IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 28.11.2014

CORAM

THE HON'BLE MR.JUSTICE R.SUDHAKAR
AND
THE HON'BLE MRS.JUSTICE PUSHPA SATHYANARAYANA

C.M.A.No.940 of 2007

Tractor and Farm Equipment Ltd.
Kalladipatti, Dindigul District. ...Appellant

Vs.

1. The Commissioner of Central Excise
Central Revenue Buildings
Bibikulam, Madurai - 2.

2. Customs, Excise and Service Tax Appellate Tribunal
Southern Zonal Bench, Sasthri Bhavan Annexe
No.26, Haddows Road, Chennai - 600 006. ...Respondents

Prayer: Appeal against the Final Order No.118 of 2007, dated 1.2.2007 passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench at Chennai, against the order passed by the Commissioner of Central Excise, Madurai, in C.No.V/87/15/11/2005 Adj. dated 04.01.2006.

For Appellant : Mr.Parthasarathy
for M/s.Lakshmikumaran

For Respondents : Mr.Haja Mohideen Gisthi
for 1st respondent

J U D G M E N T
(Delivered by R.SUDHAKAR,J.)

This appeal is filed by the Department challenging the Final Order No.118 of 2007, dated 1.2.2007, passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench at Chennai, by raising the following questions of law:

i. Whether the second respondent is right in holding that credit of the duty paid on the inputs lying in stock or contained in the finished tractors lying in stock as on 9.7.2004 and already utilised, is liable to be reversed or paid back following the exemption of tractors, when there is no statutory provision to do so?

ii. Whether the second respondent is right in holding that availing of the credit is wrong when the exemption on tractors is not subject to the condition that the credit on inputs lying in stock is to be reversed?

iii. Whether the second respondent is right in deciding the appeal of the appellants by applying the decision of Two-Member Bench in the case of Albert David Ltd. v. CCE, 2003 (151) ELT 443 (Tri.Del) contrary to the finding of the Supreme Court in the case of Dai-Ichi Karkaria, 1999 (112) ELT 353?

iv. Whether the second respondent is right in deciding the appeal of the appellants by not following the decision of the Larger Bench in the case of CCE, Rajkot v. Ashok Iron and Steel Fabricators, 2002 (140) ELT 227 (Tri.LB)?

v. Whether the second respondent is right in disagreeing, contrary to the law laid down by the Supreme Court in the case of UOI v. Paras Laminates (P) Ltd., 1990 (49) ELT 322, with the decision of the Co-ordinate Bench in appellants' own case vide Final Order No.1463/2005, dated 24.8.2005 which has held that the decision in the case of M/s.Albert David Ltd. v. CCE, 2003 (151) ELT 443 (Tr.Del.) is per incuriam?

2.1. The facts in a nutshell are as under: The appellant is a manufacturer of agricultural tractors. For manufacture of tractors, the appellant buys raw materials, parts/components (inputs) on payment of duty. The final product, namely, tractors, was exigible to excise duty. Therefore, the appellant took credit on the duties paid on the inputs under Rule 3 of the Cenvat Credit Rules.

2.2. On and from 9.7.2004, tractors falling under Tariff item 8701 were exempted from excise duty vide Sl.No.295 of Notification No.23/2004-CE, dated 9.7.2004. In view of the exemption of tractors from excise duty, the appellant was not eligible to take credit of the duties paid on the inputs received in their factory on or after 9.7.2004. It is not in dispute that the appellant has not taken credit on inputs received on or after 9.7.2004.

2.3. On 6.5.2005, the Commissioner of Central Excise issued a show cause notice alleging that the appellant has not reversed the

cenvat credit taken on inputs/components lying in stock as on 9.7.2004, and on inputs/components contained in the closing stock of finished tractors lying in stock as on 9.7.2004. The relevant portion of the show cause notice reads as under:

> "4. In view of the foregoing, it appears that TAFE have contravened the provision of Rule 6 of the CCR in as much as they have not reversed the cenvat credit taken on inputs/components lying in stock as on 9.7.2004 to the tune of Rs.2,39,29,898/- as detailed in the Annexure-I to this Show cause notice and Rs.2,02,72,473/- taken on inputs/components contained in the closing stock of 768 finished tractors lying in stock as on 9.7.2004 (as detailed in Annexure-II to this Show cause notice), which were subsequently cleared at the nil rate of duty under notification No.6/2002 CE as amended by notification No.23/2004 CE dated 9.7.2004, rendering themselves liable to pay the aforesaid Cenvat credit amount with interest under Rule 14 of CCR read with Section 11A and 11AB of Central Excise Act, 1944 (herein after referred to as CEA) besides liable for penal action under Rules 15 of CCR."

