CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
REGIONAL BENCH
Single Member Bench

Excise Appeal No. 86049 of 2020

(Arising out of Order-in-Appeal No. NSK/EXCUS/000/APPL/215/19-20/6296 dated 17.03.2020 passed by the Commissioner of CGST & Central Excise (Appeals), Nashik)

M/s. Shayona Pulp Conversion Mills P Ltd **Appellant**
Plot No. D-8, MIDC, Waluj,
Aurangabad 431 136

Vs.

Commissioner of CE & ST, Aurangabad **Respondent**
N-5, Town Centre, CIDCO, Aurangabad 431 030.

Appearance:

Shri Radheshyam Indani, Advocate, for the Appellant
Shri Xavier Mascarenhas, Superintendent, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

Date of Hearing: 12.01.2023
Date of Decision: 12.01.2023

FINAL ORDER NO. A/85027/2023

This appeal is directed against Order-in-Appeal No. NSK/EXCUS/000/APPL/215/19-20/6296 dated 17.03.2020 passed by the Commissioner of CGST & Central Excise (Appeals), Nashik. By the impugned order, the Commissioner (Appeals) has upheld the order of the Assistant Commissioner rejecting the refund claim filed by the appellant.

2.1 Appellant has filed application for refund of Rs.17,70,534/- under Section 11B of the Central Excise Act, 1944 for the period 2001-02, 2004-05, 2005-06 and 2006-07 seeking refund of Cenvat credit on HSD/LDO/IDO used for generation of electricity. This refund claim was filed on 15.03.2019.

2.2 During the course of scrutiny, taking note of the fact that the appellant had filed refund claim after expiry of more than one year from the date of payment as stipulated under Section 11B of the Central Excise Act, show cause notice dated

10.05.2019 was issued to the appellant. The refund claim has been adjudicated rejecting the claim, by the Assistant Commissioner and the rejection has been upheld by the Commissioner (Appeals) by the impugned order. Aggrieved appellant has filed this appeal.

3.1 I have heard Shri Radheshyam Indani, Advocate for the appellant and Shri Xavier Mascarenhas, Superintendent, Authorised Representative for the Revenue.

4.1 For upholding the rejection, Commissioner (Appeals) has in the impugned order observed as follows:-

"8.1 On going through the rival contentions it is seen that the department has not controverted the amount of cenvat credit of Rs 17,70,534/- not availed by the appellant which was later sought as refund, per-se. The department had issued a SCN dated 10.05.2019 proposing rejection of the claim solely on the grounds that the impugned claim had been filed after one year of the relevant period as envisaged under Section 118(2) of CEA, 1944. The lower authority later confirmed the proposal made in the SCN and rejected the claim on the grounds of time bar. The appellants main contention is that they had earlier vide letter dated 20.02.2007 had informed the Dy Commissioner Incharge that owing to disconnection of their electricity supply to their factory the factory was closed on for two months due to non-availability of electricity. The factory management then decided to run the factory by generation of electricity by using LDO/ IDO and requested that the cenvat involved may be allowed by the department.

8.2 It is well settled that even though cenvat credit is a substantial right of a manufacturer (appellant in the instant case) subject to its manufacturing dutiable goods the same must be availed and utilized in view of the provisions contained in CCR, 2004) Third proviso to Rule 4(1) of CCR, 2004 during the relevant period provided that manufacturer or output service provider shall not take cenvat credit after six months from the date of issue of any of the documents specified in sub-rule 1 of

Rule 9. ibid. It is pertinent here to note that when cenvat credit for the impugned period was availed on HSD & LDO the appellant could have availed (subject to admissibility) the cenvat of IDO. But it was their own decision that they had not availed the credit of Rs.17,70,534/- involved solely on IDO during the period 2005-06 and 2006-07. It is the appellant's own admission that the amount of credit of Rs. 17.70,534/- was shown as receivable in their books till the matter was noticed conspicuously by their accountants and therefore filed the instant refund claim. The lower authority, however has not gone into the admissibility of the claim per-se and rejected the same solely on the grounds of time bar relying upon Section 11B(1) of CEA, 1944 which is extracted as below:

