IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CENTRAL EXCISE APPEAL NO. 13 OF 2007

M/s.Gauri Plasticulture P. Ltd. a company incorporated under the Companies Act, 1956, having its registered office at 1, Gauri-Hira Park, Near Gima Bridge, N.H.No.6, Savkheda, P.O. Box 114, Jalgaon – 425 001	}	Appellant
versus		
The Commissioner of Central Excise, Indore Commissionerate, HQRS, P.B.No.10, Manik Bagh Palace, Indore	}	Respondent

WITH
CENTRAL EXCISE APPEAL NO. 257 OF 2007

The Commissioner of Central Excise, Mumbai IV, New Central Excise Building, 115, M. K. Road, Churchgate, Mumbai-400 020	}	Appellant
versus		
Bombay Dyeing & Manufacturing Co. Ltd. Pandurang Budhkar Marg, Prabhadevi, Mumbai 400 025	}	Respondents

WITH
CENTRAL EXCISE APPEAL NO. 28 OF 2008

The Union of India through the Commissioner of Central Excise Mumbai I 115, M.K.Road, Opp. Churchgate Railway Station, Mumbai – 400 020	}	Appellant
versus		
M/s.Simplex Mills Co. Ltd. 30, Keshav Rao Khadye Marg,	}	

Sant Gadge Maharaj Chowk, }
Mumbai – 400 011 } Respondents

Mr.M.H.Patil with Mr.Anil Wani, Mr.Sachin Chitnis and Ms.Padmavati Patil for the appellant in CEXA/13/2007 and for respondents in CEXA Nos.257/2007 and 28/2008.

Mr.Pradeep S. Jetly with Mr.J.B.Mishra for the appellants in CEXA Nos. 257/2008 and 28/2008 and for the respondent in CEXA/13/2007.

CORAM :- S. C. DHARMADHIKARI,
R. D. DHANUKA &
SMT. BHARATI HARISH DANGRE, JJ.

RESERVED ON :- 21st DECEMBER, 2018
PRONOUNCED ON :- 14th JUNE, 2019

JUDGMENT :- (Per S.C.Dharmadhikari, J.)

1. This Bench has been constituted pursuant to an order passed on 23rd April, 2018 by a Division Bench of this court comprising of Hon'ble Mr.Justices A.S.Oka and A.K.Menon. In that order, the Division Bench expressed its disagreement with a prior Division Bench view of this court taken in the case of *Commissioner of Central Excise vs. Jain Vanguard Polybutylene Ltd.*[1] The Division Bench referred the following questions for opinion of this Larger Bench:-

> "(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?

1 **1020 (256) ELT 523 (Bom.)**

(b) Whether by exercising power under Section 11B of the said Act of 1944, a refund of un-utilised 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 vs Slovak India Trading Company Pvt Ltd.) can be read as a declaration of law under Article 141 of the Constitution of India?"

2. In terms of this reference, the Hon'ble the Chief Justice constituted this Larger Bench.

3. The facts are already set out succinctly in the referring order. A very brief reference is required to be made thereto in order to appreciate the challenge to the order passed by the said Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench at Mumbai (for short "the CESTAT"). The appellant in Central Excise Appeal No.13 of 2007 was engaged in manufacturing of reisin PVC pipes and fittings. There was a dispute regarding availability of small scale industries exemption ("SSI" for short) under the Notification dated 28th February, 1993. A show cause notice was issued for recovery of dues on clearance of the pipes during the period of denial of this exemption. The order-in-original was passed confirming the demand and a penalty was also imposed. The exemption was denied on the ground that the appellant was manufacturing pipes bearing a mark "Jain Pipe" and that was a brand name. An

appeal was preferred to the Commissioner (Appeals) and he allowed the appeal holding that this cannot be considered as a brand name. In view of the order passed in appeal, an application for refund was made seeking refund, but a show cause notice was issued proposing to reject the refund claim of Rs.8,41,043/- out of the total amount claimed on the ground that on surrender of registration certificate on 8th September, 2000, the entire un-utilised credit lapses and hence, subsequent reversal made was not permissible.

4. An order-in-original was passed rejecting this refund claim and an appeal was preferred against this order by the appellant. The Commissioner (Appeals) upheld the order-in-original on the ground that the appellant was not entitled to cash refund, but was entitled to credit in Cenvat Account after surrender of the registration certificate. An appeal was preferred by the appellant before the appellate tribunal and that appeal was referred to a Larger Bench. The Larger Bench rendered findings, which have been reproduced in para 5 of the referring order. After the Larger Bench answered the issues referred to it, the regular Bench of CESTAT dismissed the appeal by the order dated 30th March, 2007.

5. The challenge in Central Excise Appeal No. 13 of 2007 is to both orders, whereas, the other appeal was preferred by the Revenue and the backdrop in which that has been preferred is set out in paras 7 and 8 of the referring order. Central Excise Appeal Nos.257 of 2008 and 28 of 2008 were admitted on grounds which have been noted in para 10 of the order under reference.

6. Thereafter, the arguments are noted and the Division Bench was of the view that un-utilised amount of Cenvat Credit availed by the assessee, in the circumstances set out, can be allowed or not is the moot question. That question will have to be answered and that the view taken by the earlier Division Bench does not appear to be correct. That is how this reference has been made.