That apart, the notice also proposed to levy interest under Rule 14 of the Cenvat Credit Rules read with Section 11A and 11AB of the Central Excise Act and penalty under Rule 15 of the Cenvat Credit Rules.

2.4. A detailed reply was submitted by the appellant on 28.5.2005 refuting the department's stand by relying on a decision of the Supreme Court in Commissioner of Central Excise v. Dai Ichi Karkaria Ltd., 1999 (112) ELT 353 (SC) and a decision of a Larger Bench of the Delhi Tribunal in Commissioner of Central Excise, Rajkot v. Ashok Iron and Steel Fabricators, 2002 (140) ELT 277 (Tri-LB).

2.5. However, the Commissioner of Central Excise, Madurai, by Order-in-Original dated 4.1.2006, confirmed the demand, apart from levying interest and imposing penalty.

2.6. Aggrieved by the said order, the appellant filed appeal before the Tribunal reiterating the plea that the appellant is not liable to reverse or payback the credit of duties attributable to the inputs lying in stock as such and inputs forming part of finished tractors lying in stock as on 9.7.2004, as the appellant availed cenvat credit validly when there was no exemption from excise duty on tractors. It was also pleaded that there was no fraud, misstatement or irregularity in claiming cenvat credit. The appellant relied upon the decision of the Supreme Court in Dai Ichi Karkaria Ltd. case and the decision of the Larger Bench of the Tribunal in Ashok Iron and Steel Fabricators case, referred supra. That apart, the appellant pointed out that in the appellant's own case, an identical issue was

answered by a Co-ordinate Bench of the Bangalore Tribunal in Final Order No.2103/2006, dated 23.11.2006 in favour of the appellant by placing reliance on the decisions in Dai Ichi Karkaria Ltd. case and Ashok Iron and Steel Fabricators case, referred supra.

2.7.1. The Tribunal, in the present case, was not inclined to accept the assessee's plea, and placed heavy reliance on the decision of the Delhi Tribunal in Albert David Ltd. v. CCE, Meerut, 2003 (151) ELT 443 (Tri-Del.), which order was confirmed by the Supreme Court in 2003 (157) ELT A.81 (SC). The Tribunal also relied upon a decision of the Allahabad High Court in Super Cassettes Industries Ltd. v. Union of India, 1997 (94) ELT 302 (All.).

2.7.2. The Tribunal while accepting that the appellant's final product was wholly exempt from duty on and after 9.7.2004, held that whatever inputs lying as such in stock on that date were subsequently used in the manufacture of exempted final product and, therefore, the appellant is prohibited by Rule 6 of the Cenvat Credit Rules from taking credit of the duty paid on such inputs.

2.7.3. The Tribunal, interpreting Rules 57AD and 57C of the erstwhile Central Excise Rules, observed that no credit of duty paid on input would be allowed if the final product was exempt from the whole of the duty of excise leviable thereon or chargeable to 'Nil' rate of duty.

2.7.4. The Tribunal, while accepting the fact that the Larger Bench decision of the Tribunal in Ashok Iron and Steel Fabricators case, referred supra, was in favour of the appellant and the SLP filed by the Department against the decision was dismissed by the Supreme Court, nevertheless was of the view that the decision of the Tribunal in Albert David Ltd. case also stood affirmed by the Apex Court and review petition filed was also dismissed by the Court and, therefore, the decision in Albert David Ltd. case, was having the stamp of approval of the Apex Court.

