CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.

PRINCIPAL BENCH, COURT NO. IV

EXCISE APPEAL NO. 51200 OF 2022 (SM)

[Arising out of the Order-in-Appeal No. 309 (CRM) CE/JDR/2020 dated 15/10/2020 passed by The Commissioner (Appeals), CGST, Jodhpur.]

M/s Mahavir Metal Manufacturing Company, **Appellant**
Falna, District Pali,
Rajasthan.

VERSUS

Commissioner (Appeals), **Respondent**
Central Excise and CGST,
Jodhpur, Rajasthan.

APPEARANCE
Shri Mukti Bodh, Advocate and Shri Samuel Mathew, Advocate – for the appellant.

Shri V. Saharan, Authorized Representative for the Department.

CORAM:**HON'BLE DR. MS. RACHNA GUPTA, MEMBER (JUDICIAL)**

FINAL ORDER NO. 50591/2023

DATE OF HEARING : 14.02.2023.
DATE OF DECISION : 03.05.2023.

RACHNA GUPTA

The appellant was engaged in manufacturing of umbrella/ umbrella parts and the duty structure was almost just half on the finished goods as compared to the imports in terms of Notification No. 12/2002-CE dated 17.03.2012. This resulted in accumulation of central excise duty and the corresponding Cenvat credit for an amount of Rs. 42,17,938/-. As such, a refund claim for the said amount of unutilized Cenvat credit was filed by the appellant on 15.04.2019 under Rule 5 of Cenvat

Credit Rules, 2004. The appellant, on being enquired, had informed that their factory got closed in the financial year 2016-2017 and they had already applied to disconnect the power supply by their letter dated 19.04.2017 and 10.05.2017. The supply was finally disconnected on 22.09.2017. The appellant also informed that they had migrated under GST, however, had not filed Trans-1 due to which the aforesaid amount of unutilized Cenvat credit could not be carried forward and was still lying in their books of account.

2. Being unsatisfied with that response, the Department served a show cause notice bearing No. 2302 dated 01.11.2019 upon the appellant proposing the rejection of the refund claim of accumulated Cenvat credit. The said proposal was confirmed initially vide order-in-original No. 169/2020-21 dated 29.07.2020 on the ground that Rule 5 of Cenvat Credit Rules is not available for the purpose of refund that too after the closure of the factory. It was rejected also on the ground that post introduction of CGST Act the appellant has failed to transfer the closing balance of Cenvat credit through Trans-1 as was mandatory in terms of Section 140 of CGST Act 2017. Section 11B of Central Excise Act is also held not applicable to the given facts and circumstances. These findings were confirmed by Commissioner (Appeals) vide order-in-appeal No. 309/2020 dated 15.10.2020. Being aggrieved of these findings that the appellant is before this Tribunal.

3. I have heard Shri Mukti Bodh, learned counsel for the appellant and Shri V. Saharan, learned authorized representative for the Department.

4. Learned counsel for the appellant while arguing has submitted that the refund has wrongly been rejected for want of Trans-1 under GST regime. Decision of this Tribunal in the case of **Uttaranchal Cable Network versus Commissioner, Customs** dated 13.10.2021 passed in appeal No. 50294 of 2021 (SM) has been relied upon along with decision in the case of **M/s Nichiplast India Private Ltd. versus Principal Commissioner CGST** dated 23.07.2021 in appeal No. 50790 of 2019. It is further submitted that the time line of Section 11B of Central Excise Act, 1944 has been wrongly consider despite that there have been catena of decisions holding that "relevant date" defined under Section 11B of Central Excise Act has no applicability to the refund of accumulated Cenvat credit sought under Rule 5 of Cenvat Credit Rules. It is submitted that the Cenvat credit, in question, got accumulated due to 50% difference in the duty structure on finished goods as compared to inputs and that the manufacturing facility of appellant got shut down in financial year 2016-2017. With these submissions, learned counsel prayed for order under challenge to be set aside and appeal to be allowed.

5. While rebutting these submissions it is submitted by learned Departmental Representative that the manufacturing unit

of appellant got closed in 2016-2017 itself allows but admittedly he did not surrender its service tax registration. However, the appellant opted for obtaining the GST registration without even filing the Tran-1. Resultantly the un-accumulated Cenvat credit does not stand transferred to GST regime. Hence question of invoking Section 140 of CGST Act to the impugned un-accumulated Cenvat credit does not at all arises. It is further submitted that there is a specified time line for filing the refund of Cenvat credit. Apparently the time line has not been followed by the appellant. There is no infirmity in the order while holding the impugned refund as barred by time. For these reasons, the claim has rightly been considered to be out of the scope of even Rule 5 of Cenvat Credit Rules, 2004. Finally mentioning that there is no infirmity in the order under challenge. Appeal is prayed to be dismissed.

6. Learned departmental representative has relied upon the decision of this Tribunal in the case of **Modipon Ltd. versus Commissioner of Central Excise, Ghaziabad** reported as **2014 – TIOL – 3134 – CESTAT – DEL.** And the decision in the case of **Lata Hydrocarbon Resources Pvt. Ltd. versus Commissioner of Central Tax, Hyderabad** reported as **2020 – TIOL – 265 - CESTAT – HYD**.

