

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, MUMBAI**

REGIONAL BENCH - COURT NO. I

Excise Appeal No. 843 of 2009

(Arising out of Order-in-Original No. 03/MS-03/Th-I/2009 dated 31.03.2009 passed by the Commissioner of Central Excise, Thane-I.)

M/s Prakash Jokhani

.... Appellant

Partner of M/s. Venus International,
D-1,2,3, Sainath Industrial Complex,
Mithpada, Khoni Village, Bhiwandi,
Dist. Thane

Versus

Commissioner of Central Excise-Thane-I

.... Respondent

4th Floor, Navprabhat Chambers, Ranade Road,
Dadar (West), Mumbai- 400 028.

WITH

Excise Appeal No. 844 of 2009

(Arising out of Order-in-Original No. 03/MS-03/Th-I/2009 dated 31.03.2009 passed by the Commissioner of Central Excise, Thane-I)

Venus International

.... Appellant

D-1,2,3, Sainath Industrial Complex,
Mithpada, Khoni Village, Bhiwandi,
Dist. Thane

Versus

Commissioner of Central Excise-Thane-I

.... Respondent

4th Floor, Navprabhat Chambers, Ranade Road,
Dadar (West), Mumbai- 400 028.

AND

Excise Appeal No. 852 of 2009

(Arising out of Order-in-Original No. 03/MS-03/Th-I/2009 dated 31.03.2009 passed by the Commissioner of Central Excise, Thane-I)

Shree Nathji Textiles

.... Appellant

N. H-2,3 Prince Industrial Estate,
Behind Keshav Nagar, Bhestan, Surat

Versus

Commissioner of Central Excise-Thane-I Respondent

4th Floor, Navprabhat Chambers, Ranade Road,
Dadar (West), Mumbai- 400 028.

AND**Excise Appeal No. 911 of 2009**

(Arising out of Order-in-Original No. 03/MS-03/Th-I/2009 dated 31.03.2009
passed by the Commissioner of Central Excise, Thane-I)

Commissioner of Central Excise-Thane-I Appellant

4th Floor, Navprabhat Chambers, Ranade Road,
Dadar (West), Mumbai- 400 028.

Versus

Venus International**.... Respondent**

6, Shanta Bhavan, Ganga Wadi, Ghatkopar,
(W), Mumbai- 400086

Appearance:

Shri Darius B. Shroff, Advocate for the Appellant
Shri Anantha Krishnan, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO. A/ 85237-85240/2022

Date of Hearing: 05.10.2021

Date of Decision: 28.03.2022

Per: P. Anjani Kumar

M/s. Venus International appellants, in E/844/2009, are engaged in the manufacture of cut and packed process fabrics, for export; the appellants send the duty paid yarn to various job workers to convert the same into grey fabrics; the further send the grey fabrics to different processors for dying and printing; The appellant at time purchase grey fabrics and send it for processing; the appellants avails the CENVAT Credit of duty paid under yarn and fabrics before

sending the same to job worker of the processor following the procedure containing Rule 4(5){a) of CENVAT Credit Rule 2004; the appellants export the fabrics under claim of rebate in terms of Rule 18 of Central Excise Rule 2002; in terms of Rule 12B introduced with effect from 25.03.2003 the appellants have obtained provisional registration as warehouse; the said Rule 12B has been rescinded on 09.07.2004; the appellants continued to avail CENVAT Credit. Department contested the CENVAT Credit availed by the appellant during the period 09.07.2004 to 30.06.2005 alleging that the appellant had no facility to manufacture the dyed and printed fabrics and hence they are not the manufacturers and accordingly, CENVAT Credit is not admissible; that the credit was fraudulently availed; a show cause notice dated 09.08.2005 and an addendum dated 17.09.2007 was issued to the appellants proposed into deny the CENVAT Credit of Rs.2,88,89,873/- and to recover credit amount into 2,77,00,617/-; the show cause notice also proposed penalties on the appellants and other noticees. Learned commissioner vide the impugned order dated 31.03.2009 denied the entire credit of Rs.2,88,89,873/- availed by the appellants; confirmed the demand of an amount of Rs.2,77,00,617/- utilized by the appellants, along with applicable interest; imposed penalty of Rs. 2,77,00,617/- on the appellants in terms Rule 13 of the CENVAT Credit Rule read with Section 11AC of Central Excise Act 1944; impose the penalty of 20 lacs on Shri Prakash Jokhani (E/843/2009), partner of the appellant; and the penalty of 1,00,000/- on the other Noticees that is Shree Nathjee Textiles (Appeal No E/852/2009), under Rule 26 of Central Excise Rule 2002. Department has reviewed the impugned order filed an appeal (E/911 of 2009) on the ground that learned commissioner has erred in not imposing penalty of 2,77,00,617 instead of 2,88,89,873 and erred in demanding interest only on 2,77,00,617.

