CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
REGIONAL BENCH

Excise Appeal No. 86434 of 2016

(Arising out of Order-in-Appeal No. NGP/EXCUS/000/APPL/955/15-16/532 dated 11.03.2016 passed by Commissioner of Central Excise, Customs & Service Tax (Appeals), Nagpur)

M/s. Fabrimax Engineering Pvt. Ltd. **Appellant**
Plot No.J-20, MIDC Indl. Area,
Hingna Road, Nagpur 440 016.

Vs.

Commissioner of Central Excise, Nagpur-I **Respondent**
Telangkhedi Road, Civil Lines,
Nagpur 440 001.

Appearance:

Shri Rajesh Ostwal, Advocate, for the Appellant
Shri Nitin Ranjan, Assistant Commissioner, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO. **A/85328/2021**

Date of Hearing: 20.01.2021
Date of Decision: 11.02.2021

PER: SANJIV SRIVASTAVA

This appeal has been filed by the appellants against order in appeal No NGP/EXCUS/000/APPL/055/15-16/532 dated 11.03.2016 of the Commissioner (Appeals) Central Excise Nagpur. By the impugned order, Commissioner Appeal has held as follows:

"I hereby uphold the Order in Original No 08/NGP-1/2015/AC/Adj/H-1 dated 16.07.2015 passed by the Assistant Commissioner, Central Excise Hingna-I Division Nagpur and reject the appeal of the appellant."

1.2 Assistant Commissioner had vide his Order in Original rejected the refund claim filed by the appellant in terms of Rule 5 of the CENVAT Credit Rules, 2004 and stated as under:

"I reject the refund claim of Rs 96,53,590/- (Rupees Ninety Six Lakhs Fifty Three Thousand Five Hundred and Ninety only) for the period January 2015 to March 2015 claimed by the Noticee under Rule 5 of The CENVAT Credit Rules, 2004 and 27/2012-CE$ (NT) dated 18.06.2012 issued thereunder read with Section 11B of the Central Excise Act, 1944."

2.1 Appellant is engaged in manufacture of excisable goods namely Electrostatic Precipitator, Supporting Components and Structures etc., classifiable under Chapter 73 and 84 of the First Schedule to the Central Excise Tariff Act, 1985 as it existed then. They had supplied certain goods claiming exemption under S No 336 of Exemption Notification No 12/2012-CE dated 17.03.2012 to a project awarded against International Competitive Bidding.

2.2 Claiming these supply to be deemed exports, appellants preferred a refund claim of Rs 96,53,590/- (Rupees Ninety Six Lakhs Fifty Three Thousand Five Hundred and Ninety only) for the period January 2015 to March 2015 claimed by the Noticee under Rule 5 of The CENVAT Credit Rules, 2004 read with 27/2012-CE$ (NT) dated 18.06.2012.

2.3 Since revenue was of the opinion that goods supplied claiming exemption under Notification No 12/2012-CE (S No 336) do not qualify as export goods, therefore the refund as claimed by the appellants under Rule 5 of CENVAT Credit Rules, 2004 will not be admissible to them, a Show Cause Notice No V(84)18-03/Ref/H-I dated 12.05.2015 was issued to them asking them to show cause as to why their refund claim should not be rejected for this reason.

2.4 After considering the submissions made, in their written reply and during personal hearing, Assistant Commissioner rejected the refund as per his order, referred in para 1.2 supra.

2.5 Appellants filed appeal against the order of Assistant Commissioner, to Commissioner (Appeals) which has been rejected as per the impugned order.

2.6 Against the rejection of the appeal appellants have filed this appeal before us.

3.1 We have heard Shri Rajesh Ostwal, Advocate for the appellants and Shri Nitin Ranjan, Assistant Commissioner, Authorized Representative for the revenue.

3.2 Arguing for the appellants learned counsel submitted as follow:

- The issue is squarely covered in their favour by the CESTAT final Order No A/88223-88224/16/DB dated 17.06.2016, in their own case. The appeal filed (Central Excise Appeal No 15/2016) by the revenue against the said order of CESTAT, has been dismissed by the Hon'ble Bombay High Court vide its order dated 22nd February 2017.
- In the following decisions it has been held that the supplies made to the 100% Export Oriented Units shall be eligible, for the refund under rule 5 of the CENVAT Credit Rules, 2004'-
    - Shilpa Copper Wire Industries [2008 (226) ELT 228 (T)] upheld by Hon'ble Gujarat High Court at [2011 (269) ELT 17 (Guj)]
    - Elcompanies sales Pvt Ltd [2012 (279) ELT 280 (T) affirmed by Hon'ble Allahabad High Court at [2014 (310) ELT A89 (ALL)]
    - NBM Industries [2013 (29) STR 208 (GUJ)]
    - Anita Synthetics Pvt Ltd [2014 (306) ELT 133 (GUJ)]
    - E I Dupont India Pvt Ltd [2014 (305) ELT 282 (GUJ)]
    - Metflow Cast Pvt Ltd [2016 (331) ELT 335 (GUJ)}
    - Apotex Pharmachem India Pvt Ltd [2015-TIOL-2268-CESTAT-Bang]
    - Arkay Glenrock (P) Ltd [2014 (35) STR 953 9T)]

  - o Uniworth Textiles Ltd [2016(341) ELT 438 9T)]
- In case of Om Metals Infra Projects Ltd [2015-TIOL-1211-CESTAT-Del] the benefit has been extended in case of the supply of the goods under ICB, which qualify as deemed exports.
- Clause (1A) to Explanation 1 to Rule 5 inserted w.e.f 01.03.2015 is prospective and will not apply to refund claims pertaining to period prior to this date. In their case the refund claim has been made for the supplies made by them during the period January to March 2015, to the project claiming the benefit of exemption under S No 336 of Exemption Notification No 12/2012-CE dated 17.03.2012 to a project awarded against International Competitive Bidding. Therefore the supplies made by them during the months of January and February shall not be hit by this explanation.
- The decisions relied upon by the learned Commissioner (Appeal) in his order and Authorized Representative during the course of argument are clearly distinguishable and will not apply to their case.

3.2 Countering the arguments made by the learned counsel, Learned Authorized while reiterating the arguments advanced by the Commissioner (Appeal) in order in appeal, further submits,-

- There is no term like “deemed exports” defined under the Central Excise Act, 1944 or the CENVAT Credit Rules, 2004. Plain reading of the rule 5 of the CENVAT Credit Rules 2004, suggests that this rule is applicable in respect of goods which are exported under bond or letter of undertaking, and not in respect of the goods cleared under exemption notification.
- All the decisions relied upon by the learned Counsel except the one in case of are in respect of Om Metals Infraprojects Ltd, are in respect of the supplies made to Export Oriented Units. In the case of the supplies made to the Export Oriented Units, the goods supplied are used in

manufacture/processing of the goods which are finally exported. Hence these decisions are clearly distinguishable as in the case under consideration.