2.7.5. The Tribunal observed that in Albert David Ltd. case, cenvat credit had been taken by the party when their final products (I.V.Fluids) were chargeable to duty, but subsequently, the I.V. Fluids were exempted from duty. Since on the date on which the exemption came into force, there was stock of inputs in their factory, on which cenvat credit had been taken, the Tribunal referring to Rule 57AD of the Central Excise Rules, held that the credit taken on inputs lying in stock on the date from which the final products were exempt from duty was recoverable from the assessee. The said view of the Tribunal in Albert David Ltd. case, referred supra, according to the Tribunal has been upheld by the Supreme Court and, therefore, they chose to rely upon the said decision.

2.7.6. Thus, the Tribunal, in the present case, thought it fit to hold that the Bangalore Bench decision in the appellant's own case is not acceptable and accordingly, upheld the order passed by the Commissioner of Central Excise in respect of demand of duty and a portion of the interest, but set aside the penalty imposed.

2.8. Challenging the said order passed by the Tribunal, the present appeal is filed on the substantial questions of law, referred supra.

3. It was pointed out by Mr.Parthasarathy, learned counsel appearing for the appellant that the Larger Bench decision of the Tribunal in Ashok Iron and Steel Fabricators case, referred supra, decided an issue which is identical to the facts of the present case. The Tribunal in Ashok Iron and Steel Fabricators case, referred supra, following the decision of the Supreme Court in Dai Ichi Karkaria Ltd. case, referred supra, distinguished the decision of the Larger Bench of the Tribunal in Khanbhai Esoofbhai v. Collector 1999 (107) ELT 557 (Tri.LB) and held that it is not necessary to place the matter before a Bench of seven members.

4. To sum up the facts, one another factor which becomes relevant is that the decision rendered by the Bangalore Bench of the Tribunal in the assessee's own case on identical issue was challenged by the Department before the High Court of Karnataka. The High Court, placing reliance on the decision of the Supreme Court in Dai Ichi Karkaria Ltd. case, referred supra, came to hold that once input credit is legally taken and utilized on the dutiable final product, it need not be reversed on the final product being exempted subsequently. The relevant portion of the said decision of the High Court in Commissioner of Central Excise v. TAFE Ltd., 2011 (268) ELT 49 (Kar.) reads as under:

> "6. Dealing with Cenvat credit and reversal of said credit, the Apex Court in the case of Collector of Central Excise, Pune v. Dai Ichi Karkaria Ltd. reported in 1999 (112) ELT 353 (SC), at paragraph 18 and 18 interpreting Rule 57A and 57J of the Central Excise Rules, 1944, has held as under:
>
> > '17. It is clear from these rules, as we read them, that a manufacturer obtains credit for the excise duty paid on raw material to be used by him in the production of an excisable product immediately it makes the requisite declaration and obtains an acknowledgment thereof. It is entitled to use the credit at any time thereafter when making payment of excise duty on the excisable product. There is no provision in the

rules which provides for a reversal of the credit by the Excise Authorities except where it has been illegally or irregularly taken, in which event it stands cancelled or, if utilised, has to be paid for. We are here really concerned with credit that has been validly taken, and its benefit is available to the manufacturer without any limitation in time or otherwise unless the manufacturer itself chooses not to use the raw material in its excisable product. The credit is, therefore, indefeasible. It should also be noted that there is no corelation of the raw material and the final product; that is to say, it is not as if credit can be taken only on a final product that is manufactured out of the particular raw material to which the credit is related. The credit may be taken against the excise duty on a final product manufactured on the very day that it becomes available.

18. It is, therefore, that in the case of Eicher Motors Ltd. v. Union of India, 1999 (106) ELT 3, this Court said that a credit under the MODVAT Scheme was 'as good as tax paid'.'

7. There is no provision in the modvat rules which provides for a reversal of the credit by the Excise authorities where it has been illegally and irregularly taken, in which event it stands cancelled or if utilised, has to be paid for.

