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

Excise Appeal No. 122 of 2010

(Arising out of Order-in-Appeal No. SB/77 to 82/Th-II/09 dated 29.10.2009 passed by the Commissioner of Central Excise (Appeals), Mumbai-I)

Commissioner of Central Excise, Thane-II **Appellant**
3rd floor, Navprabhat Chambers,
Ranade Road, Dadar (W), Mumbai 400 028.

Vs.

M/s. Apple International Engg. Works P Ltd **Respondent**
Survey No.62 (Part), Plot No.23,
Waliv, Sativali, Vasai (E), Thane 401 202.

WITH

Excise Appeal No. 123 of 2010

(Arising out of Order-in-Appeal No. SB/77 to 82/Th-II/09 dated 29.10.2009 passed by the Commissioner of Central Excise (Appeals), Mumbai-I)

Commissioner of Central Excise, Thane-II **Appellant**
3rd floor, Navprabhat Chambers,
Ranade Road, Dadar (W), Mumbai 400 028.

Vs.

M/s. Apple International Engg. Works P Ltd **Respondent**
Survey No.62 (Part), Plot No.23,
Waliv, Sativali, Vasai (E), Thane 401 202.

WITH

Excise Appeal No. 132 of 2010

(Arising out of Order-in-Appeal No. SB/76/Th-II/09 dated 29.10.2009 passed by the Commissioner of Central Excise (Appeals), Mumbai-I)

M/s. Apple International Engg. Works P Ltd **Respondent**
Survey No.62 (Part), Plot No.23,
Waliv, Sativali, Vasai (E), Thane 401 202.

Vs.

Commissioner of Central Excise, Thane-II **Appellant**
3rd floor, Navprabhat Chambers,
Ranade Road, Dadar (W), Mumbai 400 028.

WITH

Excise Appeal No. 133 of 2010

(Arising out of Order-in-Appeal No. SB/77 to 82/Th-II/09 dated 29.10.2009 passed by the Commissioner of Central Excise (Appeals), Mumbai-I)

M/s. Apple International Engg. Works P Ltd Respondent
Survey No.62 (Part), Plot No.23,
Waliv, Sativali, Vasai (E), Thane 401 202.

Vs.

Commissioner of Central Excise, Thane-II Appellant
3rd floor, Navprabhat Chambers,
Ranade Road, Dadar (W), Mumbai 400 028.

AND

Excise Appeal No. 1440 of 2010

(Arising out of Order-in-Appeal No. SB/77 to 82/Th-II/09 dated 29.10.2009 passed by the Commissioner of Central Excise (Appeals), Mumbai-I)

M/s. Apple International Engg. Works P Ltd Respondent
Survey No.62 (Part), Plot No.23,
Waliv, Sativali, Vasai (E), Thane 401 202.

Vs.

Commissioner of Central Excise, Thane-II Appellant
3rd floor, Navprabhat Chambers,
Ranade Road, Dadar (W), Mumbai 400 028.

Appearance:

Shri Vinay Sejpal, Advocate, for the Appellant
Ms. Anuradha Parab, Assistant Commissioner, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)
HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

Date of Hearing: 14.03.2022
Date of Decision: 14.03.2022

FINAL ORDER NO. A/85250-85254/2022

PER: SANJIV SRIVASTAVA

There are five appeals. Two appeals have been filed by Revenue and three appeals by appellant-assessee. The issue involved in these appeals vis-a-vis refund claim in terms of Rule 5 of Cenvat Credit Rules, 2004.

2.1 The appellant-assessee is a 100% EOU engaged in manufacture of engineering goods which are fully exported. During the course of manufacture, certain waste arises.

2.2 As the appellant-assessee had exported the goods under a bond or a letter of undertaking, they made claim for refund of cenvat accumulated with them in respect of the goods exported by them in terms of Rule 5 of Cenvat Credit Rules.

2.3 They had also cleared the waste and scrap generated during the course of manufacture in DTA on payment of duty. The refund claims filed by the appellant on monthly basis were modified by the concerned Deputy Commissioner/Assistant Commissioner to the extent of the scrap actually generated (about 32%) vis-à-vis for standard input-output norms (SION) (5%).

