CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

NEW DELHI

PRINCIPAL BENCH – COURT NO. – IV

Excise Appeal No. 51140 of 2022 [SM]

[Arising out of Order-in-Appeal No. 21 dated 22.12.2021 passed by the Commissioner of Central Tax (Appeals-II), Delhi]

M/s. Monochem Graphics Pvt. Ltd. **...Appellant**
A-25, Phase-I, Mayapuri Industrial Area,
New Delhi - 110064

VERSUS

Commissioner of Central Excise & CGST, Delhi West **...Respondent**
EIL Building,
Bhikajicama Place,
New Delhi - 110066

APPEARANCE:

Mr. R.K. Philips and Mr. Apoorv Philips, Advocates for the Appellant
Mr. Ishwar Charan, Authorised Representative for the Respondent

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

DATE OF HEARING: **17.08.2022**
PRONOUNCED ON: **04.10.2022**

FINAL ORDER No. 50949/2022

DR. RACHNA GUPTA

Present appeal has been filed to assail the Order-in-Appeal No. 21 dated 22.12.2021. The facts in brief are as follows:

1.1 M/s. Monochem Graphics Pvt. Ltd., A-25, Mayapuri Industrial Area, Phase – I, New Delhi-110064 are manufacturer of name plates, plastic printed stickers, etc. Since GST regime had come into effect that the appellant surrendered the Central Excise Registration. As a result, Cenvat of Rs.11,23,276 under the

erstwhile tax regime, was left unutilized. The appellant was unable to file the TRAN-1 within due date, owing to technical glitches. Therefore, the appellant preferred an Application dated 26.04.2018 before the Nodal Officer under Circular No. 39/12/2018 requesting for filing of TRAN-1 application. Simultaneously, under the fear of the possibility of the Application to the Nodal Officer being rejected, and owing to the time limitation for refund being one year, the appellant simultaneously filed refund claim application on 26.04.2018 under Section 11B of Central Excise Act, 1944 for "refund of Cenvat credit" of Rs.11,23,276/- lying in his Credit register on July 1, 2017.

1.2 The application and annexed documents were forwarded to the Range Office i.e. Central tax Range-131, Janakpuri for verification and scrutiny. The Range Officer in its report dated 07.01.2009 submitted that refund claim of Cenvat balance amounting to Rs.11,23,276/- under section 11B of Central Excise Act, 1944 is lying credit in the Cenvat account as on 30.06.2007 i.e. the day immediately preceding the appointed day of the introduction of Central Goods and Service Tax Act, 2017 but it has no legal standing and may not be sanctioned under Section 11B of Central Excise Act, 1944 read with Section 142(3) of CGST Act, 2017. Based thereupon, the aforesaid refund of Cenvat was rejected by the Assistant Commissioner, Central Tax, Delhi vide Order-in-Original No. R-01/19-20 dated 01.05.2019. Against the said Order-in-Original, the appellant filed an appeal before the Commissioner (Appeals-II) who vide Order-in-Appeal No. 144/Central Tax/Appl-II/2019 dated 17.02.2020 set aside the order and remanded back the matter to the Assistant Commissioner for

fresh adjudication, owing to the non-adherence of the Principles of Natural Justice. Pursuant to the said remand, the Assistant Commissioner passed the Order-in-Original No. 01/CT/BRK/20-21 dated 27.11.2020 again rejecting the refund of Rs.11,23,726/-. Subsequent thereto the same was appealed by the Appellant, against which the impugned order (Order-in-Appeal) No. 21 dated 22.12.2021 was passed by the Commissioner Appeals-II (Appellate Authority), rejecting the refund and upholding the said Order-in-Original. Hence, the present Appeal has been filed against the Order-in-Appeal No. 21 dated 22.12.2021 before this Hon'ble Tribunal.

2. I have heard Shri R.K. Philips and Shri Apoorv Philips, learned Counsels for the appellant and Shri Ishwar Charan, learned Authorized Representative for the department.

3. Learned Counsel for the appellant has submitted that as on 30.06.2017 the appellant had Cenvat credit of Rs.11,23,726/- which remained unutilized in the ER-1 Return for June, 2017. At the time of implementation of GST Regime, the transitional provisions were enacted provided permitting refund of credit lying in closing balance on 30.06.2017. But the adjudicating authority still rejected the claim of Cenvat balance on the grounds that claim did not relate to conditions of Section 11B (2) (c) of the Central Excise Act, 1944.

