratio of raw materials to the finished goods is 1190 Kg : 1000 Kg. Further, the learned AR for the Revenue has submitted that the appellant had failed to establish the inputs and services used in manufacture of exported goods during the month to which the refund claim relates, hence the learned Commissioner (Appeals) has rightly held that the refund claim for the particular month is not admissible to them. Further, he has submitted that the simple process of distillation does not result into 'manufacture' as held by this Tribunal in the case of

S.D. Fine Chemical's case (supra). Learned AR further submitted that the refund filed containing the report submitted by the Range Superintendent referring to input-output ratio could not be placed before this Bench even though directed because of the fact that during the course of transfer of file, on re-structuring of the organization, the same has been lost. In support, he has filed an Affidavit of the Assistant Commissioner, Raigad GST Commissionerate.

8. Heard both sides and perused the records.

9. The issue involved in the present appeals for consideration is whether the appellants are entitled to cash refund of accumulated CENVAT Credit availed on inputs used in the manufacture of finished goods exported under Rule 5 of the CENVAT Credit Rules, 2004 for the period October 2008 and November, 2008. It is not in dispute that the appellants received duty paid distilled fatty acid from their other unit at SION, Mumbai subjected it to further process of distillation and exported the same. They have claimed refund of accumulated CENVAT Credit paid on inputs after export of the finished goods following the laid down procedure under Rule 5 of CENVAT Credit Rules, 2004. Revenue initially sanctioned the cash refund of accumulated CENVAT Credit but latter issued a show-cause notice for recovery of the credit on the ground that the raw materials/inputs i.e. distilled fatty acid received by the appellant is since already marketable and further distillation of same does not result into 'manufacture' and accordingly, on export of the said goods, cash refund cannot be allowed. Further, since the

process of distillation carried out by the appellant is continuous one and there is no one to one correlation between the inputs and export goods manufactured and cleared in a particular month, accordingly, cash refund of accumulated credit cannot be granted to the appellant.

10. As far as the issue of marketability, the appellant admittedly received duty paid distilled fatty acid and in the impugned order the learned Commissioner (Appeals) observed that the raw material is subjected to further process of distillation. The finding of the learned Commissioner (Appeals) is that the further distillation process only improves/enhances the marketability of the raw material i.e. the distilled fatty acid, hence cannot be considered that a new commodity resulted out of further distillation. The relevant Chapter Note 9 to Chapter 38 reads as under: -

> *"9. In relation to products of heading 3808, addition of chemicals and other ingredients like inert carriers or solvents, surface active dispersing and stabilising agents, emulsifires, wetting and dispersing agents, deodorant, masking agent, attractants and feeding stimulants to pesticidal chemicals in concentrated form, labelling or relabelling of containers intended for consumers or repacking from bulk pack to retail packs or the adoption of any other treatment to render the product marketable to the consumer shall amount to 'manufacture'."*

In the said chapter note, it is clearly laid down that any other treatment which makes the product marketable would result into manufacture. We are of the opinion that it is an immaterial whether the product was earlier marketable and its marketability is enhanced by further process carried out by the appellant, which may comprise of the same process of distillation also. This principle has been laid down by the Hon'ble Supreme Court in *Air Liquide North India Pvt. Ltd.'s* case. The relevant para 13 of the judgment is reproduced as under: -

> ***"13.** In the instant case, Helium gas was having different marketability, which it did not possess earlier and hence the gas sold by the appellant was a distinct commercial commodity in the trade, rendering it liable to duty under Chapter Note 10 of Chapter 28 of the Act. If the product/commodity, after some process is undertaken or treatment is given, assumes a distinct marketability, different than its original marketability, then it can be said that such process undertaken or treatment given to confer such distinct marketability would amount to "manufacture" in terms of Chapter note 10 to Chapter 28 of the Act."*

11. The learned Commissioner (Appeals) heavily relied on the principle laid down in *S.D. Fine Chemical's case (supra)*. We do not find the principle laid down in the said case is applicable to the present circumstances inasmuch as in the present case Note 9 of Chapter 38 of Central Excise Tariff Act, 1985 lays down specifically that any treatment that renders the product marketable to the consumer is to be considered as manufacture. This deemed clause was not present in the old Tariff, which was before the Tribunal in *S.D. Fine Chemcial's* case*,* therefore, the ratio of the said case is not applicable.

12. On the issue of one to one correlation between the inputs and finished goods exported during the month so as to allow refund of the accumulated CENVAT Credit under Rule 5 of the CENVAT Credit Rules, 2004, we find that the issue is considered by this Tribunal in a series of cases referred by the learned Advocate where under it has been held that to claim refund of accumulated credit under Rule 5 of CENVAT Credit Rules, 2004, there is no need to show that the same input on which credit taken and claimed as fund must have been used in the finished

goods and exported during the period for which the refund is claimed.

13. In the result, the impugned orders are set aside and the appeals are allowed with consequential relief, if any, as per law.

(Operative portion of the order pronounced in court)

(Dr. D.M. Misra)
Member (Judicial)

separate concurring order

(Sanjiv Srivastava)
Member (Technical)

Sinha

Per Sanjiv Srivastava:

I have seen the order as per the Learned Member (Judicial) and have no difficulty in concurring with the same, and I concur with it completely. However I would add as follows to the order of Learned Brother while concurring with the same.

2. The present issue is in respect of the refund claims filed in terms of Rule 6 of the CENVAT Credit Rules, 2004 as amended from time to time. The said rule provides for the refund of accumulated credit in the CENVAT account in respect of goods and services exported under bond or undertaking. This rule is very specific and lays down how to determine the quantum of admissible refund from the accumulated credit. It is not a proceeding for the denial of credit available in the CENVAT account of the claimant. Thus even if the refund is denied then also the amount continues to be in the CENVAT account of the claimant.

3. If the case of revenue is that the activities undertaken by the appellants in present case is not amounting to manufacture then what was the need for registration and permit exports to be undertaken against bond or letter of undertaking. Even if revenue holds that the activities undertaken did not amount to the manufacture, then the CENVAT Credit itself should have been recovered by application of Rule 3 and Rule 6 of the CENVAT Credit Rules, 2004. The proceedings under rule 5 do not envisage denial of CENVAT Credit, but only seeks to deny the refund of accumulated CENVAT Credit. Nothing has been brought on record to show that revenue envisaged to deny the credit by

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proceeding against the appellants under Rule 13 read with Section 11A of the Central Excise Act, 1944, for recovery of inadmissible credit as the processes undertaken do not amount to manufacture. Having not done so they cannot, in a proceeding under rule 5 of CENVAT Credit Rules, 2004, for refund of accumulated credit which is available in CENVAT account, deny the refund on these grounds. In any case even if the refund under Rule 5 is denied equivalent credit continues to stand in the books of accounts of the appellants and they can use it for the clearances to be made by them in the domestic market.

4. With the above observations I concur with the order of learned Member (Judicial)

S. Srivastava

(Sanjiv Srivastava)
Member (Technical)