CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

EXCISE APPEAL NO: 89879 OF 2014

[Arising out of Order-in-Appeal No: PD/55/Th-I/2014 dated 28th July 2014 passed by the Commissioner of Central Excise (Appeals – IV), Mumbai – IV.]

Khanna Industrial Pipes Pvt Ltd
Village Khativali, Post: Vasind, Tal: Shahpur
Dist: Thane … ***Appellant***

versus

Commissioner of Central Excise
Thane – I
Navprabhat Chambers, Ranade Road, Dadar (W)
Mumbai - 400028 ***…Respondent***

WITH

EXCISE APPEAL NO: 85959 OF 2015

[Arising out of Order-in-Original No: 09/ANS-09/KHANNA/TH-I/2014-15 dated 16th January 2015 passed by the Commissioner of Central Excise, Thane – I.]

Khanna Industrial Pipes Pvt Ltd
Village Khativali, Post: Vasind, Tal: Shahpur
Dist: Thane … ***Appellant***

versus

Commissioner of Central Excise
Thane – I
Navprabhat Chambers, Ranade Road, Dadar (W)
Mumbai - 400028 ***…Respondent***

APPEARANCE:

Shri DH Nadkarni, Advocate for the appellant

Shri PK Acharya, Superintendent (AR) for the respondent

CORAM:

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

FINAL ORDER NO: 86951-86952/2025

DATE OF HEARING: 04/06/2025
DATE OF DECISION: 02/12/2025

PER: C J MATHEW

Appeals of M/s Khanna Industrial Pipes Pvt Ltd, emanating from two parallel streams – one as second appeal through order[1] of disposal of Commissioner of Central Excise and Service Tax (Appeals) – IV, Mumbai and the other as first appeal against order[2] of Commissioner of Central Excise, Thane I – are before us. That both not only arise from the same circumstances and pertain to identical set of facts but also conclude identical detriment of recovery of ₹85,82,969, along with interest, save that one of them imposed penalty of like amount without authority of law, which, in any case, must needs setting aside, is not only *'most peculiar'*, to borrow a description from the song of Simon and Garfunkel, but also as discordant as

'....and the clocks were striking thirteen'

in George Orwell's *1984*. A brief outline of the labyrinthine passage in the travel of the dispute to the Tribunal, and not just once but twice, would surely be of no small assistance in unravelling the conceptual

[1] [order-in-appeal no. PD/55/Th-I/2014 dated 28th July 2014]
[2] [order-in-original no: 09/ANS-09/KHANNA/TH-I/2014-1at 5 dated 16th January 2015]

commotion that keeps thrusting its disagreeable presence.

2. The appellant herein had, on 24th September 2009, preferred three claims for refund of ₹85,82,969, accumulated as CENVAT credit, and, being attributable to 'inputs' and 'input services' deployed in manufacture of goods exported during three quarters between October 2008 to June 2009, entitled to be monetized by the facility in rule 5 of CENVAT Credit Rules, 2004. The claims were allowed by the competent authority in order dated 21st December 2009 which, upon review empowered by section 35D of Central Excise Act, 1944, was reversed by order dated 25th November 2010 disposing off appeal before Commissioner of Central Excise (Appeals), Mumbai Zone – I at the instance of jurisdictional Commissioner of Central Excise. In the meanwhile, the same jurisdictional Commissioner of Central Excise invoked rule 14 of CENVAT Credit Rules, 2004 to issue show cause notice dated 21st October 2010 proposing recovery of the amount sanctioned by the competent authority, as well as imposition of penalty of like amount, that was confirmed in adjudication order dated 28th January 2011. Both these orders were challenged separately by appellant herein before the Tribunal and concluded, in common proceedings with final order[3], by setting aside both to enable fresh adjudication thereon. In *de novo* proceedings, the claims under rule 5 of CENVAT Credit Rules, 2004 were rejected by the competent

[3] [no. A/316-319/12/EB/C-III dated 15th March 2012]

authority by order dated 7th February 2014 that, on appeal before Commissioner of Central Excise and Service Tax (Appeals), Mumbai – IV, was upheld by the first of the orders impugned here even as Commissioner of Central Excise, Thane – I, by the second order impugned here, confirmed the recovery under rule 14 of CENVAT Credit Rules, 2004, along with interest as applicable, and imposed penalty under rule 15 of CENVAT Credit Rules, 2004. Before proceeding any further, we take note that penalty under rule 15 of CENVAT Credit Rules, 1994 does not attend on deployment of rule 14 of CENVAT Credit Rules, 2004 for recovery of refund granted erroneously and the order of Commissioner of Central Excise is without authority of law to such extent. By setting aside of penalty imposed, further proceedings for resolution of the remaining disputes are relieved of the burden of this spectre of illegality.