- Hon'ble Supreme Court has in case of Dilip Kumar & Co [2018 (361) ELT 577 (SC)] clearly laid down that the exemptions and exceptions in law are subject to strict literal construction, and should be construed in favour of the revenue. In the present case the decision of tribunal in case of Om Metal Infra Projects Ltd., extending the benefit to the supplies made to project awarded under ICB, do not seem to state the correct principle in law.
- In any case after the insertion of Clause (1A) to Explanation 1 to Rule 5, the position has been made clear that this rule is applicable only in the case of physical exports of goods, and this insertion seeking to clarify the ambiguity that earlier existed is clarificatory in nature and hence retrospective.
- In following decisions it has been held that rule 5 refund is not admissible in the case of deemed exports,-
  - Tiger Steel Engineering (I) Pvt Ltd [2010 (259) ELT 375 (T)]
  - Tricolite Electrical Indus Ltd [2012 (282) ELT 468 (T)]
  - Quality Screens [2008 (226) ELT 608 (T)]
  - Arrow Engineers [2018 (12) GSTL 311 (T)]
  - Jimtex Pvt Ltd [2018 (9) GSTL 290 (T)]
- In view of the insertions made in the rule 5, and the decisions as above there is no merits in this appeal either for the period prior to 01.03.2015 or thereafter and the appeal should be dismissed.

4.1 We have considered the impugned order along with the submissions made in appeal and during the course of arguments on appeal. The short point for consideration is admissibility of refund of accumulated CENVAT Credit, in the case where the goods have been supplied to a project awarded under ICB, treating such supplies to be deemed exports.

4.2 Rejecting the arguments advanced by the appellants Commissioner (Appeal) has in impugned order recorded as under:

The main grounds on which the refund claim has been rejected by the lower authority is that the appellant has cleared goods in question under Notification No 12/2012-CE dated 17.03.2012 (Sr No 336) read with condition No. 41, against ICB at Nil rate of Central Excise Duty. The supply of goods made against ICB are' treated as "deemed export" in terms of para 8.1 and 8.2 or Foreign Trade Policy. And as per para 8.3 of foreign Trade Policy, the goods cleared against ICB are eligible for only three benefits viz. Advance Authorization / Advance Authorization for annual requirement, DFIA, Deemed Export Drawback and Exemption from terminal excise duty where supplies are made against ICB only

35. Before proceeding any further, I would firstly like to bring home the point that the said refund claim has been filed for the period January 2015 10 March 2015 under Rule 5 of the CENVAT Credit Rules, 2004 and the notification applicable during the relevant time which prescribes the safeguards, conditions and limitations for allowing refund under rule 5 of CCR, 2004 is Notf. No. 27/2012 CE (NT) dated 18.06.2012

36. I find that the goods have been cleared at Nil rate of duty under notification No. 12/2012 dated 17-03-2012 and supplied against International Competitive Bidding (ICB). Further I find that Rule 5 of CCR, 2004 stipulates that inputs should be used in the manufacture of final product which is cleared for export under bond or letter of undertaking Thus accumulation of unutilized CENVAT credit should be on account of export of goods. Para 3(g) of Notf. No. 27/2012 CE (NT) dated 18.06.2012 also lays that

"At the time of sanctioning the refund claim the Assistant Commissioner or Deputy Commissioner shall satisfy himself or herself in respect of the correctness of the claim and the fact that goods cleared for export or services provided have actually

been exported and allow the claim of exporter of goods or services in full or part as the case may be."

37. The term "export" has been defined under Section 2 of the Customs Act 1962 as follows:

(18)"export", with its grammatical variations and cognate expressions means taking out of India to a place outside India;

(19) "export goods" means any goods which are to be taken out of India to a place outside India.

38. Further vide notification No. 8/2015-NT dated 01-03-2015, explanation added to Rule 18 of Central Excise Rules 2002 that reads as under

"Explanation: For the purpose of this Rule "export" with its grammatical variations and cognate expressions means taking goods out of India to a place India and includes shipment of goods as provision or stores for use on board a ship proceeding to a foreign port or supplied to a foreign going aircraft."

39. Further, vide notification. No. 6/2015-NT dated 01-03-2015, under the very Rule 5 of the Cenvat Credit Rules, 2004 under which the refund is claimed, the following has been added

"In the said rules, in rule 5, in Explanation 1, after clause (1), the following clause shall be inserted, namely:

(1A) "export goods" means any goods which are to be taken out of India to a place outside India."

Thus the definition of export and export goods as defined in Section 2 of the Customs Act 1962 has been incorporated in Central Excise Rules 2002 vide Notification No. No.8/2015-NT dated 01-03-2015 and in the CENVAT Credit Rules, 2004 vide Notification No. No.6/2015-NT dated 01-03 2015. These notifications are clarificatory in nature and are very much applicable for earlier cases. Thus it is not correct to interpret that inclusion of physical exports in Rule 5 of the Cenvat Credit Rules, 2004 implies that prior to this date all other exports including deemed exports can qualify for - the refund of unutilized Cenvat Credit under Rule 5 of CENVAT Credit Rules, 2004. The inclusion *of definition is only clarificatory in nature and importing definition of export from the Customs Act 1962 for earlier period is the only and correct option.* ***The Appellant has during the personal hearing stated that they are not entitled to the refund claim-after 1.3.2015 and are not filing claim since 1.4.2015.***

40. In this regard, I take support from the decision of the Hon'ble Tribunal in the case of COMMR OF C. EX., THANE-I Versus TIGER STEEL ENGINEERING (I) PVT. LTD.(2010 (259) E.L.T(375) (Tri-Mumbai) wherein it was held that:

"11. *In the present case, the respondent claimed refund of accumulated CENVAT Credit under Rule 5 of the CENVAT Credit Rules, 2004. For this benefit, they had to satisfy mainly two conditions viz. (i) the Cenvated inputs should have been used in or in relation to the manufacture of the finished goods supplied to SEZ unit by way of export under Bond/Letter of Undertaking and (ii) the CENVAT Credit taken on the inputs was practically not capable of being utilized for payment of duty on any final product. The finished goods, in this case, were admittedly supplied to SEZ units under Letter of Undertaking. However, the question arises as to whether such supply of goods to SEZ units was an 'export.' At no time was the term 'export' defined under the Central Excise Act or any Rules framed thereunder. The definition of 'export' given under the Customs Act has been traditionally adopted for purposes of the Central Excise Act and the Rules thereunder. Therefore, in the absence of a definition of 'export' under the Central Excise Act, the Central Excise Rules or the CENVAT Credit Rules, 2004, we hold that, for purposes of the CENVAT Credit Rules, 2004, one should look for its definition given under the Customs Act. The fictionalized definition of "export" under Section 2 (m) (ii) of the SEZ Act cannot be looked for as it purports only to make the SEZ unit an exporter. In other words, the term 'export' used in Rule 5 of the CENVAT Credit Rules, 2004 stands for 'export', which is 'physical export' out of the country, envisaged under the Customs Act. We take* *this view because, as we have already indicated, anybody other than SEZ unit cannot be allowed to claim any benefit under the SEZ Act/Rules. Viewed from this angle, the respondent cannot be held to be entitled to refund of accumulated CENVAT Credit on the inputs used in or in relation to the manufacture of the 'pre-fabricated buildings" supplied by them to the SEZ units."*

