CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.

PRINCIPAL BENCH - COURT NO. II

Excise Appeal No. 50825 of 2019

(Arising out of order-in-appeal No. 74/CE/DLH/2018 dated 08.10.2018 passed by the Commissioner (Appeals-I), Central Goods, Service Tax and Central Excise, Delhi).

M/s Scot Innovations Wires & Cables Private Limited — **Appellant**
10, Commissioner Lane
Civil Lines, Delhi-110054.

VERSUS

Commissioner of Central Excise and Central Goods, Service Tax, — **Respondent**
17B, IAEA House, Inderprastha House
New Delhi.
&
Commissioner of Central Excise
C. R. Building, I. P. Estate
New Delhi.

APPEARANCE:

Shri Tarun Chawla, Shri Anurag Mishra & Ms. Aditi Seetha, Advocates for the appellant.

Ms. Tamanna Alam, Authorised Representative for the respondent

CORAM:

HON'BLE SHRI ANIL CHOUDHARY, MEMBER (JUDICIAL)

FINAL ORDER NO. 50753/2020

DATE OF HEARING: 18.12.2019
DATE OF DECISION: 01.09.2020

ANIL CHOUDHARY:

The present appeal is filed against the impugned order dated 08.10.2018 passed by the Commissioner (Appeals-I), Central Goods, Service Tax and Central Excise, Delhi.

2. Brief facts of the case are that M/s Scot Innovations Wires & Cables Pvt. Limited is registered with Central Excise Department vide Central Excise Registration No. AAKCS3140EEM001 and engaged in the manufacture of power control cable under Chapter Heading 8544 1190. The appellant vide letter dated 23.06.2015 requested to transfer the unutilised credit of Rs.48,29,318/- as they want to close the Delhi unit & merge with its Baddi unit. The appellant had deposited the 43 purchase bills pertaining to which the cenvat credit was taken and transfer was sought.

3. The appellant informed that the Baddi Unit was registered with the Department on 05.05.2015 and had not taken cenvat credit as they were availing Area Based Exemption during the period prior to 05.05.2015. It is also submitted that the input credit was taken by the Delhi Unit and the material was transferred to the Baddi Unit for job work and the cenvat credit availed as the principal manufacturer. It was also submitted that no stock was available with the appellant at Delhi the goods were cleared under exemption vide Notification No. 12/2012-CE dated 27.03.2012. Show cause notice was issued on 20.09.2016 for disallowing taking of credit of Rs. 48,29,318/- and penalty was also proposed. Appellant had shown the said credit and clearance of goods in the ER-1 return. Appellant filed reply to the show cause notice dated 26.10.2017 requesting alternatively for refund of the unutilised credit of Rs. 48,29,318/-.

4. The cenvat credit demand was confirmed vide order-in-original dated 28.03.2018 whereby the adjudicating authority had also rejected the request for transferring credit of Rs. 48,29,318/-, disallow the amount of cenvat credit and imposed penalty of Rs. 48,29,318/- under Rule 15 of Cenvat Credit Rules, 2004. The appellant filed appeal against the order in original dated 28.03.2018 before the appellate authority.

5. Learned Commissioner (Appeals) was pleased to record the finding that under the facts and circumstances, availment of cenvat credit is proper and the same has been wrongly denied to the appellant. He also observed that Department never alleged diversion of any inputs or any other discrepancy. Learned Commissioner further held that as the appellant was clearing their entire production under the exemption notification they were not entitled to avail cenvat credit in terms of Rule 6(1) and (2) of Cenvat Credit Rules. Accordingly, he upheld the disallowance of cenvat credit. As regards penalty imposed under Rule 15 read with Section 11AC of the Act, he was pleased to set aside the penalty observing that there is no suppression or misinformation with the Department. Being aggrieved the appellant in appeal before this Tribunal.