8. The Punjab and Haryana High Court in the case of Commission of Central Ecise, Panchkula v. HMT Ltd., Ponjore, reported in 2010 TIOL 316-HC-P & H-CX at paragraph 17 have held as under:

'Similarly, the Principal/Larger bench of the Tribunal after considering the various judgments mentioned in case H.M.T. v. Commissioner of Central Excise's case (supra) (between the parties) has held that when the input-credit legally taken and utilised on the dutiable final products, need not be reversed on the final product becoming exempt subsequently. The observations of the aforesaid judgment 'mutatis mutandis' are applicable to the present controversy.'

> 9. Therefore it is clear from the aforesaid judgment of the Apex Court that once the input credit is legally taken and utilized on the dutiable final product, it need not be reversed on the final product being exempted subsequently. Only if any products are purchased subsequent to the said exemption and if any tax is paid on such inputs, as the final product is exempted from payment of tax, the assessee would not be entitled to avail the cenvat credit on such inputs. But the Cenvat credit availed on such inputs till the date of exemption, they vest in the assessee and the assessee cannot be divested of that credit as the law does not provide for the same. Therefore the authorities taking advantage of the notification exempting the final product cannot claim reversal of Cenvat credit either in respect of final product which have come into existence on the date of the notification or on the inputs stored in the godown or the work in progress and finished products."
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> (emphasis supplied)

5. Challenging the above said decision of the Karnataka High Court in appellant's own case, the department pursued the matter before the Supreme Court. However, the Supreme Court, by order dated 16.9.2011, condoned the delay and dismissed the special leave petition. Therefore, the issue, as such, stands settled in the light of the decision rendered by the Karnataka High Court, the special leave petition having been dismissed by the Supreme Court.

6. Yet another fact that has been pointed out by the learned counsel for the appellant is that in view of the conflicting decisions in the assessee's own case – one by the Chennai Bench and the other by the Bangalore Bench, the matter was referred to a larger Bench of the Delhi Tribunal. The Larger Bench of the Tribunal in HMT v. Commissioner of Central Excise, 2008 (232) ELT 217 (Tri.-LB), after considering the decisions in Albert David Ltd. case and Ashok Iron and Steel Fabricators case, overruled the decision of the Chennai Tribunal and followed the Bangalore Tribunal decision of the appellant's own case. The decision of the Larger Bench of the Tribunal in HMT case, referred supra, was tested before the Punjab and Haryana High Court and was upheld in the decision rendered in Commissioner of Central Excise v. HMT (TD) Ltd., 2010 TIOL 316.

7. It is also the plea of the learned counsel for the appellant that the issue as to whether cenvat credit available after the final product has become exempted and how the cenvat credit should be recovered has been clarified by insertion of Rule 11(3) of the Cenvat Credit Rules, 2004, by notification No.10/2007-CE (NT), dated

1.3.2007. Rule 11(3) of the Cenvat Credit Rules, 2004 reads as under:

> "Rule 11. Transitional provision.-
> (1) ***
> (2) ***
> (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."
>
> (emphasis supplied)

Prior to 1.3.2007, the position is that cenvat credit validly taken in respect of stock in hand, stock in production and stock in finished goods would be deemed to be validly taken and it need not be reversed.

8. He also placed reliance on Tax Research Unit Circular in D.O.F.No.334/1/2007-TRU, dated 28.2.2007 to say that the above said amendment is prospective. The relevant portion of the said Circular reads as under:

> "The CENVAT Credit Rules, 2004 have been amended as under (with immediate effect):
> a) Necessary amendments have been made in the Cenvat Credit Rules, 2004 to allow credit of Secondary and Higher Education Cess paid on inputs and capital goods, which can be utilized for payment of Education cesses only.
> b) Sub-rule (2) of rule 9 has been amended to provide that the CENVAT credit can be taken if all the particulars as prescribed under the rules are available on the invoice or other duty-paying document. Further, in case any of the required particulars (other than specified particulars) are not available on the document, the Assistant/Deputy Commissioner may allow the credit subject to his satisfaction that (i)

goods/services covered by said document has been received by the assess, and (ii) the receipt of said goods/services has been accounted for in the books of accounts of the receiver. Consequential amendments have also been made in rule 15(1) and 15(3), which provides for penal action. Sub-rule (3) of rule 9 has been deleted;

c) Sub-rule (11) has been inserted in rule 9 so as to allow an assessee to rectify mistakes and file revised return within 60 days from the date of filing of original return, subject to specified conditions;

d) New sub-rules (3) & (4) have been inserted in rule 11 to provide that when a person opts for exemption from whole of duty (in case of conditional notification) or where a product becomes exempted absolutely, in such cases, the CENVAT credit taken on inputs lying in stock, or in process or contained in the final product lying in stock should be reversed. Similar provision has been made in respect of cases wherein taxable service becomes exempted. However, no reversal of credit of input services is required to be made in such cases."