2.4 In appeal, the Commissioner (Appeals) modified the order of the adjudicating authority by accepting the plea that the ad-hoc scrap generation ratio, i.e. input output norms for the appellant-assessee were fixed by the Development Commissioner vide letter dated 23.05.2007 and thereafter approved by the Board of Approval on 10.09.2008. He allowed refund based on the approved input output norms w.e.f. 24.04.2007 (the date when the appellant-assessee filed application before the Development Commissioner for fixation of such norms).

2.5 Aggrieved by the impugned order, the appellant-assessee filed these appeals.

2.6 As per Revenue, the date from which the Commissioner (Appeals) has allowed the benefit should not have been 24.04.2007, but the date should have been fixed as per the date of Notification No.84/2007-Cus. Dated 06.07.2007 and Notification No.29/2007-CE dated 06.07.2007. So both the Revenue appeals are limited to the fixation of date from which the benefit has given by the Commissioner (Appeals) should have been allowed.

3.1 We have heard Shri Vinay Sejpal, Advocate, for the appellant-assessee and Ms. Anuradha Parab, Assistant Commissioner, Authorised Representative, for the Revenue.

3.2 Arguing for the appellant-asssessee, learned counsel submits that Rule 5 of Cenvat Credit Rules does not prescribe the refund to be limited by the quantum of waste generated or to be determined as per input output norms. The only condition prescribed by Rule 5A is that the appellant-assessee should not be in a position to utilize the accumulated credit on account of the goods exported under a bond or a letter of undertaking. There is no dispute that the appellant-assessee had exported their entire production as they are an export-oriented unit. For manufacture of the export goods they had utilized certain indigenous raw material which they procured on payment of duty and had taken cenvat credit of the duty paid. The entire inputs were consumed in production of the export goods and as by-product certain waste had been generated which had been cleared by them on payment of duty. The refund sought is to the extent of the credit which they are not in position to utilize. Accordingly the refund application should have been allowed in toto.

3.3 Learned counsel relies upon the following decisions:

- Kochar Sung-Up Acrylic Ltd. [2008 (225) ELT 68 (Tri.-Del.)]
- Philco Exports Ltd. [2013 (291) ELT 575 (Tri.-Del.)]
- ASIL Industries Ltd. [2015 (325) ELT 154 (Tri.-Del.)].

3.4 Arguing for the Revenue, learned AR reiterates the findings recorded by the Commissioner (Appeals) and those stated by the Revenue in their appeal before the Commissioner (Appeals).

4.1 We have considered the impugned order along with the submissions made in appeal and during the course of hearing.

4.2 The issue involved in the present case is in relation to refund application under Rule 5 of the Cenvat Credit Rules which, as it existed at the material time, is reproduced below:-

"Where any input or input service is used in the manufacture of final product which is cleared for export under bond or letter of undertaking, as the case may be, or used in the intermediate

product cleared for export, or used in providing output service which is exported, the CENVAT credit in respect of the input or input service so used shall be allowed to be utilized by the manufacturer or provider of output service towards payment of,

(i) duty of excise on any final product cleared for home consumption or for export on payment of duty; or

(ii) service tax on output service,

and where for any reason such adjustment is not possible, the manufacturer or the provider of output service shall be allowed refund of such amount subject to such safeguards, conditions and limitations, as may be specified, by the Central Government, by notification:

***Provided** that no refund of credit shall be allowed if the manufacturer or provider of output service avails of drawback allowed under the Customs and Central Excise Duties Drawback Rules, 1995, or claims rebate of duty under the Central Excise Rules, 2002, in respect of such duty; or claims rebate of service tax under the Export of Service Rules, 2005 in respect of such tax.*

***Provided** further that no credit of the additional duty leviable under sub-section (5) of section 3 of the Customs Tariff Act shall be utilised for payment of service tax on any output service.*

***Explanation**: For the purposes of this rule, the words "output service which is exported" means the output service exported in accordance with the Export of Services Rules, 2005."*

4.3 Further, para 4 of Notification No. 05/2006-CE(NT) dated 14.03.2006 reads as follows:-

"4. The refund is allowed only in those circumstances where a manufacturer or provider of output service is not in a position to utilize the input credit or input service credit allowed under rule 3 of the said rules against goods and taxable services exported during the quarter or month to which the claim relates…."