2. Shri Darius Shroff, Advocate, appearing for the appellants (in Appeal No. E/843 & 844/2009) submits that learned adjudicating

authority confirmed the allegations raised in the show cause notice holding that they are not manufacturers after the revocation of Rule 12B with effect from 09.07.2004; learned Commissioner confirmed the amount demanded in the addendum though the addendum was issued on a different ground alleging that the appellant have availed CENVAT Credit on the strength of bogus invoices issued by 13 suppliers of grey fabrics; the appellants were however registered as a warehouse, had warping machine installed, carried out cutting and tracking of fabrics and exporting the fabrics; they are manufacturers in view of Section 2(f) of Central Excise Act 1944; the existence of warping machines has been admitted in show cause notice; as per chapter note 2 to chapter 52 of first schedule of Central Excise Tariff Act 1985, the process of conversion of duty paid yarn into warped yarn amounts to manufacture; Deputy commissioner Central Excise Kalyan-I, vide his letter dated 05.08.2005 stated that the unit was functioning as manufacturer prior to obtaining registration as a warehouse; "concept of manufacture" for the purpose of export is wider than the concept under Central Excise; it is permissible to avail credit on fabric/ yarn sent for job working in terms of Rule 4 (5) (a) of CEVAT Credit Rule of 2004; Tribunal in the case of Shilpi Prints 2004 (170) EIT 63 (Tri-Mumbai) held that cutting and packing for export is a process that is incidental and auxiliary to the completion of manufacturing process; CESTAT held the same opinion in the cases of CCE Surat-1 Vs Indian Polyfins Ltd 2004 (166) ELT 493 (Tri-Mumbai) and CCE, Surat-1 Vs Randey Shyam Bansal 2004 (177) ELT 927 (Tri-Mumbai).

3. Learned counsel submits that the accepted facts of the case are that most of inputs were duty paid; the same were received in their factory and sent to job workers in terms of Rule 4 (5) (a) of CEVAT Credit Rule of 2004; final product was actually exported on payment of duty under claim of rebate, after verification and inspection by jurisdictional officers; once duty payment is not disputed CENVAT

Credit cannot be denied as held by R.S. India V CCE 2003 (153) ELT 114 (T) (affirmed by the Delhi High Court in CCE v R S Industries 2008 (228) ELT 347 (Del) and CCE v SPIC Pharmaceuticals Division 2006 (199) ELT 686 (T-Chennai); registration or otherwise under Rule 12B cannot be a basis for availing credit as held in CCE v Shilpi Prints 2004 (170) ELT 63 (Tri Mum), CCE vs PRS Permacel Pvt Ltd. Reported in 2018 (363) ELT 1199, and Bericap India Pvt. Ltd. Vs CCE 2018 (363) ELT 1078

4. Learned counsel submits that the appellants are engaged in cutting and packing of finish fabrics in their perusals; when the input stage rebate is claimed, it is not necessary that the finished goods should be chargeable; rebate of duty paid on inputs is permitted even if final products are chargeable to nil rate of duty are when they are not Excise Rule also; CVEC vide circular 129/540/95/CX dated 29.05.1995 and 155/66/CX dated 17.10.1995 have clarified the scope of "manufacture", the process of which include those undertaken by the appellants. Therefore, the show cause notice issued is contrary to the both circulars.

5. Learned counsel submits that it is alleged in the addendum that the credit availed on the basis of invoices issued by the 13 suppliers is incorrect, as most of them did not exist; the raw materials received were purchased in the open market; the cheques were issued by the appellants to the respective suppliers were encashed by third parties; the appellants did not take reasonable steps to confirm the genuineness of the suppliers of raw materials as required by Rule 9(3) of CENVAT Credit Rule.

6. Learned counsel submits that the issue raised in the addendum is new one and a separate show cause notice needed to be issued as held by the Tribunal in the case of **Full Specialty Ltd.: 2004 (177) ELT 217 (Tri-Del)**; addendum which incorporates totally new ground

is required to pass the test of limitation; the appellant had not indulged any act of willful misstatement or suppression of facts and therefore, extended period cannot be invoked; a show cause notice does not bring on record any evidence of collusion of the appellants with the suppliers; in respect of M/s. Sunshine Textiles the allegation that they have supplied only invoices and that there was no supply of grey fabrics is totally false; commission and omission if any are on the part of the suppliers and as such credit availed by the appellants cannot be denied. He relies upon the following cases:-

- (i) *Nizam Sugar Factory V/s CCE 2006 (197) E.L.T. 4659 SC*
- (ii) *Larsen & Toubro V/s CCE, PunE-II 2007 (211) ELT 513 (SC)*
- (iii) *CCE vs Lajya Dyeing and Bleaching Works 2008 (224) ELT 345 (SC),*
- (iv) *HMP Engineers V/s C.C.E. 2003 (161) ELT 675 (Tri-Mumbai)*
- (v) *CCE Pondicherry vs. SPIC Pharmaceuticals Division 2006 (199) ELT 686 (Tri-Chennai)*
- (vi) *Tata Engineering & Locomotive Company Ltd. Vs. CCE, Pune-I reported in 2006 (205) ELT 1045 (Tri. - Mumbai)*