3.1 It is submitted that from the perusal of the documents on record it is crystal clear that the impugned amount of Cenvat credit has been availed/utilized on account of inputs purchased from the

importers, manufactures, first stage and second stage dealers, to which the provision of Section 11B (2) (c) of the Central Excise Act, 1944, shall apply. That therefore it makes unambiguously clear that in the instant case the refund of CENVAT clearly falls under Section 11B (2) (c) of the Central Excise Act, 1944 Act. Hence, the sole ground for denying the refund of unutilized Cenvat credit, that Section 11B of the Central excise Act, 1944 do not permit refund is absolutely wrong. Learned Counsel further submitted that Hon'ble High Court(s) of Karnataka, Punjab and Haryana, and Rajasthan have been allowing the refund in cash pertaining to unutilized Cenvat credit under Section 11B. CESTAT also has upheld the refund, in cash, of unutilized credit that too under Section 11B of the Central Excise Act, 1944, on the ground that the Department cannot deny the refund of unutilized Cenvat credit, in absence of any specific provision barring such refund. Following cases have been relied upon by the appellants:

(i) ***Union of India Vs. Slovak India Trading Company reported as 2006 (201) ELT 559 (Kar.)***

(ii) ***M/s. Welcure Drugs & Pharmaceuticals Ltd. Vs. Commr. of C. Ex., Jaipur 2018 (15) G.S.T.L. 257 (Raj.)***

(iii) ***M/s. Rama Industries Ltd Vs. Commissioner of Central Excise reported as 2009 20 STT 525 (Punj. & Har.)***

(iv) ***M/s. Shalu Synthetics Pvt. Ltd. Vs. Commissioner of C. Ex. & S.T., Vapi 2017 (346) E.L.T. 413 (Tri. – Ahmd.)***

(v) ***M/s. Shree Krishna Paper Mills & Ind. Ltd. Vs. C.C.E. & S.T., Gurgaon reported as 2019 (365) E.L.T. 594 (Tri.-Chan.)***

(vi) ***M/s. Bangalore Cables P. Ltd. Vs. Commissioner of C. Ex., Bangalroe-III reported as 2017 (347) E.L.T. 100 (Tri. – Bang.)***

3.2 Learned Counsel for appellant further mentioned that this Tribunal has also recognized that Section 174(2) read with Section 142 of the CGST, in itself saves the refund of unutilized Cenvat credit, as being a right and privilege being accrued under the erstwhile act. Therefore, the stance for rejecting even when the GST Act saves the unutilized Cenvat credit is wrong, arbitrary and capricious. Following decisions of CESTAT have been relied upon:

(i) M/s. Circor Flow Technologies India (P.) Ltd. Vs. Principal Commissioner of GST & Central Excise reported as 2021 133 taxmann.com 327 (Chennai-CESTAT)

(ii) M/s. Rakon India Pvt. Ltd. Vs. Commr. Of Central Tax, bangaore North reported as 2021 (54) G.S.T.L. 183 (Tri.l-Bang.)

3.3 That in the light of above ratios and the fact that the amount claimed for refund is squarely under the ambit of Section 11B (2) (c) of the Central Excise Act, 1944, the impugned refund and appeal are prayed to be allowed.

4. While rebutting the submissions of appellants, learned DR has impressed upon the findings on merits of authorities below under two Orders-in-Original and two Orders-in-Appeal to have no infirmity. Appeal is accordingly prayed to be dismissed.

5. Having heard the rival contentions and perusing the records, it is observed and held as follows:

The refund claim is rejected on the following two grounds:

(i) Section 11B of Central Excise Act, 1944 cannot be invoked for cash refund of the unutilized Cenvat credit

lying in the Cenvat credit account of a manufacturer at the time of either closure of the factory or cannot be utilized by them for payment of duty.

(ii) Appellant not tried to file FORM GST TRANS-1 before due dated. The above said Circular is valid for only those cases, who tried to file FORM before due date but failed to file the same due to I.T. Glitches.

5.1 Relevant portion of Section 11B of Central Excise Act, 1944 reads as follows:

> *"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)* *****
>
> *(b)* *****
>
> *(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."*

6. I also observe that even in GST Act there are two transitional provisions that have been enacted providing for two possible solutions for transfer of unutilized credit balance:

(i) Section 140 of the CGST Act, 2017 wherein the said credit could be electronically carried forward by filing of TRAN-1 up to the stipulated period of time.