9. Per contra, Mr.Haja Mohideen Gisthi, learned Senior Standing Counsel vehemently argued in favour of the department placing much emphasis on the decision of the Allahabad High Court in Brook Bond Lipton India Ltd. v. CER, 2012 (283) ELT 336 (All.). In that case, the assessee was engaged in the manufacture of packet tea and credit on the inputs was taken on the inputs for use in manufacture of final product till 27.2.1993. However, as tea was exempted from payment of central excise duty with effect from 28.2.1993 under Notification No.2/93, dated 28.2.1993, the department contended that the credit should be reversed though it was availed prior to exemption granted. The Allahabad High Court distinguished the decision in Dai Ichi Karkaria case, referred supra, holding that in the case of Dai Ichi Karkaria, the question of reversal of Modvat credit on raw material after the final products become wholly exempted from excise duty was not considered. It also took the view that allowing Modvat credit on inputs which are brought into the factory, for which the credit has been taken before the date when the final product became exempted lying unutilized as raw material, will amount to unjust enrichment. This primarily appears to be the reason on which the Allahabad High Court held against the assessee and in favour of the department.

10. We have considered the rival submissions and perused the order passed by the Tribunal and the original authority.

11. We notice that the Tribunal in the present case distinguished the appellant's own case decided by the Bangalore Bench of the Tribunal on the very same issue on the basis of the decision

of the Tribunal in Albert David Ltd. case. But, the fact remains that the decision of the Bangalore Bench of the Tribunal in appellant's own case was upheld by the Division Bench of the Karnataka High Court in Commissioner of Central Excise v. TAFE Ltd, referred supra, and the special leave petition filed by the department has been dismissed by the Supreme Court by order dated 16.9.2011, referred supra. Therefore, on facts, we have no hesitation to hold that the said decision will be binding insofar as the present case is concerned.

12. Having held thus, we proceed further to examine the other contentions raised, more particularly in the light of the decision of the Allahabad High Court in Brook Bond Lipton India Ltd. case, referred supra, distinguishing the decision of the Supreme Court in Dai Ichi Karkaria Ltd. case, referred supra.

13. As a matter of fact, there is no dispute that in a case relating to valuation under the excise law, the Supreme Court, in Dai Ichi Karkaria Ltd. case, referred supra, considered the Modvat scheme by which the credit on excise duty paid on raw material was availed by the manufacturer. The observations of the Supreme court made in the light of a specific plea raised by the learned Attorney General referring to the decision of the Allahabad High Court in Super Cassettes Industries Ltd. v. Union of India, 1997 (94) ELT 302 (All.) are extracted hereunder for better clarity:

> "13. The learned Attorney General cited the judgment of a learned Single Judge of the Allahabad High Court in Super Cassettes Industries Ltd. v. Union of India [1997 (94) ELT 302]. The learned Judge found no warrant for the view that MODVAT credit once availed of by making the necessary entries was irrevocable. He held that there could be no final credit until the inputs were used and excise duty on the final product was paid or the inputs were otherwise disposed of.
>
> 14. Before we look at the rules relating to the MODVAT Scheme we must set out the submissions of the learned Attorney General in this regard. He submitted that the raw material suffered excise duty legally and factually. If there had been no MODVAT Scheme excise duty on the raw material would be included in the cost of production of the excisable product. The MODVAT Scheme did not alter this fundamental position. By virtue of it the cost of the raw material was not reduced. The MODVAT Scheme resulted in reducing the excise duty on the excisable product. It was a separate and special facility that had the effect of reducing the excise duty incidence on the excisable product and had no bearing in