"(1) Any person claiming refund of any [duty of excise and interest, if any, paid on such duty) may make an application for refund of such [duty and interest, if any, paid on such duty] to the [Assistant Commissioner of Central Excise or Deputy of Central Excise] before the expiry of [one year] [from the relevant date] [[in such form and manner] as may be prescribed and the application shall be accompanied by such documentary or other evidence (including the documents referred to in section 12A) as the applicant may furnish to establish that the amount of [duty of excise and interest, if any, paid on such duty) in relation to which such refund is claimed was collected from, or paid by him and the incidence of such [duty and interest, if any, paid on such duty) had not been passed on by him to any other person.

Provided that where an application for refund has been made before the commencement of the Central Excises and Customs Laws (Amendment) Act 1991, such application shall be deemed to have been made under this sub- section as amended by the said Act and the same shall be dealt with in accordance with the provisions of sub-section (2) substituted by that Act:]

[Provided further that the limitation of (one year) shall not apply where any duty and interest, if any, paid on such duty] been paid under protest."

Likewise, Section 118(5)(B) lays down "relevant date" which varies for different situation as envisaged under sub-clause (a) to (f) therein) Primarily, as has been made clear by the Hon'ble Supreme Court in the Mafatial Industries case, reported at, 1997 (89) EL.T. 247 (S.C.), every claim of refund is guided by the provisions of Section 118 except where the provisions have been stuck down as being unconstitutional. It is incontrovertible that the refund claim filed by the appellant with the lower authority pertained to their seeking of refund of cenvat credit involved in industrial diesel oil (IDO) which they had not availed at the first place in the cenvat account. It needs to be kept in mind that there is no provision in Cenvat Credit Rules, 2004 for grant of refund of cenvat credit except under Rule 5, ibid. The said Rule 5, ibid, envisages refund of cenvat credit accumulated in a circumstance where a manufacturer or a service provider is not in a position to utilize such credit owing to accumulation on account of Export. The present case is different inasmuch as the appellant has sought for refund of cenvat credit NOT availed by them. Clearly the law does not envisage such refund and therefore there is no provision for the same. In such light the refund claim ought to be rejected for absolute lack of merit alone. The lower authority, however, without going into such lack of merit of the refund claim, has rejected the claim solely on the grounds of time bar as the claim itself was filed 14 years from the relevant date: It is true that Section 11B(1) of CEA, 1944 clearly specifies that a claim of refund ought to be filed within one year from the relevant claim. As against this it is crystal clear that the appellant had filed the claim well beyond the said one year period prescribed in the said 118(1), ibid. The findings of the lower authority recorded while rejecting the claim cannot be interfered into."

4.2 During the course of argument, learned counsel for the appellant was to produce ER-1s on which credit sought to be refunded has been claimed. Counsel admitted that they have never claimed the credit on any of the ER-1s but the claim has been filed on the basis of the balance sheets showing the amounts as Cenvat credit receivable. They have entered into various correspondences with the Revenue authorities seeking the authorities to allow this credit. One of such correspondences is as reproduced below:-

Shayona Pulp Conversion Mills Pvt. Ltd.

To,
Dy. Commissioner
Central Excise & Customs
Div-II , N- 5, CIDCO
Aurangabad

February 20, 2007

Sub :-- <u>Cenvat credit on LDO / IDO used for generating Electricity.</u>

Dear Sir,

As you are aware we are manufacturing excisable goods falling under chapter heading Kraft Paper 48.