7. Learned counsel submits that the reliance on the statement of Shri Imtiyaz Godil, of M/s Sunrise Textiles, to conclude that no fabrics were send and only invoices were prepared is wrong; the adjudicating authority has not accorded permission for cross examination of Shri Imtiyaz; the appellants never interacted with Shri Imtiyaz Godil; payments for the fabrics were made in cheques; if Mr. Imthaz was to be believed there was no need for them to make payment of 100 percent value of the invoice; as Shri Imtiyaz was not subjected to cross examination his statement cannot be relied upon as held in *CCE v Kamal Singhania & Others* Judgement dated 17.09.2021 Bombay High Court; learned counsel further submits that the credit availed by them is correct as per the provisions of Rule 3(1) Rule 4(1) of CENVAT Credit Rule 2004 as the goods for received in the factory and were used in the manufacture of export goods; the appellants have taken reasonable steps in terms of Rule 9 (3) of CENVAT Credit Rules

which require the appellants to be satisfied about the identity and address of the manufacturer ; other than this there are no other guidelines as to the reasonable steps the appellant is required to be taken by the appellants; the appellants have informed the department enclosed in the list of manufacturers which included the Central Excise registration number of the supplier; in terms of the Board's Circular No.419/52/98-CX dated 02.09.1998 and Board's Circular No. 12/93-CX-8 dated 02.11.1993 the officers are required to verify the duty paying documents on a monthly basis by referring to the originating central excise range; out of 200 suppliers involved only 13 suppliers are alleged to be fake and that out of the total credit of Rs.2,88,89,773/- an amount of Rs.1,21,61,218/- is on a strength of bogus invoices; the department disputes the receipt of grey fabrics from this 13 suppliers on the grounds that appellants do not have transportation details and the checks issued by the appellants have been encashed by third parties who are not connected; he submits that the responsibility of transportation of grey fabrics to the appellant doors is on the suppliers and not on the appellant; appellant were not require to pay for the transportation; Shri Santosh Kumar Harishchandra Gupta, Director of M/s. Fast Live Ltd., stated that transportation charges were paid by the suppliers; he also stated that the checks were got encashed through the agents; therefore, the allegation on the appellant is not well founded; it is a fact on record that out of 13 alleged bogus suppliers , the department could identify the addresses of 4 suppliers that is Sunrise Textiles, Fast View Company Pvt. Ltd, Sajjan Textiles and Shriman Textiles; adjudicating authority himself recorded a finding that out of 13 suppliers department could not produce proof of non existence of at least 2 suppliers that is Shri Nathjee Textiles and Arvind Textiles; appellant submitted copies of the acknowledgment of application for registration in respect of Shri Charmi Creation; and Kevin Synthetics; therefore, the credit of duty availed on grey fabrics received from 6

suppliers is correct; he relies upon HMP Engineers V/s CCE. 2003 (161) ELT 675 (Tri-Mumbai) and C.C.E. Pondicherry Vs SPIC Pharmaceuticals Division 2006 (199) ELT 686 (Tri-Chennai); therefore, there is no ground for recovering credit of Rs.80, 16,022.

8. Learned counsel (Appeal No. E/843 & 844/2009) for the appellant submits that The mandate contained in Rule 9 (3) does not envisage verification of correctness of the duty payment by the supplier on the inputs or to confirm as to whether the supplier had genuine manufacturing capacity; the provision of this rule cannot be read to mean that the appellants are required to ensure that the input in respect of which payment of duty of Excise is indicated has been paid. He relies on ***R. S. Industries Vs CCE New Delhi: 2003(153) ELT 114 (Tri-Del)*** and ***CCE, Pondicherry Vs SPIC Pharmaceuticals Division 2006 (199) ELT 686 (Tri-Chennai)***. Learned counsel submits that out of total demand of Rs.1,21,61,218/- , the appellants have justified the credit of Rs.80,16,022/- and submits that Rs. 36,89,486/- has already been reversed; therefore, only Rs.4,70,710/- request to be paid in case the Tribunal holds that the credit is inadmissible. Learned counsel submits that in view of the above as there is no mala fide intention on the part of the appellant and as no commissions and omissions were on their part no penalty is imposed; he submits that rebate claim before by the appellants for an amount of Rs. 1,39,00,976/- and the same is pending with the authorities in view of the current show cause notice issued.

9. Shri Nathjee Textiles, the appellants in E/852/2009, submit that learned commissioner passed the order in a summary fashion without appreciating the facts of the case; the investigation finds out the existence of the appellant; the only contention of the authority is that document submitted by the appellant are haphazard and could not collaborate the claim of returning back of materials sold to Venus International; they submits that from the where of the finding of the

commissioner it is clear that all the invoices issued by them to M/s Venus International was genuine; M/s. Venus International have shown the reversal of credit after 1 year of taking credit; there was no reason to impose penalty of Rs.1 lac on the appellant; as the department raided the premises of M/s Venus International in April 2005 and withdrawn all the record it is understandable the reversal was made at a later date in June and August 2005; learned commissioner ignore the fact that if the appellants received the goods back they must have repaid the amount involved; learned commissioner should have asked M/s Venus International to produce the evidence like LR Vehicle no., invoice, challan etc; instead he has chosen to imposed penalty on the appellant without any authority of law.