3. As matters now stand, we have two recoveries, each of ₹85,82,969 along with applicable interest, before us – one by affirmation of order issued by Central Excise officer subordinate to Commissioner of Central Excise and the other by order of Commissioner of Central Excise. The outcome of appellate resolution in one must mirror the other as the circumstances are identical and with one, *i.e.*, resting entirely on the other. However, survival of the two recoveries – one by specific direction and the other as consequence of disallowance – poses threat to rule of law as both are separately

enforceable by coercive provisions of law which does not permit tax authorities the luxury of prioritizing or discretion to ‘write off’ of either. Moreover, integrity of judicial determination rests upon the foundation of principle of comity of courts which not only binds subordinate courts to decisions of superior courts but, concomitantly, also prescribes exclusive hierarchy of appellate remedy bereft of which exercise of overlapping jurisdiction will be cause of judicial chaos. That the two jurisdictions have converged on the same outcome is happenstance and, that too, only because the conclusion of adjudicating authority has relied entirely on the findings of appellate authority. One of the two proceedings is one too many and credibility of proceedings before the Tribunal warrants extinguishment of one; in the circumstances, extinguishment of any one of both is of no prejudice to the interests of the exchequer.

4. We do not foray onto the complexity involved in determining the scope of empowerment to review sanction of refund solely by arithmetical derivation and lacking touchstone of show cause notice proposing, while setting out grounds for, rejection by way of ineligibility. Neither side has sought our intervention with that as ground for upholding or setting aside the orders. We hasten to add that neither was the exercise of overlapping jurisdiction canvassed but that is, of necessity, to be addressed in the interests of judicial credibility and constancy. In discarding one of the two, we are conscious that, in

the earlier round of litigation, the Tribunal had remanded both but we are also constrained to note that the restoration of adjudication to Commissioner of Central Excise is characterized by mere peripheral significance with detailed scrutiny effected only of the appeal challenging order of Commissioner of Central Excise (Appeals). It has also not escaped our notice that the plea of the appellant then was, primarily, about the failure of the first appellate authority to consider their submissions countering the grounds of ineligibility for refund of which they had been placed on notice for the first time in appeal filed at the instance of jurisdictional Commissioner of Central Excise and that restoration of the claims before the Deputy/Assistant Commissioner had the effect of erasing the review which not only prompted the show cause notice under rule 14 of CENVAT Credit Rules, 2004 but also was founded upon. The review was consequence of sanction and restoration of refund claim to pre-sanction stage extinguished the sanction, along with consequential review, especially with claims having been disallowed in the second round of adjudication.

5. It could well be essayed that the Tribunal intended the Commissioner of Central Excise to deal appropriately with the show cause notice which had stultified thereby and, especially, as events unfolded. Had the proceedings under rule 14 of CENVAT Credit Rules, 2004 been characterized as ‘protective demand’, the show cause notice,

even if superfluous, could have had a tolerated existence; the issuing authority, however, did not consider it superfluous as the element of penalty was a fresh tangent and, apparently, the only reason for its issue. The additional proposal, being without authority of law in rule 15 of CENVAT Credit Rules, 2004, was not only illegal in conception but also saps at the proposal for recovery appendant to other, and sole, purpose for initiating the show cause notice. Revenue need have no apprehension if claim for eligibility to refund is rejected at the higher appellate stages as proceedings under rule 14 of CENVAT Credit Rules, 2004 is not mode of recovery but a process of determining 'debt' owed to the sovereign; appellate determination also does the same. We need not go beyond observing that an order of appellate authority does not require separate adjudication proceedings to sanctify consequential recovery. We merely set out to eliminate the extraneous which, from exposition *supra*, is the order of Commissioner of Central Excise.

6. The principle of 'first strike' in overlap of jurisdictions excludes further life support for the order of Commissioner of Central Excise in the outlined circumstances. There is nothing original in the findings therein. It militates against the principle of uninfluenced outcome in adjudicatory proceedings as well as inappropriateness of 'poaching' upon facts that were before any other authority at the same time. Most importantly, it is the lack of prejudice to the interests of the public exchequer in setting aside the order of Commissioner of Central Excise

-– an undertaking bereft of application of mind – that weighs uppermost with us. Having done so, we proceed, uncluttered and unhandicapped, to consider the order of first appellate authority on the correctness of having upheld the ineligibility of the appellant for refund under rule 5 of CENVAT Credit Rules, 2004.

