

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

Excise Appeal No. 89312 of 2013

(Arising out of Order-in-Appeal No. AV(257)229/2013 dated 29.08.2013 passed by the Commissioner of Central Excise (Appeals), Aurangabad)

M/s. Godavari Biorefineries Ltd.

Appellant

Sakarwadi, Tal. Kopargaon,
Distt. Ahmednagar 413 708 (MS)

Vs.

Commissioner of Central Excise, Aurangabad Respondent

Town Centre, N-5, CIDCO, Aurangabad 431 003.

Appearance:

Shri R.G. Sheth, Advocate, for the Appellant

Shri Dharendra Kumar, Joint 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: 29.11.2022

Date of Decision: 29.11.2022

FINAL ORDER NO. A/86164/2022

PER: SANJIV SRIVASTAVA

This appeal is directed against order-in-appeal No AV (257) 229/2013 dated 29.08.2013 of the Commissioner of Central Excise (Appeals), Aurangabad. By the impugned order, Commissioner (Appeals) held as follows:

"14. In view of my findings in the preceding paragraphs I find that the case is not covered by the provisions of Rule 10 of Cenvat Credit Rules, 2004 and the adjudicating authority has correctly rejected the appellant's request for transfer of unutilized cenvat credit. The impugned order-in-original is upheld and consequently the appeal filed by the appellant is rejected."

2.1 M/s Somaiya Organo Chemical, the lessee of M/s Tuljabhavani SSSK Ltd. Naldurg were the holder of Central Excise Registration No. AAActs5004AXM005. Further M/s Somaiya Organo Chemical, was merged with M/s Godavari Re-fineries Ltd, in view of High Court order dated 20/03/2009.

Therefore, the Central Excise Registration Certificate No. AAacts5004AXM005 issued to M/s Somaiya Organo Chemicals was surrendered by them and a new Central Excise Registration Certificate No. AABCG2543CXM002 was obtained by them on 29.04.2009 in the name of M/s Godavari Bio-refineries Ltd (appellant before us)

2.2 M/s Somaiya Organo Chemicals, the lessee of M/s Tuljabhavani SSSK Ltd. Naldurg had Cenvat credit of Rs. 1,24,55,759 lying in balance as on 30.04.2009. After change in the name of M/s Somaiya Organo Chemicals to M/s Godavari Refineries Ltd (the lessee of M/s Tuljabhavani SSSK Ltd), carried forward the said balance to the cenvat account of M/s Godavari Bio-Refineries Ltd., (the lessee of M/s Tuljabhavani SSSK Ltd. At Post Naldurg, Tal Tuljapur, Distt Osmanabad).

2.3 The appellant had taken Naldurg Distillery of M/s Tuljabhavani SSSK Limited on lease basis for three years and the lease period was over in June, 2009. Thereafter, from June, 2009 onwards the appellant have stopped production activities in the factory premises of Distillery of M/s Tuljabhavani SSSK Limited, At Post Naldurg, Tal Tuljapur, Distt Osmanabad and the said unit is completely closed as on date. Considering these facts, the assessee want to get transferred the cenvat credit balance of Rs. 1,17,50,463 lying with M/s Godavari Bio-Refineries Ltd. (the lessee of M/s Tuljabhavani SSSK Ltd.) to M/s Godavari Bio-Refineries Ltd. Sakarwadi, Tal Kopargaon, Distt Ahmednagar. Accordingly they have filed request application with this office on 28.03.2012.

2.4 A show cause notice dated 19.12.2012 was issued to the appellant asking them to show cause as to why their request for grant of permission to transfer credit lying as unutilized balance in the cenvat account of M/s Godavari Bio-Refineries Ltd. (the lessee of M/s Tuljabhavani SSSK Ltd. At Post Naldurg, Tal Tuljapur, Distt. Osmanabad) to M/s Godavari Bio-Refinery Ltd., At post Sakarwadi, Tal Kopargaon, Distt Ahmednagar should not be rejected.

2.5 The show cause notice was adjudicated by the Assistant Commissioner holding as follows:

"I reject the assesee's request for transfer of Cenvat Credit of Rs. 1,17,50,463/- (One Crore Seventeen Lacs Fifty Thousands Four Hundreds Sixty Three) under rule 10 of the Cenvat Credit Rules, 2004."

2.6 Appellant challenged the order in original before the Commissioner (Appeal) who has per the impugned order referred in para 1, rejected the appeal filed by the appellant.

2.7 Aggrieved appellant have filed this appeal.

3.1 We have heard Shri R G Sheth, Advocate for the Appellant and Shri Dharendra Kumar, Joint Commissioner, Authorized Representative for the revenue.