10. Shri Anantha Krishnan, Commissioner, Authorized Representative for the Respondent department counters the submissions of the appellants in E/911/09, E/844/09, E/852/09 and submits that with omission of Rule 12 B w.e.f. 09.07.2004, the status of M/s Venus International as manufacturer ceased, but the appellants continued to avail Cenvat credit and paid duty on final product; investigation conducted also revealed that the appellants were availing Cenvat credit on bogus/fake invoices fraudulently and were claiming rebate of excise duty paid; appellants had claimed fraudulent rebate of Rs.1,56,81,868.

11. Learned AR submits a brief as to how credit availed from different manufacturers is fraudulent.

(i). **Sunrise Textiles** - M/s Sunrise supplied 92978 L. Mtr of grey fabrics within 14 days (3/8/2004 to 18/8/2004) when their monthly manufacturing capacity was only 16800 L. Mtr; Imtiyaz Godil Authorised Signatory of Sunrise Textiles on 31/3/2005 stated that they did not manufacture any grey fabrics etc; no yarn was purchased and no fabrics manufactured on job work; he passed on credit

fraudulently, for a commission of Rs.1 to 1/50 per kg of yarn; supplies shown were fraudulent; Shri Mahesh Patel, proprietor of M/s Shree Asha Traders admitted that he never supplied any yarn to M/s Sunrise and all transactions were on paper only; Shri Bimal Jokhani admitted the fraudulent availment and paid Rs.16,48,434, in respect of M/s Sunrise Textiles and deposed that part of the payment due to Sunrise were withheld for this reason only;. Further, in another SCN dtd.17/9/2007, it was alleged that M/s Sunrise issued invoices prior to registration; the appellants being co-noticee to the Show Cause notice are aware of fraudulent acts by M/s Sunrise.

(ii). **Fast wave Trading:** Shri Santosh Kumar H. Gupta, Director could not trace out the job worker of his company; Shri Bimal Joukani admitted the bogus nature of credit passed and paid /reversed Rs.12,56,730.

(iii). **Sajjan Textiles Bhiwandi and Shreeman Textiles, Bhiwandi:** These units were not having any manufacturing facility; they were only issuing invoices facilitating the manufacturers to avail Cenvat credit on bogus invoices; Alert circular dated 19/6/2006 was issued by Thane I; Tribunal in the case of Weizmann Ltd and Others 2016-TIOL-505-CESTAT-MUM confirmed that both the above units viz. Sajjan Textiles and Shreeman textiles did not manufacture any grey fabrics and the transactions of sale of grey fabrics to various processors or merchant exporters were only on invoices purportedly indicating payment of duty, which were used by processors and merchant exporters and that the whole exercise was conducted to encash the duty in the form of rebate.

(iv). When investigations were conducted, the appellants claimed that their material purchased from **M/s Shreenathji Textiles, Surat, M/s Sushma Fabrics, M/s Beauty Fashion, Surat** was returned and credit was reversed.

(v). In case of (i) M/s **Parul** Textiles, Surat (ii) M/s **Arvind** Textiles, Surat, (iii) M/s **SVS** Tex-o-Fab, Surat (iv) M/s **Charmi** Creations, Bhiwandi (v) M/s **K P Textiles**, Bhiwandi, (vi) M/s **Kevin** Synthetics, Bhiwandi could not be located at their shown addresses.

(vi). M/s Star Enterprises and M/s Subhalxmi Trading did not exist at the given address. M/s Suraj Textiles' address turned out to be of Shri Shaikh Basher, Scrap dealer who clarified that there was no Suraj Textiles.

(vi). Total Cenvat credit, availed fraudulently on fake invoices, was Rs.1,21,61,218 (as per Annexure H to the SCN); the appellants' acceptance that they availed bogus Cenvat credit and reversal of following amounts, confirms fraudulent availment.

	Reversal	Challan	Total
Sunrise Textiles, Surat	16,48,434	1,500,000	31,48,434
Fastwave Trading Co. Pvt Ltd., Mumbai	12,56,730		12,56,730
Beauty Fashion	14,83,406		14,83,406
Shree Nathaji Textiles	16,81,082		16,81,082
Sushma Fabrics	5,24,998		5,24,998
Total			80,94,650

12. Learned Authorized Representative, further submits that it is evident that the letter dated 5th August 2005 was written by the AC, Division in response to the letter dated 4.8.2005 of by Superintendent (Prev), bearing F. No. C.Ex./CPU-K/Inq-26/2005 -06 and thus should not be read in isolation; further, in the letter the AC/DC only says that the Appellants applied for registration. In the application they sought registration as warehouse and accordingly the registration certificate was given for warehouse; the letter further says that the unit was filing the periodical returns in form ER-1, which was meant for the manufactures; the unit has declared production, clearances, availment and utilization of credit, payment of duty etc.;

Deputy Commissioner has only stated the position on record; this letter is rather supporting the stand of the Revenue; when the premises of the Appellants were visited by the officers, it was found that the Appellants M/s Venus International were not carrying any actual manufacturing activities; the SCN alleges on factual verification, the Appellants were found to be 'not manufacturers'; the letter was an internal correspondence and cannot be considered as evidence.