7. Having heard the rival contentions, I observe and hold as follows :-

Following are observed to be the admitted facts in the present case :-

(i) The appellant's manufacturing unit got closed in financial year 2016-2017 ;

(ii) The Cenvat credit got accumulated due to the difference in duty on final products as compared to the imports ;

(iii) The refund claim was filed two years later. The aforesaid closure i.e. on 16.04.2019 ;

(iv) Despite the closure of factory the service tax registration was not surrendered by the appellant ;

(v) The appellant got registered under the subsequent GST regime, however, failed to file the Tans-1 ;

(vi) Lastly that the refund claim has been filed under Rule 5 of Cenvat Credit Rules.

8. In the light of these admitted facts, foremost it is necessary to look into the scope of Rule 5 of Cenvat Credit Rules. I observe that the said rule has undergone an amendment w.e.f. 01.04.2012. The period involved in the present case is post April, 2012. The amended provision reads as follows :-

5. Refund of Cenvat credit – (1) A manufacturer who clears a final product or an intermediate product for export without payment of duty under bond or letter of undertaking, or a service provider who provides an output service which is exported without payment of service tax,

shall be allowed refund of Cenvat credit as determined by the following formula subject to procedure, safeguards, conditions and limitations, as may be specified by the Board by notification in the Official Gazette "

9. The perusal of this provision shows that the clause "where for any reason such adjustment has not been possible" of erstwhile Rule 5 stands deleted. This means that after the amendment, the Cenvat credit if could not be utilized for being considered towards payment of duty/service tax for any reason the refund thereof is no more possible. It is also observed that Rule 5 of the Cenvat credit permits cash refund of accumulated Cenvat credit only in the following circumstances :-

(1) The Cenvat credit which has accumulated and whose cash refund is sought is in respect of input/input service used in the manufacture of finished goods which have been exported out of India under bond or letter of undertaking or used in intermediate products cleared for export.

(2) The assessee is not in a position to utilize the Cenvat credit for payment of duty on finished goods cleared for home consumption or cleared for export under rebate claim.

(3) The exports have not been made by claiming draw-back or input duty rebate.

10. Though the appellant had relied upon the decision of Karnataka High Court in **Slovak India Trading Company Pvt. Ltd.** reported as **2006 (201) E.L.T. 559 (Kar.)** which was also confirmed by the Hon'ble Supreme Court but the said case declared that refund claims of Cenvat cannot be subjected to limitation of time irrespective. The period involved is prior or post amendment. In the present case, since the refund claim was filed under Rule 5 of Cenvat Credit Rules, 2004 and after it got amended after April 2012. The amended Rule 5 does not permit refund of such Cenvat credit which could not be utilized for any possible reason. I drawn support to this finding from the decision of **Lata Hydrocarbon** (supra).

"A refund claim was filed after 01.04.2012 which is the issue in dispute – Therefore, the assessee was not entitled to refund as there was no saving clause when Rule 5 of CCR was amended – Besides, the limitation period was also violated as the refund claim was filed more than six years after the closure of the factory – Hence the OIA warrants no interference with".

11. Other than Rule 5 of Cenvat Credit Rules, there is no other provision either in Cenvat Credit Rules, 2004 or in Central Excise Rules, 2002 for giving cash refund of the accumulated Cenvat credit. Even Section 11B of Central Excise Act is only for the refund of duty paid either through cash or through Cenvat credit or for the Cenvat credit wrongly reversed. Hence, this section cannot be invoked in cash refund of the unutilized Cenvat credit

lying in the Cenvat account of the manufacturer at the time of closure of the factory.

12. This Tribunal in **Modipon Ltd.** (supra) has held that when a factory closes down the Cenvat credit lying unutilized in its Cenvat credit account shall lapse unless the factory resumes production. In the present case, in the light of above noted admitted facts it becomes clear that none of the condition as enumerated above for invoking Rule 5 gets satisfied. In addition, when admittedly, the appellant while registering into new GST regime has not filed Tran-1 showing the impugned unutilized Cenvat credit Section 140 of CGST Act resultantly cannot be invoked. The question of giving cash refund for unutilized lying Cenvat credit does not at all arises.

13. Though the appellant has relied upon two decisions of the Tribunal in **Nichiplast India Pvt. Ltd.** (supra) and **Uttaranchal Cable Network** (supra), but perusal of both these decisions shows that in **Nichiplast** the appellant was held entitled for the refund after closure of the factory for the reason that he did not migrate to the GST Regime and in **Uttaranchal** the requisite form for Tans-1 qua the unutilized lying balance including the Cenvat credit could not be uploaded in the Revenue's portal due to technical glitch. The appellant, in that case, was given benefit because after applying under GST regime, he tried to fill Tran-1. The finding that Tran-1 is not mandatory in those circumstances cannot be taken as precedence in the cases where Tran-1 was

not filed intentionally that too in a case where GST registration was obtained without surrendering service tax registration.

14. The another fact which distinguish the present case is that despite the manufacturing was closed in financial year 2016-2017 and the appellant had already moved on the GST regime, but the refund claim could not have been filed before 16 April 2017 i.e. more than two years of the closure of manufacturing activity. I do not find any reason to hold that the time line as is given under Section 11B of Central Excise Act qua the refund of duty shall not apply to the refund of unutilized Cenvat credit in these peculiar circumstances.

15. In light of the entire above findings, I hold that the Adjudicating Authority has not committed any error while holding that Rule 5 of Cenvat Credit Rules, 2004 cannot be invoked to sanction the refund of unutilized Cenvat credit lying with the appellant much prior to April, 2017 that too in cash as per Section 140 of CGST Act, 2017.

16. In view of entire above discussion, the appeal is ordered to be dismissed.

(Order pronounced in open court on 03/05/2023.)

(DR. RACHNA GUPTA)
MEMBER (JUDICIAL)

PK