3.2 Arguing for the appellant learned counsel submits that:

➤ The Appellants' case is covered under Rule 10 of the Cenvat Credit Rules under the expressions "shifts his factory to another site" or "the factory is transferred on account of change in ownership or on account of.....lease....." as is evident from the admitted facts on record. On completion of lease of Tuljabhavani Distillery Plant, the inputs, capital goods were transferred to the Appellants' main unit at Sakarwadi. It is pertinent to mention here that main Sakarwadi Unit and leased assets of Naldurg Distillery Plant were granted separate Central Excise Registration (Sakarwadi Unit No.AABCG2543CXM004) & leased assets of the Appellants Naldurg Distillery Plant No.AABCG2543CXM002 under single PAN No.AABCG2543C of M/s Godavari Biorefineries Ltd. Therefore, the balance Cenvat Credit lying unutilized at Naldurg Distillery Plant amounting to Rs. 1.17 crore (approx) ought to have been transferred to the Appellants' main Sakarwadi Unit. The following are the decisions on which the Appellants rely.

- Fabrico (India) Pvt. Ltd. [2012 (284) ELT 69 (Tri. - Del.)]
- Tata Auto Components Systems Ltd. [2012 (277) ELT 318 (Kar.)]
- Nagarjuna Agrichem Ltd. [2008 (222) ELT 232 (Tri. - Bang.)]
- Shree Rama Multi-Tech Ltd [2007 (217) ELT 136 (T-Chennai)]

- Smithkline Beecham Consumer Health Care Ltd. [2007 (209) ELT 96 (T-Chennai)]
 - Commissioner Pondicherry vs CESTAT [2008 (230) ELT 209 Mad.)
 - Commissioner V s. CESTAT [2009 (237) ELT A48 (SC)]
 - LAWKIM Ltd. [2010 (252) ELT 457 (Commr. Appl.)]
 - Featherlite Products Pvt. Ltd. [2016 (337) E.L.T. 571 (Tri. - Chennai)]
 - Kirloskar Oil Engines Ltd. [2014 (304) E.L.T. 317 (Tri. - Mumbai)]
- It is submitted that as a result of the Hon'ble Bombay High Court Orders dated 01.08.2002 and 20.03.2009 resulting in amalgamation, demerger of the Appellants businesses also the Cenvat Credit Balance lying in the Appellants leased assets of Tuljabhavani, Naldurg Distillery is required to be allowed and transferred to the Appellants Sakarwadi Unit as mandated by the Hon'ble Bombay High Court as the order dated 20.03.2009 (Part of Exh. C Colly. Pgs. 29 to 31 and Exh. K Colly. Pgs. 109 to 131) "The Scheme is to transfer and vest the Sugar. Power. Chemical & Distillery Business of the transferor Company into the resulting company." (Pg. 109 of the Appeal) "The Transferor Company" or "The Demerged Company" means THE GODAVARI SUGAR MILLS LIMITED or "GSML", a Company incorporated under the Indian Companies Act. VII of 1913 having its registered office at Fazalbhoj Building, 45/47, M. G. Road. Fort, Mumbai - 400 001." (Para 3.6, Pg. 113 of the Appeal) - "The Transferee Company" or "The Resulting Company" means GODAVARI BIOREFENERIES LIMITED or "GBL", a Company incorporated under the Indian Companies Act, VII of 1913 having its registered office at Fazalbhoj Building, 45/47, M. G. Road, Fort, Mumbai - 400 001 (Para 3.7, Pg. 113 of the Appeal) - "Sugar, Power, Chemical & Distillery Business of GSML" or "Demerged Undertaking" means the Undertakings at Sameerwadi in Karnataka. Sakarwadi in Maharashtra and owned and leased assets of Pratapgad Sahakari Sakhar Karkhana Limited. Satara. owned and leased assets of Tuljabhavani Distillery a Unit of Shri Tuljabhavani Shetakari Sahakari Sakhar Karkhana Limited. Solapur both is

Maharashtra of GSML engaged in the business of manufacture and marketing of Sugar. Power. Chemical and Distillery and includes; (Para 3.9, Pg. 114 of the Appeal) - On and from the Appointed date. if any certificate for tax deducted at source, any tax credit certificate. VAT credit. CENVAT Credit or any other credit in respect of direct or indirect taxes. carried forward business losses, unabsorbed depreciation and MAT credit claims and other claims relating to the Demerged Undertaking is received in the name of the Demerged Company, it shall be deemed to have been received by the Resulting Company which alone shall be entitled to claim. credit for such tax or levy deducted or paid or such loss or unabsorbed depreciation and the relevant tax authorities are hereby directed to give the Resulting Company the credit of such claims or tax credit or levy even though such tax deducted at source or tax credit certificate or VAT credit or CENVAT Credit or any other credit in respect of direct or indirect taxes stands in the name of the Demerged Company. (Para 6.5, Pgs. 119 & 120 of the Appeal).