7. Before we proceed, we must note certain provisions of the Central Excise Act, 1944, which is an Act to consolidate and amend the law relating to Central duties of excise. The levy and collection of duty is dealt with by Chapter II. By section 2A, which appears in Chapter I, it is stated that in this Act, save as other wise expressly provided and unless the context otherwise requires, references to the expressions "duty", "duties", "duty of excise" and "duties of excise" shall be construed to include a reference to "Central Value Added Tax (CENVAT)". There is a power to grant exemption from duty of excise and it is undisputed

that there is a distinct provision (section 11B) enabling the claiming of refund. That section reads as under:-

> "**11B.Claim for refund of duty and interest, if any, paid on such duty-** (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 Commissioner of Central Excise before the expiry of one year from the relevant date in such form and manner as may be prescribed and the applicable 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.
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> Provided that where an application for refund has been made before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991 (40 of 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) as substituted by that Act.
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> Provided further that the limitation of one year shall not apply where any duty and interest, if any, paid on such duty has been paid under protest.
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> (2) If, on receipt of any such application, the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise is satisfied that the whole or any part of the duty excise and interest, if any, paid on such duty paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund:
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> Provided that the amount of duty of excise and interest, if any, paid on such duty as determined by the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise under the foregoing provisions of this sub-section shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to -

(a) rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;

(b) unspent advance deposits lying in balance in the applicant's current account maintained with the Principal Commissioner of Central Excise or Commissioner of Central Excise;

(c) refund of credit of duty paid on excisable goods used as inputs in accordance with the rules made, or any notification issued, under this Act;

(d) the duty of excise and interest, if any, paid on such duty paid by the manufacturer, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;

(e) the duty of excise and interest, if any, paid on such duty borne by the buyer, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;

(f) the duty of excise and interest, if any, paid on such duty borne by any other such class of applicants as the Central Government may, by notification in the Official Gazette, specify:

Provided further that no notification under clause (f) of the first proviso shall be issued unless in the opinion of the Central Government the incidence of duty and interest, if any, paid on such duty has not been passed on by the persons concerned to any other person.

(3) Notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal or any Court in any other provision of this Act or the rules made thereunder or any other law for the time being in force, no refund shall be made except as provided in sub-section (2).

(4) Every notification under clause (f) of the first proviso to sub-section (2) shall be laid before each House of Parliament, if it is sitting, as soon as may be after the issue of the notification, and, if it is not sitting, within seven days of its re-assembly, and the Central Government shall seek the approval of parliament to the notification by a resolution moved within a period of fifteen days beginning with the day on which the notification is so laid before the

House of the People and if Parliament makes any modification in the notification or directs that the notification should cease to have effect, the notification shall thereafter have effect only in such modified form or be of no effect, as the case may be, but without prejudice to the validity of anything previously done thereunder.

(5) For the removal of doubts, it is hereby declared that any notification issued under clause (f) of the first proviso to sub-section (2), including any such notification approved or modified under sub-section (4), may be rescinded by the Central Government at any time by notification in the Official Gazette.

Explanation. - For the purposes of this section, -

(A) "refund" includes rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;

(B) "relevant date" means, -

(a) in the case of goods exported out of India where a refund of excise duty paid is available in respect of the goods themselves or, as the case may be, the excisable materials used in the manufacture of such goods, -

(i) if the goods are exported by sea or air, the date on which the ship or the aircraft in which such goods are loaded, leaves India, or

(ii) if the goods are exported by land, the date on which such goods pass the frontier, or

(iii) if the goods are exported by post, the date of despatch of goods by the Post Office concerned to a place outside India;

(b) in the case of goods returned for being remade, refined, reconditioned, or subjected to any other similar process, in any factory, the date of entry into the factory for the purposes aforesaid;

(c) in the case of goods to which banderols are required to be affixed if removed for home consumption but not so required when exported outside India, if returned to a factory after having been removed from such factory for export out of India, the date of entry into the factory;

(d) in a case where a manufacturer is required to pay a sum, for a certain period, on the basis of the rate fixed by the Central Government by notification in the Official Gazette in full discharge of his liability for the duty leviable on his production of certain goods, if after the manufacturer has made the payment on the basis of such rate for any period but before the expiry of that period such rate is reduced, the date of such reduction;

(e) in the case of a person, other than the manufacturer, the date of purchase of the goods by such person;

(ea) in the case of goods which are exempt from payment of duty by a special order issued under sub-section (2) of section 5A, the date of issue of such order;

(eb) in case where duty of excise is paid provisionally under this act or the rules made thereunder, the date of adjustment of duty after the final assessment thereof;

(ec) in case where the duty becomes refundable as a consequence of judgment, decree, order or direction of appellate authority, Appellate Tribunal or any court, the date of such judgment, decree, order of direction;

(f) in any other case, the date of payment of duty.

8. A bare perusal of this provision and particularly proviso to sub-section (2) would denote that instead of crediting the amount of refund to the fund, it can be paid to the applicant seeking refund, if such amount is relatable, *inter alia*, to refund of credit of duty paid on excisable goods used as inputs in accordance with the rules made or any notification issued under this Act. The word "refund" is defined in the *Explanation* and it says that it includes rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India.

