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

Excise Appeal No. 86651 of 2013

(Arising out of Order-in-Appeal No. BR(24)/ThI/2013 dated 10.01.2013 passed by the Commissioner of Central Excise (Appeals), Thane-I)

M/s. Navbhabhat Industries **Appellant**
Plot No. A-156, Phase-I, MIDC,
Dombivali (E), Dist. Thane 421 203.

Vs.

Commissioner of Central Excise, Thane-I **Respondent**
4th Floor, Navprabhat Chambers, Ranade Road,
Dadar (W), Mumbai 400 028.

Appearance:

Shri Rajesh Ostwal, Advocate, for the Appellant
Shri Sunil Kumar Katiyar, 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: 30.03.2023
Date of Decision: 30.03.2023

FINAL ORDER NO. 85818/2023

PER: SANJIV SRIVASTAVA

This appeal is directed against order in appeal No BR/24/Th-1/2013 dated 10.01.2013 of the Commissioner (Appeal) Central Excise, Thane-I. By the impugned order following has been observed:

"11. It is revealed that as per condition 5 of notification No.11/2002C.E (NT) dated 02.03.2002 as amended by notification No.49/2003 C.E (NT) dated 17.05.2003, the refund is allowed only in those circumstances where a manufacturer is not in a position to utilize the credit of the duty on inputs allowed under Rule 3 of the said rules against goods exported during the period to which the claim relates. The condition No. 5 is a restrictive condition which has to be fulfilled to the satisfaction of the officer sanctioning the claim and it is specifically mentioned that the refund can be sanctioned only if claimant is unable to utilize the credit at all and not restricted to

home clearances. If the assesses is in a position to utilize the credit for clearance of goods either for home or export, then the condition 5 of the Notification is not satisfied. Further, under Rule 3 of Cenvat Credit Rules,2002 there is no restriction for utilization of credit within particular period.

12. It is also revealed that the Hon'ble CESTAT has allowed the Cenvat credit availed by the appellant on merits and held that the appellant was entitled for refund of the same under Rule 5 of Cenvat Credit Rules, 2002 and directed the lower formation to quantify the refund amount after looking into the appellant's records. In order to quantify the amount liable to be refunded, it is very much essential to determine the quantum of exact amount eligible for refund under Rule-5 of Cenvat Credit Rules, 2002, and before quantifying the amount eligible to be refunded it is required to ascertain as to how much inputs were used in the final product exported under Bond. The Rule-5 restricts the refund only to the extent of whatever Cenvat credit contained in the inputs used in the manufacture of final

13. It is revealed that the appellant could not correlate the specific inputs with its different rates to the manufacture of export goods cleared under various A.R,E. 1 (under bond) as the appellants had not maintained their records in a proper manner facilitating the possible co-relation of specific inputs to specific Outputs, as required under Rule 5 of Cenvat Credit Rules, 2002. This fact also came in notice by department while verifying their claim with their records. The refundable amount should be an actual amount and not average amount. It was also a fact on records that right from the initial stage the appellant had claimed their refund claim on average basis only and the Hon'ble CESTAT had neither given any specific direction to accept these refund claimed filed on average basis as such nor accepted the same as one filed on actual basis. The Hon'ble CESTAT Mumbai in the case of Universal Enterprises V/S CCE Mumbai [2011(271)ELT 261(Tri. Mumbai)] has held that mere statements (of partners & managers) without correlation amount to absence of any documentary evidence. The ratio of order is applicable in the instant case as claim is unsubstantiated.

14. The contention of the appellants that adjudicating authority has passed the order without adhering to the directives of the Hon'ble CESTAT Mumbai is incorrect in as much as the Order-in-Original has been passed by the adjudicating authority as per the directions of the Hon'ble CESTAT. Further, adjudicating authority has not violated principles of natural justice by relying the correspondence of Range Supdt., as the same has been done in accordance to procedure of led down in the Central Excise (CBEC - Supplementary Instructions) 2003-04. It is also revealed that the deptt. had shown inability to ascertain the actual amount of refund because the appellants had not maintained their records in a proper manner to facilitate the possible co-relation of specific inputs to specific outputs, as is required under Rule 5 of Cenvat Credit Rules, 2002 while verifying the admissible refund claim.

15. It is revealed that the adjudicating authority has correctly concluded that the refund claims are unsubstantiated, as the appellants have claimed the refund claims on average basis and no sufficient corroborative evidence was available on records to link the input and hence it was not possible to determine the actual refund for which the appellants is entitled.In the case of CCE Chennai V/s Nivaran Herbal pvt. Ltd. (2010(252) ELT 553 (tri. Chennai)} it was held that if there is no D-3 intimation given by assessee, no entry in statutory register and non-reflection in statutory returns, all these amounts to absence of documentary evidence

16. In view of foregoing and findings the arguments and relied upon case laws by the appellant do not come to their help. I, therefore, hold that the appeal filed by the appellant is devoid of merits and not fit for consideration. Accordingly I pass order.

I uphold the Order-in-Original and reject the appeal."