- The Appellants submit that the case laws referred to by the Respondent in the cases of M/s. Sheil Industries V/s. CCE Ahmadabad [2011 (263) ELT 436 (Tri- Ahmadabad)] & M/s. Bellary Steels & Alloys Vs. CCE. Belgaum 12010 (262) ELT 689 (Tri Bangalore)] in the impugned order are completely different and dissimilar to facts obtained in the Appellants' case and its reliance thereof is. therefore. erroneous in law.
- The observation/conclusion reached by the Commissioner (Appeals) in para 11 in respect of inputs and capital goods were "sold" rather than "transferred" is totally devoid of substance. Under the Provisions of the said Act and Rules framed there under, the Inputs and Capital Goods transferred from the Appellants' Lessee Unit at Naldurg to Sakarwadi Unit has to be on payment of duty which was the case and the said duty was paid by debiting the CENVAT Credit Account which is nothing but transfer under the law necessitating the application of Rule 10 of the said Rules.
- The Appellants state that they sought permission to transfer the said CENVAT Credit lying in balance, though under the law and as per the requirement of Rule 10 they were not obliged

to do so. The Appellants state that in the meanwhile they continued to file the ER Returns till date and have not surrendered the Excise Registration for the said Tuljabhavani, Distillery Plant. Furthermore, after the expiry of the said Lease Agreement, the Appellants have shifted their Machinery Tools. Spares. Equipments etc. from the said Distillery of Shri. Tuljabhavani SSSK. Naldurg to the Appellants Sakarwadi Unit and that the said Distillery Unit of Shri. Tuljabhavani SSSK, Naldurg is being operated and leased out to other Lessee namely one M/s. Drushti Sugar & Distilleries along with the Sugar Factory in the year 2010. In fact, the Appellants have purchased 2 Lakh Litres of SDS from the said Drushti Sugar & Distilleries.

3.3 Learned Authorized Representative reiterates the findings as recorded in the impugned order.

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

4.2 Original Authority for rejecting the request of transfer of credit made as per Rule 10 of CENVAT Credit Rule, 2004 has observed as follows:

"I find that M/s Somaiya Organo Chemicals, the lessee of M/s Tuljabhavani SSSK Ltd. Naldurga had Cenvat balance of Rs. 1,24,55,759 lying in balance as on 30.04.2009. After change in the name of M/s Somaiya Organo Chemicals to M/s Godavari Re-fineries Ltd a lessee of M/s Tuljabhavani SSSK Ltd., carried out the said balance to the cenvat account of M/s Godavari Refineries Ltd. (lessee of M/s Tuljabhavani SSSK Ltd.) at their own volition. As per the High Court order dated 20.03.2009, the M/s Somaiya Organo Chemical was merged with M/s Godavari Re-fineries Ltd. Accordingly the Central Excise Registration Certificate bearing No. AAActs5004AXM005 in the name of M/s Somaiya Organo Chemicals was surrendered and a new Registration Certificate bearing No. AABCG2543CXM002 was obtained on 29.04.2009 in the name of M/s Godavari Bio-refineries Ltd. They had taken Naldurg Distillery of M/s Tuljabhavani SSSK on lease basis for three years, the lease period was over in June, 2009. From June, 2009 onwards they

have stopped production at Naldurg Distillery and the said unit is completely closed. Before surrendering of the Central Excise Registration No. AABCG2543CXM002, they want to transfer the cenvat credit balance of Rs. 1,17,50,463 lying with M/s Godavari Refineries Ltd. a lessee of M/s Tuljabhavani SSSK Ltd. to M/s Godavari Refineries Ltd. Sakarwadi, Rule 10 (1) of the Cenvat credit Rules, 2004 stipulates that, if a manufacturer of the final products shifts his factory to another site or the factory is transferred on account of change in ownership or on account of sale, merger, amalgamation, lease or transfer of the factory to a joint venture with the specific provision for transfer of liabilities of such factory, then, the manufacturer shall be allowed to transfer the Cenvat Credit lying unutilised in his account to such transferred, sold, merged, leased or amalgamated factory. In the present case, the manufacturer, M/s Godavari Bio-refineries Ltd have neither shifted the factory to another site on account of sale, merger, amalgamation, lease or transfer of business nor sold to any person. The basic condition therefore is not fulfilled. I find that in the present case, there is no shifting of factory to another site, the factory of distillery unit of M/s Tuljabhavani SSSK Ltd, at Naldurg has not been transferred on account of change in ownership or on account of sale. There is no merger or amalgamation of Naldurg and Sakarwadi unit. M/s Godavari Bio- refineries Ltd, Sakarwadi does not come into picture at all. As the agreement is between Tuljabhavani SSSK Ltd and Godavari Bio-Refinery Naldurg. The case laws in the cases of M/s. Sheil Industries V/s. CCE Ahmedabad [2011 (263) ELT 436 (Tri-Ahmedabad) & M/s. Bellary steels & Alloys V/s. CCE, Belgaum [2010 (262) ELT689 (Tri-Bangalore)] are squarely applicable in the instant case.