Our unit is refered to BIFR and registration as BIFR case No. 205/2002 due to erosion *of capital and negative net worth.*

Sir, M.S.E.B. Vide their notice of permanent disconection of H.T. supply diconected due to non payment of energy Bill Rs. 25837400/--within 7 Days (copy of Energy Bill *and Notice of Disconection is inclosed)*

M.S.E.B. had disconnected H.T. Supply from Nov. -1999 after disconnection factory was closed for two months due to non availability of electricity Dispute with M.S.E.B. regarding excess energy Bill is Lying pending before judicial authority After review the situation and circumstances and consequences of disputed energy Bill amount Management has decided to run the factory by generating our own electricity through D.G.set by using disel /LDO/IDO.

Sir, actually use of D.G.Set electricity is not economical but due to circumstances *beyond our control we are forced to consume disel for production of excisable goods and* excisable good removed on payments of duty. LDO/IDO Used for generating electricity is a fuel and on such fuel cenvat/modvat credit to be allowed during disconnection period . *Statements of LDO/IDO used is enclosed for your reference for the year 2001-*02,2004-05,2005-06 & 2006-07 for Total Rs.3314605.30 (Rupees Thirty three lack fourteen Six Hundred Five Only).

Sir, please note that Hon`ble Supreme court in judgement dated 17/01/2007 in case of Rajasthan Sales Tax Act -1994 declared that diesel used for generating electricity is a raw materials (copy of judgements enclosed)

Sir, for your reference and record we have enclosed herewith following documents for your perusals .

1. B.I.F.R . COPY
2. M.S.E.B. Notice of disconnection.
3. Self declaration of use of LDO /IDO
4. Chartered Engineer certificate regarding use of LDO/IDO.
5. [illegible] dt. 30th Oct. 2006.
6. Statement of Cenvat for Rs. 3314605.30

D-8, M.I.D.C. WALUJ, AURANGABAD - 431 133 MAHARASHTRA (INDIA)
Telefax : 91-240- 6623872, fax 2345845 Email: shayonapaper@gmail.com

Sir, please note that we have brief the fact of the case regarding how the unit become SICK. *Which use of LDO/IDO is also one of the reason for sickness of unit .* If cenvat Credit on LDO/IDO allowed will help to bring down the losses .

We have seek relief and concession from B.I.F.R. (Copy for the same is enclosed)

In view of the above you are requested to allow to us to take and utilize the cenvat credit on LDO/IDO used as fuel for generating electricity .

Thanking You,

For SHAYONA PULP CONVERSION MILLS PVT LTD.

AUTHORISED SIGNATORY

4.3 In the Form R [application of refund of excise duty (interest)] filed by the appellant seeking refund, following has been stated:-

"b. Vide letter dated 20/02/2007, it had been submitted by us that, the LDO and IDO which had been utilized for generation of electricity, and that electricity had been utilized for manufacturing of Kraft Paper, and without availing the exemption provided under the law Central Excise Duty had been paid by us on kraft paper. Therefore, we were requested that kindly allow the CENVAT CREDIT of Rs. 3314605.30 involved in the HSD/ LDO / IDO, which were used for generation of electricity. However, in spite of reminder latter dated 14/03/2008, not allowed any credit and there was no communication from the department. Hence, filing this refund claim, year wise cenvat credit involved in the said letter is as under:

Sr.No.	*Year*	*Cenvat Credit Involved in HSD*	*Cenvat Credit involved in LDO*	*Cenvat Credit involved in IDO*	*Total Credit involved.*
	2001-02	*558368.34*	*82028.66*	*0.00*	*640397.00*
	2004-05	*0.00*	*315370*	*0.00*	*315370.00*
	2005-06	*0.00*	*588301.00*	*1534480.00*	*2122781.00*
	2006-07	*0.00*	*0.00*	*236054.00*	*236054.00*
	TOTAL	***558368.34***	***985699.66***	***1770534.00***	***3314602.00***

c. That we had manufactured Kraft Paper, that are goods classifiable under Chapter 48 of the First Schedule to the Central Excise Tariff Act, 1985 by using domestic and imported waste paper as raw material/input. In that -process, due to disconnection of electricity by MSEB, during the year 2005-06 & 2006-07 Industrial Diesel Oil (IDO) was used as fuel for generation of electricity.