41. Further in the case of Quality Screens Vs CCE Pune II [2008 (226) E.LT. 60 (Tri. - Mumbai)] Tribunal has observed that:

"Refund of credit - Export - Deemed export - Refund of unutilised credit availed on inputs used in manufacture of goods cleared under CT-3 certificate - Mere non-description of size and material of goods received by 100% EOU in shipping bills regarding export of goods by 100% EOU cannot mean that inputs received by 100% EOU have not been exported - Once CT-3 certificate received indicating receipt of goods by 100% EOU, supplies to 100% EOU to be considered as deemed export - However, refund having been claimed under Central Excise Act, there have to be physical exports and not deemed exports - Since appellants not physically exported goods but merely supplied the goods to 100% EOU, provisions of Rule 5 of Cenvat Credit Rules, 2004 not applicable - Refund denied. [paras 5, 6]"

42. In this regard CESTAT, Principal Bench, New Delhi, in the case of : Tricolite Electrical Industries Ltd Vs Commissioner of C.Ex, Delhi III, Gurgaon 2012 (282) ELT 468 (Tri- Delhi) has clearly held that clearances. made to 100% EOUs or to the projects for which C. Ex duty is exempted cannot be treated as export for benefits under Rule 5 of the CCR 2004. The relevant para of the said judgment reads as under:

***"6.** The point of dispute in this case is as to whether cash refund of accumulated Cenvat credit in respect of inputs/input services used in manufacture of finished goods, which were either supplied to other 100% EOUs or supplied to DMRC by availing full duty exemption under Notification No. 6/2006-C.E. is admissible or not in terms of the provisions of Rule 5 of the Cenvat Credit Rules. Rule 5 of the Cenvat Credit Rules provides* *that where any input or input services have been used in the manufacture of final product which is cleared for export under bond or letter of undertaking, or as the case may be, is used in the manufacture of intermediate product cleared for export, or used for output service which is exported, the Cenvat credit in respect of the input or input service so used shall be allowed to be utilised by the manufacturer or provider of output service towards payment of duty of excise on any final product cleared for home consumption or for export on payment of duty or for payment of service tax on output service and where for any reason, such adjustment is not possible, the manufacturer or the provider of outward service shall be allowed the refund of such amount subject to the safeguards, conditions and limitations as specified by the Government by Notification. This cash refund of accumulated Cenvat credit is subject to condition that the manufacturer/provider of output service does not avail the input duty drawback or input duty rebate. From perusal of this Rule, it is clear that this Rule is applicable only in respect of the use of Cenvat credit availed inputs or input services for manufacture of the goods which are cleared for export under bond/letter of undertaking or are used in the manufacture of intermediate product cleared for export. While the supplies to SEZ are to be treated as export for the purpose of this Rule in terms of the provisions of Section 2(m) of SEZ Act, 2005, the supplies to DMRC by availing Notification No. 6/2006-C.E. which though deemed exports in terms of the provisions of EXIM policy, cannot be treated as export for the purpose of Rule 5 of Cenvat Credit Rules, 2004. Therefore, we are of the view that the provisions of this Rule are not applicable in respect of accumulated Cenvat credit on account of supplies to DMRC by availing full duty exemption under Notification No. 6/2006-C.E. As regards supplies to 100% EOUs, as rightly observed by the Commissioner (Appeals) there is no evidence that the goods have been used by those EOUs in manufacture of finished product which were exported out of India under bond."*

43. Thus it can be reasonable inferred that such refund is only due if the goods are taken out of India lo a place outside India and therefore the supply of goods against ICB cannot be treated as export for the purpose of Rule 5 of CCR 2004. Thus, in view of the above stated decisions of Hon'ble CESTAT, I find that supply of goods against International Bidding cannot be treated as "export" for the purpose of Rule 5 or CCR 2004 and thus find that the refund has rightly been rejected by the lower authority,.

44 The various case laws cited by the appellant do not come to their rescue as the facts are different and they pertain to 100% EOUs. I also find that the earlier Order in Appeal passed by my predecessor namely No NGP/EXCUS/000/APPL 227/14-15/798 dated 22.12.2014 and No NGP/EXCUS/000/APPL/222/15-16/1010 dated 06.07.2015 has not dwelled into the definition of export goods and the only question addressed in the said appeal was as to whether the assessee can file a single claim or they should file the claims on quarterly basis."

4.3 Rule 5 of the CENVAT Credit Rules, 2004 as substituted by the Notification No 18/2012-CE (NT) dated 17.03.2012 is reproduced below along with the relevant para of the notification prescribing conditions and safeguards,

Rule 5 of CENVAT Credit Rules, 2004

> *Refund of CENVAT Credit. - (1) A manufacturer who clears* ***a final product or an intermediate product for export without payment of duty under bond or letter of undertaking, or a service provider who provides an output service which is exported without payment of service tax,*** *shall be allowed refund of CENVAT credit as determined by the following formula subject to procedure, safeguards, conditions and limitations, as may be specified by the Board by notification in the Official Gazette:*
>
> *Refund Amount =* (Export turnover of goods+ Export turnover of services) x Net CENVAT credit
> *Total Turnover*
>
> Where,-

(A)—Refund amount: means the maximum refund that is admissible;

(B) —Net CENVAT credit: means total CENVAT credit availed on inputs and input services by the manufacturer or the output service provider reduced by the amount reversed in terms of sub-rule (5C) of rule 3, during the relevant period;

(C) —**Export turnover of goods: means the value of final products and intermediate products cleared during the relevant period and exported without payment of Central Excise duty under bond or letter of undertaking;**

(D)—Export turnover of services: means the value of the export service calculated in the following manner, namely:- Export turnover of services = payments received during the relevant period for export services + export services whose provision has been completed for which payment had been received in advance in any period prior to the relevant period – advances received for export services for which the provision of service has not been completed during the relevant period;

(E) —Total turnover means sum total of the value of –

(a) all excisable goods cleared during the relevant period including exempted goods, dutiable goods and excisable goods exported;

(b) export turnover of services determined in terms of clause (D) of sub rule (1) above and the value of all other services, during the relevant period; and

(c) all inputs removed as such under sub-rule (5) of rule 3 against an invoice, during the period for which the claim is filed.

....