I find that assessee's contention during personal hearing and vide their letter F. No.RGS/G-115/178/2012 dated 26/12/2012 that in the present case there is change in ownership by virtue of lease coming to an end and claimed that as per clause 51 of their lease agreement dated 31/03/2006 there is specific provision for transfer of goods and liabilities and that in view of various High Court & tribunal orders, no permission is required for transfer of unutilized cenvat credit, is not acceptable. The

case laws mentioned by the assessee are not squarely applicable in the present case."

4.3 For upholding the order of original authority Commissioner (Appeal) has in the impugned order observed as follows:

"7. There are three different entities involved in the instant matter viz.

- (i) M/s Tuljabhavani SSK Ltd (the lessor, referred to as TBSSK)*
- (ii) M/s Godawari Biorefineries Ltd, Naldurg (Lessee of TBSSK, holding Central Excise Registration No. AABCG2543CXM002, hereinafter referred to as "transferor") and*
- (iii) M/s Godawari Biorefineries Ltd, Sakarwadi (holding Central Excise Registration No. AABCG2543CXM004, hereinafter referred to as "proposed transferee").*

7.1 The case before me is about transfer of unutilized cenvat credit of entity at (ii) above to the entity at (iii) above. M/s Tuljabhavani SSK Ltd (the lessor, referred to as TBSSK) has no role in the present case. The request for transfer of cenvat credit is in terms of Rule 10 of Cenvat Credit Rules, 2004. It is therefore necessary to see what are the provisions of Rule 10. The text of the said rule is therefore reproduced below:

Rule 10. Transfer of CENVAT credit. –

- (1) If a manufacturer of the final products shifts his factory to another site or the factory is transferred on account of change in ownership or on account of sale, merger, amalgamation, lease or transfer of the factory to a joint venture with the specific provision for transfer of liabilities of such factory, then, the manufacturer shall be allowed to transfer the CENVAT credit lying unutilized in his accounts to such transferred, sold, merged leased or amalgamated factory.*
- (2) If a provider of output service shifts or transfers his business on account of change in ownership or on account of sale, merger, amalgamation, lease or transfer of the business to a joint venture with the specific provision for transfer of liabilities of such business, then, the provider of output service shall be*

allowed to transfer the CENVAT credit lying unutilized in his accounts to such transferred, sold, merged, leased or amalgamated business.

- (3) The transfer of the CENVAT credit under sub-rules (1) and (2) shall be allowed only if the stock of inputs as such or in process, or the capital goods is also transferred along with the factory or business premises to the new site or ownership and the inputs, or capital goods, on which credit has been availed of are duly accounted for to the satisfaction of the Deputy Commissioner of Central Excise or, as the case may be, the Assistant Commissioner of Central Excise.*

7.2 A plain reading of sub-rules (1) and (2) would show that in the case of a manufacturer, if he shifts his factory to another site or the factory is transferred on account of sale, merger, amalgamation, lease or transfer of the factory to a joint venture with the specific provision for transfer of liabilities of such factory, then, such manufacturer shall be allowed to transfer the cenvat credit lying unutilized in his accounts to such transferred, sold, merged, leased or amalgamated factory. Such a transfer will be subject to the conditions stipulated in sub-rule (3) i.e. only if the stock of inputs as such or in process, or the capital goods is also transferred along with the factory or business premises to the new site or ownership and the inputs, or capital goods, on which credit has been availed of are duly accounted for to the central excise officer's satisfaction.

7.3 I find that in the impugned order-in-original, the adjudicating authority has observed that in the instant case no shifting of factory to another site has taken place or the factory at Naldurg was not transferred on account of change of ownership or on account of sale. Also it is observed that there is no merger or amalgamation of Naldurg and Sakarwadi unit. Hence he rejected the appellant's request for transfer of unutilized cenvat credit.

7.4 When I put the facts of the instant case against the requirements of Rue 10, I find that:

- (i) The cenvat credit was sought to be transferred from the M/s Godawari Biorefineries Ltd, Naldurg, Lessee of TBSSK, who were holding Central Excise*

Registration No. AABCG2543CXM002 to M/s Godawari Biorefineries Ltd, Sakarwadi (holding Central Excise Registration No. AABCG2543CXM004. The factory at Naldurg being run by the transferor was on lease to them. On completion of the lease period the same went back in the control of the lessor M/s Tuljabhavani SSK Ltd, who have no role in the present matter. Thus the factory run by the transferor cannot be said to have shifted to a new site.