d. You are well aware that due disconnection of electricity unit were run on D.G. Set and for that HSD/LDO had been used for generation of electricity. That various show cause notices were issued to us by denying the cenvat credit availed on HSD/LDO. Therefore, decision were taken by us that instead of using HSD/LDO we should use IDO, which is lower price over HSD/LDO. Therefore, letter dated 20/02/2007 were filed for *availment of Cenvat Credit used for generation of electricity, but no response from your office.*

e. Industrial Diesel Oil (IDO) heavy fuel oil which is mainly used for heating, generating power and water/steam boilers in small industrial and hospitality applications. The main advantage of IDO is the lower price over diesel which comes under inclusion part 'input'. Thus, we have used IDO for generation of electricity.

f. Further, inputs used in generation of electricity are an ancillary activity which is anterior to process of manufacture of final product the said activity comes within the ambit definition of input, because it is integrally connected with manufacture of final product Rules 2(k) of Cenvat Credit Rules, 2004.

g. Further when the electricity generation is a captive arrangement and the requirement is for carrying out the manufacturing activity, the electricity generation also forms parts of the manufacturing activity and the input used in that electricity generation is an input used in the manufacture of final product.

h. In short, a manufacturer is entitled to cenvat credit on the eligible inputs (IDO) used in generation of electricity to the extent to which they are using the generated electricity, within their factory for manufacture of finished products on which excise duty is discharged.

i. Thus we were rightly entitled to availed the Cenvat Credit on IDO, however, not availed under bona fide belief that various show cause notices were issued by the department by denying the cenvat credit availed on HSD/LDO used for generation of electricity and still are pending before CESTAT / HIGH COURT.

j. But we found that there is no restriction for availment of cenvat credit on IDO. Therefore, this Refund Claim is restricted to Cenvat Credit of IDO Rs. 1770534/- involved in the letter dated 20/02/2007, for the period from 01/08/2005 to 28/03/2006 & 03/04/2006 to 05/05/2006 which was claimed *before the authority within time vide letter dated 20/02/2007 and reminder letter 14/03/2008.*

k. The substantial benefit of Cenvat credit available to us cannot be denied in the facts of the present matter. In view of the facts that the inputs IDO used for generation of electricity and electricity had been used in the manufacture of the dutiable final goods, on which central excise duty was paid by us. Therefore, we cannot be deprived of the benefit of Cenvat credit of the duty paid on the inputs.

During the relevant period no time limit has been fixed for availment of credit. Further meaning of work viz immediately' has not been defined in cenvat credit rules anywhere. However, vide letter dated 20/02/2007 it was requested by us that to allowed the credit.

l. We further submit that, either grant the refund claim in cash or adjust the same against the arrears/ liability if any."

4.4 To the specific query made at the time of arguments counsel admitted that this amount for which refund is claimed was never reflected as Cenvat credit in any Excise records, including ER-1 return. This amount is only appearing in balance sheet as Cenvat receivable and they have filed the refund claim on that basis.

4.5 The undisputed fact is the amount sought to be claimed as refund of unutilized Cenvat credit was in fact never claimed as Cenvat credit on any of the ER-1s filed by the appellant. As these amounts were never claimed as Cenvat credit, this cannot be lying as unutilised balance with the appellant. The refund claim on this primary ground itself is not maintainable.

4.6 Further I also observe that the refund claim has been filed nearly after the lapse of 14-15 years of the date of the communication referred. The lower authorities cannot be faulted for having held that the refund claim is barred by limitation as provided by Section 11B of the Central Excise Act, 1944.

5.1 Appeal filed by the appellant is dismissed.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

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