9. The argument of Mr.M.H.Patil learned advocate appearing on behalf of the appellant in Central Excise Appeal No. 13 of 2007 and respondents in Central Excise Appeal Nos. 257 of 2007 and 28 of 2008 is that if one peruses section 11B carefully, then, cash refund of accumulated credit lying un-utilised on account of closure of factory/ stopping of activity/ inability to use, is admissible. He invites our attention to Rule 5 of the Cenvat Credit Rules, 2004 to urge that this permits the un-utilised credit to be claimed and the language thereof is, therefore, construed accordingly. Our attention is also invited to sub-rule (2) of Rule 11 to urge that a refund claim can always be made in the event the conditions laid down therein are set out. Thus, our attention is invited to Rule 5, Rule 11 and Rule 3 of the Cenvat Credit Rules, 2004 in this behalf. The counsel would submit that the Cenvat credit is allowed as set out in Rule 3 and we must, therefore, construe the language of these provisions accordingly. He also invites our attention to the Additional Duties of Excise (Textiles and Textile Articles) Act, 1978 in this behalf. Mr.Patil would urge that the consistent view of the tribunal and in number of cases further denotes that such a claim cannot be denied.

10. Our attention is invited to the judgment of the CESTAT, Bengaluru in the case of *Slovak India Trading Private Limited vs.*

Commissioner of Central Excise (Bengaluru)[2] to urge that the appellant in that case claimed refund on un-utilised Cenvat Credit in their account as on the date of the closure of their factory. The Commissioner (Appeals) took a view that there is no provision under Rule 5 of the Cenvat Credit Rules to grant cash refund. The argument was that this order was not legal and proper for the reasons set out by the tribunal. The South Zonal Bench of the CESTAT referred to the view taken by the CESTAT, Delhi and Mumbai to hold that refund claimed is eligible to the assessee and refund has to be made in cash when the assessee goes out of the erstwhile Modvat Scheme or their unit is closed. The view is taken because of the consistent approach of the tribunal. The consistent approach was that such refund claims are logical and a refund has to be made in cash when the assessee goes out of the Modvat Scheme or the company is closed. Thus, appeal of Slovak was allowed.

11. The Union of India, aggrieved and dissatisfied with this view of the tribunal, preferred an appeal, namely, Central Excise Appeal No.5 of 2006 before the High Court of Karnataka at Bengaluru. In the judgment reported in 2006 (201) ELT 559, the Division Bench of the Karnataka High Court took a view that there is no express prohibition in Rule 5. Once there is a

2 **2006 (205) ELT 956**

manufacture referred to in Rule 5 and in the case on hand, there is no manufacture or closure in the light of closure of the company, then, Rule 5 is not available for the purpose of rejection of the claim. The claims have been allowed on the basis of closure of the factory and in the light of the assessee going out of Modvat scheme. With this conclusion, the appeals of the Revenue were dismissed.

12. Aggrieved and dissatisfied with this judgment and order of the High Court of Karnataka, the Revenue carried the matter to the Hon'ble Supreme Court and the Hon'ble Supreme Court came to the conclusion that the tribunal at Bengaluru relied upon the order of coordinate Benches of the tribunal and against which, no appeals were preferred by the Revenue. The learned Additional Solicitor General appeared on behalf of the Union of India and fairly conceded to the position that those decisions of the tribunal have not been appealed against. In view of this concession of the learned Additional Solicitor General, the Revenue's appeals were dismissed.

13. Mr.Patil would submit that in the case of *Jain Vanguard Polybutylene Ltd.* (supra), the tribunal at Mumbai followed the view taken in the case of *Slovak India Trading Company Pvt Ltd.* (supra) and concluded that the refund of un-utilised credit on

account of closure of factory was permissible. It, therefore, allowed the appeal of Jain Vanguard/the assessee and reversed the view of the Commissioner (Appeals).

14. When the Revenue appealed against the order of the CESTAT, Bombay in the case of *Jain Vanguard* (supra) to a Division Bench of this court, the Division Bench came to the conclusion that there was a concession recorded by the Hon'ble Supreme Court and by none other than the learned Additional Solicitor General. It is held by the Division Bench that notwithstanding this concession, it is not possible to say that the Special Leave Petition was dismissed only because of the concession. The concession was not given with regard to the correctness of the judgment of the High Court of Karnataka. It is in these circumstances that the Division Bench held that when the question for consideration on facts is almost identical to the cases before the various Benches of the tribunal, then, the Revenue cannot be allowed to take a different view. Following this principle, the Division Bench dismissed the Revenue's appeal. Mr.Patil would submit that the view taken in the case of *Jain Vanguard* (supra) was confirmed by the Hon'ble Supreme Court because the Hon'ble Supreme Court dismissed the appeal of the Union of India by observing that it finds no reason to interfere

with the order of the Division Bench in exercise of the discretion under Article 136 of the Constitution of India. Mr.Patil submits that merely because in the next line the Hon'ble Supreme Court says that the Special Leave Petition is dismissed leaving the question of law open would not mean that the later Division Bench in this case was free to differ from the view taken by the earlier Division Bench in *Jain Vanguard* (supra). Mr.Patil, therefore, would submit that the referring order, with great respect, is uncalled for, as even thereafter, several orders have been passed by tribunals all over India taking the same view. Once such view is accepted by the Revenue, then, it cannot be selective in its approach. The Revenue does not appeal or rather accepts the view taken by the other Benches of the CESTAT in India. It cannot then request the Division Bench of this court deciding the present appeals to adopt a different approach. Thus, we should not disturb this trend and emerging from the judgments of the Division Benches of atleast two High Courts. It is argued that we must uphold the consistent views of the tribunal.

15. Mr.Patil also submits that the lack of consistency in the approach of the Revenue would disable it from questioning the correctness of the view taken by the tribunal. Mr.Patil has relied upon the Modvat Scheme and invited our attention to Rule 57H

and 57AG of the Central Excise Rules, 1944, Rule 9 of the Cenvat Credit Rules, 2002 and Rule 11 of the Cenvat Credit Rules, 2004 as prevailing in 2017-18 to urge that the scheme has remained the same throughout. There is absolutely no departure from it at all.