6. As per grounds of appeal, it is urged that the impugned order is contrary to facts and attendant provisions of law and if permitted to stand would result in grave miscarriage of justice. Further it is urged that the appellant had submitted the photocopy of ER-1, Part-

1 and also submitted prescribed undertaking given by L&T Construction that the material supplied by the appellant was received at the Amarvati site (power project) without paying the excise duty, which shows the fulfilment of the condition of exemption notification. It is also submitted that the appellant does not have any inputs as such or under process in the stock, as the clearance of finished goods was made under exemption vide Notification No. 12/2012-CE dated 17.03.2012. Therefore, the condition under Rule 10(3) of Cenvat Credit Rules for transfer of cenvat credit is fulfilled. It has been so laid down in Tribunal decision in **Fabrico India (P) Ltd. vs. CCE (F. O. No. A/747/2012-EX(BR) in C.E. Appeal No.38 of 2011 dt. 27.6.2012)**. Appellant also relied on the judgment of Hon'ble High Court in **CCE, Pondicherry vs. CESTAT -2009 (240) ELT 367 (Mad.)** and **Shree Rama Multi Tech Ltd. vs. CCE, Pondicherry - 2007 (217) ELT 136 (Tri. Chennai)** and **AAR AAY Products Pvt. Ltd. vs. CCE, New Delhi-2003 (157) ELT 40 (Tri. Del.)** in support of their claim.

7. It is further submitted that as appellant is not able to make use of cenvat credit, it be refunded by way of cash. He relies on the following decisions **CCE vs. Kochar Sung-Up acrylic Ltd. -2010 (259) ELT 713**, **Raymond Ltd. vs. CCE-2011 (274) ELT 513** & **CCE vs. Birla Textiles Mills -2010 (257) ELT 146 = 2011 (21) STR 340**. It is also submitted that there is no provision prohibiting the refund of duty, paid through cenvat credit account, in cash, and

in this regard he relied upon the judgments of this Tribunal in **CCE, Ahmedabad-I vs. Arcoy Industries -2004 (170) ELT 507 (Tri. Mum.)** and **Supreme Industries Ltd. vs. CCE, Mumbai-V in 2008 (226) ELT 354 (Tri. Mumbai)**. The appellant's factory was closed down, the amount of refund was required to be sanctioned in cash as they were not in a position to utilise the cenvat credit, if the amount is refunded to them through cenvat credit. Appellant relied on the decision of **CCE, Jalandhar vs. Kochar Sung-up Acrylic Ltd. -2010 (259) ELT 713 (T)**.

8. There is no dispute that the appellant is claiming refund of excise duty paid on inputs and the goods were cleared under the exemption to mega power projects, wherein excise duty do not attract and further the cenvat credit of excise duty cannot be utilised; the appellant claims the refund of excise duty under Rule 5 of Cenvat Credit Rules. This Tribunal in **CCE vs. D.C. Polyester Pvt. Ltd.** held that "Board's Circular No. 701/17/2003-CX dated 12.03.2003 allows refund of un-utilised credit of Additional Duty of Excise (Goods of Special Importance) on export of the finished goods, even if such finished goods are not subjected to levy of the said additional duty – Department's appeal was rejected in view of Rule 5 of CCR. The above ruling has been affirmed by Hon'ble High Court of Bombay in **2009 (242) ELT 348 (Bom.)**. In addition to above, CESTAT, Bangalore in the case of **MRF Ltd. vs. CCE, Hyderabad -2004 (171) ELT 471 (Tri.)** has held that "Additional Excise duty – accumulated on account of export of goods and could

not be utilised as goods cleared to domestic market, were not chargeable to AED – Refund of credit is permissible". Further, this Tribunal (Mumbai) in the case of **Virender Processors Ltd.** vide final order No. A/1437-1437/WZB/2005/C-II/E dated 24/25-10-2005 rejected the department's appeal involving the similar issue. In other words, the department contended that the refund in terms of Rule 57AC(7) and Rule 57F(13) is admissible only if the goods are exported under bond and not when the same are exported under rebate claim. In this case, one of the conditions under which the refund is rejected was that the appellant exported the goods under rebate and not under bond. Further the Tribunal in **CCE, Rohtak vs. Mittal International** (supra) held that 'refund of cenvat / modvat of AED (T&TA) paid on inputs used in goods exported under rebate, issue settled by Tribunal in **2007 (213) ELT 117,** held that final product not subject to AED (T&TA) and rebate claim being confined to basic excise duty, refund of unutilised credit of additional excise duty admissible. Appeal filed by the Revenue was dismissed by High court under Rule 5 of CCR, 2002/2004. It is further submitted that the claim of refund is not subjected to limitation under Section 11B as it is the claim of refund of unutilised credit.