- (ii) It is only when there is any of the eventualities viz. transaction of sale, merger, amalgamation or joint venture taking place between the transferor and the proposed transferee of the unutilized cenvat credit, along with fulfillment of the other conditions stipulated in this regard, that Rule 10 of Cenvat Credit Rules, 2004 will come into play. It is evident from the records that no transaction of sale, merger, amalgamation or joint venture*
- (iii) the stock of inputs as such or in-process or capital goods getting transferred to the new site or ownership does not arise and does not take place. No documentary evidence is there that any liabilities of transferor unit have been transferred to proposed transferee unit either. During PH the appellants have clarified that after May 2009 the inputs and capital goods were "sold" to their Sakarwadi Unit and to other parties. No "transfer" of the same took place.*

Hence I find nothing wrong with the impugned order-in-original which rejected the appellant's request for transfer of unutilized cenvat credit in the instant case.

8. In their grounds of appeal, the appellant at para C(i) page 8 have categorically stated that the unit / factory at Sakarwadi and that at Tuljabhavani, Naldurg were having separate registrations. Thus the appellant is seeking to transfer unutilized cenvat credit from one central excise registration to another without there being any of the eventualities as prescribed under rule 10 ibid. As such, the provisions of rule 10 ibid do not apply

in this case. In this regard I find that the adjudicating authority has correctly relied upon the case law in Sheil Industries vs. CCE Ahmedabad [2011 (263) ELT 436 (Tri-Ahmd)]. It was held by the Hon'ble Tribunal that "Merely because two units are owned by one person is no ground to treat both of them as the same unit Both units were separate manufacturing units located in two different sites and were separately registered with Central Excise Department - Rule 10 of Cenvat Credit Rules, 2004 not applicable Transfer of unutilized Cenvat credit was in contravention of provisions of law." The appellant have assailed the impugned for this on the grounds that the facts in that case are different from their case. However, no points of distinction have been put forth and hence I cannot attribute any merit to their argument.

9. In para C(iv) at page 8 of grounds of appeal, the appellant contends that the lease agreement ended in Jun 2009, which resulted in change of ownership and this factor clearly resulted in coming into play of provisions of rule 10 of Cenvat Credit Rules, 2004, necessitating transfer of cenvat credit from the transferor to the proposed transferee. In this regard I find that the appellant could not possibly be referring to a lease agreement between the transferor and the proposed transferee because none exists. Therefore the reference to lease agreement has to mean the one between the transferor and M/s TBSSK. As already stated, M/s TBSSK is not a party to the issue and has no role as far as the present case of transfer of unutilized cenvat credit is concerned from M/s Godawari Biorefineries Ltd, Naldurg, Lessee of TBSSK, to M/s Godawari Biorefineries Ltd, Sakarwadi.

10. At para D, page 9 of grounds of appeal the appellant has challenged the findings of the adjudicating authority that "from June 2009 onwards they have stopped production at Naldurg Distillery and the said unit is completely closed" as factually incorrect since, as per the appellant, the same is being operated by some other lessee of TBSSK. I do not see any reason to discuss this point

11. central excise law if there are more than one factories of the same manufacturer, operating from different locations, then each such factory has to be individually registered and for all

purposes of central excise be independent of each other. Accordingly, the transferor and the proposed transferee, though factories of the same manufacturer, by virtue of operating from different locations, are necessarily to be treated as independent entities. There cannot be any exception to this for the purpose of rule 10 ibid. Therefore, as stated by the appellant, even if the lease agreement was between M/s Godawari Biorefineries Ltd, Sakarwadi and M/s TBSSK, they cannot deny the fact that the unit operating out of Naldurg had a separate central excise registration than that of M/s Godawari Biorefineries Ltd, Sakarwadi. Further the fact that on expiry of lease in May 2009, the inputs and capital goods were "sold" (rather than "transferred") by their Naldurg Unit to Sakarvadi Unit and to other independent buyers also establishes that the appellants themselves were always treating the two as separate entities with completely independent existence on the same footing as they were treating any other unit of any other assessee. Rule 10 would apply only if it is assumed that the units of M/s Godawari Biorefineries Ltd at Sakarwadi and Naldurg are one and the same, which is definitely not the case in instant appeal.

