CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

EXCISE APPEAL NO: 87848 OF 2013

[Arising out of Order-in-Appeal No: GOA/CEX/GSK/20/2013 dated 29th May 2013 passed by the Commissioner of Central Excise & Customs (Appeals), Goa.]

Commissioner of Customs & Central Excise
ICE House, EDC Complex, Patto, Panaji, Goa … ***Appellant***

versus

Surana Telecom & Power Ltd
Survey No. 165/166, 1st Floor, Niketa Enclave
Porvorim, Goa – 403 521 ***…Respondent***

WITH

EXCISE APPEAL NO: 87853 OF 2013

[Arising out of Order-in-Appeal No: GOA/CEX/GSK/21/2013 dated 29th May 2013 passed by the Commissioner of Central Excise & Customs (Appeals), Goa.]

Commissioner of Customs & Central Excise
ICE House, EDC Complex, Patto, Panaji, Goa … ***Appellant***

versus

Bhagyanagar India Ltd
Survey No. 165/166, 1st Floor, Niketa Enclave
Porvorim, Goa – 403 521 ***…Respondent***

APPEARANCE:

Shri N N Prabhudesai, Superintendent (AR) for the appellant

None for the respondents

CORAM:

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

FINAL ORDER NO: A / 86275-86276 /2022

DATE OF HEARING:	05/04/2022
DATE OF DECISION:	05/04/2022

PER: C J MATHEW

Revenue is in appeal against sanction of ₹ 91,23,836/- and ₹ 86,71,289/- as refund of accumulated CENVAT credit remaining unutilized at the time of surrender of registration of M/s Surana Telecom & Power Ltd and M/s Bhagyanagar India Ltd by Commissioner of Central Excise & Customs (Appeals), Goa *vide* order-in-appeal no. GOA/CEX/GSK/20/2013 dated 29th May 2013 and *vide* order-in-appeal no. GOA/CEX/GSK/21/2013 dated 29th May 2013 respectively on challenge of rejection of claims for refund by the original authority.

2. None appeared for the respondents and we have heard Learned Authorised Representative.

3. The entitlement to claim monetization of accumulated CENVAT credit under rule 5 of CENVAT Credit Rules, 2004, available specifically to credit pertaining to exports, at the time of closure of factory has been settled by a Larger Bench of the Hon'ble High Court of Bombay in *Gauri Plasticulture P Ltd v. Commissioner of Central Excise, Indore [2019 (30) GSTL 224 (Bom)]* answering

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.'*

4. The Tribunal, in *Amar Tubes Pvt Ltd v. Commissioner of Central GST, Raigad [final order no. A/86225/2022 dated 21st December 2022 in appeal no. E/88069/2019 challenging order-in-appeal no. US/133/RGD/2013 dated 23rd May 2013 of Commissioner of Central Excise (Appeals – II), Mumbai],* has held thus

‘9. ……. The Tribunal, in Voltas Ltd v. Commissioner of Central Excise, Pune-IV [2018 (4) TMI 352-CESTAT MUMBAI,] had examined the nature of CENVAT credit scheme as well as the significance of utilization of credit for discharge of duty liability 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.*
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> *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.'*

making it abundantly clear that CENVAT credit enables the conforming of discharge of duty liability to the value added by a manufacturer and that payment of billed value, inclusive of duty, suffices for availment of credit.

10. The duty liability, on which CENVAT credit is availed, is nothing but the leviability discharged in accordance with section 3 of Central Excise Act, 1944 on clearances effected by the supplier - manufacturer and refund of that amount would be tantamount to negating the correctness of that levy. CENVAT Credit Rules, 2004 does not, for this reason, envisage any erosion of credit availed except by utilization towards duty liability under rule 3(4) thereof, by refund under rule 5 thereof or by recovery for ineligible availment under

> *rule 14 thereof. To accede to the plea of the appellant herein would be to discard the leviability of duty/tax on manufacture/supply of goods/services procured by the appellant.'*

5. In view of the decisions *supra*, the orders of the first appellate authority merit setting aside. Accordingly, the appeals of Revenue are allowed.

(Operative Part of the Order pronounced in the open court on 5th April 2022)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*