16. Our attention has also been invited to the view taken by the North Zonal Bench of the CESTAT in the case of *Purvi Fabrics & Texturise (P) Ltd. vs. Commissioner of Central Excise, Jaipur III* to the effect that there is no legal provision existing for refund either by cash or cheque. The only exception carved out is that the refund in cash is granted as an incentive measure to the exporter. The provisions and particularly section 11B of the Central Excise Act provides for payment of amount of refund to the applicant only in situations specified in proviso to sub-section (2) of section 11B of the Central Excise Act, 1944. The argument before us is that when the Central Excise Rules permit the refund in cash on such duty only when the final goods are exported out of the country and the manufacturer is not in a position to utilise the credit towards the duty, the refund amount is to be given in RG 23A, Part II Account if the same is in operation. Mr.Patil submits that though the rejection of refund was upheld by the tribunal and the Hon'ble Supreme Court, still, the Hon'ble Supreme Court found that the tribunal has failed to consider one

contention with regard to interest and that claim of the appellant having not been examined, the matter was remanded back to the tribunal.

17. Mr.Patil brought to our notice the judgment of the Hon'ble Supreme Court in the case of *Collector of Central Excise, Pune vs. Dai Ichi Karkaria Ltd.*[3]. Mr.Patil finally attempted to urge that a long standing decision adopting a particular view should be followed. In that regard, our attention has been invited to the judgment in the case of *Shanker Raju vs. Union of India*[4]. Mr.Patil emphasises that the doctrine of binding precedent has a element of certainty and consistency. The pronouncement of law by the Larger Bench of the tribunal was binding on a Bench of two members and when an appeal against the judgment of both has been dismissed by the higher court, then, discipline requires that this consistent view must be followed. Mr.Patil also tried to emphasise before us that the doctrine of merger could not have been deviated from. Today, the judgment in the case of *Slovak India* (supra) has merged with the view taken by the Hon'ble Supreme Court. Hence, we should not reopen the controversy.

3 1999 (112) ELT 353 (SC)
4 2011 (271) ELT 492

18. On the other hand, Mr.Jetly appearing for the Revenue would submit that the referring order has rightly noted the controversy. In the referring order, this court has found that the attempt is to claim something which the law does not permit to be claimed at all. If the law does not permit something, no provision therein should construed to hold that it is also not prohibited. It not being prohibited, the provision has been erroneously construed as permitting the refund. This would amount to rewriting the provisions or reading into them something which they themselves do not provide. In these circumstances, according to Mr.Jetly, we must proceed to answer the questions referred accordingly. He submits that this court should hold that a refund of unutilised amount of Cenvat Credit on account of closure of manufacturing activities or inability to utilise input credit is not permitted. The order passed by the Hon'ble Supreme Court in *Slovak India* (supra) cannot be a declaration of law. It appears that the Revenue has brought to the notice of the Division Bench, the view of the larger Bench of the CESTAT in the case of *Steel Strips Ltd. vs. Commissioner of Central Excise, Ludhiana*[5]. The Revenue relied upon this judgment while urging that the claim of refund is not a matter of right unless vested by law. The plea of injustice or hardship cannot be raised to claim

5 **2011 (269) ELT 257 (Tri.)**

refund in the absence of statutory mandate. No equity or good conscience influence fiscal courts without the same being embedded to statutory provisions. Thus, strict compliance with law in matters of refund is a pre-requisite. This larger Bench judgment in the case of *Steel Strips* (supra), according to the Revenue, expressly refers to all prior views of the tribunal and answers the questions, accordingly. It also decides the issue of merger, which was pressed into service. Hence, the attention of this court is invited to the view taken in this matter and though it is claimed that an appeal has been admitted against this larger Bench order by the High Court of Punjab and Haryana, still, now there is at least a certainty. Now the tribunal's view is that refund of un-utilised Cenvat Credit on closure of unit was not admissible in the absence of express statutory mandate or provision of law.

19. Mr.Murtuza Nazmi learned advocate sought to render assistance to this court by bringing to our notice the views of the Hon'ble Supreme Court on interpretation of taxing statutes. It is contended that a refund is not axiomatic and nothing should be read in the provisions, enabling claiming of refund, which is expressly not there.

20. Thus, the narrow issue before us is whether cash refund is permissible when Cenvat Credit is un-utilised.

21. In this regard, a reference can usefully be made to the judgment of the Hon'ble Supreme Court setting out the fundamental legal principles. These are that in a fiscal statute, nothing can be read, into its provisions and rather should not be read, which is expressly not there. In other words, an implied meaning cannot be given. The Hon'ble Supreme Court in one of the decisions, in the case of *Union of India and Ors. vs. Ind-Swift Laboratories Limited*[6] summarised the legal position thus:-

> "20. A taxing statute must be interpreted in the light of what is clearly expressed. It is not permissible to import provisions in a taxing statute so as to supply any assumed deficiency. In support of the same we may refer to the decision of this Court in CST v. Modi Sugar Mills Ltd. wherein this Court at AIR para 11 has observed as follows:
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> > "11. .....In interpreting a taxing statute, equitable considerations are entirely out of place. Nor can taxing statutes be interpreted on any presumptions or assumptions. The court must look squarely at the words of the statute and interpret them. It must interpret a taxing statute in the light of what is clearly expressed: it cannot imply anything which is not expressed; it cannot import provisions in the statutes so as to supply any assumed deficiency."
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> 21. Therefore, the attempt of the High Court to read down the provision by way of substituting the word "or" by an "and" so as to give relief to the assessee is found to be erroneous. In that regard the submission of the counsel for the appellant is well founded that once the said credit is taken the beneficiary is at liberty to utilise the same, immediately thereafter, subject to the Credit Rules."

