CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

WEST ZONAL BENCH

EXCISE APPEAL NO: 85919 OF 2015

[Arising out of Order-in-Appeal No: PUN-EXCUS-001-APP-251-14-15 dated 25th March 2015 passed by the Commissioner of Central Excise (Appeals), Pune – I.]

Emcure Pharmaceuticals Ltd
Emcure House, T-184 MIDC Bhosari, Pune – 411 001 … ***Appellant***

versus

Commissioner of Central Excise
Pune – I
ICE House, 41/A Sassoon Road, Pune – 411 001 ***…Respondent***

APPEARANCE:

Shri R G Sheth, Advocate for the appellant

Ms Anuradha Parab, Assistant Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: A / 86206 /2022

DATE OF HEARING: 15/06/2022
DATE OF DECISION: 15/12/2022

PER: C J MATHEW

This appeal of M/s Emcure Pharmaceuticals Ltd, a manufacturer of 'pharmaceutical products' at three facilities in Pune, arises from order for refund of duties discharged during investigation into undervaluation of ‘physician samples’, cleared by them between 8th January 2005 and 6th November 2006, culminating in confirmation of demand of duties of central excise amounting to ₹ 1,51,38,431 that was substantially set aside in appeal. The appellant herein had remitted ₹ 1,32,60,035 by debiting CENVAT credit account and from ‘personal ledger account (PLA)’ and, following disposal of their appeal by the Tribunal restricting a liability to only ₹ 4,99,690, refund of ₹ 1,27,60,345 was sought *vide* claim dated 12th June 2014. Of this, ₹ 71,33,842 paid by unit II comprised ₹ 66,87,835 from CENVAT credit and ₹ 39,06,996 paid by unit V comprised ₹ 13,80,249 from CENVAT credit. While ₹ 51,46,780 was refunded through cheque, ₹ 76,13,565 paid through CENVAT credit was refunded by restoring ₹ 65,08,842 and ₹ 11,04,723 in the credit account of unit II and unit V respectively.

2. Asserting that this mode of consequential relief by restoration in CENVAT credit account of units that had since closed operation was tantamount to rejection of the claim by Commissioner of Central Excise (Appeals), Pune-I in order-in-appeal no. PUN-EXCUS-001-APP-251-14-15 dated 25th March 2015, the appellant is now before us citing the precedent of several decisions and drawing upon the peculiarity of the circumstances in which they had been deprived of credit earlier.

3. It is common ground that the credit restored in the account of the two units was the reversal of earlier debit for discharge of duty liability ‘under protest’ during the investigations. In the normal course, the controversy would not have arisen except that, as the appellant contends, the only way of implementing the decision of the Tribunal directing consequential relief was, owing to non-existence of CENVAT credit account, by releasing payment instead.

4. Learned Counsel for the appellant relies upon the decision of the Hon’ble High Court of Bombay in *Commissioner of Central Excise, Nashik v. Jain Vanguard Polybutlene Ltd [2010 (256) ELT 523 (Bom)]* following the binding precedent of the judgement of Hon’ble High Court of Karnataka in *Union of India v. Slovak India Trading Co Ltd [2006 (201) ELT 559 (Kar)]*. Likewise, the decision of the Tribunal in *Raymond Ltd v. Commissioner of Central Excise, Mumbai-III [2011 (274) ELT 513 (Tri-Mumbai]* and in *Commissioner of Excise, Delhi-I v. Birla Textiles Mills [2010 (257) ELT 146 (Tri-Dell)],* besides several others on similar lines, were cited by Learned Counsel. He submitted that the distinguishment of these decisions in the impugned order with the finding that, unlike the facts in those disputes, one unit of the appellant continued operation is erroneous inasmuch as the said unit, as ‘100% export oriented unit (EOU)’, was also unable to utilize the restored credit.

5. Learned Authorised Representative placed reliance on the decision of a Larger Bench of Hon'ble High Court of Bombay in *Gauri Plasticulture P Ltd v. Commissioner of Central Excise, Indore [2019 (30) GSTL 224 (Bom)]* and decision of the Tribunal in *SKH Sila India Pvt Ltd v. Commissioner of Central Excise & Service Tax, Pune-I [final order no. A/85153/2022 dated 21st February 2022 disposing of appeal no. 85926 of 2019 against order-in-appeal no. PUN-EXCUS-001-APP-576/18-19 dated 31st December 2018 of Commissioner of Central Tax (Appeals-I), Pune]* which, in addition to following the decision of the Hon'ble High Court of Bombay *supra*, also found the elaboration of CENVAT credit scheme by the Tribunal in *Voltas Ltd v. Commissioner of Central Excise, Pune-IV [2018 (4) TMI 352-CESTAT MUMBAI]* to be of relevance.

6. The claim of the appellant is that, in the special circumstances of non-existence of CENVAT credit account by closure of unit, they are in much the same boat as exporters unable to utilize accumulated credit who are entitled to be compensated through operation of rule 5 of CENVAT Credit Rules, 2004. There is also no doubt that the decision of the Hon'ble High Court of Karnataka in *re Slovak India Trading Co Pvt Ltd* had been followed by the Tribunal in several disputes in circumstances of inability to utilize restored credit. Since then, however, the decision of the Hon'ble High Court of Bombay in *re Gauri Plasticulture Pvt Ltd* has answered the reference of

'"(a) Whether cash refund is permissible in terms of clause (c) to the proviso to section 11B(2) of the Central Excise Act, 1944 where an assessee is unable to utilize credit on inputs?