12. The appellant had cited various case-laws in the personal hearing before the adjudicating authority which they claim ought to have been followed by the adjudicating authority. Chief of these are:

2007 (218) ELT 303 (Tri-Del) – Hindustan Coca Cola Beverages

2006 (198) ELT 390 (Tri-Bang) - ECIE Impact vs. CCE

199 (106) ELT 543 (Trib) - CCE Vishakhapatnam vs. Usha Iron & Ferrous Metals

2008 (222) ELT 111 (Tri-Ahmd) - TERA Cables India vs. Commr.

Examination of the above case-laws shows that the facts and circumstances involved therein were entirely different from those of the instant case. In each case the transfer of cenvat credit was for different reasons. For e.g. in Hindustan Coca Cola it was on account of change in ownership; in ECIE Impact there was shifting of factory; in Usha Iron it was on account of transfer of ownership due to merger and in TERA Cables it on account of

take-over of business. Therefore the adjudicating authority cannot be faulted for not following the same. In contrast I find the case laws relied upon by the adjudicating authority to be squarely applicable to the issue. In addressing the contentions raised by the appellant I also rely upon Asian Paints versus CCE 1990 (50) ELT 76(T-SRB).

13. During the personal hearing on 29.08.2013, the appellant once again drew attention to various case laws in support of their case. These case laws have also been examined and the following is observed:

(i) 2012 (284) ELT 69 (Tri-Del) - Fabrico (India) Pvt Ltd vs. CCE, Meerut:- In this case there was movement of capital goods from Sirsa unit (transferor) of that appellant to the Meerut unit (Transferee) under proper intimation to the Department. The appellant had also intimated to the Department, before moving the capital goods, his intention to merge the unit at Sirsa with the unit at Meerut. However, in the instant case, the facts are very different inasmuch as no such intimation of shifting and merger of units appears to have been given to the Department. Secondly, as clarified by the appellant in the personal hearing on 29.8.2013, inputs and capital goods were sold to Sakarwadi unit and to other parties, on expiry of the lease. There was no shifting of capital goods but it was sale thereof. Thus, since the facts of the cited case are different from those of the instant case, the ratio of the cited case law will not apply to the instant case.

(ii) 2012 (277) ELT 318 (Kar) - CCE, Bangalore-III vs. Tata Auto Components Systems:- The facts of this case involved shifting of factory to a new site by following proper procedure including removal of inputs and capital goods on payment of duty. The facts being different, the cited case law does not apply.

The various other case laws cited also are not applicable to the instant case as they are distinguishable on facts."

4.4 Both the lower authorities Have concluded that the case of appellant is not covered by the provisions of the Rule 10 of the CENVAT Credit Rules, 2004. However explaining the facts in detail in his submissions counsels for the appellant has reiterated the facts as follows, and argued that his case is one of

the lease and hence the transfer of credit as per the provisions of Rule 10 shall apply.

- 1) *Appeal is being filed by M/s. Godavari Biorefineries Ltd. (formerly M/s. Somaiya Organo Chemicals and Lessee of M/s. Tuljabhavani SSK Ltd.. Naldurg) since, the Excise Registration Certificate is not surrendered and EXCISE Returns are being filed till date.*
- 2) *Lease agreement dated 31.03.2006 between Shri Tuljabhavani Shetkari Sakhar Karkhana Ltd., situated at Naldurg. Tal. Tuljapur (Maharashtra) as a Lessor of a one part and M/s. Somaiya Organo Chemicals - A unit of the Godavari Sugar Mills Ltd. as Lessee on the other part - the entire Distillery unit of the Lessor taken on lease for the period of three years, i.e.. with effect from 1st April, 2006 to 31st March, 2009.*
- 3) *Somaiya Organo Chemicals Ltd. was amalgamated with Godavari Sugar Mills Ltd. and post merger the name of Somaiya Organo Chemicals Ltd. became Somaiya Organo Chemicals (a unit of Godavari Sugar Mills Ltd.) as per the order dated 01.08.2002 passed by the Hon'ble Bombay High Court.*
- 4) *As per High Court order dated 20.03.2009, Godavari Sugar Mills Ltd. (GSML) transferor Company by virtue of scheme of arrangement under Sections 391 to 394 of the Companies Act, there was demerger and transfer and the vesting of sugar, power, chemical and Distillery Business of GSML to Godavari Biorefineries Ltd. (GBL) as a going concern which included leased assets of Tuljabhavani Distillery.*
- 5) *In view of the said High Court order dated 20.03.2009. Central Excise Registration No. AAAC5004AXM005 was surrendered and a new Central Excise Registration Certificate No. AABCG2543CXM002 was obtained on 29.04.2009 in the name of M/s Godavari Biorefineries Ltd. lessee of Tuljabhavani SSSK Ltd.*
- 6) *As a result of demerger scheme of arrangement. the Cenvat Credit of Rs.1.24 crore (approx.) lying in balance as on 30.04.2009 was transferred from Somaiya Organo*

Chemicals - A unit of the Godavari Sugar Mills Ltd. to Godavari Biorefineries Ltd., Tuljabhavani.