4.4 From a perusal of Rule 5 of Cenvat Credit Rules and Notification No.05/2006, the only conditions required to be considered are as follows:-

- Appellant was having accumulated credit in their books of account on account of goods exported under a bond or a letter of undertaking.
- He is not in a position to utilize such accumulated credit.

4.5 The order of the lower authority has denied the refund stating that the waste generated is more than the prescribed norms. The above grounds cannot be a reason for denial of refund of such accumulated credit. If excess waste was generated, the same has also been cleared in DTA on payment of duty due on such waste. This automatically will take care of such accumulated credit. Hence we find that excess waste generated cannot be a norm for denial of such credit. We do not find any merits in the impugned order. Even the appeal filed by Revenue is not sustainable for this reason only. We are also supported by the decisions as follows:-

Kochar Sung-Up Acrylic Ltd. [2008 (225) ELT 68 (Tri.-Del.)]. Para 5 of the said decision reads as under:-

*"**5.** As per the provisions of this Rule 5 of Cenvat Credit Rules, the refund is admissible in respect of inputs used in the manufacture of final product which are cleared for export. There is no dispute regarding the use of inputs in the manufacture of final products which was cleared for export. There is no prohibition under the Rules for claiming refund in respect of credit on inputs contained in the waste. In these circumstances, I find as the credit is admissible in respect of inputs used in the manufacture of final products which was cleared for export. There is no ground to deny the refund of credit in respect of inputs attributable to waste generated during the manufacture of such goods specifically in absence of any provisions under the Rules. I find no merit in the appeals. The same are dismissed."*

Philco Exports Ltd. [2013 (291) ELT 575 (Tri.-Del.)]. Para 8 of the said decision reads as follows:-

*"**8.** It can be seen that provisions of Rule 5 of Cenvat Credit Rules, 2002 was not considered by the learned Commissioner (Appeals) or by the adjudicating authority in the proper perspective, as the said Rule 5 does not contemplate the reduction of the refund claim of an amount of credit availed and lying in the balance and which could not be utilised for home clearance, subject to the conditions that the goods are exported and the appellants follows the procedure laid down. It is not disputed in this cases that the appellants herein had followed the proper procedure for filing of the refund claim. After careful perusal of Rule 5 of Cenvat Credit Rules, 2002, we find that the said Rule does not contemplate about fixing of refund claim of the credit based upon any input/output norms. The SION norms which has been relied upon by both the lower authorities are in different context, that is for import of the goods and said norms were fixed by DGFT which was no relevance, at least, for refund of the amount of Cenvat Credit lying unutilised due to exports."*

ASIL Industries Ltd. [2015 (325) ELT 154 (Tri.-Del.)]. Para 6 of the said decision reads as under:-

*"**6.** In terms of Rule 5 of the Cenvat Credit Rules, where any input or input services have been used in the manufacture of final product cleared for export under bond/LUT or has been used in the intermediate product cleared for export, the Cenvat credit in respect of input or input services so used shall be allowed to be utilised by the manufacturer towards payment of Central Excise duty on the final products cleared for home consumption or cleared for export on payment of duty and where for any reason, such adjustment is not possible, the accumulated Cenvat credit can be refunded in cash subject to the safeguards and conditions as prescribed by the Central Government by notification issued in this regard. In this case there is no dispute that the conditions prescribed in the notification issued under this Rule and also the conditions of the exports not having been made by claiming duty drawback or*

input duty rebate stand satisfied. The only dispute is as to whether the duty payable on the scrap cleared for home consumption during the quarter to which the refund claim pertains and also whether the amount recovered from the customers as duty on the sale of waste and scrap during the period from January, 2003 to 30th June, 2004 can be deducted from the refund. In our view for these deductions there is absolutely no authority. The appellant would be eligible for cash refund of the accumulated Cenvat credit taken in respect of inputs which have been used in the manufacture of goods which has been exported under bond/LUT and in this case, cash refund can be disallowed only to the extent the cenvated inputs are contained in the scrap cleared for home consumption on payment of duty. In view of this, the impugned order is set aside and the matter is remanded to the Assistant Commissioner for re-determining the quantum of cash refund under Rule 5 of the Cenvat Credit Rules, 2002 payable to the appellant and the differential amount, if any, due shall be paid to them. The appeal stand disposed of, as above."

5.1 In view of the above, the appeals filed by the appellant-assessee are allowed and the appeals filed by the Revenue are dismissed.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

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