22. In the case at hand, we are considering a claim of refund of duty. Section 11B(1) clearly says that a person claiming refund has to make an application for refund of such duty before the

6 **(2011) 4 SCC 635**

expiry of the period prescribed and in such form and manner. The application has to be accompanied by such documentary or other evidence as the applicant may furnish to establish that the amount of duty of excise, in relation to which such refund is claimed, was collected from or paid by him and incidence of such duty had not been passed by him to any other person. The later provision enabling the claiming of refund is now worded differently. We have reproduced it and now it is only when the proviso is attracted that the amount of refund can be paid over to the applicant or else it has to be credited to the fund. Even earlier, the amount used to be credited to the fund, but the proviso says that instead of being credited to the fund, it can be paid to the applicant if such amount in this case is relatable to refund of credit of duty paid on excisable goods used as inputs in accordance with the rules made. The crucial words are that "the refund of credit of duty paid on excisable goods used as inputs in accordance with the rules made or any notification issued under this Act". If the excisable goods are not used as inputs in accordance with the rules made, to our mind, there is no question of any refund. Our view gets support and reinforcement from the language of the rules themselves. Mr.Patil relies upon Rule 5 of the Cenvat Credit Rules, 2004. That Rule reads as under:-

"**RULE 5. Refund of CENVAT Credit.-** Where any input or input service is used in the final products which is cleared for export under bond or letter of undertaking, as the case may be, or used in the imtermediate products 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 products 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 shall be allowed refund of such amount subject to such safeguards, conditions and limitations, as may be specified, by the Central Government, by notification:

Provided that no refund of credit shall be allowed if the manufacturer or provider of output service avails of drawback allowed under the Customs and Central Excise Duties Drawback Rules, 1995, or claims a rebate of duty under the Central Excise Rules, 2002, in respect of such duty.

Provided further that no credit of the additional duty leviable under sub-section (5) of section 3 of the Customs Tariff Act, as amended by clause 72 of the Finance Bill, 2005, the clause which has, by virtue of the declaration made in the said Finance Bill, under the Provisional Collection of Taxes Act, 1931, the force of law, shall be utilised for payment of service tax on any output service.

Explanation : For the purposes of this rule, the words 'output service which are exported' means any output service in respect of which payment is received in India in convertible foreign exchange and the same is not repatriated from, or sent outside, India.

Provided that the CENVAT credit or inputs shall not be denied to job worker referred to in rule 12AA of the Central Excise Rules, 2002, on the ground that the said inputs are used in the manufacture of goods cleared without payment of duty under the provisions of that rule."

23. Thus, a perusal of this rule indicates that where any input or input service is used in the final product, which is cleared for

export etc. or used in the intermediate product cleared for export or used for providing output service which is exported, then, the Cenvat Credit in respect of the input or input service so used shall be allowed to be utilised by the manufacturer or provider of output service towards payment of duty of excise on any final product cleared for home consumption or for export on payment of duty or service tax on output service. Whether for any reason, such adjustment is not possible, the manufacturer shall be allowed refund of such amount subject to such safeguards, conditions and limitation as may be specified by the Central Government by a notification.

24. The word input is defined in Rule 2(k) of the Cenvat Credit Rules, 2004 to mean all goods used in the factory by the manufacturer of the final product or all goods including accessories, cleared along with the final product, the value of which is included in the value of the final product and goods used for providing free warranty for final products or all goods used for generation of electricity or steam for captive use or all goods used for providing any output service. We are not concerned with the excluded portion, but the consistent thread is that input means all goods used in the factory by the manufacturer of the final product. In the situation that is presented before us and

particularly in the central excise appeals at hand, it is evident that the order-in-original has been passed by accepting the plea that the assessee was availing Cenvat Credit of duties paid on the inputs purchased and was utilising the same for payment of additional duties of excise on final products at the time of clearance of the same. According to the case of the assessee, by a notification dated 9th July, 2004, the Government of India had exempted all goods appearing within the Schedule of the said Act of 1978. The assessee utilised credit balance of additional duty of excise in their RG-23A Part II Register as on 6th September, 2004, which could not be utilised in future and had remained un-utilised. The condition was that since none of the products are charged to additional duties of excise, it would not be possible to utilise the said un-utilised credit and the assessee was liable for cash refund. This plea was not accepted in the order-in-original, but came to be accepted by the appellate authority. The Revenue approached the CESTAT against the appellate authority's view, but the CESTAT dismissed the Revenue's appeal. Now, if the cash refund was not permissible, then, it is evident that by reading into the provision something which is expressly not there, such a refund was sought.