- 7) The said lease agreement which came to an end on 31.03.2009 was extended by two months i.e. up to 31.05.2009.*
- 8) Letter dated 01.05.2009 for the transfer of CENVAT credit lying in balance of Somaiya Organo Chemicals – A unit of Godavari Sugar Mills Ltd., Tuljabhavani to Godavari Biorefineries Ltd., Tuljabhavani amounting to Rs 1.24 crore (approx).*
- 9) Letter dated 04.08.2009 for transfer of Cenvat balance in Distillery Unit at Naldurg Unit to Sakarwadi Unit Letter dated 10.04.2010 for transfer of Cenvat balance. - letters dated 02.06.2011. 19.01.2012. 17.02.2012. 28.02.2012, 25.06.2012, also state that stock of raw material. finished goods. capital goods have been transferred from Naldurg Distillery Unit to Sakarwadi Main Unit on payment of duty and, therefore, Cenvat balance remains at Rs.1.17 (approx) Crores instead of Rs.1.24crore (approx.) which should be allowed to be transferred to the main Sakarwadi Unit - Letters dated 17.07.2012 & 13.10.2012 gives sales invoices of inputs, capital goods etc. while seeking transfer balance of Rs.1.17 Crores to main GBL Sakarwadi Unit.*

4.5 The facts as stated in the submission of the appellant, simply mean that there is a distillery business of M/s Shri Tuljabhavani Shetkari Sakhar Karkhana Ltd., situated at Naldurg. Tal. Tuljapur Maharashtra (Lessor) which as per the Lease agreement date 31.03.2006 was given on lease for period of three years i.e. with effect from 1st April 2006 to 31st March, 2009 to M/s Somaiya Organo Chemicals, which as per the order dated 01.08.2002 of Hon'ble Bombay High Court became Somaiya Organo Chemicals (a unit of Godavari Sugar Mills Ltd). Subsequently as per High Court order dated 20.03.2009, there was demerger and the sugar, power, chemical and Distillery Business of Godavari Sugar Mills Limited to Godavari Biorefineries Ltd. (GBL) as a going concern which included leased assets of Tuljabhavani Distillery. As a result of this order the distillery business of M/s Shri Tuljabhavani Shetkari Sakhar Karkhana Ltd., situated at Naldurg. Tal. Tuljapur Maharashtra

became the leased asset of the M/s Godavari Biorefineries Ltd. So the effect of the order is that with effect from 20.03.2009 the lease agreement is between M/s. Tuljabhavani SSK Ltd.. (Naldurg) (Lessor) and M/s Godavari Biorefineries Ltd (lessee).

4.6 M/s Godavari Biorefineries Ltd. have another unit at Sakarwadi.

4.7 The lease agreement between lease agreement is between M/s. Tuljabhavani SSK Ltd.. (Naldurg) (Lessor) and M/s Godavari Biorefineries Ltd. (lessee) was extended for two months beyond 31.03.2009 and final got terminated on 31.05.2009. On termination of the lease agreement appellant is seeking transfer of the unutilized CENVAT Credit from Naldurg unit to Sakarwadi Unit.

4.8 Admittedly the fact as stated above point to only one thing that there is lease agreement for the Distillery business at Naldurg with M/s Godavari Bio Refineries with effect from 31.05.2009. That being so there is no transfer of any business on any account of any existing lease deed by which M/s Godavari Refineries is operating the Distillery Business at Naldurg. From plain reading of the Rule 10 of CENVAT Credit Rules, 2004, which has been reproduced in the 7.1 of the impugned order it is evident the transfer of the unutilized credit in the lessor account is permitted to lessee account only when the assets and liabilities of the in respect of the lease business/ factory are transferred as result of the lease agreement entered between the lessor and lessee. Such transfer is not permissible from one unit to the other unit of the same entity in terms of this rule. Same view has been expressed by various authorities in the decisions referred below:

Jai Corporation Ltd [2015 (315) E.L.T. 283 (Tri. - Ahmd.)]

10. *It can be noted from the above reproduced rule that transfer of Cenvat credit has been provided in said provision in sub-rule (1). On deeper perusal of sub-rule (1), it is very clear that when there is change in ownership or on account of sale, with specific provision for transfer of liability, then the manufacturer shall be allowed to transfer the Cenvat credit lying unutilized to such transferred/sold factory. In the case in hand, it is undisputed that the Cenvat credit which has been availed by*

the appellant herein was lying in RG-23A Part II register of M/s. Santogen Spinning Mills and was unutilized.