Notification No 27/2012-CE (NT) dated 18.06.2012

G. S. R -(E).- In exercise of the powers conferred by rule 5 of the CENVAT Credit Rules, 2004 (hereinafter referred to as the *"said rules"), and in supersession of the notification of the Government of India in the Ministry of Finance (Department of Revenue), No 5/2006 - Central Excise (N.T), dated the 14th March, 2006, published in Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) vide number G.S.R 156(E), dated the 14th March, 2006, the Central Board of Excise and Customs hereby directs that refund of CENVAT credit shall be allowed subject to the procedure, safeguards, conditions and limitations as specified below, namely:-.*

2.0 Safeguards, conditions and limitations.- *Refund of CENVAT Credit under rule 5 of the said rules, shall be subjected to the following safeguards, conditions and limitations, namely:-*

(a) ....

(b) ....

(c) the value of goods cleared for export during the quarter shall be the sum total of all the goods cleared by the exporter for exports during the quarter as per the monthly or quarterly return filed by the claimant.

(d) the total value of goods cleared during the quarter shall be the sum total of value of all goods cleared by the claimant during the quarter as per the monthly or quarterly return filed by the claimant.

(e) ....

(f) ....

(g) ....

(h) ....

(i) ....

3.0 Procedure for filing the refund claim. –

(a) ....

(b) ....

(c) ....

(d) ....

(e) ....

(f) ....

(g) At the time of sanctioning the refund claim the Assistant Commissioner or Deputy Commissioner shall satisfy himself or herself in respect of the correctness of the claim and the fact that goods cleared for export or services provided have actually been exported and allow the claim of exporter of goods or services in full or part as the case may be.

4.4 From the plain reading of the above rule and the notification it is clear that this rule is applicable only in the case of finished goods or the intermediate products for export under bond or letter of undertaking. Following is now settled by the decision of the five member bench of Hon'ble Supreme Court in the case of Dilip Kumar & Company [2018 (361) ELT 577 (SC)],-

"19. *The well-settled principle is that when the words in a statute are clear, plain and unambiguous and only one meaning can be inferred, the Courts are bound to give effect to the said meaning irrespective of consequences. If the words in the statute are plain and unambiguous, it becomes necessary to expound those words in their natural and ordinary sense. The words used declare the intention of the Legislature. In Kanai Lal Sur v. Paramnidhi Sadhukhan, AIR 1957 SC 907, it was held that if the words used are capable of one construction only then it would not be open to the Courts to adopt any other hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of the Act.*

20. *In applying rule of plain meaning any hardship and inconvenience cannot be the basis to alter the meaning to the language employed by the legislation. This is especially so in fiscal statutes and penal statutes. Nevertheless, if the plain language results in absurdity, the Court is entitled to determine the meaning of the word in the context in which it is used keeping in view the legislative purpose [Assistant Commissioner, Gadag Sub-Division, Gadag v. Mathapathi Basavannewwa, 1995*

(6) SCC 355]. Not only that, if the plain construction leads to anomaly and absurdity, the Court having regard to the hardship and consequences that flow from such a provision can even explain the true intention of the legislation. Having observed general principles applicable to statutory interpretation, it is now time to consider rules of interpretation with respect to taxation."

4.5 Further Rule 6 (6) of the CENVAT Credit Rules, 2004 categorized the clearances of the goods, without payment of duty, but in respect of which the provision of Rule 6 (1), (2), (3) & (4) were not applicable. In the said Rule also the clearances for export under bond and the clearances made under the exemption Notification No 12/2012-CE (Sr No 366) under separate categories. The text of the said sub-rule, is reproduced below:

Rule 6 (6) of the CENVAT Credit Rules, 2004 as it existed at the relevant time' -

(6) The provisions of sub-rules (1), (2), (3) and (4) shall not be applicable in case the excisable goods removed without payment of duty are either-

(i) cleared to a unit in a special economic zone; or

(ii) cleared to a hundred per cent. export-oriented undertaking; or

(iii) (iii)cleared to a unit in an Electronic Hardware Technology Park or Software Technology Park; or

(iv) supplied to the United Nations or an international organization for their official use or supplied to projects funded by them, on which exemption of duty is available under notification of the Government of India in the Ministry of Finance (Department of Revenue) No.108/95-Central Excise, dated the 28th August, 1995, number G. S R. 602 (E), dated the 28th August, 1995; or

(iva) supplied for the use of foreign diplomatic missions or consular missions or career consular offices or diplomatic agents in terms of the provisions of notification No. 12/2012-Central Excise, dated the 17th March, 2012, number G.S.R. 163(E), dated the 17th March, 2012 ; or

(v) cleared for export under bond in terms of the provisions of the Central Excise Rules, 2002; or

(vi) ......; or.

(vii) all goods which are exempt from the duties of customs leviable under the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) and the additional duty leviable under sub-section (1) of section 3 of the said Customs Tariff Act when imported into India and are supplied,-

(a) against International Competitive Bidding; or

(b) to a power project from which power supply has been tied up through tariff based competitive bidding; or

(c) to a power project awarded to a developer through tariff based competitive bidding, in terms of notification No. 12/2012-Central Excise, dated the 17th March, 2012.

(viii) ....;

(ix) ....;

4.6 Since different judicial for a were interpreting the Rule 5, differently and were of the expressing contrary view in respect of the supplies made to 100 % Export Oriented Units, the Clause (1A) was inserted in explanation to Rule 5, clearly stating that the export goods would in terms of this rule shall refer only to the goods physically exported. The explanation as inserted is identical to the definition of the export goods as per Section 2 (19) of the Customs Act, 1962. Since this clause only clarifies the intention of the legislature, in respect of the applicability of the Rule 5, of the CENVAT Credit Rules, 2004 and do not create any additional liability or restricts any benefit to the subjects. The rule 5, only provides for the refund of accumulated CENVAT Credit in respect of the goods cleared for export under bond or letter of undertaking. In case such refund is not allowed it do not impact the eligibility of the subject to the CENVAT Credit of the duty paid. The admissibility to the CENVAT Credit needs to be determined in terms of Rule 3, 4, 6 and 9 of the CENVAT Credit Rules, 2004. It is not even the case for the department that the CENVAT Credit is not admissible in such cases. In the case of Dilip Kumar & Co, referred above, Hon'ble Apex Court has further observed:

"25. We are not suggesting that literal rule de hors the strict interpretation nor one should ignore to ascertain the interplay between 'strict interpretation' and 'literal interpretation'. We may reiterate at the cost of repetition that strict interpretation of a statute certainly involves literal or plain meaning test. The other tools of interpretation, namely contextual or purposive interpretation cannot be applied nor any resort be made to look to other supporting material, especially in taxation statutes. Indeed, it is well-settled that in a taxation statute, there is no room for any intendment; that regard must be had to the clear meaning of the words and that the matter should be governed wholly by the language of the notification. Equity has no place in interpretation of a tax statute. Strictly one has to look to the language used; there is no room for searching intendment nor drawing any presumption. Furthermore, nothing has to be read into nor should anything be implied other than essential inferences while considering a taxation statute.