25. In the case of *Commissioner of Central Excise vs. Gujarat Narmada Fertilizers Company Limited*[7], the Hon'ble Supreme Court construed the provisions and held as under:-

> "15. As can be seen from the submissions, the contention of the assessee is that exclusion of fuel inputs from the purview of sub-rule (2) of Rule 6 would mean that such inputs are also automatically excluded from sub-rule (1) whereas according to the Department sub-rule (1) is a general rule which provides, that except for the circumstances mentioned in sub-rule (2), CENVAT Credit shall not be allowed on such quantity of inputs used in the manufacture of exempted goods and even though fuel inputs are excluded from sub-rule (2), such inputs would still fall under sub-rule (1).
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> 16. In our view, sub-rule (1) is plenary. It restates a principle, namely, the CENVAT credit for duty paid on inputs used in the manufacture of exempted final products is not allowable. This principle is inbuilt in the very structure of the CENVAT scheme. Sub-rule (1), therefore, merely highlights that principles. Sub-rule (1) covers all inputs, including fuel, whereas sub-rule (2) refers to non-fuel inputs. Sub-rule (2) covers a situation where common cenvatted inputs are used in or in relation to manufacture of dutiable final product and exempted final product but the fuel input is excluded from that sub-rule. However, exclusion of fuel input vis-a-vis non-fuel input would still fall in sub-rule (1). As stated above, sub-rule (1) is plenary, hence, it cannot be said that because sub-rule (2) is inapplicable to fuel input(s), CENVAT credit is automatically available to such inputs even if they are used in the manufacture of exempted goods."

26. This view follows that taken in the case of *Maruti Suzuki Limited vs. Commissioner of Central Excise, Delhi III*[8]. In this judgment, the Hon'ble Supreme Court held as under:-

> "28. Coming to the statutory definition of the word "input" in Rule 2(g) in the CENVAT Credit Rules, 2002, it may be noted that the said definition of the word "input" can be divided into three parts, namely :

7 (2009) 9 SCC 101
8 (2009) 9 SCC 193

(i) specific part

(ii) inclusive part

(iii) place of use

Coming to the specific part, one finds that the word "input" is defined to mean all goods, except light diesel oil, high speed diesel oil and petrol, *used in or in relation to the manufacture of final products* whether directly or indirectly and whether contained in the final product or not. The crucial requirement, therefore, is that all goods "used in or in relation to the manufacture" of final products qualify as "input". This presupposes that the element of "manufacture" must be present.

29. In *J.K.Cotton Spg. & Wvg. Mills Co. Ltd. v. STO [AIR 1965 SC 1310:(1965) 16 STC 563]* this Court held that the expression "in the manufacture of goods" should normally encompass the entire process carried on by the dealer of converting raw material into finished goods. It was further held that where any particular process (generation of electricity) is so integrally connected with the ultimate production of goods, that, but for such process, manufacture of goods would be inexpedient, then goods required in such process would fall within the expression "in the manufacture of goods".

30. In *Union Carbide India Ltd. v. CCE [(1996) 86 ELT 613 (Tri)]* a larger Bench of CEGAT observed that a wide impact of the expression "used in relation to manufacture" must be allowed its natural play. Inputs (raw materials) used in the entire process of conversion into finished products or any other process (like electricity generation) which is integrally connected with the ultimate production of final product has to fall within the above expression. It was observed that the purpose was to widen the scope, ambit and content of "inputs". According to the Special Bench of CEGAT, the purpose behind the above expression is to widen the ambit of the definition so as to attract all goods, which do not enter directly or indirectly into the finished product, but are used in any activity concerned with or pertaining to the manufacture of the finished product.

34. In the past, there was a controversy as to what is the meaning of the word "input", conceptually. It was argued by the Department in a number of cases that if the identity of the input is not contained in the final product then such an item would not qualify as input. In order to get over this

controversy in the above definition of "input", the legislature has clarified that even if an item is not contained in the final product still it would be classifiable as an "input" under the above definition. In other words, it has been clarified by the definition of "input" that the following considerations will not be relevant :

(a) use of input in the manufacturing process be it direct or indirect;

(b) even if the input is not contained in the final product, it would still be covered by the definition.

These considerations have been made irrelevant by the use of the expression "goods used in or in relation to the manufacture of final product" which, as stated above, is the crucial requirement of the definition of "input".

38. In each case it has to be established that inputs mentioned in the inclusive part are "used in or in relation to the manufacture of final product". It is the functional utility of the said item which would constitute the relevant consideration. Unless and until the said input is used in or in relation to the manufacture of final product within the factory of production, the said item would not become an eligible input. The said expression "used in or in relation to the manufacture" has many shades and would cover various situations based on the purpose for which the input is used. However, the specified input would become eligible for credit only when used in or in relation to the manufacture of final product."

27. The attempt made to rely upon the transitional provision, particularly Rule 11 carries the case no further. Rule 11 of the Cenvat Credit Rules, 2004 reads as under:-

"**Rule 11. Transitional provision.-** (1) Any amount of credit earned by a manufacturer under the CENVAT Credit Rules, 2002, as they existed prior to the 10th day of September, 2004 or by a provider of output service under the Service Tax Credit Rules, 2002, as they existed prior to the 10th day of September, 2004, and remaining unutilized on that day shall be allowed as CENVAT credit to such manufacturer or provider of output service under these rules, and be allowed to be utilized in accordance with these rules.

(2) A manufacturer who opts for exemption from the whole of the duty of excise leviable on goods manufactured by him under a notification based on the value of quantity of clearances in a financial year, and who has been taking CENVAT credit on inputs or input services before such option is exercised, shall be required to pay an amount equivalent to the CENVAT credit, if any, allowed to him in respect of inputs lying in stock or in process or contained in final products lying in stock on the date when such option is exercised and after deducting the said amount from the balance, if any, lying in his credit, the balance, if any, still remaining shall lapse and shall not be allowed to be utilized for payment of duty on any excisable goods, whether cleared for home consumption or for export.