determining the cost of its production. The credit of excise duty on the raw material in the register maintained for MODVAT purposes was only a book entry which might be utilised later for payment of excise duty on the excisable product. In other words, it matured when the excisable product was removed from the factory and the stage for payment of excise duty thereon was reached. Actually, credit was taken, that is, availed of or utilised, at the time of the removal of the excisable product. Consequently, the cost of production of the excisable product was not reduced by the amount of the MODVAT credit on the raw material. The credit was a contingent credit. It might be disallowed under certain circumstances. It could not be withdrawn like a credit amount in a bank account. The manufacturer did not have any indefeasible right or title to it. The rules pertaining to the MODVAT Scheme made it clear that the MODVAT credit was in the nature of a set-off or an adjustment.

15. There is no doubt that were it not for the MODVAT Scheme and the credit available on the excise duty paid on the raw material thereunder, the excise duty paid on the raw material would be a factor in determining the cost of the excisable product. The question is: does the MODVAT Scheme make a difference?"

But the Supreme Court, while considering Rules 57A to 57J of the Central Excise Rules, which provide for the manner and procedure for availing credit of duty paid on excisable goods used as inputs, was of the view that the credit for excise duty paid on raw materials, if available could be used any time thereafter when making payment of excise duty on the exisable product. It also came to hold that there is no provision in the Rules which provides for reversal of credit by the excise authorities except where it has been illegally or irregularly taken. These two factors make a vital difference. In the case on hand, it is nobody's case that the credit of duty on inputs was taken illegally and irregularly, as the final products during the relevant time were exigible to duty. It also speaks about using the credit for payment of excise duty on excisable products. In other words, the credit of duty on inputs cannot be utilized in any other manner and, therefore, the view of the Allahabad High Court that is a case of unjust enrichment does not arise. Rule 5 of the Cenvat Credit Rules, 2004 makes the position very clear to the effect that cenvat credit could not be utilized in any other manner except as provided therein. Rule 5 of the Cenvat Credit Rules, 2004 reads as under:

"Rule No : 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:

$$\text{Refund amount} = \frac{(\text{Export turnover of goods} + \text{Export turnover of services}) \times \text{Net CENVAT credit}}{\text{Total turnover}}$$

Where,--

(A) "Refund amount" means the maximum refund that is admissible;

(B) "Net CENVAT credit" means total CENVAT credit availed on inputs and input services by the manufacturer or the output service provider reduced by the amount reversed in terms of sub-rule (5C) of rule 3, during the relevant period;

(C) "Export turnover of goods" means the value of final products and intermediate products cleared during the relevant period and exported without payment of Central Excise duty under bond or letter of undertaking;

(D) "Export turnover of services" means the value of the export service calculated in the following manner, namely:--

Export turnover of services = payments received during the relevant period for export services + export services whose provision has been completed for which payment had been received in advance in any period prior to the relevant period - advances received for export services for which the provision of service has not been completed during the relevant period;

(E) "Total turnover" means sum total of the value of--

(a) all excisable goods cleared during the relevant period including exempted goods, dutiable goods and excisable goods exported;

(b) export turnover of services determined in terms of clause (D) of sub-rule (1) above and the value of all other services, during the relevant period; and

(c) all inputs removed as such under sub-rule (5) of rule 3 against an invoice, during the period for which the claim is filed.

(2) This rule shall apply to exports made on or after

the 1st April, 2012:
Provided that the refund may be claimed under this rule, as existing, prior to the commencement of the CENVAT Credit (Third Amendment) Rules, 2012, within a period of one year from such commencement:

Provided further 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 and Service Tax Drawback Rules, 1995, or claims rebate of duty under the Central Excise Rules, 2002, in respect of such duty; or claims rebate of service tax under the [Service Tax Rules, 1994] in respect of such tax.

Explanation 1.—For the purposes of this rule,--

(1) "export service" means a service which is provided as per [rule 6A of the Service Tax Rules, 1994];

(2) "relevant period" means the period for which the claim is filed.

Explanation 2.—For the purposes of this rule, the value of services, shall be determined in the same manner as the value for the purposes of sub-rules (3) and (3A) of rule 6 is determined.]"