(ii) Section 142 of the CGST Act, 2017, which provides for the case refund of the unutilized Cenvat credit with only on rider that the same amount of Cenvat credit has not been carried forward to the electronic credit leger through TRAN-I.

7. The bare perusal reveals that at the time of implementation of GST Regime, the legislature had perceived as to what would happen to the credit of tax lying in stock as on the date of the introduction of GST, or to the credit balance lying unutilized. Therefore, in order to avoid the double taxation on the goods lying with the business person the Central govt under its wisdom, to pass on the benefit of the unutilized credit whether in inputs or otherwise as closing balance as appeared in ER-I Return filled by the assesses, has introduced above mentioned Transitional Provisions under Chapter XX in GST Act, 2017.

8. I find that the appellant has filed the present refund claim under Section 11B and not under Rule 5 of CCR read with Notification No. 27/2012. Further, I also find that after the introduction of GST, if the appellant could not transfer the excess debit into TRAN-I, the only option for the appellant remains is to file a refund claim under Section 11B read with Section 142(5). Further, I find that the impugned order has not disputed the eligibility of credit debited in excess. After the introduction of GST in july, 2017, there is no option provided to the notice to avail the said Cenvat credit, as the returns have been suspended with regard to erstwhile regime. With the onset of GST regime the claim of Cenvat credit was eligible under Section 11B of Central Excise Act was allowed to be refunded in cash. Consequently, the appellant is opined to have rightly filed the refund of the amount debited Cenvat credit lying unutilized in his account on the last day of erstwhile Central Excise Act regime i.e. on 30.06.2017 under Section 11B of Central Excise Act, 1944.

8.1 I further observe that as per Section 174(2)(c) of CGST Act, the appellant cannot be affected of its right, privilege, in availing credit merely in respect of refund rejected on account of limitation being passed after 27.12.2017. Further, I am of the opinion that change in taxation regime should not affect the credit availment right of assessee. Hence the appellant is rightly entitled for the credit and also refund.

9. This issue has otherwise been no more *res integra*, Hon'ble High Court, Karnataka in the case of **Union of India Vs. Slovak India Trading Co. Pvt. Ltd. reported as 2006 (201) E.L.T. 559 (Kar.)** has held as follows:

> *"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 rule 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.*

9.1 Against the aforesaid decision SLP was dismissed by the Supreme Court in **Union of India Vs. Slovak India Trading Co. Pvt. Ltd. – 2008 (223) E.L.T. A170 (S.C.)**

10. Otherwise also if on the inputs the assessee had already paid the taxes on the basis that when the goods are utilised in the manufacture of further products as inputs thereto then the tax on these goods gets adjusted which are finished subsequently. Thus a right accrued to the assessee on the date when they paid the tax on the raw materials or the inputs and that right would continue until the facility available thereto gets worked out or until those goods existed. Hon'ble Apex Court in the case of **Collector of Central Excise, Pune Vs. Dai Ichi Karkaria Ltd. – 1999 (112) E.L.T. 353 (S.C.)**, has been observed 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 acknowledgement 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 co-relation 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."*

11. Decision of **Slovak India Trading Co. Pvt. Ltd.** (supra) has continuously been followed by High Courts as that of Punjab &

Haryana in case of **Rama Industries Ltd Vs. Commissioner of Central Excise reported as 2009 20 STT 525 (Punj. & Har.).** Hon'ble Apex Court in the case of **Adfert Technologies (P.) Ltd. Vs. Union of India reported as (2019) 111 taxmann.com 27 (Punj & Har)** has been held that transitional credit being a vested right, it cannot be taken away on procedural or technical grounds. The said order was upheld by the Hon'ble Supreme Court as 2020 (34) GSTL J138 (SC). The Hon'ble Jurisdictional High Court in the case of **Tara Exports Vs. Union of India [2018] 98 taxmann.com 363 (Mad.)** has held that GST laws contemplate seamless flow of tax credits on all eligible inputs. In various decisions, it has been held that substantive right of credit cannot be denied on account of procedural grounds. In the case of **Leo Prime Comp. (P.) Ltd. Vs. Dy. CCE 2020 (373) ELT 820 (Mad.)**, it was held that accumulated credit cannot be said to got lapsed.

12. In light of the above discussion, the first ground of rejection of claim is held wrong and against the statutory provisions and several decisions.

13. Coming to another aspect about TRAN-I, there is no denial to following facts:

(i) That the appellant attempted to file TRAN-1 but was unsuccessful due to IT glitches, and further requested for allowing filing of same but was not allowed.