13. Learned Authorized Representative submits also that the addendum dated 17.09.2007 issued on the basis of further investigation, proved that the appellants availed fraudulent Cenvat credit; the issue in the show cause notice and addendum was same i.e. disallowance of Cenvat credit; No additional demand has been issued by addendum; investigation proved that the appellant continued to work in the status/capacity of manufacturer under erstwhile Rule 12 B only with an intention to avail fraudulent Cenvat credit and to claim fraudulent rebate; As fraud was involved in the matter, the show cause notice correctly invoked proviso to Section 11; the addendum also was issued well within the time of 5 years. He relies upon:

- (i) *UOI Vs. Maheshwari Woolen Mills 1998 (97) ELT 220 (SC)*
- (ii) *Sara Services & Engineer P Ltd. 2010 (254) ELT 486 (Tri-Del)*
- (iii) *Sundarval Match Industries Ltd. Vs CCE 1992 (59) ELT 77 (T)*

14. Heard both sides and perused the records of the case. Brief issues that requires to be decided in these cases are:

- (i) As to whether the appellants are eligible to CENVAT Credit even after revocation of Rule 12B of Central Excise Rules with effect from 9.7.2004;
- (ii) Whether the corrigendum / addendum dated 17.9.2007 to the show-cause notice is valid in law;

- (iii) Whether the appellant i.e., M/s. Venus International have availed credit on the basis of bogus invoices and if so, whether they have rendered themselves to pay CENVAT credit thus availed;
- (iv) Whether penalties are imposable on different appellants; and
- (v) Whether the Revenue appeal is sustainable.

15. Coming to the first issue, show-cause notice dated 9.8.2005 was issued to be appellant M/s. Venus International on the ground that though vide Notification No.11/2004-CE (NT) dated 9.7.2004, Rule 12B has been rescinded, the appellants continued to avail CENVAT credit of Rs.2,88,89,873/- and the same is not available to the appellants. We find that Rule 12B empowered non-manufacturer to get specified textile and textile articles produced or manufactured on his account on job work basis subject to observance of conditions and procedures prescribed and for that purpose.

16. It is the contention of the department that when the Rule was rescinded, the appellants lost their status as manufacturer, whereas the appellants contend that they are ab initio manufacturers in terms of Section 2(f) of the Central Excise Act, 1944 and not only on the basis of Rule 12B as claimed in the Notice; even the show-cause notice acknowledges the fact that there was a warping machine in their premises; they have maintained all records; when the goods were sent for job working CENVAT was debited and was credited back when the goods were received back in the factory; they have exported the textiles under ARE-1 after due examination of the goods and transport under escort of the officers. Rule 4(5)(a) of CENVAT Credit Rules, 2004 permits, availment of CENVAT credit on inputs (yarns or fabrics) sent to various job workers; appellants rely on the case of Shilpi Prints (*supra*) and contend that the activities

undertaken by them are incidental and ancillary to the completion of manufacturing process.

17. The appellants also contend that Revenue did not dispute the receipt of raw materials/inputs and therefore, in view of RS India (supra), credit cannot be denied; Registration cannot be a determinant factor for applicability of rebate as held in Shilpi Prints (supra); they also contend that in respect of rebate, the concept of manufacturer is wider and cannot be restricted to the definition under Section 2(f) of Central Excise Act, 1944; they also rely upon the Board Circular No.129/40/95-CX dated 29.5.1995 which states that the definition of 'manufacture' for the purposes of grant of input stage rebate has also been made liberal to include the process of blending, alterations or any other operations thereon; therefore, the appellants contend that the show-cause notice is issued contrary to the clarifications given by CBEC.

18. We find that the issue of applicability of CENVAT Credit to the appellants is no longer *res integra*. Tribunal vide various decision has settled the issue in favour of the appellants. We find that Tribunal in the case of ***Maharashtra Dyeing and Printing Works: 2011 (271) ELT 558 (Tri.)*** holds that:

“4. We find that the CBE &C Circular No. 345/2/2004-TRU dated 28-7-2004 have categorically clarified as under :-

“.....Hence, from the above it is clear that even after the omission of Rule 12B of Central Excise Rules, 2002, the firm can clear goods lying with them under an invoice after paying Central Excise Duty as per law”.

5. It can be seen from the above reproduced portion of the Board Circular that the trader can discharge the duty liability on the goods, which were received by him prior to 9-7-2004. It is not clear in this case whether such goods, duty was paid on the goods invoiced to appellant, on which credit was availed were in fact received by the trader prior to 9-7-2004. If the trader issues an invoice of 18-8-2004, it has to be presumed

that the Excise registration certificate issued to him was valid. If that be so, the issue needs to be considered from this angle also. In the absence of any findings on these points, we set aside both the orders of lower authorities and remand the matter back to the adjudicating authority to re-consider the issue afresh after following the principles of natural justice. We allow the appeal by way of remand.”