(b) Whether by exercising power under Section 11B of the said Act of 1944, a refund of unutilised amount of Cenvat Credit on account of the closure of manufacturing activities can be granted?

(c) Whether what is observed in the order dated 25th January, 2007 passed by the Apex Court in Petition for Special Leave to Appeal (Civil) No. CC 467 of 2007 (Union of India v. Slovak India Trading Company Pvt. Ltd.) can be read as a declaration of law under Article 141 of the Constitution of India?"'

thus

'40. As a result of the above discussion, we answer the questions of law framed above as (a) and (b) in the negative. They have to be answered against the assessee and in favour of the Revenue. Questions (a) and (b) having been answered accordingly, needless to state that the order of the Hon'ble Supreme Court in the case of Slovak India (supra) cannot be read as a declaration of law under Article 141 of the Constitution of India.'

7. Learned Counsel pleaded that the said decision does not apply to refund arising from relief granted as outcome of appeal. In our view, the findings of the Hon'ble High Court of Bombay is not limited to one of the circumstances in which refund under section 11B of Central Excise Act, 1944 arises. More to the point, the essence of

CENVAT credit scheme, dealt with at length thus

> *'6. It would appear from these decisions that neither assures a precedent to be followed without examining the circumstances of eligibility. Indeed, the Hon'ble High Court of Karnataka did, in re Slovak India Trading Co Ltd, emphasise the importance of scrutinising the circumstances of each claim for refund and directed that a disposal solely on that one statutory exclusion would not suffice. Following that prescription, it is necessary to examine the circumstances in which this claim has been made. Before so doing, the CENVAT credit and the implication of allowing the claim preferred by the appellant must also be subject to examination.*
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> *7. CENVAT credit, the accumulated pool of taxes and duties collected on supply of input services and inputs from an assessee, was in vogue till recently as the successor scheme of MODVAT credit for discharge of duty liability on outputs. The erstwhile Central Excise Rules, 2002 by rule 8(2) deemed goods to have been cleared under authority of law if discharged by payment or by utilisation of credit; this flows from the authority to levy and collect duty of excise in section 3 of Central Excise Act, 1944.*
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> *8. Thus the scheme, with the avowed objective of preventing the cascading effects of tax, allows discharge of tax liability from two sources: the cash deposit known as 'account current' and from the credit of the tax already collected from the production chain known as 'CENVAT credit account' with the latter as an option to be used fully or partially in each instance. This is also in pursuance of the constitutional power to tax manufacture and provides the mechanism to restrict the actual payment to the contribution of an assessee to the production chain. At the root is the resting of the tax burden on the ultimate consumer, which could either be the entity that is*

not a registered assessee or an assessee who is beyond the ambit of Central Excise Act, 1944. We are not here concerned with the former. As far as the latter is concerned, the assessee is within the authority of Central Excise Act, 1944 only to the extent that it produces excisable goods or is in possession of such goods that are yet to be cleared. Without production in process or without possession of processed goods, an assessee is not an assessee but in the same status as the ultimate consumer.

9. For that reason, if an assessee has CENVAT credit balance without any duty on which to apply it, such assessee is an ultimate consumer to the extent that duty or tax has been paid upto the preceding stage and there no scope for setting off of such credit – just as the ultimate consumer, as commonly understood, is. It is clear that legislative intent did not envisage the monetisation of CENVAT credit in the event of impossibility of utilisation. CENVAT Credit Rules, 2004 is not an exemption scheme but a contrivance to ensure that the incidence of duty or tax is borne by the ultimate purchaser of goods or service in a chain.

10. If it were an exemption scheme, entitling assessees to refund of unused accumulated credit, the CENVAT Credit Rules, 2004 would have had the authority of section 5A of Central Excise Act, 1944 and section 93 of Finance Act, 1994. The Rules are issued under section 37 of Central Excise Act, 1944 and section 94 of Finance Act, 1994 to operationalize section 3 of the former and section 66 of the latter.

11. Moreover, the conversion of credit into cash would be a refund to the buyer of the tax collected under authority of law from a manufacturer-seller. Refund in tax statute is the return of a tax collected without authority of law and, hence, not validly retainable with the exchequer. Refund of such accumulated

> *credit arising from payment of duty or tax at the stage of manufacture is tantamount to a finding that the duty or tax was collected at the preceding stage without the authority of law. That is certainly not, and can never be, the contention of the appellant.'*

by the Tribunal in *re Voltas Ltd,* makes it abundantly clear that monetizing of accumulated credit is tantamount to determining the amount as not liable to duty in the hands of supplier-manufacturer.

8. Impossibility of utilisation of such credit upon restoration is not valid ground for monetisation as an alternative. The restoration of credit has placed the appellant no differently from that of having carried forward the credit till closure of the units without having undertaken discharge of duty liability. Furthermore, duty liability had been discharged at the option of the appellant; in the revised appellate scheme, prescribed pre-deposit pending disposal was the sole mandate of law. The submission of the Learned Counsel for appellant is thus devoid of logic or merit.

9. Accordingly, we find no reason to interfere with the rejection of plea for monetisation of the impugned amount. Appeal is dismissed.

(Order pronounced in the open court on 15/12/2022)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*