2. Tribunal while remanding the matter to original authority has vide Order No A/476/WZB/06/C-II/EB dated 24.03.2006 observed as follows:

"2. After hearing both sides, we find that as per the facts on record, the appellant is engaged in the processing of textile fabrics. mainly cotton fabrics and exporting the same under bond. As a result of export of the final products. Modvat credit

availed in respect of the inputs got accumulated in their records and could not be utilized for home clearance. for payment of duty. Accumulation of credit was also on the ground that whereas the rate of duty on input was 10%, final product attracted duty only @5%. Accordingly, the refund claims on monthly basis was filed by the appellant in terms of the provisions of Rule 5 of the Cenvat Credit Rules. 2002 read with Notification No 11/02-CE (NT). The said refund claims were rejected by the original adjudicating authority i.e. the Deputy Commissioner on the ground that computation of the amount of credit was on average basis: that the assessee have not utilized the credit for subsequent clearances; that Rule 5 is not applicable in respect of the credit availed on one time basis in terms of the provisions of Rule 9A. The said order was appealed against before the Commissioner (Appeals) who confirmed the same. Hence the present appeal.

3. We find that in terms of the provisions of Rule 5 of Cenvat Credit Rules, 2002 where any inputs are used in the final products which are cleared for export under bond, ... the Cenvat Credit in respect of the inputs so used shall be allowed to be utilized by the manufacturer towards demand of duty of excise on any final products cleared for home consumption or for export on payment of duty and where for any reason such adjustment is not possible. the manufacturer shall be allowed refund of such amount subject to such safeguards, conditions and limitations as may be specified by the Central Government by notification.

4. The Central Government vide its Notification No. 11/02-CE (NT) dated 1.3.2003 in exercise of the powers conferred by said Rule 5 of Cenvat Credit Rules. 2002 has laid down safeguards. conditions and limitations, set out in the Appendix to the said Notification. As per serial No 2 of the said Appendix, claims for refund in respect of export clearance of textile and textile articles can be made in each calendar month. This shows that if an assessee is not able to utilize the credit within one month, he could claim refund of the credit of duty paid on the inputs used in the manufacture of final product which stands ultimately exported under bond. As such the objection of the authority below that the appellant could have utilized the said credit for future clearances is clearly erroneous.

5. It is also seen that the appellant had availed transitioral credit in terms of the provisions of Rule 9A of the Cenvat Credit Rules. 2002 and notification No. 35/03-CE(NT) dated 10.4.2003 to the tune of Rs 13.19.080/-. The said rule read with Notification in question entitled the assessee to avail the credit as specified therein in respect of inputs lying in stock or semi processed or on inputs contained in the finished goods lying in stock. The authorities below have rejected the refund on the ground that refund cannot be granted in respect of the said credit in terms of Rule 5. However, we find that Rule 3 (2) allow an assessee to take Cenvat Credit of the duty paid on inputs lying in stock or in process or contained in the final product lying in stock on the date on which any goods seized to be exempted goods or any goods become excisable. As such Rule 3 (2) is the enabling provision entitling an assessee to avail the credit and notification issued under Rule 9A was only for quantifying the credit amount. Serial No 5 of Notification No. 11/02-CE(NT) issued under Rule 5 relates refund of that credit of duty on inputs allowed under Rule 3 of the said rules against goods exported during that quarter or month to which the claim relates. Admittedly the transitional credit was availed under Rule 3 and as such, as rightly argued by the appellant, was covered by the provisions of Rule 5. We find no justification for denying the same to the appellant.

6. We agree with the Ld Advocate appearing for the appellant that the provisions of Rule 5 relating to refund of Modvat credit accumulated in the records on account of their non utilization for the exported goods is a beneficiary piece of legislation, the refund arising on account of the same cannot be denied being a substantive right of the citizen. The wording of Rule 5 read with Rule 3 are very clear providing for refund of accumulated Modvat credit if the same cannot be adjusted for any reason. As such the only condition in the said Rule is non utilization of the credit and no jurisdiction vests in the Central Excise officer to find out the reason for such non adjustment. The use of the expression that "where for any reason" such adjustment is not possible, the manufacturer shall be allowed refund of such amount' is an unlimited expression and cannot be narrowed or curtailed down by the departmental authorities.

7. In view of our foregoing discussion, we set aside the impugned order and hold that the appellant is entitled to the refund of the accumulated credit which shall be quantified by the authority below, after looking into their records for which purposes we remand the matter to the original adjudicating authority."

3. In the remand proceedings appellant submitted all the documents required for verification and quantification. All the documents were verified by the jurisdictional range officer and vide his report dated 25.11.2006/ 12.12.2006, referred in para 19, of the order of original authority observed, "The calculation of refund claim on average basis is found in order." If on verification of the documents submitted the quantum of refund claim has been found in order by the jurisdictional authorities have been found in order, then the in terms of the CESTAT Order, the refund should have been granted to the appellant. From the CESTAT order, it is observed that in the first round of litigation also the refund was rejected by the lower authorities for the reason that the claim was made on average basis. Tribunal has allowed the appeal and remanded the matter only for re-quantification. The impugned order travels beyond the directions in the order of tribunal and cannot be sustained, in view of the observations made by the jurisdictional range superintendent referred earlier.

4.0 Appeal is allowed.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

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