In the case of **Suntex Mercantile Pvt. Ltd.: 2014 (313) ELT 809 (Tri.-Mumbai)** has held:

“6. On careful consideration of the submissions made by both the sides, I find that the case law relied upon by the learned DR is not applicable to this case as in this case the facts are different to the case before me. As in the case of Jay Yuhshin Ltd. (supra) the issue before the Hon’ble Larger Bench was of revenue neutral situation in the case where the goods were sent to the job worker and the component supplied by the principle manufacturer free of cost and the final product manufactured by the appellant were cleared on payment of duty to the principle manufacturer who in turn to take modvat credit of the duty paid by the appellant on said items. In this case the appellant has procured the goods from their supplier and took credit on that, the credit was not available but by reversing the same clearance along with same duty paid from the PLA Account amounts to revenue neutral. The facts of the case before me are identical to the case of Keetex (supra) and in that case this Tribunal has held that the assessee was not entitled to modvat credit as they have not undertaken any manufacturing activity nor did have any manufacturing premises but facts remains that they had paid duty on final products in which the input was used and quantum of duty paid on the final products is not less than the credit taken on the inputs. The whole exercise therefore becomes revenue neutral and therefore, no purpose will be served by demanding duty. Moreover as per the invoice shown by the learned Advocate for the appellant at page 35 of the appeal memo, which clearly shows that if the goods were directly sent to the job worker than the credit is available to the job work as the name of the job worker clearly entered in the invoice. Accordingly, the arguments advanced by the learned Advocate for the appellant have forced that it is a case of revenue neutral situation. Hence, I do not find any merit in the impugned order same is set aside, appeal is allowed with consequential relief if any.”

19. We further find that availment of CENVAT credit was held to be correct on the principle of revenue neutrality by Tribunal in the case

of ***CCE, Pune vs. Keetex: 2008 (227) ELT 536 (Tri.)***. In view of the above, we have not hesitation whatsoever in holding that irrespective of the registration or otherwise, under Rule 12B, the appellants are entitled to CENVAT Credit on inputs used by them.

20. Coming to the second issue, we find that department has conducted some investigations on the credit availed by the appellants and have come to a conclusion that the appellants have availed CENVAT credit of Rs.1,21,61,218/- on the strength of bogus invoices / invoices issued by non-existent parties / invoices issued without any actual movement of goods and that the cheques issued to the 13 suppliers of raw materials i.e., grey fabrics have been discounted / withdrawn by third parties who have no connection with the suppliers. On completion of investigation, an addendum dated 17.9.2007 was issued. It is contention of the appellants that the addendum is beyond the scope of the original show-cause notice and therefore, cannot be issued as an addendum. Moreover, the same is time barred. It is the contention of the department that though an addendum has been issued, it is in consonance with the basic issue raised in the show-cause notice i.e., admissibility of CENVAT credit; the addendum supplements the basis of holding the inadmissibility of credit and in no way increases the liability of the appellant.

21. We find that the contention of the department is acceptable. It is not the appellant's claim that the original show-cause notice and the addendum were on separate issues. The original show-cause notice dated 9.8.2005 seeks to demand the inadmissible credit of Rs.2,88,89,873/- availed by the appellants after the rescinding of Rule 12B. The addendum 17.9.2007 supplements the allegations in the original show-cause notice and states that out of the original demand of inadmissible credit of Rs.2,88,89,873/-, Rs.1,21,61,218/- is also inadmissible on the allegation that the CENVAT credit was

fraudulently availed on bogus invoices issued by non-existing/fraudulent suppliers. Therefore, we hold that there is no legal infirmity in the issuance of addendum in this regard.

22. Coming to the allegation of fraudulent availment of CENVAT credit on bogus invoices, the department contends that credit availed from different manufacturers is fraudulent as follows:

(i). **Sunrise Textiles** - M/s Sunrise supplied 92978 L. Mtr of grey fabrics within 14 days (3/8/2004 to 18/8/2004) when their monthly manufacturing capacity was only 16800 L. Mtr; Imtiyaz Godil Authorized Signatory of Sunrise Textiles on 31/3/2005 stated that they did not manufacture any grey fabrics etc; no yarn was purchased and no fabrics manufactured on job work; he passed on credit fraudulently, for a commission of Rs.1 to 1/50 per kg of yarn; supplies shown were fraudulent; Shri Mahesh Patel, proprietor of M/s Shree Asha Traders admitted that he never supplied any yarn to M/s Sunrise and all transactions were on paper only; Shri Bimal Jokhani admitted the fraudulent availment and paid Rs.16,48,434, in respect of M/s Sunrise Textiles and deposed that part of the payment due to Sunrise were withheld for this reason only;. Further, in another SCN dtd.17/9/2007, it was alleged that M/s Sunrise issued invoices prior to registration; the appellants being co-noticee to the Show Cause notice are aware of fraudulent acts by M/s Sunrise.

(ii). **Fast wave Trading:** Shri Santosh Kumar H. Gupta, Director could not trace out the job worker of his company; Shri Bimal Joukani admitted the bogus nature of credit passed and paid /reversed Rs.12,56,730.