9. The Hon'ble Karnataka High Court in **UoI vs. Slovak India Trading Co. Pvt. Ltd. 2006 (201) ELT 559 (Kar.)** =2008 (10) STR 101 (Kar.) has held that in the absence of any express prohibitory provisions, unutilised credit is admissible as cash refund. It has been consistently held by the following decisions that the

refund of unutilised credit is permissible when it is not possible to utilise such credit-

(a) 2004 (169) ELT 162 (Tri.) Shree Prakash Textile

(b) 2004 (170) ELT 507 (Tri.) Arcoy Industries

(c) 2003 (158) ELT 215 (Tri.) Babu Textiles

(d) 1990 (48) ELT 333 (AP) Coromondal Fertilisers

(e) 2006 (202) ELT 199 (T. LB) Gauri Plasticultrue

(f) 2006 (201) ELT 559 (Kar.) Slovak India Trading

(g) 2007 (80) RLT 545 (Tri.) Bombay Dyeing & Mfg. Co. Ltd.

(h) National Organic Chemical -1994 (70) ELT 722 (T).

This decision is upheld by the Supreme Court as reported in 1996 (84) ELT A-106 (SC).

10. It is further submitted that the Adjudicating Authority had given the finding at para No. 6.2 that the appellant had not given the job work register or accounting transactions etc., which is baseless as the summary of the jobwork was submitted and the same had been verified by the range office. It is relevant to state that same is part of the RUD of the subject show cause notice. Therefore, denial of transfer of cenvat credit vide the impugned order is liable to be set aside. It is submitted that the appellate authority had admitted the contention of the appellant that the reason for denial of credit by the adjudicating authority was not justified. This finding is evident from para 11 of the impugned order. Thereafter, the appellate authority erred and disallowed the cenvat credit under Rule 6(1) & (2) of Cenvat Credit Rules, 2004,

observing that appellant was clearing their entire production under exemption Notification No. 12/2012-CE, thus they could not have availed input credit. He therefore, prays for allowing of the appeal.

11. Learned Authorised Representative Ms. Tamanna Alam for Revenue opposes the appeal and rely upon the findings in the impugned order. She further reiterated that under the facts and circumstances appellant is not entitled to cash refund of unutilised cenvat credit. Rule 5 of Cenvat Credit Rules provides for refund of unutilised cenvat credit in specific case of export etc. of finished goods.

12. Having considered the rival contentions, I find that admittedly appellant have maintained proper record of their transactions including taking of cenvat credit on the eligible inputs. Appellant have claimed transfer/ shifting of their Delhi unit to their Baddi unit. But from the finding of the Court below, I find that no finding have been recorded with respect to the claim of shifting of Delhi unit to Baddi unit and its consequent merger with the Baddi unit. Shifting of a factory to another site is the primary condition under Rule 10(1) alongwith liabilities of the Delhi unit, if any, and Rule 10(3) provides for additional condition that such transfer/ unit or factory should include transfer of stock of input as such or in process, or the capital goods to the new site and such transferred goods are duly accounted for to the satisfaction of the Central Excise Authority.

13. Thus, prima-facie with respect to claim of the appellant or request for transfer of cenvat credit from Delhi unit to Baddi unit requires that a finding to be recorded by the Central Excise Authority having jurisdiction over the Baddi unit to record the finding of transfer / shifting of Delhi unit to Baddi and to record a further finding in regard to transfer of inputs or capital goods etc. and proper accountal of the same. For such purpose, the Adjudicating Authority of the Baddi unit can call for proper report from the jurisdictional Central Excise Authority of the Delhi unit.

14. If the aforementioned two conditions are satisfied, the appellant is entitled to the transfer of cenvat credit to their Baddi unit.

15. Accordingly, I allow this appeal by way of remand setting aside the impugned order to the adjudicating authority to pass a denovo order recording finding on the two aspects as aforementioned and thereafter pass consequential order. The appellant is also directed to appear before the Adjudicating Authority and see opportunity of hearing. Thus, the appeal is allowed by way of remand.

(Pronounced on 01.09.2020).

(Anil Choudhary)
Member (Judicial)

Pant