7. That goods had been exported by the appellant and the quantum thereof is not in controversy. That CENVAT credit of ₹85,82,969 had been accumulated is not doubted; nor that this represented the duty/tax discharged on 'input'/'input service' deployed for manufacture of exported goods. Though there was some speculation early on about the amount in claim having been reversed in the books of the appellant, that is naught but a curable defect and it is on record that the debits were effected on sanction of refund at the first stage. The sole ground for rejection was lack of conformity with

> *'RULE 5. Refund of CENVAT Credit. —*
>
> *'Where any input or input service is used in the manufacture of final product which is cleared for export under bond or letter of undertaking, as the case may be, or used in the intermediate product cleared for export, or used in providing output service which is exported, the CENVAT credit in respect of the input or input service so used shall be allowed to be utilized by the manufacturer or provider of output service towards payment of*
>
> *(i) duty of excise on any final product cleared for home consumption or for export on payment of duty; or*

(ii) service tax on output service

and where for any reason such adjustment is not possible, the manufacturer or the provider of output service shall be allowed refund of such amount subject to such safeguards, conditions and limitations, as may be specified, by the Central Government, by notification: …' (emphasis supplied)

and Appendix in notification 4 issued under empowerment *supra* specifying, *inter alia*, that

'4. The refund is allowed only in those circumscribed where a manufacturer or provider of output service is not in a position to utilize the input service credit allowed under Rule 3 of the said Rules against goods exported during the quarter or month to which the claim relates (hereinafter referred to as "the given period").'

was to be enforced as restraint on exercise of option by exporter. A further condition stipulated that

'5. The refund of unutilised input service credit will be restricted to the extent of the ratio of export turnover to the total turnover for the given period to which the claim relates i.e. Maximum Refund amount = Total Net CENVAT credit taken on input services during the given period x Export turnover/Total turnover

.....

Explanation: For the purposes of condition no. 5, -

1. "Export turnover" shall mean the sum total of the value of

[4] [no. 5/2006-CE (NT) dated 14th March 2006]

final products and output services exported during the given period in respect of which the exporter claims the facility of refund under this rule

2. "Total turnover" means the sum total of the value of

(a) all output services and exempted services provided, including value of services exported;

(b) all excisable and non-excisable goods cleared, including the value of goods exported;

(c) The value of bought out goods sold

during the given period.'

8. Learned Counsel submitted that it was evident from the balance remaining as credit at the end of each month that the refund claimed, being below the accumulated credit, was not utilizable for clearance of goods domestically.

9. Learned Authorized Representative contended that the stipulation in rule 5 of CENVAT Credit Rules, 2004, as well as in the attendant notification, did mandate monetization of credit as only a last resort.

10. We take note that the Tribunal had remanded the matters thus

'8. We find that as the Commissioner (Appeals) in the impugned order allowed the appeals filed by the Revenue on the ground that the refund claims are not sanctioned in accordance with the provisions of law. In these circumstances, we find that refund claims are to be considered afresh in view

> *of the provisions of Rule 5 of the Cenvat Credit Rules and the relevant notification. As we are remanding the matter to the adjudicating authority in respect of the impugned orders which are passed by the Commissioner (Appeals), therefore, the issue regarding recovery of erroneous refund by the Commissioner of Central Excise to decide afresh……'*

which, by restoring the claims for refund before the authority empowered under rule 5 of CENVAT Credit Rules, 2004, extinguished every milestone in the chronology of the disputes, after filing of the applications, from the narrative of the dispute commencing with the sanction of refund and upto the appeals filed before the Tribunal in the first round of litigation.

11. The Tribunal had not given any indication that the claims had been properly sanctioned by the original authority in the earlier round. The Tribunal had not given any indication that the claims deserved to be rejected either. Both were outcomes available to the authority under rule 5 of CENVAT Credit Rules, 2004 to venture upon and in accordance with law and procedure governing such refunds. Having considered rejection on the ground *supra*, it was incumbent on that official to communicate the reasons for such intendment to the applicant.

12. Insofar as the ground of rejection itself is concerned, we note that a mechanism for ascertainment of potential use of such accumulated credit, if not monetized, has not been designed. This would be

tantamount to vesting the device of tool for determining eligibility in the hands of officials and on case-to-case basis. The lower authorities have rendered a finding that the evidence of lack of wherewithal to utilise was not furnished. That is the detail which should have found a place in the show cause notice for effective opportunity of furnishing, or disclaiming availability, and, thus, paving the way for reasoned conclusion of proceedings. There was nothing on record for the appellant herein to respond upon and to be heard about. In the lack thereof, the order that was carried to the first appellate authority, who, too, overlooked the essential requirement in rejecting the challenge thereto, was not in conformity with the remand order of the Tribunal directing that the application be decided afresh.

13. For enabling compliance thereof, we set aside the impugned order of first appellate authority and restore the applications before the original authority for fresh processing in accordance with law and procedure as prescribed.

(Order pronounced in the open court on 02/12/2025)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*