26. Justice G.P. Singh, in his treatise 'Principles of Statutory Interpretation' (14th ed. 2016 p.-879) after referring to Re, Micklethwait, (1885) 11 Ex 452; Partington v. A.G., (1869) LR 4 HL 100; Rajasthan Rajya Sahakari Spinning & Ginning Mills Federation Ltd. v. Deputy CIT, Jaipur, (2014) 11 SCC 672, State Bank of Travancore v. Commissioner of Income Tax, (1986) 2 SCC 11 and Cape Brandy Syndicate v. IRC, (1921) 1 KB 64, summed up the law in the following manner -

"A taxing statute is to be strictly construed. The well-established rule in the familiar words of LORD WENSLEYDALE, reaffirmed by LORD HALSBURY AND LORD SIMONDS, means : 'The subject is

not to be taxed without clear words for that purpose : and also that every Act of Parliament must be read according to the natural construction of its words. In a classic passage LORD CAIRNS stated the principle thus : "If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of law the case might otherwise appear to be. In other words, if there be admissible in any statute, what is called an equitable construction, certainly, such a construction is not admissible in a taxing statute where you can simply adhere to the words of the statute. VISCOUNT SIMON quoted with approval a passage from ROWLATT, J. expressing the principle in the following words : "In a taxing Act one has to look merely at what is clearly said. This is no room for any intendment. There is no equity about a tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."

It was further observed :

"In all tax matters one has to interpret the taxation statute strictly. Simply because one class of legal entities is given a benefit which is specifically stated in the Act, does not mean that the benefit can be extended to legal entities not referred to in the Act as there is no equity in matters of taxation...."

Yet again, it was observed :

"It may thus be taken as a maxim of tax law, which although not to be overstressed ought not to be forgotten that, "the subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax on him", [Russel v. Scott, (1948) 2 All ER 1]. The proper course in construing revenue Acts is to give a fair and reasonable construction to their language without leaning to one side or the other but keeping in mind that no tax can be imposed without words clearly showing an intention to lay

the burden and that equitable construction of the words is not permissible [Ormond Investment Co. v. Betts, (1928) AC 143]. Considerations of hardship, injustice or anomalies do not play any useful role in construing taxing statutes unless there be some real ambiguity [Mapp v. Oram, (1969) 3 All ER 215]. It has also been said that if taxing provision is "so wanting in clarity that no meaning is reasonably clear, the Courts will be unable to regard it as of any effect [IRC v. Ross and Coutler, (1948) 1 All ER 616]."

Further elaborating on this aspect, the Learned author stated as follows :

"Therefore, if the words used are ambiguous and reasonable open to two interpretations benefit of interpretation is given to the subject [Express Mill v. Municipal Committee, Wardha, AIR 1958 SC 341]. If the Legislature fails to express itself clearly and the taxpayer escapes by not being brought within the letter of the law, no question of unjustness as such arises [CIT v. Jalgaon Electric Supply Co., AIR 1960 SC 1182]. But equitable considerations are not relevant in construing a taxing statute, [CIT, W.B. v. Central India Industries, AIR 1972 SC 397], and similarly logic or reason cannot be of much avail in interpreting a taxing statute [Azam Jha v. Expenditure Tax Officer, Hyderabad, AIR 1972 SC 2319]. It is well-settled that in the field of taxation, hardship or equity has no role to play in determining eligibility to tax and it is for the Legislature to determine the same [Kapil Mohan v. Commr. of Income Tax, Delhi, AIR 1999 SC 573]. Similarly, hardship or equity is not relevant in interpreting provisions imposing stamp duty, which is a tax, and the Court should not concern itself with the intention of the Legislature when the language expressing such intention is plain and unambiguous [State of Madhya Pradesh v. Rakesh Kohli & Anr., (2012) 6 SCC 312]. But just as reliance upon equity does not avail an assesse, so it does not avail the Revenue."

The passages extracted above, were quoted with approval by this Court in at least two decisions being Commissioner of

Income Tax v. Kasturi Sons Ltd., (1999) 3 SCC 346 and State of West Bengal v. Kesoram Industries Limited, (2004) 10 SCC 201 [hereinafter referred as 'Kesoram Industries case' for brevity]. In the later decision, a Bench of seven-Judges, after citing the above passage from Justice G.P. Singh's treatise, summed up the following principles applicable to the interpretation of a taxing statute :

"(i) In interpreting a taxing statute, equitable considerations are entirely out of place. A taxing statute cannot be interpreted on any presumption or assumption. A taxing statute has to be interpreted in the light of what is clearly expressed : it cannot imply anything which is not expressed : it cannot import provisions in the statute so as to supply any deficiency : (ii) Before taxing any person, it must be shown that he falls within the ambit of the charging section by clear words used in the section; and (iii) If the words are ambiguous and open to two interpretations, the benefit of interpretation is given to the subject and there is nothing unjust in a taxpayer escaping if the letter of the law fails to catch him on account of Legislature's failure to express itself clearly".

27. Now coming to the other aspect, as we presently discuss, even with regard to exemption clauses or exemption notifications issued under a taxing statute, this Court in some cases has taken the view that the ambiguity in an exemption notification should be construed in favour of the subject. In subsequent cases, this Court diluted the principle saying that mandatory requirements of exemption clause should be interpreted strictly and the directory conditions of such exemption notification can be condoned if there is sufficient compliance with the main requirements. This, however, did not in any manner tinker with the view that an ambiguous exemption clause should be interpreted favouring the revenue. Here again this Court applied different tests when considering the ambiguity of the exemption notification which requires strict construction and after doing so at the stage of applying the *notification, it came to the conclusion that one has to consider liberally.*

28. With the above understanding the stage is now set to consider the core issue. In the event of ambiguity in an exemption notification, should the benefit of such ambiguity go to the subject/assessee or should such ambiguity should be construed in favour of the revenue, denying the benefit of exemption to the subject/assessee? There are catena of case laws in this area of interpretation of an exemption notification, which we need to consider herein. The case of Commissioner of Inland Revenue v. James Forrest, [(1890) 15 AC 334 (HL)] - is a case which does not discuss the interpretative test to be applied to exemption clauses in a taxation statute - however, it was observed that 'it would be unreasonable to suppose that an exemption was wide as practicable to make the tax inoperative, that it cannot be assumed to have been in the mind of the Legislature' and that exemption 'from taxation to some extent increased the burden on other members of the community'. Though this is a dissenting view of Lord Halsbury, LC, in subsequent decisions this has been quoted vividly to support the conclusion that any vagueness in the exemption clauses must go to the benefit of the revenue. Be that as it is, in our country, at least from 1955, there appears to be a consistent view that if the words in a taxing statute (not exemption clause) are ambiguous and open to two interpretations, the benefit of interpretation is given to the subject and it does not matter if the taxpayer escapes the tax net on account of Legislatures' failure to express itself clearly (See the passage extracted hereinabove from Kesoram Industries case (supra)).