(ii) That the Appellant then opted for another option under Section 142 ibid and filed application for refund claim on 26.04.2018.

14. Though Commissioner (Appeals) has relied upon the Circular No. 39/13/2018 dated 03.04.2018, para 8 thereof but the issue has been duly settled. **Hon'ble High Court Kerala in the case of Naga Distributors Vs. Union of India reported as 2018(16) G.S.T.L. 15 (Ker.)** has held about Glithces in GSTN that subsequent to the failure to upload Form GST TRaN-1 within stipulated time due to system error, if assessee applies to concerned Nodal Officer appointed in terms of C.B.I. & c. Circular No. 39/13/2018-GST, dated 3-4-2018 within two weeks, it is for Nodal Officer to facilitate assessee's uploading FORM GST TRAN-1 without reference to time frame, especially when uploading of said form was not possible for reasons not attributable to assessee. The authority was directed also to enable assessee to take credit of input tax available at time of migration. Also in the case of **Leo Logistics Vs. Union of Inida reported as 2019 (22) G.S.T.L. 185 (Ker.),** it was held that Transitional provisions i.e. Section 140 of Central Goods and Services Tax Act, 2017 is about inability to upload FORM GST TRAN-1 within stipulated time due to system error and requires assessee to apply to Nodal Officer to look into issue of inability of assessee to upload Form GST TRAN-1 and to facilitate him uploading the same without reference to time-frame, if uploading of form not possible for reason not attributable to petitioner. It was clarified that in such case refund cannot be rejected even on the basis of Circular No. 39/13/2018 dated 03.04.2018. The relevant paras read as follows:

> *"8.1 A large number of taxpayers could not complete the process of TRAN-1 filing either at the stage of original or revised filing as they could not digitally authenticate the TRAN-1s due to IT related glitches. As a result, a large number of such TRAN-1s are stuck in*

the system. GSTN shall identify such taxpayers who could not file TRAN-1 on the basis of electronic audit trail. It has been decided that all such taxpayers, who tried but were not able to complete TRAN-1 procedure (original or revised) of filing them on or before 27.12.2017 due to IT-glitch, shall be provided the facility to complete TRAN-1 filing. It is clarified that the last date for filing of TRAN 1 is not being extended in general and only these identified taxpayers shall be allowed to complete the process of filing TRAN-1.

8.2 The taxpayer shall not be allowed to amend the amount of credit in TRAN-1 during this process vis-à-vis the amount of credit which was recorded by the taxpayer in the TRAN-1, which could not be filed. If needed, GSTN may request field formations of Centre and State to collect additional document/ data etc. or verify the same to identify taxpayers who should be allowed this procedure.

8.3 GSTN shall communicate directly with the taxpayers in this regard and submit a final report to GIC about the number of TRAN-1s filed and submitted through this process.

8.4 The taxpayers shall complete the process of filing of TRAN 1 stuck due to IT glitches, as discussed above, by 30th April 2018 and the process of completing filing of GSTR 3B which could not be filed for such TRAN 1 shall be completed by 31st May 2018.

15. Reverting to the relevant fact of the case, it is observed as a fact that under the scenario of continued IT glitches the Noticee attempted to file FORM GST TRAN-1 at 3.24 pm on 27.12.2019 but was not successful. Further in compliance of procedures for redressal provided under Circular No.39/13/2018-GST dated 03.04.2018, the Noticee had written to the Nodal Officer, IT Grievance Redressal Committee, Delhi West CGST Department, EIL Building, Bhikaji Kama Place, RK Puram, New Delhi vide its letter dated 26.04.2019. In the said letter the Noticee had requested that he may be allowed to file FORM GST TRAN-1. However, his

request was not acceded to by the learned adjudicating Nodal Officer.

16. In the given circumstances, the refund of said amount in cash remains the only possibility under transitional provisions of GST Act. Those provisions are to protect the claim under Section 11B of erstwhile Act. Accordingly, the appellant is held entitled for refund of amount in question.

17. In view of this discussion, I hold that even second ground of rejection of refund claim is not sustainable.

18. As a result of entire above discussion, it is held that Commissioner (Appeals) has ignored the relevant statutory provisions and has also failed to observe the judicial protocol while passing a mechanical order rejecting the impugned refund claim. Both the grounds of rejection are hereby overruled. The order under challenge is therefore set aside. Consequent thereto, appeal stands allowed.

[Order pronounced in the open Court on **04.10.2022**]

(DR. RACHNA GUPTA)
MEMBER (JUDICIAL)

HK