Hewlett Packard India Sales Ltd. [2012 (279) E.L.T. 203 (Kar.)]

Sub-rule (1) of Rule 10 categorically declares the legal position. It states that when any manufacturer of final products shifts his factory to another site or the factory is transferred on account of change in ownership or on account of sale, merger or amalgamation or transfer of the factory or joint venture with the specific provision for transfer of liabilities on such factories, then, the manufacturer shall be allowed to transfer the Cenvat credit lying unutilized in his accounts to such transferred sold, merged, leased or amalgamated factory.

Sheil Industries {2011 (263) E.L.T. 436 (Tri. - Ahmd.)}

5. *As is seen from above transfer of cenvat credit lying unutilized in an assessee's factory is permissible in a case where the manufacturer shifts his factory to another site or the factory is transferred on account of change in ownership or on account of sale, merger, amalgamation, lease or transfer of a factory a joint venture. Admittedly the appellants are not covered by any of the expressions appearing in the later part of Rule 10. Their claim is that the factory of M/s. Disha Industries is shifted to the factory of M/s. Sheil Industries and as such the unutilized cenvat credit would also get shifted. The above claim stands made by the appellant on the ground that proprietor of both the units is same and as such both the units have to be considered as one and the same unit. The above claim has not been accepted by the authorities below on the ground that both the units were located differently, were duly registered with the department and as such have to be considered as two different manufacturers. Merely because both the units are owned by one person is no ground to treat both of them as the same unit. Commissioner (Appeals) has observed that the central excise registration has not been granted to Shri Arun Choksi, proprietor of the units but has been given to M/s. Sheil Industries and M/s. Disha Industries separately. A cheque issued in the name of M/s. Disha Industries cannot be credited to the account of M/s. Sheil Industries as they are two separate manufacturers.*

6.

7. *As the provisions of Rule 10 do not apply to the facts of the case in as much as it cannot be held that M/s. Disha Industries has shifted its factory to another site and there being no other provision for transfer of unutilized cenvat credit, I agree with the lower authorities that such transfer was in contravention of the provisions of law. Accordingly I hold that the transfer of unutilized credit from M/s. Disha Industries to M/s. Sheil Industries is liable to be held as not in accordance with law. Accordingly the demand confirmed against M/s. Sheil Industries on the above ground is upheld. They are directed to reverse the credit or if utilized to pay the same in cash and such credit would reappear in the accounts of M/s. Disha Industries. In as much as M/s. Disha Industries is closed, such credit would get lapsed.*

NAGARJUNA AGRICHEM LTD. [2008 (222) E.L.T. 232 (Tri. - Bang.)]

The above Rule grants the manufacturer to utilize the credit which was lying in the lessor's factory. The Commissioner (Appeals), after detailed consideration has found that on the lease being entered into by the appellants, there was credit available for utilization. He has noted that even though the assessee has taken the credit after 1-4-2003 on the invoices relating to the lessor unit, the same should be treated as lying unutilized credit on the accounts of lessor unit as per Rule 8 of the Cenvat Credit Rules, 2002. He has taken the lapse as technical lapse only. He has upheld the OIO passed by the Deputy Commissioner, which was also in the assessee's favour. I am satisfied that both the authorities have correctly applied the law and no deviation has been done in view of the clear provisions of Rule 10 of Cenvat Credit Procedure Rules, which provides for taking credit of unutilized credit.

Medrieche Ltd., EOU-II [2016 (340) E.L.T. 517 (Tri. - Bang.)]

5. *At the outset, it is little strange that when the department vide Assistant Commissioner, Central Excise, Yeshwanthpur's, letter dated 23-11-2007 under Rule 10 of Cenvat Credit Rules, 2004 granted the permission for transfer of Cenvat credit lying in*

capital account and input account with the lessor unit of BPRL to the lessee unit viz., M/s. Medrieck Ltd., who is the appellant and when such permission has not been withdrawn, a show cause notice was issued against such a transfer and later the demand along with interest was confirmed and penalty was also imposed. When there are number of case laws permitting such transfer of unutilised credit from the lessor unit to the lessee unit, even when initially the lessor unit is a DTA unit and after the execution of the lease agreement, when it is an EOU and lessee is also an EOU. There is no rational and merit in the demand confirmed against the appellant in this case, when Rule 10 of Cenvat Credit Rules, 2004 specifically allows such transfer of Cenvat credit and when there are number of decisions of higher judicial fora in support of such transfer of Cenvat credit”

4.10 Same conclusion has been arrived at by both the lower authorities and we do not find any reason to differ with the same.

4.11 In view of the above we do not find any infirmity in the impugned order.

5.1 Appeal is dismissed.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

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