(iii). **Sajjan Textiles Bhiwandi and Shreeman Textiles, Bhiwandi:** These units were not having any manufacturing facility; they were only issuing invoices facilitating the manufacturers to avail Cenvat credit on bogus invoices; Alert circular dated 19/6/2006 was

issued by Thane I; Tribunal in the case of Weizmann Ltd and Others 2016-TIOL-505-CESTAT-MUM confirmed that both the above units viz. Sajjan Textiles and Shreeman textiles did not manufacture any grey fabrics and the transactions of sale of grey fabrics to various processors or merchant exporters were only on invoices purportedly indicating payment of duty, which were used by processors and merchant exporters and that the whole exercise was conducted to encash the duty in the form of rebate.

(iv). When investigations were conducted, the appellants claimed that their material purchased from **M/s Shreenathji Textiles, Surat, M/s Sushma Fabrics, M/s Beauty Fashion, Surat** was returned and credit was reversed.

(v). In case of (i) M/s **Parul** Textiles, Surat (ii) M/s **Arvind** Textiles, Surat, (iii) M/s **SVS** Tex-o-Fab, Surat (iv) M/s **Charmi** Creations, Bhiwandi (v) M/s **K P Textiles**, Bhiwandi, (vi) M/s **Kevin** Synthetics, Bhiwandi could not be located at their shown addresses.

(vi). M/s Star Enterprises and M/s Subhalxmi Trading did not exist at the given address. M/s Suraj Textiles' address turned out to be of Shri Shaikh Basher, Scrap dealer who clarified that there was no Suraj Textiles.

Thus, the Authorised Representative submits that out of total fraudulently availed credit of Rs.1,21,61,218/-, the appellants have reversed credit of Rs.80,94,650/-.

23. Whereas the appellant submits that the statement of Shri Imtiaz Godil stating that merely invoices were sent for fabrics is false; they never dealt with him; learned adjudicating authority did not allow cross-examination of Shri Imtiaz Godil; if Mr. Imtiaz Godil was correct, there was no need for them to pay the amount at 100% of

the invoice price; they have not violated any provisions of Rule 9(3) of CENVAT Credit Rules; when they availed credit, department was under obligation to verify the duty paying documents in terms of Circular No.12/93-CX-8 dated 2.11.1993; the appellants are not under obligation to have the transportation details; the appellants as well as the department identified the 4 suppliers i.e., M/s. Sunrise Textiles, M/s. Fast Weave Co. Pvt. Ltd., Sajjan Textiles and Shreeman Textiles; out of total demand of Rs.1,21,61,218/-, the appellants have justified the retention of credit of Rs.80,16,022/- and Rs.36,89,486/- and therefore, if at all they are held to pay the CENVAT credit availed by them, they are liable to pay only Rs.4,70,710/-.

24. We find that Rule 9(3) of CENVAT Credit Rules casts certain responsibility on the manufacturers who avail CENVAT credit. It would be beneficial to have a look at the relevant provisions:

Rule 9 (3) of the Cenvat Credit Rules:

The manufacturer or producer of excisable goods or provider of output service taking CENVAT credit on input or capital goods or input service, or the input service distributor distributing CENVAT credit on input service shall take all reasonable steps to ensure that the input or capital goods or input service in respect of which he has taken the CENVAT credit are goods or services on which the appropriate duty of excise or service tax as indicated in the documents accompanying the goods or relating to input service, has been paid.

Explanation - The manufacturer or producer of excisable goods or provider of output service taking CENVAT credit on input or capital goods or input service or the input service distributor distributing CENVAT credit on input service on the basis of invoice, bill or, as the case may be, challan received by him for distribution of input service credit shall be deemed to have taken reasonable steps if he satisfies himself about the identity and address of the manufacturer or supplier or provider of input service, as the case may be, issuing the document specified in sub-rule (1) evidencing the payment of excise duty or the additional duty of customs or service tax, as the case may be, either –

(a)

- (b) *on the basis of the certificate given by a person with whose handwriting or signature he is familiar; or*
- (c) *on the basis of certificate issued to the manufacturer or the supplier or, as the case may be, the provider of input service by the Superintendent of Central Excise within whose jurisdiction such manufacturer has his factory or such supplier or provider of output service has his place of business or where the provider of input service has paid the service tax and where the identity and address of the manufacturer or the supplier or the provider of input service is satisfied on the basis of a certificate, the manufacturer or producer or provider of output service taking the CENVAT credit or input service distributor distributing CENVAT credit shall retain such certificate for production before the Central Excise Officer on demand.*

25. We find that the thrust of the Rule is that the person who avails CENVAT credit should be satisfied about the identity and address of the manufacturer. In the instant case, Revenue could produce evidence to the effect that most of the 13 input suppliers were non-existing or have issued bogus invoices. In fact, some of the suppliers were declared to be fraudulent distributors of CENVAT credit. Revenue have produced the evidence that in respect of some of the suppliers, CESTAT has already given a finding that the same are fraudulent. We find that the Revenue could establish to a reasonable extent that the appellant's claim was bogus; in some cases, the parties are not existing; in some cases, only documents were moving without involvement of actual movement of materials. Under the circumstance, we find that the contentions of the appellants are not tenable and therefore, the case laws relied upon by them are not applicable as the facts are different. CENVAT credit is a huge facility given to the manufacturers. The manufacturers are duty bound to adhere to the conditions stipulated under CENVAT Credit Rules. It was incumbent upon the appellants to satisfy themselves about the name, address and existence of the suppliers. We find that even going by the appellants own contentions, some of the suppliers are not traceable. It would be very naïve to believe that the appellants are not concerned with the whereabouts of their suppliers. The fact that