(3) A manufacturer or producer of a final product shall be required to pay an amount equivalent to the CENVAT credit, if any, taken by him in respect of inputs received for use in the manufacture of the said final product and is lying in stock or in process or is contained in the final product lying in stock, if,-

(i) he opts for exemption from whole of the duty of excise leviable on the said final product manufactured or produced by him under a notification issued under section 5A of the Act; or

(ii) the said final product has been exempted absolutely, under section 5A of the Act, and after deducting the said amount from the balance of CENVAT credit, if any, lying in his credit, the balance, if any, still remaining shall lapse and shall not be allowed to be utilized for payment of duty on any other final product whether cleared for home consumption or for export, or for payment of service tax on any output service, whether provided in India or exported.

(4) A provider of output service shall be required to pay an amount equivalent to the CENVAT credit, if any, taken by him in respect of inputs received for providing the said service and is lying in stock or is contained in the taxable service pending to be provided, when he opts for exemption from payment of whole of the service tax leviable on such taxable service under a notification issued under section 93 of the Finance Act, 1994 (32 of 1994) and after deducting the said amount from the balance of CENVAT credit, if any, lying in his credit, the balance, if any, still remaining shall lapse and shall not be allowed to be utilized for payment of duty on any excisable goods, whether cleared for home consumption or for export or for payment of service tax on

any other output service, whether provided in India or exported."

28. It is evident from a reading of the transitional provision that any amount of credit earned by a manufacturer under the Cenvat Credit Rules, 2002, as they existed prior to the 10th September, 2004 or by a provider of output service under the Service Tax Credit Rules, 2002 as they existed prior to 10th September, 2004 and remaining un-utilised on that day shall be allowed as Cenvat Credit to such manufacturer or provider of output service under these rules, and be allowed to be utilised in accordance with these rules. This is how the transitional provision enables carrying forward of the un-utilised Cenvat Credit. That is a distinct contingency altogether. That transitional provision does not enable us to hold that the amount of un-utilised Cenvat Credit can be refunded in cash.

29. We do not think that by taking assistance of this provision, we will be able to hold as contended by Mr.Patil that the Cenvat Credit can be refunded even in relation to those inputs which have not been used in the manufacture of the final product or the exported goods. We are called upon to read something in the substantive rule and which is totally absent therein. When Rule 5 follows Rule 4, which is titled as "Conditions for Allowing Cenvat Credit", then, we must understand the scheme in such manner as

would make the law workable and consistent. Refund of Cenvat Credit in terms of Rule 5 is permissible only when there is a clearance of a final product of a manufacturer or of an intermediate product for export without payment of duty under a bond or letter of undertaking of a service provider, who provides an output service which is exported without payment of tax and by applying the format which is carved out with effect from 1st April, 2012 by the substituted Rule 5.

30. Prior to such substitution, we have not seen anything in Rule 5 permitting refund of un-utilised credit. We are not dealing with a situation or case of a manufacturer or producer of final products seeks to claim Cenvat Credit of the duty paid on inputs lying in stock or in process when the manufactured or produced goods cease to be exempted goods or any goods become excisable (see Rule 3(2) of the Cenvat Credit Rules, 2004). Thus, refund of Cenvat Credit is permissible where any input is used for the final product which is cleared for export under bond or letter of undertaking, as the case may be, or used in the intermediate products cleared for export. In the scheme of the rules, therefore, what is sought by the assessee is not permissible. Thus, the attempt by the assessee to claim refund of un-utilised Cenvat Credit cannot be upheld. Merely because the inputs were lying

un-utilised or were capable of being utilised, but the manufacturing activities came to a stand still on account of closure of the factory would not enable the assessee to claim refund of Cenvat Credit. That such credit can be availed of provided the inputs are used and not otherwise is clear from the scheme of the rules to which we have made a detailed reference in the foregoing paragraphs.

31. The sheet anchor of Mr.Patil's arguments is the judgment of the earlier Division Bench of this court and that is based on the view taken by the High Court of Karnataka. The High Court of Karnataka has not discussed the scheme of Cenvat Credit in details. The South Zonal Bench of the CESTAT in *Slovak India* (supra) considered the case of refund of un-utilised Cenvat Credit on account of closure of the factory of the said Slovak India. The Commissioner (Appeals) took the view that there is no provision in Rule 5 of the Cenvat Credit Rules to grant cash refund. After being approached, what the CESTAT observed is that there is a consistent view taken by the tribunal that such claim is eligible and the assessee can seek refund when it goes out of the Modvat scheme (predecessor of Cenvat) or the unit is closed. This is the reasoning in the tribunal's order and though the appeal of the Revenue before the High Court of Karnataka at Bengaluru raised

several grounds and pleas, the High Court referred to the arguments and in para 4 of its order, reproduced Rule 5 of the Cenvat Credit Rules, 2002. In para 5, the reasoning of the High Court of Karnataka reads thus:-

> "5. There is no express prohibition in terms of Rule 5. Even otherwise, it refers to a manufacturer as we see from Rule 5 itself. Admittedly, in the case on hand, there is no manufacture in the light of closure of the Company. Therefore, Rule 5 is not available for the purpose of rejection as rightly rules by the Tribunal. The Tribunal has noticed that various case laws in which similar claims were allowed. The Tribunal, in our view, is fully justified in ordering refund particularly in the light of the closure of the factory and in the light of the assessee coming out of the Modvat Scheme. In these circumstances, we answer all the three questions as framed in para 17 against the Revenue and in favour of the assessee."