14. In the instant case, assuming for the moment that the credit is available, it can be used for payment of duty on any other excisable articles and not exempted goods. In such view of the matter, we are not agreeable with the view taken by the Allahabad High Court that it will amount to unjust enrichment. We also notice that the decision in Super Cassettes Industries Ltd case, referred supra, which has been relied upon by the Division Bench in Brook Bond Lipton India Ltd. Case, referred supra, did not find favour with the Supreme Court in Dai Ichi Karkaria Ltd. Case, referred supra. In such view of the matter, it has to be held that the view taken by the Allahabad High Court has not been accepted by the Supreme Court.

15. At this juncture, the Tribunal in Ashok Iron and Steel Fabricators case, referred supra as well as the decision of the Bangalore Bench of the Tribunal in the assessee's own case have emphasised over and over again on para (17) of the decision of in Dai Ichi Karkaria Ltd. Case, referred supra, which has very clearly set out the position as to how the credit taken on inputs should be utilized. To sum up, paragragh (17) of the Dai Ichi Karkaria Ltd. case, referred supra, which answers the present issue, is extracted

hereunder:

> "17. It is clear from these rules, as we read them, that a manufacturer obtains credit for the excise duty paid on raw material to be used by him in the production of an excisable product immediately it makes the requisite declaration and obtains an acknowledgment thereof. It is entitled to use the credit at any time thereafter when making payment of excise duty on the excisable product. There is no provision in the rules which provides for a reversal of the credit by the Excise Authorities except where it has been illegally or irregularly taken, in which event it stands cancelled or, if utilised, has to be paid for. We are here really concerned with credit that has been validly taken, and its benefit is available to the manufacturer without any limitation in time or otherwise unless the manufacturer itself chooses not to use the raw material in its excisable product. The credit is, therefore, indefeasible. It should also be noted that there is no corelation of the raw material and the final product; that is to say, it is not as if credit can be taken only on a final product that is manufactured out of the particular raw material to which the credit is related. The credit may be taken against the excise duty on a final product manufactured on the very day that it becomes available."
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> (emphasis supplied)

16. Once it is held that no co-relation between the raw material and the final product is required, the appellant's plea stands answered. If credit can be taken against excise duty on a final product manufactured on the very day, it makes it abundantly clear that there need not be co-relation between the input and the goods cleared and as a result, validly taken credit need not be reversed. The Central Excise Rules would come into play in the following manner, that is to say, on the date when the final goods become exempt from payment of duty, for the inputs received on and after the said date, no credit can be taken. This would be the correct method of understanding of the position of law.

17. The introduction of Rule 11(3) of the Cenvat Credit Rules, 2004, by notification No.10/2007-CE (NT), dated 1.3.2007 and the Tax Research Unit Circular in D.O.F.No.334/1/2007-TRU, dated 28.2.2007 clarifying that it will come into effect immediately, makes it clear that the position of law as it stood decided in the assessee's own case by the Karnakata High Court, the appeal against which was dismissed by the Supreme Court, is the correct position. The Tribunal in this case erred in distinguishing the decision of the Bangalore Bench Tribunal placing reliance on Albert David Ltd. case,

referred supra. In any event, Ashok Iron and Steel Fabricators case, referred supra, is a Larger Bench decision and the same has been upheld by the Supreme Court and that would be binding on the Tribunal, rather than the Two-Member Bench decision in Albert David Ltd. Case, referred supra.

For the foregoing reasons, we allow the appeal answering the substantial questions of law (1) to (4) in favour of the appellant and against the department. In such view of the matter, we do not propose to answer the substantial question of law (5) as the same is purely academic. No costs.

Sd/-
Assistant Registrar(CS-III)

//True Copy//

Sub Assistant Registrar

sasi

To

1. The Assistant Registrar
Customs, Excise and Service Tax Appellate Tribunal
South Zone Bench, Sasthri Bhavan Avenue
1st Floor, Haddows Road,
Chennai - 600 006.

2. The Commissioner of Central Excise
Central Revenue Buildings
Bibikulam, Madurai - 2.

C.M.A.No.940 of 2007

PUR (CO)
PSI (24.12.2014)