in most of the cases, cheques were encashed by third parties unconcerned with the suppliers, supports the contention of the department. Therefore, we find that the appellants have engaged themselves in a fraudulent activity inasmuch as availing credit on the basis of bogus invoices and again claiming the same as rebate on the exported goods. Fraud committed vitiates every activity of the appellants. We find that this Bench vide Final Order No. A/3314-3329/15/EB dated 16.7.2015 have dealt a similar issue and have upheld the demand of credit availed fraudulently on the basis of bogus invoices. Therefore, we are of the considered opinion that the credit of Rs.1,21,61,218/- was fraudulently availed by the appellants and the same requires to be reversed/paid by them along with applicable interest and penalty.

26. We find that the appellants contended that the issue as far as addendum is concerned is barred by limitation as there was no suppression or mis-declaration or mis-statement with an intent to evade payment of duty on their part; they have been submitting ER-1 returns incorporating the details of credit; the department could have verified the same; the issue raised in addendum could have been dealt in separate show-cause notice rather than by an addendum. We find that Revenue has contended that the addendum dated 17.09.2007 issued on the basis of further investigation, proved that the appellants availed fraudulent Cenvat credit; the issue in the show cause notice and addendum was same i.e. disallowance of Cenvat credit; No additional demand has been issued by addendum; investigation proved that the appellant continued to work in the status/capacity of manufacturer under erstwhile Rule 12 B only with an intention to avail fraudulent Cenvat credit and to claim fraudulent rebate; As fraud was involved in the matter, the show cause notice correctly invoked proviso to Section 11; the addendum also was issued well within the time of 5 years. We are of the considered opinion that the department has correctly invoked the extended

period. For this reason, we find that the case law relied upon by the appellants are of no avail to them. We find that M/s. Venus International are liable to pay fraudulently availed CENVAT credit of Rs.1,21,61.218/- along with interest and equal penalty under Rule 13 of the Cenvat credit of the Cenvat Credit Rules, 2002/Rule of the Cenvat credit Rules, 2004 read with Section 11AC of Central Excise Act-1944.

27. Coming to the appeal filed by Shree Nathji Textiles, we find that the adjudicating authority has imposed a penalty of Rs.1,00,000/- on the appellant. The appellant submits that they have supplied some goods to M/s. Venus International Pvt. Ltd. and the same were returned. We find that the main allegation of the department is about the non-existence of the suppliers and issue of only invoices without movement of goods physically. In the instant case, the existence of the supplier-appellant is not in question. The fact of return of goods also indicates that goods were indeed supplied and returned and for that reason, we find that penalty on the appellant i.e., Shree Nathji Textiles is not warranted.

28. We find that a penalty of Rs.20,00,000/- has been imposed on Mr. Prakash Jokhani and Bimal Jokhani. However, the learned adjudicating authority has not clearly delineated the role of Shri Prakash Jokhani separately viz-a-viz Bimal Jokhani. In fact, Adjudicating Authority finds that Shri Prakash Jokhani cooperated with the investigation, whereas Shri Bimal Jokhani has not responded to summons and has not joined the investigation. Therefore, imposing similar penalty on both of them defies logic. Looking into the role played by Shri Prakash Jokhani, we are inclined to reduce the penalty from Rs.20,00,000/- to Rs.5,00,000/-.

29. Coming to the departmental appeal (E/911/2009), we find that the grounds of appeal of the department that penalty equivalent to

the credit wrongfully availed and utilised is obviated for the reason that we have come to the conclusion that credit availed after revocation of Rule 12B is in order and that penalty for fraudulent availment of CENVAT credit of Rs.1,21,61,218/- shall be equal to the amount arrived after reconciliation and that such credit shall be recovered along with applicable interest. To this extent, the appeal filed by the department becomes infructuous.

30. In the result,

- (i) Appeal No. E/843/2009 is partly allowed by reducing the penalty imposed on Shri Prakash Jokhani from Rs.20,00,000/- to Rs.5,00,000/- (Rupees Five Lakhs Only).
- (ii) The appeal No. E/844/2009 are partly allowed by holding that the CENVAT credit availed after revocation of Rule 12B with effect from 9.7.2004 is in order and upholding the demand of Rs.1,21,61,218/- being fraudulently availed CENVAT credit is concerned along with interest under Section 11AB of Central Excise Act, 1944 and penalty under Rule 13 of CENVAT Credit Rules read with Section 11AC of Central Excise Act, 1944.
- (iii) Appeal No. E/852/2009 filed by Shree Nathji Textiles is allowed.
- (iv) Appeal No. E/911/2009 filed by the Revenue is dismissed as infructuous.

(Pronounced in open court on 28.03.2022)

(S.K. Mohanty)
Member (Judicial)

(P. Anjani Kumar)
Member (Technical)