40. After considering the various authorities, some of which are adverted to above, we are compelled to observe how true it is to say that there exists unsatisfactory state of law in relation to interpretation of exemption clauses. Various Benches which decided the question of interpretation of taxing statute on one hand and exemption notification on the other, have broadly *assumed (we are justified to say this) that the position is well-settled in the interpretation of a taxing statute : It is the law that any ambiguity in a taxing statute should enure to the benefit of the subject/assessee, but any ambiguity in the exemption clause of exemption notification must be conferred in favour of revenue - and such exemption should be allowed to be availed only to those subjects/assesses who demonstrate that a case for exemption squarely falls within the parameters enumerated in the notification and that the claimants satisfy all the conditions precedent for availing exemption. Presumably for this reason the Bench which decided Surendra Cotton Oil Mills case (supra) observed that there exists unsatisfactory state of law and the Bench which referred the matter initially, seriously doubted the conclusion in Sun Export Case (supra) that the ambiguity in an exemption notification should be interpreted in favour of the assessee.*

41. After thoroughly examining the various precedents some of which were cited before us and after giving our anxious consideration, we would be more than justified to conclude and also compelled to hold that every taxing statute including, charging, computation and exemption clause (at the threshold stage) should be interpreted strictly. Further, in case of ambiguity in a charging provisions, the benefit must necessarily go in favour of subject/assessee, but the same is not true for an exemption notification wherein the benefit of ambiguity must be strictly interpreted in favour of the Revenue/State.

42. In Govind Saran Ganga Saran v. Commissioner of Sales Tax, 1985 Supp (SCC) 205, this Court pointed out three components of a taxing statute, namely subject of the tax; person liable to pay tax; and the rate at which the tax is to be levied. If there is any ambiguity in understanding any of the components, no tax can be levied till the ambiguity or defect is removed by the legislature [See Mathuram Agrawal v. State of Madhya Pradesh, (1999) 8 SCC 667; Indian Banks' Association v. Devkala Consultancy Service, (2004) 4 JT 587 = AIR 2004 SC

2615; and Consumer Online Foundation v. Union of India, (2011) 5 SCC 360.].

43. There is abundant jurisprudential justification for this. In the Governance of rule of law by a written Constitution, there is no implied power of taxation. The tax power must be specifically conferred and it should be strictly in accordance with the power so endowed by the Constitution itself. It is for this reason that the Courts insist upon strict compliance before a State demands and extracts money from its citizens towards various taxes. Any ambiguity in a taxation provision, therefore, is interpreted in favour of the subject/assessee. The statement of law that ambiguity in a taxation statute should be interpreted strictly and in the event of ambiguity the benefit should go to the subject/assessee may warrant visualizing different situations. For instance, if there is ambiguity in the subject of tax, that is to say, who are the persons or things liable to pay tax, and whether the revenue has established conditions before raising and justifying a demand. Similar is the case in roping all persons within the tax net, in which event the State is to prove the liability of the persons, as may arise within the strict language of the law. There cannot be any implied concept either in identifying the subject of the tax or person liable to pay tax. That is why it is often said that subject is not to be taxed, unless the words of the statute unambiguously impose a tax on him, that one has to look merely at the words clearly stated and that there is no room for any intendment nor presumption as to tax. It is only the letter of the law and not the spirit of the law to guide the interpreter to decide the liability to tax ignoring any amount of hardship and eschewing equity in taxation. Thus, we may emphatically reiterate that if in the event of ambiguity in a taxation liability statute, the benefit should go to the subject/assessee. But, in a situation where the tax exemption has to be interpreted, the benefit of doubt should go in favour of the revenue, the aforesaid conclusions are expounded only as a prelude to better understand jurisprudential basis for our *conclusion. We may now consider the decisions which support our view.*

48. The next authority, which needs to be referred is the case in Mangalore Chemicals (supra). As we have already made reference to the same earlier, repetition of the same is not necessary. From the above decisions, the following position of law would, therefore, clear. Exemptions from taxation have tendency to increase the burden on the other unexempted class of taxpayers. A person claiming exemption, therefore, has to establish that his case squarely falls within the exemption notification, and while doing so, a notification should be construed against the subject in case of ambiguity.

50. In Tata Iron & Steel Co. Ltd. v. State of Jharkhand, (2005) 4 SCC 272, which is another two-Judge Bench decision, this Court laid down that eligibility clause in relation to exemption notification must be given strict meaning and in para 44, it was further held -

“The principle that in the event a provision of fiscal statute is obscure such construction which favours the assessee may be adopted, would have no application to construction of an exemption notification, as in such a case it is for the assessee to show that he comes within the purview of exemption (See Novopan India Ltd. v. CCE and Customs).”

By application of principles of interpretation as laid down by the Hon’ble Apex Court as stated above we can fairly conclude that the refund of the accumulated credit in terms of Rule 5 of the CENVAT Credit Rules, 2004 was admissible only, if the person claiming such refund was able to establish actual and physical export of the goods cleared by him for export under bond or against a letter of undertaking. These conditions are substantial and in case of non fulfillment of the same refund could not have been allowed. This is what has been clarified by the para 3 (g) of the Notification No 27/2012-CE (NT) dated 18.06.2012. Any doubt or ambiguity which existed was further clarified by the insertion of clause (1A) in Explanation to Rule 5, by the Notification No . 6/2015-CE (NT) dated 01-03-2015.

4.7 In a series of decisions relied upon by the Appellant Counsel, the refund in terms of Rule 5, have been held to be admissible in case of the supplies made to Export Oriented Unit. These decisions follow the decision of in case of Shilpa Copper. The issue under consideration in the case of Shilpa Copper was in respect of the goods cleared by one EOU to another EOU. The facts of the case in Shilpa Copper are distinguishable and hence the said decision would not be applicable to the present case.

4.8 The basic principle which has emerged in all such cases of the supplies made to the EOU's is that in respect of the goods supplied to EOU, the clearances have been made under the bond following the procedure as prescribed for such clearances. The goods which have been supplied to the EOU or cleared for exports are not cleared under an exemption notification issued under Section 5 of the Central Excise Act, 1944, but are cleared for export either in finished form or in intermediate state for the production of finished goods which get finally exported. This aspect get well highlighted by the Tribunal in the decision in case of Jimtex Pvt ltd, wherein following has been held:

"6. Being aggrieved, the appellant has filed appeal before this Tribunal on the ground among others that the adjudicating authority has exceeded the direction in the remand, which was for verification to the export made i.e. to verify the fact of export from the 100% EOU, which was not done and unnecessarily got into the issue of export vis-à-vis deemed export. The adjudicating authority was required to verify from his counterpart, having jurisdiction over the factory of M/s. Haria Exports Ltd., a 100% EOU at Vapi and as such the impugned order is vitiated and fit to be set aside. It is further contended that Rule 5 of Cenvat Credit Rules does not require that the goods must be directly exported from the factory, even if the inputs are used in the manufacture of intermediate product

and/or final products, which are wholly cleared for the export, which resulted into unutilised Modvat credit under the scheme.