32. Thus, the High Court of Karnataka took the view that there is no express prohibition in terms of Rule 5 and that rule refers to a manufacturer. Thus, even if there is no manufacture in the light of the closure of the factory, the assessee being a manufacturer is construed as one coming out of the Modvat scheme but still eligible for cash refund. The factory is closed and the inputs were not used in the manufacture of a final product is, thus, overlooked. So long as the assessee is a manufacturer even if his factory is closed, the input credit was available, is thus the view.. Hence, the refund was held to be permissible.

33. When the matter was carried to the Hon'ble Supreme Court by the Revenue, the Hon'ble Supreme Court noted the concession

of the learned Additional Solicitor General. That concession is that the views of the tribunals to the aforesaid effect have not been appealed against by the Revenue/Union of India. Pertinently, there is no concession by the Additional Solicitor General of India on the point of law. Hence, going by this concession on fact, the Special Leave Petition of the Revenue was dismissed. This, by no stretch of imagination, is a confirmation or approval of the view taken by the South Zonal Bench of the Tribunal at Bengaluru or the High Court of Karnataka.

34. Pertinently, when the matter was brought before this court in the case of *Jain Venguard* (supra), this court, relying upon the judgment in the case of *Slovak India* (supra) and the order in the Special Leave Petition, dismissed the Revenue's appeal. The aggrieved Revenue, carried the matter to the Hon'ble Supreme Court and the order passed on that Special Leave Petition reads as under:-

> "Delay condoned.
>
> We find no reason to interfere with the impugned order in exercise of our discretion under Article 136 of the Constitution. The Special Leave Petition is, accordingly, dismissed leaving the question of law open."

35. The Special Leave Petition was dismissed, but the question of law was expressly kept open. It is in these circumstances that we are not in agreement with Mr.Patil that the issue or the

controversy before us stands concluded against the Revenue. The question of law was still open to be raised and equally examined by us. There is no question of judicial discipline in such matters. The counsel relied upon this principle of judicial discipline by inviting our attention to the judgment of the Hon'ble Rajasthan High Court in the case of *Welcure Drugs and Pharmaceuticals Ltd. vs. Commissioner of Central Excise, Jaipur reported in 2018 (15) GST Law Times Page 257*. There, the Hon'ble Rajasthan High Court concluded that the Revenue cannot seek to urge before that High Court that the view taken by four different High Courts approving the order of CESTAT has lost its persuasive value, particularly when the Special Leave Petitions against the view taken by four different High Courts were either not filed or filed but not entertained. Thus, the tribunals have taken a consistent view and the Revenue could not succeed in having that set aside. It is in these circumstances, the Rajasthan High Court negatived the contention of the Revenue that the tribunal under the jurisdiction of that High Court could have distinguished the orders and judgments of its Benches. That was found to be contrary to the judicial discipline. It is in these circumstances so also when there was a larger Bench view of the tribunal having a binding effect, that the principle of judicial discipline was pressed into service.

36. After the view taken in *Steel Strips Ltd.* (supra) and which was also fairly brought to our notice, it is evident that this principle has no application to the facts and circumstances before us.

37. Finally, we do not find any merit in the arguments of Mr.Patil to the effect that if the earlier judgment is not appealed against, an appeal against the subsequent order or judgment passed relying upon the earlier judgment cannot be sustained. He pressed into service the judgment of the Hon'ble Supreme Court in the case of *Birla Corporation Ltd. vs. Commissioner of Central Excise*[9]. There, the issue was entirely different. The issue was whether the duty paid on spares of rope way used for the purpose of transporting the crushed limestone from the mines located 4.2 kilometer away to the factory is entitled to Modvat Credit. That was disallowed on the ground that rope way transports raw material from the mines to the factory premises and is not a material handling equipment within the factory premises. It was not disputed that the crushed limestone is brought from the mines to the factory premises where it is deposited utilising the rope way as a means of transportation.

9 **2005 (186) ELT 266 (SC)**

38. An identical issue came up for consideration in the case of *J.K.Udaipur Udyog Limited vs. Commissioner of Central Excise*[10]. In that case, the tribunal followed the principles laid down in its prior decision and held that the Modvat Credit was admissible. A civil appeal was preferred to the Hon'ble Supreme Court, but that was dismissed as not pressed. That is because the judgment relied upon by the tribunal in the case of *J.K.Udaipur Udyog Limited* (supra) and *the Commissioner of Central Excise, Chennai vs. Pepsico India Holdings Limited* [11] was accepted by the Chief Commissioner of Central Excise, Chennai. In these circumstances, the Special Leave Petition by Birla Corporation Limited came to be allowed. The Hon'ble Supreme Court held that when same question arises for consideration, the facts are almost identical, then, the Revenue cannot be permitted to take a different stand. More so, when the earlier appeal involving identical issue was not pressed and therefore, dismissed. Hence, a contrary stand cannot be taken and that will confuse everybody. This judgment, therefore, has no application to the issue before us.

39. The referring order has already discussed in detail as to how the principle of merger cannot be invoked in this case. In the

10 **2001 (130) ELT 996**
11 **2001(130) ELT 193 (Tri.)**

order passed in the case of *Jain Venguard* (supra), the question of law was expressly kept open. Hence, the earlier view of the tribunal does not merge with dismissal of the Special Leave Petition in the case of *Slovak India* (supra). Hence, this principle has also no application.

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.

41. The reference is disposed of accordingly. The appeals filed by respective parties may now be listed before the Division Bench for disposal in accordance with our judgment.

(S.C.DHARMADHIKARI, J.)

(R. D. DHANUKA, J.)

(SMT. BHARATI HARISH DANGRE, J.)