6.1 The learned Counsel for the appellant also relies on the ruling of this Tribunal in the case of Manoj Handlooms v. Commissioner of Central Excise, Chennai - 2009 (240) E.L.T. 158 (Tri-Chennai), wherein it has been held by the learned Single Member, where also refund claim was on account of clearing the goods without payment of duty to an EOU, that the clearance to EOU have to be treated as export and refund of unutilized credit was allowed to the assessee as per decision of the Tribunal in the case of Shilpa Copper Wire Industries - 2008 (226) E.L.T. 228 (Tri). Further, I find from perusal of the said order that this Tribunal remanded the issue back to the lower authority with observation that documents evidencing clearance of final products to the EOU should be accepted as proof of export as envisaged under Clause (6) of the Appendix to Notification No. 11/2002-C.E.. Other ruling, also relied upon by the learned Counsel is also by way of remand, wherein this Tribunal held that although by fiction of law, the goods cleared to 100% EOU have been equated with export i.e. they are deemed export, however such fiction of law is created only for a specific purpose and cannot be equated with exports, for all purposes.

7. The learned AR relies on the impugned order and further relies on the Division Bench ruling of this Tribunal in the case of Tricolite Electrical Indus. Ltd. v. Commissioner of Central Excise, Delhi-Ill - 2012 (282) E.L.T. 468 (Tri-Del.), where in the case of cash refund, the accumulated credit in respect of inputs/input services used in manufacture of goods supplied to 100% EOU/SEZ, under Notification No. 6/2006-C.E., full duty exemption was availed. It was held that cash refund subject to condition of non-availment of input duty drawback or rebate under Rule 5 of the Cenvat Credit Rules, 2004 as applicable to inputs, if goods are cleared for export under Bond/Letter of Undertaking or used in manufacture of intermediate product for *export. Although supplies to SEZ is treatable as export under Section 2(m) of SEZ Act, 2005, in absence of evidence of goods used by 100% EOU/SEZ in manufacture of finished goods exported under Bond, the rejection of refund claim is held proper.*

8. Having considered the rival contentions, I find that Appendix to Notification No. 11/2002 wherein clause (4) provides that manufacturer (appellant) is required to submit refund application along with Bill of Lading or shipping bill or export proof duly certified by any office of Customs, to the effect that the goods have in fact been exported. There is no ambiguity in the requirement as the documents referred to under clause (4) are only available in case of actual export and not deemed export. The appellant herein have admittedly failed to furnish the evidence of actual export in spite of opportunity in the second round of litigation. Thus, the rejection of claim by the learned Commissioner (Appeals) is correct and in accordance with law. The rulings relied upon by the appellant do not lay down any ratio of law and only allowed by way of remand. Thus, the appeal is dismissed and the impugned order is upheld.

9. It is noticed that the appellant have already paid back 50% of the refund as directed vide Stay Order No. S/253/2013/SMB/C-IV, dated 1-3-2013, the appellant is directed to deposit the balance refund received and report compliance to the respondent Commissioner of Central Excise, Thane-I within a period of 90 days from receipt of a copy of this order."

4.9 Further in case of Arrow Engineers, Tribunal held as follows:

"6. This reasoning flows from the objective of the scheme of Cenvat credit to restrict levy of duties only to that value which has been added by the manufacturer to goods or by provider of services. In a tariff that is extensive, it is not possible to assign rates that accommodate stages of manufacture; the levy of duty to the extent of contribution to manufacture is facilitated by permitting debit of duty to the extent of liability contribution

made in the prior stages. It is, therefore, not a mechanism for refund of duties that have already been loaded onto the goods but for restricting the levy to such as is intended by law. A harmonious construction of Rules 3, 5 and 6 of Cenvat Credit Rules, 2004 would amplify the intent : while, generally, input services/inputs used in manufacture/provision of exempt (including export) goods/services are excluded for consideration for the pool of credit under the Cenvat scheme, the compelling necessity to leach the duty from export goods/services warrants the enablement of such privilege. It may, therefore, be posited that Rule 5 is the exception to Rule 3 and the strict injunction in Rule 6 barring the acknowledgement of exempt goods/services is waived in the circumstances enumerated in sub-rule (5) of Rule 6.

7. Applying this stencil to supplies effected to units in special economic zones, it is apparent from Rule 6(5) that such supplies are not exports per se but are accorded a treatment akin to that of exports in the availing of Cenvat credit. Therefore, the credit of duty/tax on inputs/input services utilized in supplies to special economic zones are no different from the inputs/input services used for manufacture of dutiable goods. For other export related privilege to devolve on these supplies, the appropriate provision should specify coverage. Therefore, duties suffered by goods that are exported are neutralized through the rebate scheme or through Rule 5 of Cenvat Credit Rules, 2004. Supplies to special economic zones are not specified to be so privileged.

8. This is a logical corollary of the deeming of special economic zones as 'outside the customs territory' and, in accordance with which, drawback (at par with exports) is extended to the goods procured from the 'Domestic Tariff Area' by units in special economic zones against foreign exchange. The parity with exports is accorded to supplies effected to Special Economic Zones through the provision of the statute governing such Zones.

9. The decision of the Tribunal in Commissioner of Central Excise, Pune-II v. Quality Screens [2008 (226) E.L.T. 608 (Tri.-Mumbai)] makes it amply clear that only physical exports would entitle the refund under Rule 5 of the Cenvat Credit Rules, 2004. The decision of the Tribunal in Commissioner of Central Excise & Service Tax, Rajkot v. Parth Trading Co. [2016 (338) E.L.T. 616 (Tri.-Ahmd.)] relies upon the circular dated 28th April, 2015. Likewise, the decision in Shri Bajrang Power & Ispat Ltd. v. Commissioner of Central Excise, Raipur [2012 (282) E.L.T. 108 (Tri.-Del.)] also relies upon the circular of the Central Board of Excise and Customs. The circular has been issued to allay the apprehensions of the trade that amendments to Rule 5 of Cenvat Credit Rules, 2004 and Rule 18 of Central Excise Rules, 2002 may alter any privilege of goods cleared to Special Economic Zone to the extent that such goods are in conformity with the definition of 'exports' in the Central Excise Act, 1944 and the rules framed therein. The benefit of Rule 18 of Central Excise Rules, 2002 and Rule 5 of Cenvat Credit Rules, 2004 are available. However, in the present instance, the impugned order has failed to demonstrate as such.

10. From the above, it is apparent that supplies to special economic zones are not exports except then viewed through the provisions of Special Economic Zones Act, 2005. The decisions of the Tribunal cited by Learned Counsel and support of the claim of the appellants to be exporters acknowledges the entitlement to benefit of exemption from terminal duties which is accorded by Section 26 of Special Economic Zones Act, 2005. That is not the subject of dispute in the present appeal.

11. For the above reasons, and considering the facts on record, it must be held that the impugned order has erred in allowing the application under Rule 5 of Cenvat Credit Rules, 2004."

4.9 In view the discussions as above we find that none of the decisions relied upon by the appellants decided the issue in their favour. Finally we are left with one single member decision in the case of Om Metals Infra Projects Ltd: wherein following has been held:-

"6. The issue as to whether supply of goods under the international competitive bidding governed under the provisions of the Foreign Trade Policy as deemed export should get the benefit of refund under the Rule 5 of the Cenvat Credit Rules, 2004 has already been settled by this Tribunal in the case of Apotex Pharmachem India Pvt. Ltd. (supra), wherein this Tribunal vide para 13 has held as follows:-

"13. The findings recorded in the impugned order that physical export is not to be equated with deemed export, and thus, the appellant is not entitled for refund of Cenvat credit in terms of Rule 5 of the Rules, in my considered opinion, is not legal and proper, in view of the judgment of Hon'ble Gujarat High Court in the case of Shilpa Copper (supra). In response to the question framed in paragraph 1(a), as to whether, the clearances made by one 100% EOU to another 100% EOU which are deemed export are to be treated as physical export for the purpose of entitling refund of unutilized Cenvat credit, the Hon'ble Court vide paragraph 16 have answered as follows:-

"16. In the above fact situation, we are of the view that no question of law much less any substantial question of law, arises out of the order of the Tribunal and even if it arises, the answer is very obvious and we, therefore, hold that the Tribunal is justified and has not committed any substantial error of law in dismissing the appeal of the Revenue and confirming the order of the learned Commissioner (Appeals) holding that the clearances made by one 100% EOU to another 100% EOU which are deemed exports are to be treated as physical exports for the purpose of entitling refund of unutilized Cenvat credit contemplated under the provisions of Rule 5 of the Cenvat Credit Rule, 2004."

7. Reliance placed by the ld. Commissioner (Appeals) in the impugned order in case of Tricolite Electrical Indus. Ltd. (supra) is not applicable to the present case, in as much as, operation of *the order in the case of Trigar Steel Engg. (supra), relied therein has been stayed by the Honble Bombay High Court as reported in 2011 (263) E.L.T. A 104 (Bom.)."*

The said decision, do not dwell on the issue independently but relies upon the decision in case of Apotex Pharmachem India Pvt Ltd, which was not the case of supply made to a project awarded under ICB, but was the case of supply made from one EOU to another EOU. The Tribunal thus relying on the decision of Hon'ble High Court in the case of Shilpa Copper which was on identical facts allowed the appeal partially. Since the decision in the case Om Metals Infra Projects Ltd., do not record any finding as to how the supplies made to a project awarded under ICB, is covered by the Rule 5 of the CENVAT Credit Rules, 2004, we find that the decision is sub-silento and cannot be a binding precedent. Even otherwise the bench deciding the case was not having the benefit of the decision of Hon'ble Apex Court in case of Dilip Kumar and Company. Hence this decision do not advance the case of the appellants any further.

4.10 Appellants have relied upon the decision of the Hon'ble Bombay High Court in their own case to argue that the issue has been settled in their favour. Hon'ble High Court has in its order dated 22.02.2017 in Central Excise Appeal No 15/2016, held as under:

"So also, there is no merit in the submission made on behalf of the appellant- department that the Tribunal was not justified in coming to the conclusion that the clearances made by the assessee to international competitive bidding could be considered as exports. The appellate authority as well as the Tribunal have held that by the show cause notice, the respondent- Assessee was not asked to show cause why the clearances made to international competitive bidding cannot be considered as exports. Since the assessee was not asked to show cause on the aforesaid question, the appellate authority and the Tribunal rightly held by relying on the judgment of this Court in the case of Bajaj Auto Limited, reported in

2003 (151) ELT 53 that the grounds in appeal cannot travel beyond the show cause notice."

From the perusal of the above it is evident that neither the appellate authority, nor tribunal nor High Court has dealt the issue on its merit, but have decided the issue holding that the appeal filed by the revenue has travelled beyond the show cause notice. In the case under consideration we find that the show cause notice was specifically issued on these grounds only, para 7, 8 and 9 of the show cause notice read as under:

"7. During scrutiny of refund claim it is observed that the Noticee have cleared the goods in question under Notification No. 12/2012-CE dated 17.03.2012 (Sr. No. 336 read with condition No. 41) against International Competitive Bidding (for short "ICB") at Nil rate of Central Excise Duty. The supply of goods made against ICB are treated as "deemed export" in terms of para 8.1 and 8.2 of foreign Trade Policy. And as per para 8.3 of foreign Trade Policy, the goods cleared against ICB are eligible for only three benefits viz. Advance Authorisation / Advance Authorisation for annual requirement/ DFIA. Deemed Export Drawback and Exemption from terminal excise duty where supplies are made against ICB only

8. In view of the forgoing it appears that the as per explanation (1A) of the Rule 5 of Cenvat Credit Rule, 2004 any goods which are taken out of India to a place outside India are treated as "export goods" are eligible for cash refund of unutilised Cenvat Credit lying in Cenvat Account under Rule 5 ibid. In this case, the goods are cleared against ICB hence treated as deemed export, and are eligible for Advance Authorisation / Advance Authorisation for annual requirement / DFIA, Deemed Export Drawback and Exemption from terminal excise duty where supplies are made against ICB only. Therefore an aforesaid goods supplied against ICB does not fall under the category of export goods and therefore cannot be held eligible for cash refund under rule 5 ibid and Notifications issued thereunder read with section 11 B of the Central Excise Act, 1944.

9. Now, therefore the claimant is hereby required to show cause to the Assistant Commissioner, Central Excise, Division Hingna-I, Commissionerate-Nagpur-I, Telangkhedi Road, Civil Lines, Nagpur as to why the refund amount of Rs. 96,53,590/ as claimed by the noticee should not be rejected under rule 5 of the Cenvat Credit Rules, 2004 read with Notification No. 27/2012-CE (NT) dated 18.06.2012 and under section 11B of the Central Excise Act, 1944."

Thus we do not find that this decision of the Hon'ble High Court will advance the case of the appellants any further.

5.1 In view of the discussions as above we do not find any merits in the appeal and reject the same.

(Order pronounced in the open court on 11.02.2021)

(S.K. Mohanty)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

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